International Brotherhood of Teamsters, Local 722, AFL–CIO[1] ***and*** **Kasper Trucking, Inc. and Rockford Blacktop Construction Co.** Cases 33–CC–1116–2 and 33–CC–1117–2

August 31, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On December 3, 1993, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed briefs in support of the judge's decision and in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions and to adopt the recommended Order as corrected.

The Respondent asserts that the judge's findings are the result of erroneous legal and factual rulings, as well as the judge's bias and prejudice against it.[3] The Respondent argues that at the hearing the judge improperly excluded relevant evidence it sought to introduce. Although the Respondent acknowledges that the judge subsequently reversed this ruling in his decision, it argues that this reversal does not mitigate the prejudice it suffered and that, in any event, the judge failed to properly consider this evidence.[4] The Respondent also argues, among other things, that the judge: (1) improperly assisted the General Counsel in litigating her case; (2) interrupted and interfered with its offer of proof; (3) rejected ''specious'' legal arguments it never advanced; (4) prejudged its defense, as demonstrated by posthearing comments; and (5) made veiled comments about the competence of Respondent's counsel and otherwise demonstrated prejudice and bias against him.

Having examined the entire record, we are satisfied that the Respondent's bias and prejudice allegations lack merit. Thus, for the following reasons, as well as those articulated by the judge, we find that the parties received a full and fair opportunity to litigate this proceeding.

A. *Exclusion of Evidence*

The Respondent initially argued in its motion for disqualification that the judge erred in preventing its sole witness, Kurt Freeland, from testifying. In its opening statement at the hearing, the Respondent announced that Freeland, general counsel of the Illinois Commerce Commission, would testify that Illinois law requires ''brokers'' to be licensed; that Kasper was not licensed; that Kasper had failed to file with the State its lease agreements for owner-operators; and that by failing to comply with these requirements, Kasper's leases with the owner-operators were void. When the Respondent called Freeland as a witness, and began questioning him about Illinois' filing and licensing requirements, the General Counsel and the Charging Party objected, citing relevancy. The Charging Party argued that under *Don Bass Trucking*[5] and *Air Transit*,[6] government regulations constitute supervision by the state and not by the parties. The judge sustained the objections, finding that Illinois law was irrelevant to the determination whether owner-operators were employees of Kasper Trucking or independent contractors.

After sustaining these objections, the judge directed the Respondent to ''move on to something else.'' The judge made clear however, that he was not precluding Freeland or any witness from testifying about matters relevant to this proceeding.[7] Rather than asserting that

[1] The name of the Respondent has been changed to reflect the official name of the Union.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] At the conclusion of the hearing, the Respondent filed a motion to disqualify the judge, claiming that the judge was biased and prejudiced against it, and that the judge had made erroneous legal rulings. In his decision, the judge rejected this motion in a detailed response to the Respondent's allegations. In its exceptions, the Respondent renews many of its allegations of bias, prejudice, and legal error.

[4] The Respondent also argues, more broadly, that had it been allowed to present its case, it would have provided additional bases for dismissing the complaint. The Respondent, however, offers no additional arguments.

[5] 275 NLRB 1172, 1174 (1985).

[6] 271 NLRB 1108, 1110 (1984).

[7] The Respondent argued in its motion to disqualify the judge that the judge prevented Freeland from testifying. In this regard, the Respondent cited the judge's statement in the record that ''we need not hear [Freeland's] testimony.''

The judge rejected the Respondent's argument, finding that Freeland was not prevented from testifying about matters relevant to this case. The judge also found that the record was incomplete on this point. The judge stated that when the Respondent's counsel asked him if Freeland could further testify, the judge responded ''not in this area.'' The judge modified the transcript accordingly.

The Respondent excepts arguing that the judge never stated ''not in this area.'' Regardless whether this statement was made, we find that the Respondent was afforded ample opportunity to examine Freeland and other witnesses on matters relevant to this proceeding. Thus, when the judge sustained initial objections to Freeland's testimony about Illinois law, he did not foreclose Freeland from further testimony. Instead, the judge directed the Respondent's counsel to proceed to another area of inquiry. Although the judge later directed Freeland to step down as a witness—after Freeland's testimony was excluded on relevancy grounds—the judge simultaneously announced that the Respondent could present any other witness who would testify to matters relevant to this proceeding. Rather than argue that Freeland would testify about other, germane, issues, the Respondent asked to make an offer of proof about what Freeland would have testified. Before this offer was made, the judge again

Freeland had other matters on which to testify, however, the Respondent made an offer of proof about what Freeland would testify, if further examined.[8] This offer related to regulations and requirements under Illinois Commerce Transportation law which the judge determined irrelevant.

The Respondent next proffered a ''certificate'' of record search by personnel in the Illinois Commerce Commission, purporting to show that Kasper Trucking had not applied for an Illinois intrastate broker's license. When the General Counsel and the Charging Party objected to the admission of this document, the judge sustained the objections on relevancy grounds.

Finally, the Respondent asked the judge to take official notice of portions of the Illinois Commerce Transportation law governing brokers and leases. Following objections by the General Counsel and the Charging Party, the judge denied the Respondent's request, finding that the Respondent had not established that these regulations were even marginally relevant to the issues in this proceeding.

In its posthearing brief to the judge, the Respondent presented, for the first time, an additional basis on which the excluded testimony and evidence would be relevant. Specifically, the Respondent contended that Kasper's failure to register with Illinois as a broker, its failure to file employee lease agreements or the Independent Contractor Agreement(s) for Owner-Operators, and provisions of the equipment lease agreements that it did file, misled the Respondent into believing that the Dixon and Amboy drivers were Kasper employees.

Based on this newly articulated theory, the judge found that the Respondent had established that the excluded evidence bore some relevance to the issue whether the Act had been violated. Accordingly, the judge reversed his rulings and admitted the ''certificate,'' the state law provisions, and treated the offer of proof as testimony by Freeland. After considering this evidence, however, the judge determined that Respondent's picketing violated Section 8(b)(4)(i) and (ii)(B). Thus, the judge found that although the Respondent's initial inquiry to the State was appropriate, once Kasper notified it that the Dixon drivers were independent owner-operators, provided it with the Independent Contractor Agreement(s) for Owner-Operators supporting this claim, and reiterated even more explicitly that the Amboy drivers were not its employees, the Respondent acted at its peril when picketing the jobsites.

For purposes of this proceeding, we need not decide whether the judge erred when initially excluding from evidence the ''certificate,'' Freeland's testimony, or proffered sections of Illinois law. See generally *NLRB v. Del Rey Tortilleria*, 823 F.2d 1135 (7th Cir. 1987). Thus, the judge reversed his rulings, accepted this evidence, and duly considered it in his decision. In these circumstances, we find that the Respondent was not prejudiced.

B. *Interference with Presentation of Evidence*

The Respondent next argues that the judge improperly interfered with the litigation by directing the General Counsel, during her direct examination of George Kasper, to ask additional questions. Specifically, after Kasper testified that picketing occurred at the Dixon jobsite on January 19, 1993, the General Counsel proceeded to another line of inquiry. When the judge directed the General Counsel to pursue the picketing issue, the Respondent objected. The Respondent argued that as it was an adversarial proceeding, if the General Counsel, as prosecutor, failed to develop the record, the judge should not do so. The Respondent further asserted that the judge should wait until the parties had finished examining a witness before posing his own questions. The judge disagreed, stating that he wanted a complete and integrated record, and that if any party failed to provide it he would step in. The judge also stated that since the Board was governed by administrative law, it did not view the General Counsel as a prosecutor.

Although we agree with the Respondent that the General Counsel functions as a prosecutor in unfair labor practice proceedings,[9] we otherwise find that the judge's actions were proper. Section 102.35(k) of the Board's Rules and Regulations authorizes administrative law judges to ''call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.'' Further, it is well settled that judge's may examine witnesses or interrupt questioning in order to clarify testimony or develop the record. *NLRB v. Overseas Motors*, 818 F.2d 517, 520 (6th Cir. 1987); *NLRB v. Top Form Mills*, 789 F.2d 262, 265 (4th Cir. 1986). Here, the judge did no more than pursue a line of questioning in order to develop a complete and integrated record. Although the judge might have accomplished this through his own questioning, rather than by prompting the General Counsel, we do

told the Respondent that he wanted to hear testimony from any additional witnesses it had. The Respondent elected not to present further testimony or witnesses, but rested on its offer of proof.

In these circumstances, we agree with the judge that the judge did not preclude the Respondent from questioning Freeland further or, indeed, from presenting any witness or evidence on matters relevant to this proceeding.

[8] The Respondent argues that the judge erred in finding that the General Counsel and the Charging Party objected to its offer of proof. The Respondent is correct. We note, however, that although no party objected to the offer of proof, both the General Counsel and the Charging Party earlier objected to Freeland testifying on precisely those issues contained in the offer.

[9] See, e.g., *Frito Co. v. NLRB*, 330 F.2d 458, 465 (9th Cir. 1964) (''Once having elected to prosecute a complaint before the Board, the General Counsel is cast in the role of prosecutor in a judicial proceeding'').

not find this isolated incident improper or evidence of bias or prejudice. *NLRB v. Superior Sales*, 366 F.2d 229, 233 (8th Cir. 1966).

C. *Interference with Offer of Proof*

The Respondent maintains that the judge demonstrated bias by interrupting its counsel and attempting to scuttle its offer of proof of what Freeland would have testified. We have carefully examined the record and find no evidence that the judge acted improperly. Although there were verbal exchanges between the judge and Respondent's counsel on the subject of the offer, before the offer was made, we are satisfied that the judge acted temperately and judiciously towards Respondent's counsel. Moreover, the latter made a complete offer of proof and, ultimately, this offer was accepted as if Freeland had testified.

D. *Rejecting Legal Arguments that Were Never Made*

The Respondent argues that the judge improperly attributed numerous legal arguments to it that it never made, and that were, in fact, ''nonsensical.'' The Respondent contends that this evidences bias by the judge and demonstrates his failure to comprehend its legal position. We reject both arguments. First, the Board has held that bias is not established merely because a judge incorrectly attributes legal arguments to a party, or mischaracterizes those arguments. *SCC Contracting*, 307 NLRB 1519 fn. 1 (1992). This holding is particularly apt here where, despite frequent entreaties by the judge, the Respondent repeatedly declined to articulate its theory of defense.[10]

Contrary to the Respondent's claims, we are satisfied that the judge fully comprehended and evaluated its legal argument that Kasper's owner-operators were its employees based on Illinois' law and filing requirements. The fact that the judge rejected this argument and concluded that the owner-operators were independent contractors does not reflect a misconception of the Respondent's theory, but rather the application of applicable legal precedent. See, e.g., *Precision Bulk Transport*, 279 NLRB 437 (1986); *Don Bass Trucking*, supra.

[10] For example, when the Respondent's counsel cross-examined General Counsel's witness Rafferty, he responded to repeated objections only that he would ''link up'' the testimony. Similarly, when the Respondent's counsel was cross-examining Gordon Kasper, the judge frequently asked him where he was going with a particular line of questioning, and to explain the Respondent's legal theory. Rather than comply, the Respondent's counsel variously replied that he would ''get to it,'' that he was almost finished and, finally, that he did not want to reveal his theory until presenting the Respondent's case-in-chief.

E. *Prejudgment of the Case*

According to the Respondent, after the hearing closed, the judge shook hands with its counsel and stated, ''You're a good attorney, Mr. O'Hara, but it's not going to do you any good here.'' The Respondent argues that these comments reflect the judge's prejudgment of the case.

