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

Advice Memorandum

DATE: July 20, 2010

TO : Wayne Gold, Regional Director
Region 5

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

SUBJECT: Operative Plasterers & Cement Masons International Union Local 891
Case 5-CD-325

United Brotherhood of Carpenters & Joiners of America, Mid-Atlantic Regional Council of Carpenters,
Case 5-CD-326

The issue presented is whether reasonable cause exists to believe that the Respondent Unions—the Operative Plasterers & Cement Masons International Union Local 891 ("the Cement Masons") and the United Brotherhood of Carpenters & Joiners of America, Mid-Atlantic Regional Council of Carpenters ("the Carpenters")—violated Section 8(b)(4)(D) of the Act by engaging in picketing in support of an express or implied work-reassignment claim or demand, and therefore whether the Board should initiate a jurisdictional proceeding under Section 10(k) of the Act. We conclude that reasonable cause does not exist and that the Region should not issue notice for a 10(k) hearing, but instead should, absent withdrawal, dismiss the charges in these related matters.

FACTS

The case has its genesis in a Section 8(f) pre-hire agreement between McClone Construction and the Charging Party, the Baltimore/Washington Construction and Public Employee Laborers District Council ("the Laborers"). The agreement covers all construction work to be performed in a renovation project at the Hilton Washington Hotel, Construction Phase II. The agreement with the Laborers specified the same $19/hour wage rate, with an additional $1.75/hour payment for Health & Welfare, for each of the following employee classifications: Laborer, Carpenter, Finisher, Operator, and Iron Worker. It is undisputed that this wage rate and fringe benefit package was well beneath area-standard wages for employees in each of these trades, including area laborers.

This was at least the second such project-agreement the Laborers had entered into with a contractor in the Washington D.C. area, the other being a road-widening

project ("the Hot Lane project"). There, the Laborers had entered into a contract that covered employees working in various specified trades, including carpentry. Because a sizeable number of "carpentry laborers" worked at the Hot Lane project, the Carpenters filed an election petition with Region 5 to represent them in a separate craft unit. The Laborers intervened and argued that only a wall-to-wall unit was appropriate. Following a hearing, the Regional Director issued a decision dismissing the Carpenters' petition. The Regional Director found that the Carpenters failed to show that a separate craft unit was appropriate because there was overlap in job assignments and supervision between carpenter laborers and regular laborers.

It was in this context that, when the Respondent Unions learned of the Laborers' contract with McClone on the Hilton project, both sent letters to McClone. The letters stated that McClone was grossly undercutting area standard wages for employees working in various trades on the Hilton project and declared the Respondent Unions' intent to launch an area-standards campaign against that practice at the site.

Thereafter, the Carpenters picketed, and the Cement Workers handbilled, outside the Hotel on various occasions, each with signs or handbills stating that work was being performed at the site for wages and benefits that undercut area standards. Neither Union had any other communication with McClone or any of its representatives, or made any express or implicit demand or claim for the work being performed at the Hilton.

Specifically, the picket signs and handbills focused exclusively on publicizing and criticizing the Hilton and McClone for undermining area standards. The Carpenters' picket signs read:

- "Lowering Area Standards for Carpenters"; and
- "McClone Construction Company, Inc. DOES NOT PAY Area Standards Wages & Benefits."

The Cement Workers' handbills read:

- "[T]his Hilton Hotel is using tradesmen on their renovation who are not paid area standards for wages and fringe benefits";
- "[S]hame, shame, shame";
- The Employer "pays substandard wages and takes advantage of their cement mason employees";

- The Hilton had contracted with an employer that paid "substandard wages" for concrete work and asked the public to "show your displeasure with Hilton now"; and

- The Hilton is "using tradesmen on their renovation who are not paid area standards for wages and fringe benefits."

The Laborers sent a representative to observe the picketing and handbilling. He reported that two representatives of the Carpenters told him that it was not right that the Laborers were lowering area standards and doing everyone else's job at a cut rate. The Laborers' representative also reported that the two Carpenters stated that the Laborers had no business stealing Carpenter work.

The Carpenters faxed to other building trade unions a flyer with the heading "All union members beware of a thieving rat," and asked, "Are the Laborers' International Union of North America and its local Unions stealing your work," followed by a list of the rates being paid to various trades under the McClone agreement compared with area standard rates. The Carpenters made clear in the flyer that the Laborers were "driving down area standards for all construction trades crafts . . . ." The Carpenters also distributed a flyer to its own picketers which accused the Laborers of entering into a "sweetheart contract that cut their [very own] members wages and benefits by 26% on the Washington Hilton Hotel project."

The Laborers also asserted that a representative of the Metropolitan Contractors Trade Association ("MCTA") told a McClone representative that the only way to get rid of the Carpenters' picket line would be to tear up the contract with the Laborers and sign individual agreements with the traditional trades. No evidence was presented that the MCTA representative was speaking for anyone other than himself or his association's members.

ACTION

We conclude that there is not reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and therefore the Region should dismiss the charge, absent withdrawal.

