

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: October 20, 2003

TO : Frederick Calatrello, Regional Director  
Region 8

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: IUOE, Local 150  
(R.J. Corman Derailment Services, LLC)  
Cases 8-CP-383 & 17-CP-363 578-6007  
578-6084

These cases were submitted for advice as to whether the Union's picketing violated Section 8(b)(7)(C).

We conclude that there is insufficient evidence to establish that an object of the Union's picketing was recognitional or organizational. The Regions should dismiss the charges, absent withdrawal.<sup>1</sup>

## FACTS

### Background:

International Union of Operating Engineers, Local 150 (the Union), and R.J. Corman, LLC, and its subsidiaries R.J. Corman Derailment Services and R.J. Corman Railroad Construction (collectively, the Employer), have in recent years been involved in numerous unfair labor practice charges, including charges filed by the Employer against the Union for picketing in violation of Section 8(b)(7)(C). The relevant history of the parties' relationship is addressed in detail in Operating Engineers, Local 150 (R.J. Corman Derailment Services, LLC), Cases 26-CP-93 & 8-CP-376, Advice Memorandum dated October 7, 2002. In short, from December 2001 to June 2002, the Union engaged in intermittent ambulatory picketing at Employer job sites in Missouri, Louisiana, Ohio, Indiana, and Michigan. When picketing, the Union carried signs that read, "I.U.O.E. Local #150 ON STRIKE AGAINST RJ CORMAN FOR UNFAIR LABOR PRACTICES." The Union purportedly picketed the Employer to protest certain unfair labor practices, but also expressed a recognitional

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<sup>1</sup> [FOIA Exemption 5

objective at various times away from the picket lines. In June 2002, the Union settled all outstanding 8(b)(7)(C) cases, and advised the Employer that the Union disclaimed interest in representing the Employer's employees.

In August 2002, however, the Union resumed its intermittent picketing at Employer job sites, using the same signs it used in the earlier picketing. Among the unfair labor practices the Union was protesting were the Employer's failure to hire Union "salts" and failure to consider the Union "salts" for hire.<sup>2</sup> Given the totality of the Union's conduct, we concluded in those cases that the Union's picketing had a recognitional or organizational object and, therefore, that the Union had again violated 8(b)(7)(C).  
[FOIA Exemption 5

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On or about September 9, 2002, the Union ceased its intermittent picketing of the Employer.

Prior to the administrative hearing in the authorized cases, the Region, the Employer, and the Union executed a formal settlement that provided, inter alia, that the Union would not picket the Employer for 14 days from the date of the Board's order approving the settlement, and that the Union would not thereafter picket the Employer with a recognitional or organizational object.<sup>4</sup> Nothing in the settlement would prohibit the Union from engaging in otherwise lawful picketing against the Employer.

By letter dated February 18, 2003,<sup>5</sup> the Union advised the Employer that the Union:

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<sup>2</sup> See, R.J. Corman Railroad Company, L.L.C., 13-CA-38807, JD-111-01 (August 22, 2001).

<sup>3</sup> The Region obtained a 10(1) injunction against the Union on December 2, 2002.

<sup>4</sup> The Board's order approving the settlement stipulation issued on March 25; on June 23, the Sixth Circuit issued a consent judgment enforcing the Board's order.

<sup>5</sup> All dates hereafter refer to 2003, unless noted otherwise.

has stopped, and has no intention of resuming, any alleged recognitional and/or organizational activity involving any of [the Employer's] employees[,], including but not limited to picketing.

The Union also advised the Employer that it reserved its right to:

protest peacefully the failure of any R.J. Corman entities to pay area standard wages and/or benefits; to pay wages and/or benefits previously owed under collective bargaining agreements with [the Union]; and/or to protest certain of [the Employer's] as yet unremedied statutory labor law violations.

The Union further asserted that such protests would comply with the formal settlement between the parties, and would be lawful under "federal labor law."

The Instant Charges:

In June, the Union sent notices to some of the Employer's customers stating that the Union had a "primary labor dispute" with the Employer. The Union stated that it might engage in ambulatory picketing of the Employer, but that it had "no organizational or recognitional intent[.]"