The judge states in his decision that he told the Respondent's counsel, ''You're a fine attorney, Mr. O'Hara, but you are in the wrong court, it cannot help you here.'' The judge denied that his comment was prejudicial, and asserted that it was a ''complimentary truth consistent with his rulings from the bench.''

Under either version of this posthearing discussion, we do not find the judge's comments improper. At most, they reflect the judge's belief that the Respondent's state law defense was inapplicable to a determination whether the Dixon and Amboy owner-operators were Kasper employees or independent contractors. In comparable circumstances, the Fourth Circuit held that ''[a] judge's remarks that constitute mere expressions of a point of law are not sufficient to show personal bias or prejudice.'' *NLRB v. Top Form Mills*, supra, 789 F.2d at 265. See also *Liteky v. U.S.*, 114 S.Ct. 1147 (Mar. 7, 1994).

F. *Overall Bias and Prejudice Allegations*

Finally, based on the above-referenced conduct of the judge, as well as other incidents cited in its exceptions, the Respondent argues that the judge was biased and prejudiced against it. On our full consideration of the Respondent's allegations, and the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent—or its counsel—in the hearing or in analyzing and discussing the evidence.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Teamsters, Local 722, AFL–CIO, LaSalle, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order.

Judith T. Poltz, Esq., for the General Counsel.
Michael W. O'Hara, Esq. (Cavanagh & O'Hara), of Springfield, Illinois, for the Respondent.
Gerald A. McInnis, Esq. (Husch & Eppenberger), of Peoria, Illinois, for the Charging Party.

DECISION

Statement of the Case

Elbert D. Gadsden, Administrative Law Judge. Unfair labor practice charges were filed in Case 33–CC–1116–2 by

Kasper Trucking, Inc., on February 4, 1993, and in Case 33–CC–1117–2 on the same date by Rockford Blacktop Construction Co. (Kasper Trucking, Rockford Blacktop, or Charging Parties, respectively) against International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 722 (the Respondent). Pursuant to Section 102.3 of the National Labor Relations Board's Rules and Regulations, the Regional Director for Region 33 ordered the above-captioned cases consolidated and, on behalf of the General Counsel, issued the consolidated complaint, February 19, 1993, and an amended consolidated complaint on April 23, 1993.

In essence, the consolidated complaint alleges that Respondent has been engaged in a primary dispute with Kasper Trucking, and not in a dispute with Rockford Blacktop who was performing work at two jobsites, Dixon and Amboy, Illinois, respectively; that Kasper Trucking was performing trucking services with the use of owner-operators, along with other trucking companies engaged in commerce, as independent contractors; that on certain dates in late December 1992 and January 19 and 23, 1993, Respondent established a picket line at the Rockford Blacktop jobsite in Dixon, Illinois, and a picket line on February 4, 1993, at the Rockford Blacktop jobsite in Amboy, Illinois, because Kasper Trucking does not have a contract with Respondent Local 722; that the picket lines caused other trucking company owner-operators to refuse to perform trucking services, and thereby threatened, coerced, and restrained Rockford Blacktop and other trucking owner-operators engaged in commerce in an industry affecting commerce, with an object to force and require Rockford Blacktop to cease doing business with Kasper and other independent contractors, and to force and require the other trucking independent contractor drivers to cease doing business with Kasper, in violation of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

Respondent filed an answer to the complaint and an amended answer to the amended consolidated complaint on March 3 and April 28, 1993, respectively, denying that it has engaged in unfair labor practices as set forth in the amended consolidated complaint. Respondent also affirmatively alleged that at no time prior to the filing of the amended consolidated complaint did he learn in correspondence with the General Counsel or counsel for the Charging Party, that the amended consolidated complaint asserts that Kasper Trucking was a ''broker'' for purposes of referring independent contractor owner-operators to haul materials; and that Respondent denies Kasper Trucking was a subcontractor for Rockford Blacktop at the Dixon and Amboy jobsites.

The hearing in the above matter was held before me on July 22, 1993, in Rockford, Illinois.

FINDINGS OF FACT

I. JURISDICTION

Rockford Blacktop Construction Co. (Rockford Blacktop) is, and has been at all times material, an Illinois corporation with a corporate office in Loves Park, Illinois, where it is engaged in an ongoing truck hauling business as a contractor in the construction industry on construction projects, including a jobsite in Dixon, Illinois, and a jobsite in Amboy, Illinois.

During the past calendar year Rockford Blacktop, in the course and conduct of its business operations, purchased and received at its Illinois jobsites goods valued in excess of $50,000 directly from points located outside the State of Illinois.

The complaint alleges, the parties stipulated, and I find that Rockford Blacktop is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Kasper Trucking, Inc. (Kasper) is and has been at all times material, an Illinois corporation with a corporate place of business in Poplar Grove, Illinois, where it is engaged in hauling materials to and from construction projects, including one located in Dixon, Illinois, and one in Amboy, Illinois.

During the past calendar year, Kasper Trucking, in the course and conduct of its business operations, derived gross revenue in excess of $50,000 from performing services directly to customers located outside the State of Illinois.

The complaint alleges, the parties stipulated, and I find that Kasper Trucking is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 722 (the Union) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent Union, Local 722 has geographic jurisdiction over a portion of northwestern Illinois, in which Dixon and Amboy, Illinois, are located. Respondent Union maintains an office in LaSalle, Illinois, and a satellite office in Dixon, Illinois.

Gerald Reilly was president of Respondent Union until January 1993 when he undertook a position with The Central Conference of Teamsters.

R. G. Lathrop was vice president and construction business agent of Respondent Union until January 1993, when he became secretary-treasurer.

Teamsters Local 325, a sister Local to Respondent, has geographic jurisdiction covering Rockford, Illinois, and is a member of the Teamsters Joint Council 25. Local 325 is not a party to the current proceeding.

Charging Party Rockford Blacktop has an office in Loves Park, Illinois, where it is engaged in business as a contractor in the construction industry in the Rockford area.

Charging Party Kasper Trucking holds authority from the Illinois Commerce Commission to operate as a common carrier holding itself out to the public to haul construction materials and farm products. Kasper's operating authority extends across a 100-mile radius of Capron, Illinois, located near Rockford, Illinois. Kasper also has authority from the Interstate Commerce Commission to perform as a contract carrier for shippers within its geographic authority.

Kasper Trucking provided trucking services for Rockford Blacktop pursuant to a verbal agreement.

Respondent Union has been engaged in a primary dispute with Kasper Trucking but not with Rockford Blacktop Construction Co., or other trucking concerns (Finner Trucking, Inc., John Leiser, Fadness Trucking, Orval Dobbs Trucking, Fyke Farms, Richard Brown, and Daniel Coniglio), or any other person at the jobsite other than Kasper Trucking.

However, on or about December 21, 1992, and January 19 and 26, 1993, unnamed pickets, in support of Respondent Union, picketed Rockford Blacktop's jobsite in Dixon, Illinois, with signs. On February 4, 1993, unnamed pickets in support of Respondent's dispute with Kasper Trucking, also picketed Rockford Blacktop's jobsite at Amboy, Illinois, with signs.

The General Counsel alleges that the picketing at both jobsites induced and encouraged individuals employed by Rockford Blacktop, Finner Trucking, Orval Dobbs Trucking, Fyke Farms, Richard Brown, David Coniglio, and other persons engaged in commerce or an industry affecting commerce, to strike or refuse to perform services, and thereby Respondent has threatened, coerced, and restrained Rockford Blacktop and the other aforenamed trucking concerns, all with a design to force or require Rockford Blacktop to cease doing business with Kasper and the other aforenamed truckers, in violation of Sections 8(b)(4)(i) and (ii)(B) and 2(6) and (7) of the Act.

Respondent denies that Kasper is a ''broker''; that Respondent demanded Kasper to sign a contract; that Respondent appealed to truckdrivers other than Kasper drivers to engage in a work stoppage; that Respondent appealed to other trucking concerns at either jobsite to cease doing business with Rockford Blacktop; or that Respondent has coerced and restrained Rockford Blacktop or any of the other trucking concerns, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.[1]

B. *Respondent Counsel's Motion to me to Disqualify Myself and Grant Respondent a New Trial*

Subsequent to the close of the hearing in the instant proceeding, August 22, 1993, I received a motion on August 10, 1993, from Michael O'Hara, counsel for Respondent, to disqualify myself and grant Respondent a new trial, allegedly because of the my personal bias and/or prejudice against Respondent and its counsel, O'Hara. The motion is accompanied by four affidavits in support of the motion from Respondent's counsel, Michael O'Hara himself; Respondent Union's secretary-treasurer, R. G. Lathrop; Respondent Union's recording secretary, Terry Luitz; and a member of Respondent Union, Steve Morgan, the latter three of whom are officially affiliated with Respondent Union.

The motion and the accompanying affidavits assert that I displayed throughout the proceeding open animosity, antagonism, bellicosity, and hostility to Respondent Union's attorney, O'Hara, lecturing him and making veiled comments as to his competence.

The hearing in the above matter was held before me on July 22, 1993, in Rockford, Illinois. Motions in opposition to O'Hara's motion were timely filed by counsel for the General Counsel and counsel for the Charging Party, respectively. Also, briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, all of which have been carefully considered. Upon request, leave was granted O'Hara to further support his motion, which he did in his posthearing brief to me.

The charge of personal bias and prejudice is a serious charge, and one which should not be taken lightly without clear substantiation, at the risk of summarily undermining the integrity of the administrative law judge, and the administrative process in general.

Section 102.37 of the Board's Rules and Regulations under hearing provides as follows:

> *Disqualification of administrative law judges*.—An administrative law judge may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the administrative law judge, at any time following his designation and before filing of his decision, to withdraw on grounds of personal bias or disqualification, *by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification*. If, in the opinion of the administrative law judge, such affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. *If the administrative law judge does not disqualify himself and withdraw from the proceeding*, he shall so rule upon the record, stating the grounds for his ruling, and proceed with the hearing, or, if the hearing has closed, *he shall proceed with issuance of his decision, and the provisions of section 102.26, with respect to review of rulings of administrative law judges, shall thereupon apply*. [Emphasis added.]

It is quite apparent that Section 102.37 of the Board's Rules and Regulations requires a request for withdrawal of an administrative law judge for personal bias or disqualification shall be accompanied by an affidavit. Significantly, the attempt to disqualify a judge could result in an unwarranted disruption of the judicial or quasi-judicial process, at conceivably gross inconvenience and expense to other parties and the Government.

Moreover, the objective of the affidavit in support of the motion is to discourage baseless allegations by requiring persons offering it to be sworn. It is the general hope that a sworn statement, like testimony of a sworn witness, will have some semblance of truth, even if not ultimately substantiated. Such a statement would appear to entail a detailed description of conduct and language in the context in which it occurred, measured not by the number of affidavits, but by the substantive content of them. Consequently, ethical considerations also play a part in the quest for objectivity and truth.

In this regard, disciplinary rule 8-102 (D), *The American Bar Association, Code of Professional Responsibility and Canons of Judicial Ethics*, defines misconduct as the expression of ''false and untrue and unfounded charges of misconduct against an adjudicatory officer.'' In re *Meeker*, 414 P 2d 862, 869. The constraint applies to any allegation which an attorney ''knew or should have known to be false.'' Violation of the standards have been described as:

> [U]nethical and unprofessional conduct tending to bring the bench and bar into disrepute and to undermine pub-

[1] The facts set forth above are not in conflict in the record.