Section 8(b)(4)(D) and Section 10(k) create a statutory scheme designed to afford an employer caught between competing claims for the same work an expeditious Board determination of which competing claim prevails. However, before an employer can invoke the Board's nonadversarial 10(k) processes, it must provide proof that there is reasonable cause to believe that a violation has

occurred: both that the respondent union has engaged in a pressure tactic prohibited under subsection (i) or (ii) (here, picketing), and that the pressure tactic, at least in part, was in pursuit of a work reassignment or acquisition objective.[1]

It is well settled that a union does not violate Section 8(b)(4)(D)'s prohibitions by engaging in area standards picketing, even though it is fair to assume that the union would prefer that the work at issue be performed by employees whom it represents at area standards wages.[2] Thus, the Board in Streimer II made clear that area standards picketing could not be converted into an 8(b)(4)(D) violation unless evidence supported a finding that the picketing furthered an express or implied demand or request for a reassignment of the work. As the Board explained, simply proving that the picketing union believed that the work should have been assigned to employees whom it represented was not enough:

> [S]ubsection (D) describes what can be called for simplicity's sake a work-reassignment objective, but does not itself proscribe that object in the normal sense of the word; that is, it does not "declare it to be unlawful" for a union merely to "want" a certain category of work to be assigned to its constituency; or to harbor or maintain as a long-term goal the securing of such work for its constituency. Rather, the proscription associated with the work-reassignment "object" described in subsection (D) is to be found elsewhere — in subsection (i) and (ii) of Section 8(b)(4)— which ban certain kinds of conduct by unions . . . where "an object" of such conduct is to secure the reassignment of a particular increment or category of work from one group or class of workers to another. Arguably, therefore, the language and structure of the statute themselves make it dubious that a union's mere abstract wish to obtain certain work for its members could suffice to establish a presumption that such a desire inspired any picketing it might conduct while simultaneously maintaining that overall goal.

Id. at 1112 (internal footnote omitted).

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[1] See NLRB v. Radio and Television Broadcast Engineers Union, Local 1212, 364 U.S. 573, 574-76 (1961).

[2] See Plumbers Local 290 (Streimer Sheet Metal Works), 323 NLRB 1101, 1112 (1997) ("Streimer II").

In the present case, the investigation belies that there was any work-reassignment objective to the Respondents' activities at the Hilton site. To the contrary, the evidence shows only that the Respondent Unions were protesting the fact that the Laborers were performing work at substandard wages that undermined area standards and, in so doing, took work opportunities from their members. Neither Respondent Union made any request or demand for a reassignment of the cement work at the Hilton site. In fact, the extent of their official communications with any of the entities involved at the site—the Hilton, the general contractor, McClone, or the Laborers—were their letters to McClone stating each union's intent to launch an area standards campaign at the site. The focus of all handbills, picket signs, and any incidental statements made by Carpenter representatives on the picket line was to protest the substandard wage rates at the Hilton project which, the Respondent unions believed, posed a real threat to work opportunities and wages of their members.

The fact that the Carpenters were concerned that the Laborers were intent on waging a campaign throughout the D.C. area of offering Laborers to perform traditional trade union jobs does nothing to prove a proscribed motive. The root of the threat was not that another union was crossing jurisdictional lines, but rather that the Laborers were under-bidding job opportunities at a rate at which the Respondent Unions could not compete because of the Laborers' sub area-standards rates. Those substandard wages, if unchecked, could drive down area standards and preclude employers with contracts with either Respondent Union from competing successfully for work. Thus, because neither union engaged in actions suggestive of a work reassignment motive, only of a traditional area standards motive, we conclude that the Respondent Unions were interested only in publicizing a threat to area standard wages.

The Laborers'attempt to ascribe a work-reassignment purpose to the Respondent Unions' picketing by contending that a representative of the Metropolitan Contractors Trade Association told a McClone representative that the only way to get rid of the Carpenters' picket line would be to tear up the contract with the Laborers and sign agreements with the traditional trades, is unavailing. This contention does not implicate either Respondent Union and, even if it did, would only evidence a representational objective, not

a work-acquisition one, and therefore violate no precept embodied in 8(b)(4)(D).[3]

In sum, the Laborers failed to produce any evidence to prove that the Respondent Unions had engaged in any activity that had a work reassignment or acquisition objective. Instead, the picketing focused exclusively on publicizing that the McClone-Laborers agreement on the Hilton project eviscerated area standard wages. Accordingly, the Region should dismiss the Section 8(b)(4)(D) charge, absent withdrawal.[4]

B.J.K.

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[3] See Laborers Local 423 (Electrical Constuctors), 183 NLRB 895, 898 (1970) (evidence of a possible recognitional objective inconsequential in 8(b)(4)(D) context).

[4] See Streimer II 323 NLRB at 1112-14; Local 98 (Fairfield Co.), 337 NLRB 793, 794-95 (2002); IBEW Local 640, (Stromberg-Carlson Communications, Inc.), 228 NLRB 1078, 1079 (1977), aff'd, 55 F.2d 939 (9th Cir. 1978).
It should be noted that, while the Cement Workers engaged only in protected handbilling that itself is not proscribed under 8(b)(4)(i)(ii)(D) of the Act, an argument can be made that its handbilling activities were of a piece with the Carpenters' picketing. Therefore, assuming adequate proof of a proscribed objective, it is arguable that the Cement Workers could properly have been charged under a reasonable-cause-to-believe standard based upon the Carpenters' actions in picketing.