On July 17 and 18, four Union agents picketed at an Employer job site in Kansas City, Kansas. As in earlier picketing, the Union agents carried signs that read, "I.U.O.E. Local 150 AFL-CIO On Strike Against R.J. Corman LLC For Unfair Labor Practices." Unlike previous picketing, however, the Union attached to each sign an 8 ½" x 11" sheet of paper that read,

Local 150 is on strike against the above-named Employer for the following unremedied or pending statutory/contractual unfair labor practices:

- o Interrogating employees about union activity
- o Conveying to employees that union activity is futile
- o Threatening to close one of its facilities if the Union came in

- o Threatening Employees with loss of benefits
- o Failure to pay contractually agreed-upon wages
- o Filing frivolous lawsuits to interfere with Local 150's Section 7 right to pursue grievances to arbitration.<sup>6</sup>

There is no evidence that, during the picketing, the Union agents said anything to any of the Employer's employees, representatives, or customers, or engaged in any conduct other than holding the above-referenced signs at four entrances to the Employer's Kansas City job site.

The Union has not engaged in any picketing at any Employer location since July 18.

#### ACTION

We conclude that there is insufficient evidence to establish that the Union's picketing on July 17 and 18 had a recognitional or organizational object.

Section 8(b)(7)(C) does not prohibit a union from picketing an employer with the sole object of protesting the employer's unfair labor practices.<sup>7</sup> However, in those cases where recognition or organization is an object of the picketing, even if it is not the sole or even the primary object, such picketing may violate Section 8(b)(7).<sup>8</sup> Because "[a]n unlawful objective in picketing is rarely

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<sup>6</sup> The Union's references to contract wages and grievance arbitration solely involve a dispute that arose out of the Union's representation of employees at a now-closed facility. Resolution of this dispute would not require the Employer to recognize or bargain with the Union in the future.

<sup>7</sup> Waiters & Bartenders Local 500 (Mission Valley Inn), 140 NLRB 433, 437 (1963) (emphasis added). See also, Plumbers Local 32 (Robert E. Baley Construction), 315 NLRB 786, 789 (1994).

<sup>8</sup> See, e.g., St. Helens Shop 'N Kart, 311 NLRB 1281, 1286 (1993).

proved by admission, but rather must be ascertained from the union's overall conduct, which would include past relations between the parties as well as the context in which the picketing occurred[,]"<sup>9</sup> the Board considers the totality of the circumstances,<sup>10</sup> including the legends on picket signs,<sup>11</sup> to determine whether union picketing is for an object proscribed by Section 8(b)(7)(C).

The Board has long rejected the application of any presumption that a union's illegal object during earlier picketing "carries over" to subsequent picketing, absent substantial independent evidence to support such a finding. Rather, the "new picketing should be determined to be good or bad for what it is and not by reason of the object or purpose of earlier picketing."<sup>12</sup> For example, when a substantial hiatus intervenes between a union's picketing for an unlawful object and its initiation of new picketing for a purportedly different purpose, that hiatus will negate any presumption that the unlawful object of the earlier picketing "carried over to the second round."<sup>13</sup> Where there is a substantial hiatus between picketing episodes, and the "second round" is preceded by the union's

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<sup>9</sup> Id. at 33.

<sup>10</sup> See, e.g., Iron Workers Local 10 (R & T Steel Constructors, Inc.), 194 NLRB 971, 973 (1972).

<sup>11</sup> See e.g., San Francisco Culinary Workers (McDonald's System of California), 203 NLRB 719 (1973), *enfd. as mod.* 501 F.2d 794 (D.C. Cir. 1974); Operating Engineers Local 542-A,-B,-C (Kaminski Brothers, Inc.), 152 NLRB 553, 558 (1965), *enfd.* 360 F.2d 111 (3<sup>rd</sup> Cir. 1966).