> lic confidence in the integrity of the judicial process. [*Kentucky Bar Assn. v. Heleringer*, 602 SW 165 (Ky, 1980).]

Therefore, it would appear that most members of the bar would exercise due caution to ensure separating passionate perception from factual accuracy, where a judge or a reviewing authority is requested to inconvenience other parties and alter the course of a proceeding by granting a new trial. This is especially true where the legal position of the maker of the motion appears, or in fact proves, to be nonmeritorious.

Accusations

It is especially noted that the essence of counsel for Respondent's motion, as well as the accompanying affidavits of its supporting affiants, assert that I displayed open animosity, antagonism, bellicosity, and hostility to the Union's attorney, O'Hara, lecturing him and making veiled comments as to O'Hara's competence.

Unfortunately, the cold transcript of this proceeding does not and cannot manifest the attitudinal conduct (facial expressions and other body language) of me or O'Hara. Neither O'Hara's motion, nor the assertions in the supporting affidavits *describe in detail*, nor support my alleged characterization of attitudinal conduct (animosity, antagonism, bellicosity, and hostility), except to attribute to me the aforedescribed subjective, conclusionary perceptions of the affiants.

O'Hara's motion does not provide any details of such conclusionary characterizations and the record does not support them. However, the record does reveal that I, almost consistently, ruled against O'Hara's persistent efforts to cross-examine witnesses on matters that were not even mentioned on direct, and which were patently irrelevant to the issues in this proceeding. O'Hara was asked on several occasions during the trial to state or explain the relevancy of his extensive cross-examination and arguments on the record. For most of the proceeding, he would only inform me that he would show a connection—he would ''link it up,'' which he failed to do in spite of the many opportunities afforded him to do so.

The above characterizations and other assertions of O'Hara, and his supporting affiants, that, (1) I made numerous unspecified erroneous and prejudicial rulings; (2) that I lectured him at length and made unspecified veiled comments about O'Hara's competence; (3) that I refused to permit his only witness to testify on behalf of Respondent because his testimony was ruled irrelevant; (4) that I interrupted and refused to allow him to make an offer of proof about what his witness would testify to, on the same ground that such testimony was irrelevant; (5) that I refused to take official (administrative) notice of the Illinois Commerce Transportation Law (affidavits notably, neglected to state that the code was related to the same subject (Illinois law) ruled irrelevant by me because it has no bearing, force, and effect upon the issues raised in this case under the National Labor Relations Act); (6) that I permitted counsel for the General Counsel to place into evidence ''contracts'' between Kasper Trucking and independent owner-operators (without affidavits stating the ''contracts'' were specifically related to the ''employees versus independent contractor owner-operators'' issue raised under the National Labor Relations Act, although such ''contracts'' may have had some relevance to the Illinois Commerce Transportation Law in an Illinois administrative proceeding); (7) that I refused to permit O'Hara to present his case in chief—in defense (with affidavits failing to state that O'Hara elected not to put on his case after the bench ruled that his sole witness' testimony about Illinois Commerce Transportation Law was irrelevant to this proceeding under the National Labor Relations Act, but that his witness was not precluded from testifying on matters related to the issues in this proceeding under the Act); and finally, (8) that after the proceeding herein was closed O'Hara came to the bench to shake hands with me as a professional courtesy, and the latter stated, ''You're a good attorney, Mr. O'Hara, but it is not going to do you any good here.'' The last (8) inaccurate and absurd assertion will be addressed after a review of the transcript of the proceeding.

The truth and accuracy of the above-described accusations and assertions can be fairly evaluated only by a careful examination of the transcript and record in this proceeding. That examination will show that the rulings in this proceeding were a proper and honest exercise of my judgment (even if not correct) in accordance with Section 102.35 of the Board's Rules and Regulations.

An examination of the transcript will also show that any comments about, or lecture of, O'Hara by me during this proceeding was an appropriate and reasoned response to O'Hara's passionate and persistent arguments about my rulings, and O'Hara's persistence in addressing the Illinois Commerce Transportation Law, while failing to state its relevancy to the issues raised under the National Labor Relations Act.

An examination of the transcript will further show assertions (3) through (7), about my rulings, that O'Hara, and his supporting affiants were reckless with accuracy and truth. All of the assertions by the affiants were either half truths, perceptions, questions, or statements taken out of context, or not explained, or made without any foundation in truth.

Before examining the transcript it should facilitate clarity of understanding to have a brief foundation of the legal basis for the current controversy.

Issues Presented for Determination

The ultimate issue in the instant matter is whether Respondent attempted to enmesh Rockford Blacktop, and other neutral owner-operator truckdrivers in Respondent's primary dispute with Kasper Trucking, by picketing the jobsites where Kasper was not present, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

However, the crucial subordinate issue presented for determination is whether the owner-operator drivers here were ''independent contractors'' or ''employees'' of Kasper Trucking, within the meaning of the National Labor Relations Act.

Section 2(3) of the Act specifically excludes from the definition of ''employee'' an individual ''having the status of an independent contractor.''

The standards and criteria distinguishing an independent contractor from an employee have been well enumerated by the Board and the courts. *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184, 190–198 (1974); *Teamsters Local 525 (Helmkamp Construction Co.)*, 271 NLRB 148, 150 (1984), enfd. 723 F.2d 921 (7th Cir. 1985); *Scott & Cole*

Paper Independent Contractors or Employees: The View of the National Labor Relations Board, Labor Law Journal 395 (July 1993), and cases cited.

In order to determine whether the truckdrivers sent by Kasper Trucking to the Dixon and Amboy jobsites met the definition of ''employees'' of Kasper Trucking, or ''independent contractors,'' in accordance with the criteria set forth under the above-cited Board law, factual evidence of the presence or absence of the kinds of control or authority Kasper Trucking possessed and/or exercised over the owner-operator truckdrivers on the Dixon and Amboy jobsites would constitute relevant evidence. Whether Kasper Trucking complied with or satisfied definitions and filing requirements under the laws of Illinois, ordinarily would not be relevant in making such determination under Board law. Such compliance and satisfaction by Kasper might be relevant under Illinois law in an Illinois proceeding, but the Respondent is herein charged with a violation of the National Labor Relations Act.

Thus, the consolidated complaint in the instant proceeding alleged in paragraph 2, as pertinent herein:

> (g) . . . that Kasper trucking is engaged in business as a contractor in the construction industry hauling construction materials.
>
> (h) Finner Trucking Inc., John Leiser, Fadness Trucking, Orval Dobbs Trucking, and other independent contractor owner-operators have been subcontractors of Kasper at Rockford Blacktop's Dixon jobsite.
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> 2(d) of the Amended Consolidated Complaint alleged, in part, that Kasper Trucking . . . ''is engaged in the construction industry hauling construction materials and as a [broker] making referrals of independent contractor owner-operators to haul construction materials.''
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> . . . .
>
> 2(g) . . . at all times material herein, Kasper Trucking has been a ''broker'' referring independent contractor owner-operators to haul for Rockford Blacktop's Dixon and Amboy jobsites.

Crucial to the above allegations is whether the owner-operators contracted by Kasper Trucking and referred to the Dixon and Amboy jobsites by Kasper were ''employees'' of Kasper or ''independent contractors'' under the Board's definitions, notwithstanding how Illinois law may define their status or relationship.

Examination of the Transcript of the Proceeding

In conducting any proceeding before the National Labor Relations Board, I am consciously guided by Section 102.35 of the Board's Rules and Regulations, which provide as pertinent here as follows:

> *Duties and powers of administrative law judges*.—It shall be the duty of the administrative law judge *to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint*. The administrative law judge shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:
>
> . . . .
>
> (d) *To rule upon offers of proof and receive relevant evidence;*
>
> . . . .
>
> (f) To *regulate the course of the hearing* . . . . [Emphasis added.]

After certain preliminary matters and the admission of the formal papers into evidence, counsel for General Counsel was permitted to make an opening statement. In making her statement she cited and proceeded to explain official Board authority in support of what she intended to prove. At this juncture:

> MR. O'HARA: I'm going to object. I know this is opening statement, but opening statement is for purposes of indicating factual matters that are intended to be proven. This is not closing argument with respect to bringing a law brought to bear on the fact. I think an appropriate time to do that is after the facts are determined.
>
> I have some disagreements with respect to the law being cited and her interpretation of that law.
>
> So, I would ask that General Counsel be required to restrict her opening statement to the factual matters that she intends to prove, as opposed to arguing the law at this point.
>
> JUDGE GADSDEN: Well, counsel [they] thereoften refer to the authority on which they are relying because that's a part of the theory of their case. This is an opening statement. It is not really argument. It's really her theory and on that basis, I will permit Ms. Poltz to continue.
>
> JUDGE GADSDEN: Well, what you're saying, counsel, you're really saying that the case that you are citing or discussing, really—you would cite in support of your theory in this case. Is that correct?
>
> MS. POLTZ: Yes, Your Honor. [Tr. 14–15.]
>
> JUDGE GADSDEN: Well, without any detail or discussion of those other cases, your citing them and certainly just briefly just stating about what you've already done, I think is sufficient.
>
> MS. POLTZ: Thank you, Your Honor. I'm just about finished with that line of discussion.
>
> JUDGE GADSDEN: Alright.
>
> MS. POLTZ: I just want to say in conclusion that in the present case, Kasper Trucking Company was the object of Respondent's picket, and it is the theory of the General Counsel that, by picketing these independent owner-operators, Respondent was clearly attempting to enmesh Rockford Blacktop and the owner-operators in its dispute with Kasper Trucking Company.
>
> Thank you, Your Honor.
>
> JUDGE GADSDEN: Thank you. Anyone with an opening statement?
>
> MR. MCINNIS: No, Your Honor.
>
> JUDGE GADSDEN: Mr. O'Hara?
>
> MR. O'HARA: Your Honor, I'd like to reserve my opening statement for my case in chief.
>
> JUDGE GADSDEN: Certainly.
>
> MR. O'HARA: Thank you.

JUDGE GADSDEN: Alright. You may proceed, Ms. Poltz.

Thereafter, counsel for General Counsel called *R. G. Lathrop*, secretary-treasurer of Respondent Union, Local 722, Dixon, Illinois, one of the affiants in support of O'Hara's motion for me to disqualify myself and grant Respondent a new trial. Lathrop testified that in December 1992 he was vice president of Local 722 and construction business agent. Gerald Reilly was president of Local 722 from 1986–1992, after which he assumed a position with the Central Conference of Teamsters (all Joint Councils and Conferences of 13 States, including Illinois). Local 722 is a constituent of the Central Conference.

Lathrop said the Associated General Contractors of Illinois has a contract with the Illinois Conference of Teamsters, effective May 1, 1992–April 30, 1995 (G.C. Exh. 2). However, the latter contract does not cover the Joint Council in which Local 722 is located, Dixon, Illinois. Local 325 has jurisdiction over Rockford, Illinois. Dixon is in the jurisdiction of Local 722, Lee County, including Amboy.

Lathrop further testified that on or around December 18, 1992, Rockford Blacktop, Charging Party in Case 33–CC–1116–2 had a job and jobsite in Dixon, Illinois. When the job started, he visited the jobsite where Rockford Blacktop was clearing out an area to construct box culverts. Materials were being hauled away in Kasper trucks driven by Orval Dobbs, John Leiser, and Gary Hinde. Lathrop said he asked Dobbs, Leiser, and possibly Hinde to see their union cards. When they displayed their cards, he discovered they were not dues-paying members of Local 722. He denied he told them they could not work but said he told them Kasper Trucking did not have a signed agreement with Local 722. After he talked to the three drivers they left the jobsite. He does not recall calling Rockford Blacktop at that time. He denied he told the aforenamed drivers he was going to stop the job unless he got a contract with Kasper.

