



## MEMORANDUM

TO: Law Enforcement Personnel and Property Managers

FROM: Michael T. Manley, IBT Legal Department

DATE: September 21, 2017

RE: Hand Billing and First Amendment Activity

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I am counsel to the International Brotherhood of Teamsters (IBT). The IBT and some of its affiliated local unions are currently involved in a dispute with Vistar, a nationwide food distributor. The IBT and its affiliated local unions intend to publicize this dispute by engaging in peaceful hand billing at retail establishments, including movie theaters that utilize Vistar's products and services.

The First Amendment to the United States Constitution, as well as the National Labor Relations Act give IBT and affiliated local unions the protected right to publicize their dispute with Vistar via hand billing and other forms of publicity.

Interference with these rights will likely result in litigation in which the IBT is likely to recover its legal fees from the other side. Your police department can avoid this by declining to arrest or otherwise interfere with hand biller's lawful activity, leaving Vistar to pursue its own remedies.

Hand billing has long been recognized as a form of communication protected by the First Amendment. *Lovell v. City of Griffin, Georgia*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a

vehicle of information and opinion.”); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.”)

Sidewalks have long been viewed as “public forums” under the First Amendment to the United States Constitution, open to those who wish to publically air opinions and disputes. *Hague v. CIO*, 307 U.S. 496, 515 (1939); *Boos v. Barry*, 485 U.S. 312, 318 (1988).

First Amendment protection is not lost simply because the hand bill criticizes someone or the contents are offensive to either the person receiving the hand bill or the person or company who is the target of the hand bill. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character, however, simply because it embarrass others or coerce them into action.”); *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 1219 (2011) (“If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

Hand billing to publicize a labor dispute is protected by the First Amendment. *United States v. Hutcheson*, 312 U.S. 219, 243, (1941) (peaceful publication of labor dispute “is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress”) (J. Stoner, concurring). See also, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988) (finding hand billing urging consumers to boycott shopping center utilizing non-union construction lawful); *Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 197 (8<sup>th</sup> Cir. 1994) (finding union’s hand billing accusing a grocery store of racial discrimination protected by First Amendment.)

While it is true that the retail establishments and movie theaters are simply utilizing Vistar products, this makes no difference in the protection afforded the IBT’s right to peacefully publicize its dispute. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988), the Supreme Court upheld a union’s right to distribute hand bills urging consumers to boycott a shopping center because one of the stores in the center utilized a non-union

contractor. The IBT has a right, under both the First Amendment and the National Labor Relations Act, to publicize its dispute with Vistar at any site where Vistar is conducting business. See, e.g. *Teamsters Local 287 (Buck's Butane-Propane Service Inc.)*, 186 N.L.R.B. 187 (1987) (upholding picketing of customer sites during time trucks from struck companies were making deliveries); *Mautz & Oren, Inc. v. Teamsters Local 279*, 882 F.2d 1117, 1122 (7<sup>th</sup> Cir. 1989).

Under the Supremacy Clause of the U.S. Constitution, state and local governments are forbidden from enacting laws or regulations that attempt to regulate, in any way, activity that is arguably subject to federal labor law. *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959). Federal law protects the right of workers to hand bill in order to publicize labor disputes, even if the hand billing has the object of putting pressure on other employers. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988). Because such hand billing is protected and governed by federal law, state and local governments are not free to take actions to prohibit it. *Johnston Development Group v. Carpenters Local 1578*, 712 F. Supp. 1174 (D.N.J. 1989).

If a local government, including a local law enforcement official, takes action to interfere with the federal constitutional right of free speech, or takes actions to limit activity protected by federal labor law, such as prohibiting peaceful hand billing by members, then the locality violates the hand billers civil rights under the Ku Klux Klan Act, 42 U.S.C. §1983, subjecting the officials involved to possible liability for the plaintiff's attorney's fees, actual damages and punitive damages under 42 U.S.C. §1988. *Golden State Transit v. City of Los Angeles*, 493 U.S. 103 (1989); *Livadas v. Bradshaw*, 512 US 107 (1994); *Radcliffe v. Rainbow Constr.*, 254 F.3d 772, 780 (9<sup>th</sup> Cir. 2001) (recognizing federal civil rights claim against local prosecution of union agents).

In summary, both the First Amendment of the U.S. Constitution and federal labor law protect the right of union members to engage in peaceful hand billing on public property, which includes areas adjacent to public rights of way at entrances or exits at private businesses.