

# Labor Board: Secondary Picketing Not Protected, Subcontracted Janitors Lawfully Fired

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## Related Services

Labor Relations

In a ruling that may affect many industries, a three-member panel of the National Labor Relations Board (NLRB) has held that a group of subcontracted janitors in San Francisco were justifiably fired after engaging in secondary picketing at the building where they worked. *Preferred Building Services, Inc.*, 366 NLRB No. 159 (Aug. 28, 2018). The Board ruled the employees engaged in conduct unprotected by the National Labor Relations Act (NLRA) when they urged the building's tenants to "take responsibility" and help improve the janitors' working conditions. The Board said the workers essentially were pressuring the building to cease doing business with their employer.

### Background

The janitors worked for Ortiz Janitorial Services (OJS). OJS had a contract with Preferred Building Services, Inc. Preferred contracted with building management companies in the San Francisco Bay Area to provide janitorial services, and it often fulfilled its obligations by subcontracting work to various other entities, including OJS. In fall of 2014, building management company Harvest Properties contracted with Preferred to service one of Harvest's buildings. Preferred, in turn, subcontracted the work to OJS.

That fall, three janitors employed by OJS and working at the Harvest building began attending meetings hosted by the San Francisco Living Wage Coalition (SFLWC). At various times, the janitors complained to SFLWC codirectors about low wages, heavy working conditions, and sexually inappropriate statements made to them by OJS owner Rafael Ortiz. At the suggestion of SFLWC, the janitors also sought the assistance of Service Employees International Union (SEIU) Local 87. The janitors later met with SEIU Local 87's President and agreed to participate in a picket on October 29.

### October 29 Picket

To publicize their complaints, the janitors on October 29 picketed in front of the Harvest Properties building where they worked. They marched outside the lobby and chanted such slogans as, "Up with the union, down with exploitation."

The picketers also carried signs stating, "PREFERRED BUILDING SERVICES UNFAIR!" and "WE PREFER NO MORE SEXUAL HARASSMENT." In small font below the capitalized language, the signs contained the following disclosure: "This is NOT a strike. It is an informational picket line. We are NOT calling for a boycott of this building. We are in a labor dispute with the cleaning contractor at this building."

Finally, the picketers distributed leaflets with pictures of individual janitors and comments about the number of children each janitor was attempting to raise on their minimum wage earnings. The leaflets asked for a minimum wage increase and provided the following explanation:

We work for Preferred Building Services which cleans the offices of KGO radio. We get paid the San Francisco minimum wage of \$10.74 per hour. We endure abusive and unsafe working conditions and sexual harassment .... *We are calling on KGO radio to*

*take corporate responsibility* in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights.

(Emphasis added.)

A few days after the picketing, SEIU Local 87's President met with the employees involved to discuss "reactions and responses" of the Harvest property tenants. The picketers reported that the tenants were "upset by what they had learned."

### November 19 Picket; Contract Termination

The janitors again picketed in front of the Harvest property on November 19. They chanted, distributed leaflets, and carried signs similar to those previously used. Among the minor differences was the fact that one of the leaflets used this time called on "KGO radio and Cumulus media as the major tenant[s of the Harvest property] to help in getting Preferred ... to listen to demands and not ignore [them]."

The picketers also met with Harvest Property Manager Benjamin Maxon. Maxon later testified that the picketers stated they were going to keep showing up "until we made changes." During the conversation, Maxon announced that Harvest intended to substitute a unionized contractor for Preferred and reported that the picketers seemed "happy" with this decision.

On the same day, one of SFLWC's codirectors filmed a video of the picket and explained that the picketers were there to "speak to the building manager on behalf of the janitors who work there." The video showed one of the janitors explaining, "[W]e spoke with the building manager and he suspended our employer and promised there will be changes and respect for us."

Concerned about the picketers' allegations, Maxon provided a copy of one of the leaflets and asked that Preferred investigate, particularly regarding the allegation of sexual harassment leveled at OJS's owner. Instead, Preferred gave Maxon notice of its intent to cancel the cleaning contract at the Harvest location. Preferred also notified OJS of its intent to cancel the corresponding subcontract.

OJS owner Ortiz terminated two of the picketers when they reported for work that evening. When OJS's subcontract with Preferred ended approximately one month later, OJS terminated several other employees, including the remaining employees involved in the picket.