Lathrop said he did make some signs (G.C. Exh. 13) which read:

Our Only Dispute
Is with Kasper Trucking
Teamsters of TLU 722
&
Has no agreement.

Lathrop further testified he instructed pickets to appear at the Dixon jobsite with the above sign and picket. The pickets appeared and picketed midday on or about December 18, 1992. The backhoe operator of the operating engineers refused to work behind the pickets. Without the backhoe operator there was nothing to load the trucks. He said he also had the pickets to picket the jobsite again January 11 and 19, 1993. The operating engineers again refused to operate the backhoe and the backhoe was operated by salaried employees.

In February 1993, Rockford Blacktop had a job in Amboy, Illinois, also in the jurisdiction of Local 722, removing tanks from underground. On or about February 4, Lathrop said he sent pickets to that jobsite with picket signs bearing the same language used at the Dixon jobsite. He did not speak to the drivers at the Amboy jobsite because the drivers would not stop and speak with him. During December 1992 and January 1993, his office was the satellite office in Dixon and Reilly was the boss who worked out of the LaSalle, Illinois office, although his secretary, Don Sheppard, worked in the Dixon office.

In January Lathrop said he called Gordon Kasper trying to reach Gary Kasper. That evening Gary Kasper called him and he asked Gary Kasper to sign a contract with Local 722.

Lathrop testified without dispute and he was not cross-examined by Respondent. The proceeding thus far was cordial and essentially without significant procedural and evidentiary conflict.

Counsel for the General Counsel then called *Myron Rafferty* (Butch), president of Rockford Blacktop, Charging Party in Case 33–CC–1117–2. Rafferty testified that Rockford Blacktop is engaged in the business of road construction and that it hires the trucking services of Kasper Trucking on various jobsites, including a jobsite in Dixon it had restructuring Route 2 for the State of Illinois, hauling materials away to disposal sites, and construction materials from quarries to jobsites.

Rafferty said Kasper Trucking sent trucks to the jobsite December 18, 1992, at Dixon, Illinois, and that on that date Business Agent R. G. Lathrop called and told him his subcontractor, Kasper Trucking, was not right with the Union; and that in order for Rockford Blacktop to use Kasper Trucking, it had to make Kasper right (sign a contract with Respondent).

Rafferty said he told Lathrop if we have a problem, Lathrop should call Kasper Trucking.

At this juncture, counsel for General Counsel asked the witness (Lathrop):

Q. Do you recall whether anything was said?

A. The only thing, I said, well, if we got a problem he should call Kasper Trucking.

Q. Do you recall whether anything was said on the subject of—

MR. O'HARA: I'm going to object. This is not an adverse witness, and this is getting into the form of leading questions, putting into the mind of this individual particular things. And that's improper. It's leading. If she ask what was said—his recollection—that's appropriate. But to have a leading question as to what was said is an improper question.

JUDGE GADSDEN: Well, you may be right, but I believe you're a little premature, counsel, because I don't know what counsel is about to ask the witness. I thought the last question was designed to exhaust his recollection. If it was, she may proceed. If it was not, then we have another question.

MR. O'HARA: Let me just make sure that the record is clear here.

JUDGE GADSDEN: Yes, sir.

MR. O'HARA: Even if she exhausts his recollection I don't believe that she can ask the leading question that I believe she was going to ask. The only reason I interrupted is to make sure that this testimony is not tainted by such.

JUDGE GADSDEN: Sure.

MR. O'HARA: And that's the reason I raised the question . . . .

By Ms. Poltz: Q. The question is, do you recall that anything else was said?

A. The only other thing that I said was that he should—if there was a problem with Kasper Trucking, he should call Kasper.

Q. And my question is, do you recall whether anything else was said?

A. That was all.

Q. Was there any interruption of work on December 18th, that first day?

A. No, there was not. Not that I recall.

Rafferty further testified he learned from his foreman that there were pickets at the jobsite. He called the business agent of the operators and informed him that pickets had appeared on the jobsite and there was a work stoppage. There was also work stoppage later on January 11 and 19. His foreman called and informed him and he told the foreman to send everybody home.

On January 26 pickets of Local 722 appeared with the same picket signs (G.C. Exh. 13) on the jobsite and Rafferty said he told the foreman to keep everybody there and he would come to the site. However, the operators would not work so he went down and operated the backhoe himself, and Kasper drivers worked.

In February 1993, Rockford Blacktop used the services of Kasper Trucking on a jobsite at the Green River Ordinance Depot near Amboy, Illinois, to remove and haul away underground storage tanks for the Corps of Engineers, pursuant to established rates by the hour or by the ton per mile. The agreement does not specify what trucks or drivers Kasper may use to perform the services. Kasper Trucking was verbally contracted to haul the dirt to a landfill about 40 miles away. Rafferty's son, Sean Rafferty, called him and informed him pickets were at the jobsite. Rafferty said he knows that Kasper Trucking uses company-employed drivers and also leased drivers. Once on the jobsite the foreman of Rockford Blacktop directs all drivers.

Rafferty said the contractor on the Dixon jobsite was Profitter Construction but he did not know whether the latter was signatory to a collective-bargaining agreement with the Teamsters.

Although Rafferty said he did not know whether Profitter was signatory to an agreement with the Teamsters, he did know Rockford Blacktop was not. O'Hara asked Rafferty was he familiar with any of the terms of the contract between Profitter and the Teamsters. Counsel for the General Counsel objected on the grounds of relevance, and O'Hara informed the bench he would show a connection, and the bench permitted him to continue his interrogation over the objection of counsel for the General Counsel (p. 52).

O'Hara then asked Rafferty was there a provision in the subject contract regarding owner-operators and the witness said, ''[Y]es there is a section that covers it.''

Counsel for the General Counsel again voiced a continuing objection of relevance, since neither Charging Party (Kasper nor Rockford Blacktop) is signatory to the agreement.

O'Hara asked the witness several other questions about provisions in the contract regarding subcontracting as related to onsite and offsite hauling. The witness answered from memory of a time when he was signatory to the agreement years ago.

O'Hara asked another question about provisions in the contract and counsel for the General Counsel objected. Since O'Hara had not yet shown a connection of relevance, the bench reminded him that he was permitted to ask a few questions (over counsel for the General Counsel's proper objection) and O'Hara withdrew the question.

However, O'Hara then asked the witness if he had read the complaint in the proceeding and, if so, did he agree with the accuracy of the statements therein. Counsel for the General Counsel objected and the bench intervened:

JUDGE GADSDEN: What's the basis, counsel? You seem to be going pretty much at the same thing, in a different way.

MR. O'HARA: I'm asking about the complaint.

Judge Gadsden: Well the point is, we have the complaint here. We have what language is in it.

Mr. O'Hara: I'm going to—I'll—

JUDGE GADSDEN: What are you doing?

MR. O'HARA: Well . . . .

O'Hara was permitted to ask the witness a series of questions about Rockford Blacktop ''engaging'' Kasper Trucking as a ''broker'' to furnish trucking services, since those terms ''engage'' and ''broker'' were used in section 2(d) of the complaint herein. After the witness (Rafferty) explained what he understood those terms to mean, O'Hara then persisted in asking Rafferty about his personal definition of a ''broker,'' and counsel for the General Counsel objected because the question called for a technical conclusion by the witness. Thereafter counsel for Respondent asked Rafferty whether Rockford Blacktop engaged Kasper Trucking to provide it with trucking industry brokerage service to independent contractor owner-operators. Rafferty replied, ''[S]pecifically, no,'' and he explained why he answered no on page 60 of the transcript. He said he knew the trucks Kasper sent to the jobsite were owner-operators because the truck signs read ''leased to Kasper Trucking'' and he was familiar with the faces of the drivers.

Responding to counsel for the General Counsel's objection to O'Hara's questions, the bench admonished O'Hara about his technical questions of the witness as to how the witness defined ''broker'' because it did not matter what the witness thought or understood the term to mean—we will determine whether or not he was a broker by what the facts indicate occurred, that is sufficient for the record (pp. 63–64):

JUDGE GADSDEN: Well, I've already spoken to counsel with respect to the use of that term. It doesn't matter what the witness thinks or understands, we will determine whether he's a broker or not, and so that's why—it's almost like asking a person to define a word by using a word, and if you would move on without emphasizing the matter of broker and determine what the facts indicate occurred, that is sufficient for the record.

MR. O'HARA: Your Honor, let me indicate that I'm not the one that amended the complaint, and I'm going to indicate to you right now that it is a critical issue with respect to this particular proceeding.

JUDGE GADSDEN: I don't need you to tell me that it's critical. I know exactly what you want. I've been around a long time. Now I'm asking you to ask the wit-

> ness the question without using the term ''broker,'' because the facts will establish whether he is a broker or not. Not only did I ask you not to do it, but you went back and re-emphasized it. Now I am directing you to question this witness and not to use the attorney's language in the complaint.
>
> Are you an attorney, Mr. Witness?
>
> MR. RAFFERTY: No, sir, I'm not.
>
> JUDGE GADSDEN: You're not, I didn't think you were. Alright.
>
> MR. O'HARA: Well let me indicate for the record, just so we're clear.
>
> JUDGE GADSDEN: Sure.
>
> MR. O'HARA: If you're ruling as a matter of law that broker is a legal term—
>
> JUDGE GADSDEN: I'm not making that ruling, and I'm not allowing you to put your definition of a broker on the record, either. That's exactly why I'm asking you to question the witness with respect to facts and leave alone the technical terminology that's used by the counsel in the complaint. They weren't his. He didn't use them. Okay?

At this juncture in the hearing I noted that O'Hara had not yet shown a connection of relevance for his questions on ''broker'' and he was quite persistent in pursuing the same line of inquiry regarding the term ''broker'' under Illinois law. Nonetheless, O'Hara was permitted to question Rafferty about whether or not he examined the contract between Kasper Trucking and the truckdrivers on the jobsite (pp. 882–884), whether he had possessed Illinois operating authority, whether he had interstate and intrastate authority, for-hire motor carriage, whether he hauled for himself or hired haulers for himself. The witness answered all of these questions (p. 65).

Counsel for the General Counsel called *Gordon Kasper*, president and owner of Kasper Trucking, Inc., who testified that on December 18, 1992, the Union distributed handbills at the Dixon jobsite. Kasper Trucking records show that owner-operators worked only 5, instead of 8, hours that day. In explaining why the owner-operators only worked 5 hours, Kasper said Rockford Blacktop's truck superintendent, George Butts, called Kasper Trucking and informed him that Union Business Agent Lathrop was on the Dixon jobsite and told the superintendent to send the truckdrivers home.

O'Hara objected to what Butts told Kasper Trucking, on the grounds that it was ''hearsay,'' and he moved that the testimony be stricken. The objection was overruled because Lathrop and Rafferty had previously testified Lathrop was at the Dixon jobsite on that date handbilling for the Union and questioning the drivers (owner-operators). Since Lathrop's and Rafferty's testimony tended to support the ''hearsay,'' and particularly since Kasper was offering the statement attributed to Butts as an explanation for the owner-operators working 5 hours that day, I ruled the statement admissible.

Thus far, the objections by O'Hara in this proceeding and my rulings upon them, have been noted.