<sup>12</sup> Retail Clerks Local 1357 (Genuardi Super Markets), 252 NLRB 880, 887 (1980), quoting Philadelphia Building Trades Council (Altemose Construction), 222 NLRB 1276, 1280 (1976). See also, Plumbers Local 290 (Streimer Sheet Metal Works and Hoffman Construction), 323 NLRB 1101, 1113 (1997)

<sup>13</sup> Hoffman Construction, above, 323 NLRB at 1113 (hiatus of 45 to 75 days considered "substantial"); Carpenters (Ventura County) District Council (Compositor Corp.), 242 NLRB 1109, 1111 (1979) (50 day hiatus sufficient to negate presumption that unlawful objective "carried over" to subsequent picketing).

disclaimer of any unlawful object, a presumption that the union's earlier, unlawful object carried over is particularly inappropriate.<sup>14</sup>

In the instant cases, the substantial hiatus separating the Union's earlier, recognitional picketing and the picketing at issue here, and the Union's disclaimer of its past and any future recognitional or organizational object negate any presumption that the Union's prior organizational and recognitional purpose should be ascribed to its picketing on July 17 or 18. The Union had not picketed the Employer for ten months, during which time it affirmatively disclaimed any past or future interest in organizing or representing the Employer's employees.<sup>15</sup> Since then, the Union has consistently reiterated its disclaimer to the Employer, the general public, and the Region, and there is no evidence that Union agents have said or done anything that would demonstrate a recognitional object.<sup>16</sup> Thus, there is no "substantial independent evidence" that the Union picketed the Employer on July 17 and 18 with a recognitional or organizational object, and we cannot presume that any unlawful object the Union may have had for earlier picketing "carried over" to the July 17 and 18 picketing.

We also conclude that, in contrast to the prior case involving these parties,<sup>17</sup> none of the unfair labor practices the Union protested on July 17 or 18 inherently contains, or is inseparable from, a recognitional object. The Union's pickets specifically list several "statutory and/or contractual unfair labor practices." However, resolution of those unfair labor practices would not require

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<sup>14</sup> Hoffman Construction, 323 NLRB at 1113.

<sup>15</sup> See Genuardi Super Markets, 252 NLRB at 888, and cases cited there (union's 29-hour hiatus and contemporaneous disclaimer sufficient to negate presumption that earlier recognitional object applied to later picketing; no independent evidence that union had recognitional or organizational object for second round of picketing).

<sup>16</sup> Id. at 888; Hoffman Construction, 323 NLRB at 1114.

<sup>17</sup> Operating Engineers, Local 150 (R.J. Corman Derailment Services, LLC), Case 26-CP-93, et al., Advice Memorandum dated October 7, 2002 (the Union protested, inter alia, the Employer's failure to hire or consider for employment the Union's "salts" which inherently contained, and was inseparable from, an organizational object).

the Employer to recognize and bargain with the Union or result in the designation of the Union as the employees' collective bargaining representative.

Finally, we would not rely on the language of the Union's pickets signs, alone, to infer an unlawful object in this case. We know of no case in which the Board has held that a union's use of the term "On Strike" when picketing an unorganized employer, per se, evinces an unlawful object. Rather, a union's use of "on strike" language can best be viewed as secondary indicia of a union's recognitional or organizational object, providing some context for other independent evidence of a union's object. For example, in IUOE, Local 150, Case 26-CP-93, et al., above, we determined that the Union's use of "On Strike" was misleading because employees were not on strike, nor was the Union calling on employees to join its protest. The Union's misleading signage in those cases allowed us to look elsewhere for evidence of the Union's object, i.e., its protest of the Employer's refusal to hire or consider for hire the Union's "salts." Here, the Union's signs are not misleading as they are directed at the public and include a specific recitation of the unfair labor practices the Union is protesting, none of which is inherently organizational.<sup>18</sup> Thus, in the absence of any evidence of a recognitional or organizational object that provides some additional basis for concluding that the Union's use of "on strike" also indicates an unlawful object, the Union's use of that term here is insufficient to establish that the Union in fact had such an object.

In sum, the circumstances of the Union's July 17 and 18 picketing fail to establish that the Union picketed the Employer with a recognitional or organizational object. Therefore, there is insufficient evidence to establish that the Union violated the Board's order, as enforced by the Sixth Circuit, or otherwise violated Section 8(b)(7)(C).

Accordingly, the Regions should dismiss the instant charges, absent withdrawal.

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<sup>18</sup> See, e.g., Geske & Sons, Inc., 317 NLRB 28, 55 (1995) (union's use of term "on strike" on its picket signs was not misleading, union's signs supported its protest of the employer and called on employer's employees, customers, and suppliers to honor the union's picket line).

Cases 8-CP-383;  
17-CP-363

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B.J.K.

cc: Contempt &  
Compliance Branch