### Unfair Labor Practice Charge

The union filed an unfair labor practice charge against OJS and Preferred, as joint employers. The charge claimed various unfair labor practices, including cancelling contracts, discharging, threatening, interrogating and surveilling employees in reaction to the employees' picketing activity.

In defense, OJS and Preferred argued that the employees lost the protection of the Act because they engaged in picketing with a secondary object prohibited by the NLRA. Section 8(b)(4)(ii)(B) of the NLRA, "prohibits threatening or coercive conduct that has an object to force a secondary employer — a neutral — to cease doing business with a primary employer, i.e., the employer with whom a labor dispute exists." They argued that the demonstrations had an unlawful secondary object of pressuring Harvest building tenants to force building

management to terminate its contract with Preferred, even though the employees' dispute was solely with OJS.

### Administrative Law Judge Decision

Administrative Law Judge (ALJ) Mary Miller Cracraft agreed with the union, and ruling the demonstrations were not unlawful secondary picketing.

ALJ Cracraft noted that, as originally stated in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549-51 (1950), when pickets occur at a common situs where both primary and neutral employers are present, the picketing is presumptively lawful if: (1) the picketing is strictly limited to times when the situs of the dispute is located on the neutral employer's premises; (2) at the time of the picketing, the primary employer is engaged in its normal business at the situs; (3) the picketing is limited to places reasonably close to the location of the situs; and (4) the picketing discloses clearly that the dispute is with the primary employer.

She found these standards clearly met. OJS's daytime employees were performing their normal job duties and Ortiz was located in the Harvest building lobby at the time of the picketing. The picketing was reasonably close to the situs of the dispute as it was located just outside the building lobby and, according to the ALJ, the picket signs "clearly disclosed" Preferred as the primary employer.

Finally, the ALJ found no independent evidence of an unlawful secondary object. Although the picket signs sought KGO's assistance in improving working conditions, there was no demand that KGO cease doing business with OJS or Preferred. Additionally, the appeal to KGO did not seek any specific, affirmative action as a *quid pro quo* for the removal of the pickets.

### Board Decision

The Board reversed the ALJ's decision and dismissed the complaint in its entirety, finding merit to the affirmative defense raised by OJS and Preferred.

Workers and their unions may picket or protest at job sites with multiple employers, the Board explained. They also may inform "secondary" or "neutral" employers that they plan to perform such picketing directed at the primary employer. However, the Board explained, it is generally unlawful to coerce a secondary employer to stop working with the primary business that is the party to the labor dispute.

Contrary to the ALJ's findings, the Board determined the picketing did not meet the *Moore Dry Dock* criteria, because it failed to disclose clearly that the dispute was with Preferred and OJS, rather than with the Harvest building or its tenants. While the picket signs named Preferred, the distributed leaflets asked that KGO ensure "*their* janitors" obtain better working conditions. This language led the public to believe KGO (which was not involved in the dispute) was the picketers' employer and had the ability to adjust working conditions.

Further, even if the picketing complied with *Moore Dry Dock*, independent evidence established that an impermissible object of the picketing was to disrupt the business relationship between the primary employers and Harvest property management. The Board found the following facts supported the impermissible object:

- At the November 19 meeting with the Harvest Property Manager, the picketers

demanding changes the property manager was uniquely positioned to effectuate. They also warned that they would keep showing up until *he* made changes.

- Statements made in the video filmed the same day further confirmed that the picketers' intent was to pressure Harvest management to initiate change. For example, one picketer explained that they "spoke with *the building manager* and *he* suspended our employer and promised there will be changes."
- The Harvest Property Manager recounted the picketers' "happy" reaction when he stated he was searching for a unionized contractor.
- The picketers reported to SEIU Local 87 President that neutral tenants were "upset" about the picketing.

The facts illustrated to the Board that "an object of the picketers was to pressure Harvest, a neutral employer, to cease doing business with Preferred unless it increased wages for janitorial employees working in that building and removed Ortiz."

### Implications for Employers

The Board's decision suggests that it may be more closely scrutinizing:

1. Picketing at job sites where multiple employers share workspace; and
2. When activities may be secondary, falling beyond the protections of the Act.

The SEIU has asked the Board to reconsider its decision. Jackson Lewis attorneys will continue to monitor the matter and provide updates.

Please contact Jackson Lewis with any questions about the NLRA and Board decisions.

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