With respect to the admissibility of evidence, the administrative law judge is guided by the Section 10 of the National Labor Relations Act which provides, in part as follows:

> Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

Rule 611(a) of the Federal Rules of Evidence provides as follows:

> MODE AND ORDER OF INTERROGATION AND PRESENTATION
>
> (a) Control by court. *The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so far as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time*, and (3) protect witnesses from harassment or undue embarrassment.

O'Hara objected to my requesting counsel for the General Counsel to further interrogate her witness on a last statement made by the witness, namely, ''There were picketers there.'' I asked counsel for the General Counsel to further ''pursue'' the latter statement,—(in the interest of time and in order to develop a complete record). O'Hara's objection was overruled as he proceeded accusing me of usurping the function of the General Counsel and lecturing me on what he believed to be the proper procedure. His arguments and accusations in this proceeding led me to ponder whether he was a new attorney, or at least new to Board proceedings, a fact for which I generally allow reasonable latitude, with understanding.

However, O'Hara's passionate and argumentative stance on rulings of the bench was, in my judgment, conveying an impression on the record and to persons in the court that he was being deprived of due process and thereby tending to undermine the integrity of the administrative process, even though he frequently addressed the bench as, ''Your honor.'' Consequently, his conduct invited the appropriate and reasoned responses by the bench.

Also, when counsel for the General Counsel asked Kasper was there any interruption in work on the jobsite January 19 reported to him, Kasper said his son went to the site because someone told him picketing would occur and O'Hara objected on the grounds of ''hearsay.'' When Kasper was asked how was picketing brought to his attention, and Kasper replied ''we were told by Rockford Blacktop that there—,'' O'Hara objected and both objections were overruled in the interest of time and because previous testimony of witness Rafferty obviously supported Kasper's statement, and the statement was simply being offered as Kasper's reason for why the trucks worked only 5 hours, he said because the business agent told them to go home.

Continuing on direct examination, Kasper was asked did interruption of work occur on January 19, 1993. Kasper said, ''[Y]es, I could indicate that.'' He was asked what happened on January 19 and he responded, ''There was pickets there.'' The General Counsel asked, ''[W]hat does the two hours that were billed reflect?'' I felt the witness had not finished his statement and he asked the General Counsel to let the witness finish. The witness (Kasper) said that's all he meant, but

I asked counsel for the General Counsel to further pursue his answer (in the interest of time):

> MR. O'HARA: Well, I'm going to object to that, Your Honor. If she can present her case—this is a formal, adjudicatory, adversarial case, and if she doesn't enlighten us, I don't think it's the job of—
>
> JUDGE GADSDEN: Well, it is the job of an Administrative Law Judge to see to it that this record is complete. He is the one who has to—or she—who has to make the decision in the case. I'm directing counsel to question this witness further with respect to pickets being there, and this way we don't leave holes in the record for someone to assume. So, you may do that, and I can tell you this is not anything new.
>
> MR. O'HARA: Well—
>
> JUDGE GADSDEN: In fact, the Court should have been doing it a long time before we had the revision of the rules of evidence.
>
> MR. O'HARA: Well, let me indicate just for the record—
>
> JUDGE GADSDEN: Sure.
>
> MR. O'HARA: —that I believe the proper way to do so is to allow both sides to have an opportunity to present their case, and then, if the Administrative Law Judge has questions to fill in the gaps, then he may do so. But having another party directing someone who is prosecuting this case to ask particular questions, when I haven't had an opportunity to cross-examine with respect to the questions that have elicited, is leading this witness to a particular area. And I believe the proper way is to wait for the parties to have questioned the witness, to determine whether the ALJ, in fact, has any remaining questions, because I may, indeed, ask the questions that you desire to ask.
>
> JUDG GADSDEN: Well, if—
>
> MR. O'HARA: And let me indicate, with all due respect—
>
> JUDGE GADSDEN: Just a moment, Counsel! No argument! You see, I don't know how long you have been around. All judges proceed slightly differently. But this is not anything that is new. Now, I want the record developed. I want a record developed that is as complete as possible; and, not only that, I will do the very same thing with your witness if you stop and you [don't] move on. We want an integrated record, also. So, I'm not going to entertain any argument on it. You may object. Your objection is noted on the record. But I want you to develop this record. And very often—I can tell you this. when neither counsel asks the questions, I proceed [to do] it even though neither one of them explored it. That strikes you, too, doesn't it?
>
> MR. O'HARA: No, I think that's proper, Your Honor.
>
> JUDGE GADSDEN: Okay, well—
>
> MR. O'HARA: But I think interrupting direct testimony and directing a prosecutor to ask particular questions during her direct examination is improper.
>
> JUDGE GADSDEN: We do not conceive her as a prosecutor, and that's one of the distinctions between administrative law as distinguished from the law. We have a little more latitude. We are fact-finders, and we develop a record. Now, I have lectured in law schools in administrative law. How long have you been in practice?
>
> MR. O'HARA: Twelve years, but I'm—I'm sorry. I'm a Hearing Officer for the Illinois Department of Mines and Minerals and also a Hearing Officer for the Illinois Secretary of State's office and have conducted many proceedings as the Hearing Officer.
>
> JUDGE GADSDEN: Well, I believe you are competent, but you learn something every day. I'll tell you that.
>
> MR. O'HARA: I agree with that, Your Honor.

Counsel for the General Counsel then asked Kasper was there any interruption in work January 19 reported to you?

> A. My son Gary went down there that day because he was told that there would be picketers there, so—
>
> MR. O'HARA: I object as far as to hearsay and ask that it be stricken.
>
> JUDGE GADSDEN: Now, what is the witness testifying to now?
>
> MS. POLTZ: I have asked him whether any interruption of work was reported to him on January nineteenth.
>
> JUDGE GADSDEN: Which you asked him previously.
>
> MS. POLTZ: Yes.
>
> JUDGE GADSDEN: And he said yes. That's right. Now, continue.

By Ms. Poltz:

> Q. What was the nature of the interruption of work on January nineteenth?
>
> JUDGE GADSDEN: If you know. Create a foundation first.
>
> MS. POLTZ: Well, Your Honor, I think he has testified that, in the ordinary course of business, where there are interruptions in work, he will receive a report of it.
>
> JUDGE GADSDEN: Not when you have an objection there. Lay the foundation. That is a basis for knowledge. What was reported to him?
>
> MS. POLTZ: You're asking—I don't understand where we are right now. I mean, I would like to ask this witness if there was an interruption of work, and then how it was brought to his attention.
>
> JUDGE GADSDEN: Well, ask that.

By Ms. Poltz:

> Q. How was the interruption of work brought to your attention?
>
> A. It was brought to our attention by—we was told by Rockford Blacktop that there—
>
> MR. O'HARA: I'm going to object. That's hearsay.
>
> JUDGE GADSDEN: Overruled. And, for your information, some hearsay is admissible, especially when there is other evidence that indicates that it may be true. That's all there is to it.
>
> MR. O'HARA: Just note my continuing objection.
>
> JUDGE GADSDEN: That's it. I didn't come here to teach evidence. I've been around a long time. I've been on the other side of this bench, too, in practice—private practice. Now, I don't need to have anybody arguing

> with the bench on its ruling. I have made the ruling, so you just sit and live with it. You have your objections noted in the record.
>
> MR. O'HARA: I just want to protect my client's interests, Your Honor.
>
> JUDGE GADSDEN: I would be the last person in the world to try to deprive you of doing that, Counsel. But, at the same time, I am responsible for running a trial and a hearing, and I've done it for over 24 years. That's right. And I'll do the same thing when your witness is on the stand. That's right. You are not the important person in the trial. the important persons at the trial are the persons who are the Charging Party and the Respondent in this proceeding. You represent this Respondent. Not only that, there have been occasions when counsel was really incompetent. And the bench will take over the examination, because we're here to develop the record and get the facts. That's new to you, too? You'll learn a lot of new things if you stay around long enough.

Presumably it is the above exchange between O'Hara and the bench to which O'Hara, and his supporting affiants, attribute the accusations that I made veiled comments about his competence and lectured him throughout the proceeding. Any reader of the transcript will see who was lecturing whom, and who invited the lecturing.

Moreover, as the court stated in *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641, 652 (D.C. Cir. 1941):

> It is the function of an examiner, just as it is the recognized function of a trial judge, to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made. If the spirit and conduct of the Examiner throughout this case were reversible error, few administrative and few judicial proceedings could withstand attack.

In my judgment, the responses to O'Hara's persistent, passionate, argumentative, and mostly nonmeritorious objections were reasoned and appropriate responses to them. See *Logan County Airport Contractors*, 305 NLRB 845 fn. 1, 854, 862–863 (1991). Moreover, many of O'Hara's questions on cross-examination, which not only excessively exceeded the bounds of direct examination, but were generally irrelevant. While the bench's responses were firm and not harsh, the U.S. Court of Appeals has held that even harsh language itself by the judge does not establish prejudice. *Lawson Co. v. NLRB*, 753 F.2d 471 (6th Cir. 1985).

Proceeding Continued

General Counsel's Exhibit 10 is an undated letter from Local 722 requesting Kasper Trucking to complete a copy of an enclosed contract, and forms for Kasper to participate in the Union's Health and Welfare Pension Funds. Kasper Trucking was asked to complete the forms and return one copy of each to the Dixon branch office of Teamsters Local 722.

Gordon Kasper testified that between December 18, 1992, and January 1993 he received a copy of the above letter and forms. In response thereto, he said he called Lathrop's office two or three times at Dixon, Illinois, and Reilly on one occasion at the LaSalle office, and left messages on their answering machines, but he did not receive a return call from either union agent. The latter statements are not denied in the record.

Kasper Trucking entered into Independent Contractor Agreement for Owner-Operators described in General Counsel's Exhibits 3(a), 4(a), 5(a), 6(a), 9(a), and 25(a) with all approximately 70 owner-operators.

On cross-examination O'Hara asked Kasper was he a ''broker'' since the word ''broker'' appears in paragraph 2(d) of the amended complaint and on page 2 of the contract, namely: Whereas company is engaged in business as a broker of transportation services.

It is noted that the amended complaint alleges that Kasper Trucking is a contractor in the construction industry hauling construction materials, and as a ''broker'' making referrals of independent contractor owner-operators to haul construction materials that the Independent Contractor Agreement for Owner-Operators between Kasper and the drivers referred, provides:

> Whereas, contractor declares that contractor is engaged in an independent business as an *independent owner-operator* and *has complied with all Federal, State and local laws regarding business permits and licenses of any kind that may be required* to carry out the said business and the task to be performed under this agreement.

In response to questions by O'Hara, Kasper further testified that he is not a ''broker.'' He said a long time ago owner-operators were referred to as ''brokers.'' However, he denies he is a ''broker'' since he is no longer an owner-operator, and he understands that ''broker'' means independent contractor, even though the word ''broker'' appears in paragraph 2(d) of the consolidated complaint. O'Hara's questions of the witness and his argument about the use of the word ''broker'' in the amended consolidated complaint and in the contract were not deemed by me dispositive of what function Kasper performed in relation to the two jobsites, or what control he had over the drivers, because Kasper did not prepare the complaint as amended, nor the contract, although he signed the contract.

It is important to note at this juncture that O'Hara makes quite an argument in his posthearing brief to me about the General Counsel amending the complaint to also describe Kasper as a ''broker,'' even though Kasper denied he is a broker. O'Hara also accuses the bench of not allowing him an opportunity to prepare to meet the amendment (''broker'') until he appeared at the hearing. This assertion is not accurate. The records will show O'Hara received a copy of the amended complaint April 23, 1993, prior to the July 22, 1993 hearing herein. The record also shows that O'Hara cross-examined Kasper extensively about his being a ''broker,'' what was his definition of a ''broker,'' and whether he filed with the State as a ''broker.'' By such extensive cross-examination of Kasper about a ''broker,'' over the objections of counsel for the General Counsel and counsel for Charging Party, O'Hara cannot claim he was surprised by the amendment, or that he was deprived of notice,

because he nonetheless litigated the issue of a ''broker.'' *Peck Inc*., 269 NLRB 451, 462 (1984).

Additionally, and more significantly, paragraphs 2(d) and (h) of the original complaint describe Kasper Trucking as a subcontractor at the Dixon jobsite to which Kasper supplied owner-operators under a subcontract agreement entitled Independent Contractor Agreement for Owner-Operators. Consequently, for purposes of the National Labor Relations Act, whether Kasper or other owner-operator drivers were ''brokers,'' owner-operators, or independent contractors in the technical sense of these terms, or as used by the parties, can only be determined by the evidence of Kasper Trucking's operating performance, the contractual arrangement between Kasper and the drivers Kasper supplied on the Dixon and Amboy jobsites, evincing what kind of control and authority, if any, Kasper possessed or actually exercised over them.

O'Hara was permitted to cross-examine Kasper extensively on the independent contractor owner-operator agreement and filing requirements under Illinois Commerce Transportation Law. The witness was permitted to answer all of his questions, over the objection of counsel for the General Counsel that such questions were irrelevant. O'Hara then asked Kasper was he familiar with the terms and conditions of the lease agreement executed by Kasper Trucking which Kasper acknowledged is a form prescribed by the Illinois Commerce Commission.

O'Hara then requested to approach Kasper with the lease form. Since the relevance of O'Hara's examination over the objection of the General Counsel was still not apparently related to the issues in this case, the bench asked O'Hara where was he taking his examination, and how was it relevant to the proceeding:

> MR. O'HARA: Well after I get done with my case in chief, I believe that the administrative law judge will be familiar with my theory. But I don't have to reveal my theory until such time, and I should ask the witnesses the questions that I want to ask them.
>
> JUDGE GADSDEN: Well, no—
>
> MR. O'HARA: Because, by revealing the theory, that would provide answers to this particular witness.
>
> JUDGE GADSDEN: No, you don't have the authority to go off into left field asking any questions you want when the bench nor counsel for either side can see the relevancy of them to the case. That's when the bench rules on relevancy. Now, if you don't want to answer the questions and I find them irrelevant, then you just won't be permitted to ask the question. . . .
>
> MR. O'HARA: I'm not finished, Your Honor.
>
> JUDGE GADSDEN: Well, I'm asking you what is your theory? . . .
>
> Mr. O'Hara: Permit me five more questions.
>
> JUDGE GADSDEN: Wait a minute, wait a minute. Not only that, if you don't want to state it in open court, I can let you approach the bench, you along with counsel, and we'll ask the witness to step outside the courtroom. Would you do that, please?

The witness was directed to step outside the courtroom and I called a bench conference with respective counsel. The reporter asked me if I wanted the conference on or off the record. In view of O'Hara's passionate, persistent, and argumentative failure to disclose the relevance of his line of inquiry, or his theory of defense, the reporter was directed to record the bench conference. During the conference, O'Hara continued to argue what Illinois Commerce filing laws require, without explaining the relevance of such filings to this proceeding. (Tr. 161–162.) O'Hara then requested to ask the witness five more questions and the witness was recalled to the stand. O'Hara was permitted to ask the witness several questions about lease agreements under Illinois law over the objection of counsel for the General Counsel and counsel for the Charging Party.

When none of O'Hara's questions revealed any relevance to the issues in this case, I sustained the objections of the General Counsel and counsel for the Charging Party for lack of relevance. O'Hara asked whether I was going to sustain the objections. I responded, ''I certainly am,'' and O'Hara concluded his cross-examination by asking the witness several other questions which proved to be irrelevant.

Thereafter, counsel for the General Counsel rested her case and O'Hara asked to make his opening statement, which he had deferred until this time, and he was permitted to do so.

O'Hara commenced his opening statement by stating he believed that perhaps his presentation of the case has prejudiced his client by my rulings on relevance. He then stated without specificity, that *Associated General Contractors*, 290 NLRB 522, 528–530 (1988), cited by counsel for the General Counsel during her opening statement, is distinguishable from, and inapplicable to, the facts in the instant case.

The bench made an unsuccessful effort on numerous occasions during the hearing to have O'Hara state the relevance of many of his questions of witnesses on cross-examination or his theory of defense, or what was he trying to establish. O'Hara made his most explicit and complete explanation of what he deemed the relevance of his cross-examination and his sole theory of defense, for the first time, during his opening statement given at the conclusion of the General Counsel's case, as follows:

> The question is, what is the relationship between Kasper and the truckers? The Illinois Commerce Commission is governed by the Illinois Commerce Transportation Law, and the Illinois Commerce Transportation Law specifically and unequivocally indicates that the leasing of equipment and personnel by a holder of operating authority has to be filed with the Illinois Commerce Commission—the complete terms. And the failure to file the complete terms between the operator holding authority and the lessor—failure to do so renders the contract provisions void. And it is against Illinois Law to operate without filing all the terms and conditions governing the relationship between a holder of operating authority and a lessor . . . . [Tr. 177–178.]

O'Hara then stated explicitly what he intended to prove through his prospective witness, Kurt Freedland as follows:

> I intend to call the General Counsel for the Illinois Commerce Commission to attest to the indications that I am indicating are in the law, and for him to identify the statute and his understanding with the proper enforcement of those provisions. . . . I would indicate that the facts have already shown that, indeed, this operator with authority did not file the proper leases.

> What I am indicating is that the Illinois Commerce Commission requires that the leases, the one holding the operating authority, have exclusive direction and control of the lessor, and that if that provision is not provided within the agreement, that it is implied by law. [Tr. 179–180.]

Respondent's Case

O'Hara then called Freedland who testified he is the general counsel for the transportation division of the Illinois Commerce Commission, as opposed to another division of the Commission, public utilities. On several occasions I inadvertently referred to the Illinois Commerce Commission as the Utilities Commission. However, neither O'Hara nor other counsel in the case corrected me because it was understood by them that I was referring to the Illinois Commerce Commission, the only state agency to which O'Hara made reference, and which, he advised, the court enforces the Illinois Commerce Transportation Law.

In response to questions by O'Hara, Freedland proceeded to testify about sections of the Illinois Commerce Transportation Law. When he was asked does the Illinois law regulate ''brokers,'' counsel for the General Counsel and counsel for the Charging Party both objected, as they consistently had with regard to Illinois regulations being relevant to this proceeding. Their objections were sustained.

In support of his objection, McInnis cited *Don Bass Trucking*, 275 NLRB 1172, 1174 (1985). In his brief to me, McInnis' argued that in *Don Bass*, the issue of whether truckdrivers were employees or independent contractors, involved essentially the same relations under the Act that existed between Kasper Trucking and the owner-operators in the instant case. In *Don Bass*, the union argued, as does the Union here, that the alleged owner-operators are employees within the meaning of the Act because the Illinois Commerce Commission regulations dictate the terms of the employment relationship between the subcontractor and the owner-operators. In disposing of the issue in *Don Bass*, the Board restated the test for establishing independent contractor status as the common law agency test, stating:

> When the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while on the other hand, where control is reversed [sic] only as to the result sort, the relationship is that of an independent contractor. The resolution of this question *depends on the facts of each case* and no one factor is determinative.

The Board further stated in rejecting the Union's argument, and relying upon the courts and its own decisions stated:

> Government regulations constitute supervision not by the employer but by the State, ''. . . extensive governmental regulation afford less opportunity for control by the putative employer'' because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the driver.

In supporting its position, the Board cited its decision in *Air Transit*, 271 NLRB 1108, 1110 (1984), citing *Seafarers Local 77 (Yellow Cab) v. NLRB*, (603 F.2d 862 (D.C. Cir. 1978)), where the court rejected the argument that government-imposed regulations constitute company control over drivers, as in *Air Transit*, supra.

The objections of the General Counsel and counsel for Charging Party were sustained and O'Hara was precluded from further questioning the witness about Illinois Commerce Transportation Law. Although O'Hara contends on the record, in his motion, and in his posthearing brief to me that he was precluded from having Freedland testify, he was not precluded from interrogating Freedland on matters relating to the issues in this case under the National Labor Relations Act. He was only precluded form further questioning Freedland about Illinois Commerce Transportation Law, without a showing of its relevancy. The electronic recording of the proceeding did not accurately reflect my ruling on O'Hara's request to further question Freedland. The bench's specific answer was [''Not in this area'']. The transcript is so corrected. O'Hara's proffer supports this correction.

This conclusion is further substantiated by O'Hara's request to make a showing (offer of proof), which he was permitted to do. There, O'Hara stated that Freedland would have testified about whether Kasper Trucking filed lease agreements under the requirements of Illinois law, the requirement of brokers to be licensed under Illinois law, what kind of control a lessor must retain over a lessee, and other requirements of Illinois Commerce Transportation Law.

Notably, O'Hara's showing of proof did not include any prospective testimony about ''employees'' and ''independent contractors'' under the National Labor Relations Act and Board decisions.

Counsel for General Counsel and counsel for the Charging Party objected to O'Hara's showing of proof, and although such objections are not necessary, the bench sustained their objections since I was satisfied the subject of O'Hara's offer of proof was already a matter of record.

O'Hara then requested me to take official (administrative) notice of specific subsections of section 18(c) of the Illinois Commerce Transportation Law and sections of the Illinois Administrative Code. The request was denied because as O'Hara stated, the subject of the request involved a complete statement of the Illinois regulations on what O'Hara stated in his opening statement, in his offer of proof, and in his posthearing brief to me, all of which, during the hearing, were ruled irrelevant to the issues in this case, and because of O'Hara's failure to show the relevancy of Freedland's testimony to the issues in this case. O'Hara engaged in quite an argument on the record regarding my denial of his request to take official or administrative notice of the sections of the Illinois law cited but not supplied by him.

I then asked O'Hara did he have anything else?:

> MR. O'HARA: No. Let me indicate, Your Honor, this. I had five other witnesses. In light of the ALJ's ruling with respect to not allowing my first witness to testify and to finish what, in fact, he was going to testify to, with a prediction, prior to hearing that testimony, what that testimony would be, I believe that my client's case has been severely prejudiced. . . .
>
> MR. O'HARA: I just wish I could have presented all my case.

> JUDGE GADSDEN: Well, I'm sorry that you feel that way, counsel, but I can't entertain a trial on matters that are not relevant to the National Labor Relations Act. Alright?

The record is clear that I did not preclude O'Hara from calling any additional witnesses. In fact O'Hara had been previously asked by the bench to call all of his witnesses. O'Hara forgot he had told the bench in his offer of proof what Freedland was going to testify about, which is in the record. The record is very clear that it was O'Hara who elected not to call any other witnesses because, as he intimated, since Freedland was not allowed to testify about the Illinois Commerce Transportation Law, their testimony would not be helpful to him, or because they would be testifying along the same line that Freedland would have testified (compliance with Illinois filing requirements).

Since O'Hara was not permitted to continue his line of interrogation and arguments about Illinois law which he maintained throughout the proceeding, he elected not to call any additional witnesses. He was not prohibited from calling other witnesses or to have any witness including Freedland testify about matters related to the issues in this case brought pursuant to the National Labor Relations Act.

O'Hara briefly explained the subject of the Illinois Commerce Transportation Law on the record on several occasions. However, in spite of being asked numerous times during the hearing by me to explain how the Illinois law was relevant to the issues in this case, O'Hara failed to make any explanation of relevance. Even if I am incorrect in his ruling on relevancy, his rulings were based upon an honest exercise of his authority to rule on relevancy (Sec. 102.30, Board's Rules and Regulations), and not because of any bias against O'Hara or the Respondent.

Although I do not consider his language to O'Hara harsh, untactful, or intemperate, the Board has held that the use of harsh language alone does not evidence bias, prejudice or lack of objectivity. *Ohio Power Co*., 215 NLRB 165 (1974). Additionally, the Board has also held that the resolution of all issues in favor of one party is insufficient to support a finding of bias or prejudice. *Penn Color, Inc*., 261 NLRB 395 (1982); *Dimensions & Metal*, 258 NLRB 593 (1981).

Even where a transcript in another proceeding showed that an administrative law judge was impatient and irritated at having to try a case previously heard by another judge, the Court in *NLRB v. Webb Ford, Inc*., 689 F.2d 733, 737 (7th Cir. 1982), succinctly stated:

> Our standard in determining whether an ALJ's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for hearing before a new ALJ is an exacting one, and requires that the ALJ's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process. *A. O. Smith Corp. v. NLRB*, 343 F.2d 103, 110 (7th Cir. 1965); *Tele-Trip Co. v. NLRB*, 340 F.2d 575, 581 (4th Cir. 1965). A reading of the transcript makes it clear that the ALJ was impatient and irritated at having to re-try the case. While his repeated comments urging expedition and expressing exasperation reflect regrettable hostility on the part of the ALJ, and certain comments may be read as evidencing an overly solicitous attitude towards the General Counsel, we do not believe the record as a whole reveals such bias and partiality as to require rejection of his findings and conclusions in toto.
>
> Nor do we find a sufficient denial of due process in the ALJ's adoption and incorporation of portions of the General Counsel's brief. While we do not as a general rule endorse such a practice, see *Machlett Laboratories, Inc. v. Techny Industries, Inc*., 665 F.2d 795, 797 (7th Cir. 1981), we have recognized that it is within the discretion of the finder of fact so to do, id.; *Scheller-Globe Corp. v. Milsco Manufacturing Co*., 636 F.2d 177, 178 (7th Cir. 1980). We find no such abuse of discretion in the instant case sufficient to warrant remand of the case on that basis alone.

Lastly, O'Hara and his supporting affiants assert that after the hearing was conducted, he went to the bench to shake Judge Gadsden's hand as a professional courtesy; and that while shaking hands, Judge Gadsden stated, ''You're a good attorney, Mr. O'Hara, but it's not going to do you any good here.''

The above off-the-record assertion is only partially accurate. It is accurate that after the hearing was closed, O'Hara came to the bench and extended his hand. After such a passionate argumentative presentation by O'Hara, during which I was constrained to rule against his positions on many occasions, I was quite pleased to meet and shake hands with O'Hara. I do not meet any gesture of courtesy by anyone, on or off the bench, with a discourtesy.

In fact, as I shook O'Hara's hand, greeting him warmly with two hands, and as one professional to another professional, said, ''You're a fine attorney Mr. O'Hara but you are in the wrong court [with his state law argument], it cannot help you here,'' or as O'Hara recalled it, ''[I]t's not going to do you any good here [in a Board proceeding].'' I do not conceive such a well-intentioned truth from one professional to another to constitute bias or an offense, but a complimentary truth consistent with the rulings of the bench. Nonetheless, O'Hara passionately exploded, yelling, ''You put that on the record!, I want you to put that statement on the record,'' as if he dared me to put it on the record. I was surprised by his reaction, and as he turned to walk away, I said, ''[Y]ou take things too personally, counsel.'' He did not look back as he walked out of the courtroom in apparent anger. I considered O'Hara's demand so absurd I was still in a state of surprise when O'Hara started walking away without a response from me.

In my 24 years as a Federal administrative law judge, perhaps hundreds of lawyers (as few as one, and as many as seven in one proceeding) have appeared before me throughout the Eastern United States. O'Hara is the first and only lawyer to argue to the degree he did about rulings, or to accuse my rulings as bias and prejudice against himself and his client. I can recall an interim appeal being filed in only one proceeding and that was denied by the Board. Naturally, lawyers have objected to some of my rulings, and when they did not agree with the ruling, they properly excepted to it and moved on. Very few, if any, have argued with the bench over a ruling, and certainly none to the extent of O'Hara.

Some attorneys are considerably aggressive and challenging and that it is to be expected. Most judges, including myself, welcome such aggressiveness and challenge. However, regardless how aggressive (even approaching obstreperous) counsel may be, I have never lost sight of who are the parties entitled to justice: the Charging Party and the Respondent, not the attorney or other representative of a party. Consequently, if ill feelings were to develop during a hearing against a participating counsel, which experience I have never encountered, such feelings would never be taken against those entitled justice.

Prior to the hearing I had never met O'Hara or any members of the Respondent, and while O'Hara was at times passionately argumentative with the bench on rulings, he was not in my judgment excessively aggressive, especially since I made what he believed appropriate and reasoned responses to his arguments and actions. Consequently, there was no reason for the bench to have any personal or nonpersonal bias and prejudice against O'Hara or members of the Respondent, who sat approximately 28 feet away from the bench.

It is noted that O'Hara's posthearing brief to me is essentially an extension of his passionate arguments and accusations made during the hearing and in his motion, except in his brief, he lifted out of context several statements attributing such attitude to me, sometimes editing sentences and phrases with sarcasm or profanity (I ''did not give a damn,'' just screw the Union). Most of the edited statements attributed to me are not supported by the transcript. Fortunately, we have a transcript of the proceeding and most of O'Hara's passionate accusations have been addressed in this decision in the actual context in which they were made, if made at all.

The transcript shows, throughout O'Hara's cross-examination of Kasper and his offer of proof of testimony of his witness, Freedland, concerning, Illinois Commerce Transportation Law filing requirements, whether or not Kasper filed with the Illinois Commission as a ''broker'' and complied with Illinois law, without O'Hara ever stating or showing the relevance of such testimony to the issues in this Board proceeding. His state law argument is apparently his only defense and he made no effort to address the issues in the case.

However, in his posthearing brief, O'Hara for the first time, partially mentions what appears to be what he considered the relevancy of Freedland's testimony and Illinois Commerce Transportation Law to the issues in this unfair labor practice proceeding before the Board. If I can separate any showing of relevancy of O'Hara's legal arguments in his brief, from his passionate accusatory injections, attacking my rulings, it appears he is contending the Illinois filing requirements are relevant because Kasper did not file under that law as a ''broker'' or otherwise complied with other filing requirements.

Respondent's Argument

O'Hara contends that Kasper did not file copies of the Independent Contractor Agreement for Owner-Operators with the Commerce Commission as required by Illinois law. Nor were those agreements posted in the cabs of the trucks of owner-operators that Kasper referred to the Dixon and Amboy jobsites. Kasper acknowledged that the purpose of the filing and the posting required under the Illinois Commerce Transportation Law number on the side of the trucks was to enable the general public to inquire of the Illinois Commerce Commission, and verify whether or not the driver or the truck is a lessee or lessor filed with the Commission and, if so, in what capacity.

O'Hara further argued that at the time the picketing took place (December 1992), Respondent (Union) inquired of the Illinois Commerce Commission to obtain the complete and exclusive statement of the terms between Kasper Trucking and the owner-operators on the jobsites. Respondent learned from the Commission that only trucks (the motorized power units and not the drivers) were on file leased to Kasper by Orval Dobbs, Glen Fadness, and John Leiser; and that the same equipment leases used by the owner-operator drivers were also used by Kasper employee drivers. It is noted that while the latter statement may be true, that does not mean that Kasper employees were driving such leased trucks on the subject jobsites here. O'Hara argues that no filings with the Illinois Commerce Commission indicated that anyone other than employees were driving trucks with the insignia of Kasper Trucking on the door at the Dixon and Amboy jobsites. It is also noted that while the records of the Commission may not have so indicated, it does not follow that the drivers of the leased trucks were in fact employees of Kasper.

O'Hara continued that since the Union first inquired of the Illinois Commerce Commission to determine the leasing arrangement between Kasper Trucking and Dobbs, Fadness, and Leiser, and was informed by the Commission that only the trucks, not the drivers, were leased by Kasper; and that Illinois Commerce Transportation Law provides that under a lease of motorized power units, the lessee is aware of his responsibility for direction and control of operators under the lease. Specifically, he argues the law provides:

> *Direction and Control of Leased Equipment* It shall be the responsibility of the licensed holder to exercise full *direction and control* of all equipment *and personnel* used in its operations. Equipment used in its operations must be owned by or under lease to the carrier. . . . [t]he lessee of equipment used under authority of a license issued by the Commission shall have exclusive possession and control of equipment while it is so used. Failure to exercise supervision and control of equipment constitutes an illegal transfer of authority, making both the lessor and lessee subject to sanctions provided by Section 18(c)–4307 of the law.
>
> Exclusive possession and control
>
> The lessee shall have exclusive possession and control of leased equipment during all periods when the equipment is operated under the lease. Such exclusive possession and control shall extend also to the drivers of leased equipment.

Thus, O'Hara's specific argument of *relevancy to his defense* appears to be that Kasper labeled himself a ''broker,'' and he was alleged as such in the amended complaint, in an attempt to evade his explicit failure to properly file and comply with the Illinois Commerce Transportation Law; that by failing to so file and comply, Kasper kept the Independent Contractor Agreement for Owner-Operators in his office, so

that copies of them could not be carried within the trucks as Illinois law requires; that making the agreements unaccessible to the public and not available for inspection in the trucks when Union Agent Lathrop stopped drivers on the jobsite, Respondent was misled that the drivers on the jobsite were employees of Kasper; that the only lease agreements in the cab of the trucks were leases for only motorized power units under Illinois law; and that since Respondent could not see proper agreements for independent contractors, but only for a lessee, Respondent (Union) was deprived of its ''window opportunity'' to picket . . . measured in days or weeks.

O'Hara appears to be arguing that the Union did not know and could not have ascertained whether or not the owner-operators on the subject jobsites were independent contractors or employees of Kasper, if Kasper failed to properly comply with the Illinois filing requirements. In support of his argument, he cites *Mauts & Oren v. Teamsters Local 279*, 882 F.2d 1117, 1124 (1989). That is, he argues, since Kasper Trucking did not file with the Illinois Commerce Commission for independent owner-operators, as he did for leased equipment (motorized power units only), the public, including the Union, was left to assume that the owner-operators referred to the jobsites by Kasper were employees of Kasper, and not independent contractors. O'Hara's argument also seems to be contending that under the above-cited Illinois law, the licensed holder for leased equipment only, shall have full direction and control of all *equipment* and *personnel* used during all periods of the leased operation, thereby making them employees of Kasper.

It is noted that if O'Hara had stated the above argument at the hearing as being relevant to his defense, in all probability I might have permitted him to continue his examination of Freedland, as at least being peripherally relevant to the Respondent's theory of defense. However, O'Hara refused to state why such law was relevant, leaving the bench and the opposition to speculate on the unapparent relevance of Illinois law to the issues in the instant case.

Whether or not Respondent's proffered testimony and submitted sections of Illinois law are sufficiently relevant to the issues in this case, and whether or not they constitute a valid legal defense for the Union picketing the two subject jobsites, will be determined by an analysis and consideration of the credited evidence and the law, both Federal and State, infra.

Evidence of the Contractual Arrangement and Actual Performance of Kasper and the Owner-Operators He Referred to the Dixon and Amboy Jobsites

Company Drivers

The essentially uncontroverted and credited testimony of Gordon Kasper established that Gordon personally owned seven semi-dump trucks and three tandem-axel straight trucks which he leases to Kasper Trucking, Inc., under an arrangement wherein he personally makes the payments on purchase loans of the trucks. Kasper Trucking is responsible for all maintenance and the operation of the trucks. That is Kasper Trucking has the following responsibilities for the trucks:

1. License plates
2. Insurance—collision and liability, including cargo losses.
3. Fuel tanks for gasoline and a garage where light repairs are performed by one mechanic hired by Kasper Trucking to perform lubrications, oil and tire changes, brake shoes, drums and lights.
4. A lot where trucks are parked.
5. Other major repairs are best performed by outside motor services at the expense of Kasper Trucking.
6. Pay drivers an hourly wage.

Kasper Trucking's busiest season is between April and Thanksgiving when it employs 10 drivers to operate its trucks. Five to eight drivers are laid off during the winter months but laid-off drivers are recalled in the spring.

Kasper Trucking drivers are represented by Teamsters Local 325 and the Local and Kasper have a collective-bargaining agreement covering its employed drivers operation. However, Local 325 is not involved in this dispute. Kasper Trucking selects and hires its drivers and pays them wages and benefits in accordance with the collective-bargaining agreement. It makes benefit contributions to a Health, Welfare, and Pension plan, and deducts social security, income taxes, union dues, and garnishments from the wages of its drivers. The drivers work full time and sometimes as much as 50 hours a week. They receive time and a half for overtime and Saturday work and Kasper provides them with a W-2 form at the end of the year.

Driver work assignments with information regarding destinations, etc., are given by Gary Kasper, son of Gordon Kasper, a day ahead of time and drivers report to the Company's facility (lot) where they have coffee or smoke before commencing the workday. Before departing the drivers are responsible for checking the oil, water, and tires and warming the engine of their truck. Their worktime begins when they get in the truck to warm it up and ends when they return their truck to park it. At the close of the workday they wash their trucks with a water hose, soap, and pail, and fuel the truck at the pump, all provided by Kasper Trucking.

Kasper's drivers have no out-of-pocket expenses related to their work, although Kasper will reimburse them for an occasional toll paid by the driver.

Both Gordon Kasper and his son, Gary Kasper, make the assignments of company drivers and they keep in touch with these drivers by a two-way radio installed in each company truck. The foreman of the construction contractor directs the drivers where to pick up and deliver materials hauled. If a driver has a problem on the jobsite, the contractor's foreman will inform Gordon Kasper by radio.

Lastly, company drivers may not refuse to work on any particular day or refuse to perform any hauling assignment without being subject to discipline. They may not work for any other employer during the construction season.

Owner-Operator Drivers

Kasper Trucking uses the services of approximately 70 individuals, known as owner-operators, who own and drive their own trucks. Two of these individuals own two trucks and one of them is driven by the son of Gordon Kasper, Gary Kasper. Some of the owner-operators are sole proprietors, partnerships, or incorporated. The owner-operators lease both the truck and the driver to Kasper Trucking. Occasionally an owner-operator will permit another person to drive his truck, and the lease agreement contains nothing prohibiting such practice. Nonetheless, only one or two

owner-operators have other drivers, and most of them have signs painted on their trucks indicating the truck is leased to Kasper Trucking, showing Kasper's registration number with the Illinois Commerce Commission. Such owner-operators are responsible for the following:

1. Truck purchase financing.
2. Truck maintenance and repairs.
3. Obtaining license plates, liability and collision insurance, if they so elect.
4. They are not covered by Kasper Trucking's Workmens Compensation insurance as are drivers employed by Kasper.
5. They must purchase occupational hazard insurance against on-the-job injury.
6. They are not covered by the collective-bargaining agreement between Kasper and Local 325.
7. They are simply a party to a lease, an owner-operator agreement between Kasper and themselves, for which they are paid 85 percent of the gross amount of what is received by Kasper from the contractor.
8. Kasper bills the contractor for all trucking services on the basis of either mileage ton or hourly services, depending upon the nature of the job.
9. Each owner-operator is signatory to an equipment lease with Kasper Trucking and that is a printed lease form required by the Illinois Commerce Commission with which such lease is filed.
10. The form identifies Kasper Trucking as the lessee and the owner-operator as the lessor, and provides for the identification and description of the truck leased.
11. The form also contains a statement of the percent of gross revenue which reflects the owner-operator's compensation for the leased equipment.
12. Each owner-operator is signatory to an agreement with Kasper Trucking, captioned *Independent Contractor Agreement for Owner-Operators*. The agreement provides that: (a) the owner-operator directs the operation of the leased vehicle, with respect to when, how, and by whom the vehicle is to be loaded, unless directed by the customer; (b) when and how the vehicle is to be financed; (c) how it is to be repaired, maintained, and garaged; (d) determines the method, means, and manner of performance; (e) is free to sublease his equipment to other carriers; (f) is responsible for payment of all Federal, state, and local taxes; (g) social security and unemployment insurance taxes; (h) licensing vehicles; and (i) maintaining insurance on vehicles.

The agreement with Kasper also provides that the owner-operator is free to refuse any load and any job offer by Kasper trucking; that the operator is not required to give Kasper Trucking any priority over any other party with whom the owner-operator does business; owner-operators may secure their vehicles from any source and arrange their own financing; they may drive their own vehicle or designate other drivers; they submit billings for their services to Kasper Trucking, which the latter must pay within 10 to 14 days thereafter; Kasper pays them 85 percent of the gross revenue charged the customer; and gross revenue is determined by the published tariffs which Kasper Trucking files with the Illinois Commerce Commission.

The owner-operators receive their assignments by calling Kasper Trucking in the evening to learn about available work the following day. Kasper Trucking offers them work according to the type of truck that is needed and the owner-operator may inquire about the nature of the work. The owner-operator is free to decline work or to refrain from calling to inquire about work. If an owner-operator accepts a job, he is free to leave the job by simply informing the contractor's job foreman, without any adverse consequences. They may have signs on their trucks identifying themselves as owner and operator; they obtain their own license plates, insurance, fuel, tires, and mechanical work.

Kasper makes no contributions to any kind of pension or welfare fund on behalf of owner-operators. Kasper sends owner-operators a W-2 tax form at the end of the year. When on the jobsite, the construction contractor's foreman tells owner-operators where to park, and where to dump or pickup materials. Kasper Trucking has no radio means of communicating with owner-operators when they are on the job as it does with its own employee drivers. Any problem arising on the job with owner-operators is worked out between the owner-operator and the job foreman. Kasper may not learn about the problem until the end of the day or he may be asked not to refer an owner-operator to the contractor again.

Secondary Employer

In December 1992 Rockford Blacktop contracted with the State of Illinois to rebuild Route 2 in Dixon, Illinois, which necessitated the removal of materials. Kasper Trucking was hired by Rockford Blacktop to haul materials away from the jobsite and dispose of it at two sites, one adjacent to the jobsite and another 1-1/2 miles away, and also to haul material from a quarry 5 miles away, to the jobsite. Kasper Trucking provided trucking services for Rockford Blacktop pursuant to a verbal agreement in accordance with the preestablished published rates (tariffs) on file at the office of the Illinois Commerce Commission, which provides for lease rates on either the ton/mile or by the hour. Kasper Trucking did not assign any of its employee drivers to the Dixon jobsite, but only the following owner-operators:

Gary Hinde	Truck #801
Orval Dobbs	Truck #834
John Leiser	Truck #835
Kevin Finner	Truck #820.

On or about December 18, 1992, union agent of Local 722, R. G. Lathrop visited the jobsite at Dixon and reportedly asked the drivers to show him their union dues receipts. Lathrop testified that he told the drivers that Kasper Trucking did not have a contract with Respondent Union.

Myron Rafferty of Rockford Blacktop testified without dispute that on the same day, December 18, 1992, Lathrop called him and told him Kasper Trucking ''[w]as not right with the Union; and in order for us [Rockford Blacktop] to use him [Kasper Trucking] down there, we had to make him right.'' Rafferty told Lathrop to contact Kasper Trucking himself.

Lathrop acknowledged he put up picket signs that same day (December 18, 1992) which read:

TLU 722
Our Only Dispute
Is with Kasper Trucking
Teamsters of TLU 722
&
Has no Agreement.

Lathrop acknowledged that when he put up the above picket sign at the Dixon jobsite December 18 and 21 and January 11, 19, and 26, the backhoe operator refused to work and the trucks could not be loaded. In fact the evidence shows the truckdrivers worked only 5 hours instead of the usual 8 hours the first or second day. As a result of the work stoppage, the drivers were sent home early on December 21 and January 11 and 19. Rafferty went to the jobsite on January 26, 1993, and operated the backhoe himself.

During the picketing in January and December, Union Agent Gerald Reilly sent an undated letter bearing his signature (G.C. Exh. 10) to Kasper Trucking with a collective-bargaining agreement, a Health & Welfare and a Pension participation agreement enclosed for Kasper to sign. Thereafter, Gordon Kasper called Reilly at the LaSalle, Illinois hall and learned that he was in Las Vegas. He called Lathrop at the Dixon office two or three times and left messages from himself, but he did not receive a return call. Lathrop testified that in January, Gordon Kasper reached him by telephone and he asked Kasper to sign a contract with Respondent Union.

In a letter dated January 12, 1993 (G.C. Exh. 16) the attorney for Kasper Trucking advised Respondent Union that Kasper Trucking engaged only independent owner-operators to perform all trucking work on the Dixon jobsite.

In a letter dated January 14, 1993, Respondent Union's attorney demanded evidence to support the assertion that the independent owner-operator drivers on the jobsite were independent contractors. In reply letters dated January 15 and 18, Kasper Trucking's attorney provided copies of Independent Contractor Agreement for Owner-Operators executed between the subject Drivers and Kasper (G.C. Exhs. 16–19).

Rockford Blacktop also had a contract to remove underground storage tanks and haul away contaminated soil from a jobsite near Amboy, Illinois. Rockford Blacktop contracted with Kasper Trucking to perform the hauling requirements to a landfill 40 miles away. Kasper Trucking did not send any of its own employee truckdrivers to the Amboy jobsite, but on February 3, 1993, it sent only the following owner-operators:

Dick Brown	Truck #603
Doug Fyke	Truck #633
David Coniglio	Truck #646

On February 4, 1993, Respondent Union sent pickets carrying the same picket signs to the Amboy jobsite. On the same day (February 4), Kasper Trucking's attorney sent a letter (G.C. Exh. 20) to Respondent's attorney, advising that Kasper Trucking did not send any of its truckdriver employees to the Amboy jobsite, but that only the independent contractor owner-operators named in the letter would perform the work on that jobsite. On the same day, Rockford Blacktop and Kasper Trucking filed the charges in the instant matter.

Based upon the foregoing essentially uncontroverted evidence, counsel for the General Counsel argues that the owner-operators sent by Kasper Trucking to the Dixon and the Amboy jobsites were not employees of Kasper, but Independent Contractors. In support of her position she cites *Teamsters Local 525 (Helmkamp Construction)*, 271 NLRB 148, 150 (1984), enfd. 773 F.2d 921 (7th Cir. 1985); *Scott & Culpepper, Independent Contractors of Employees: The view from the National Labor Relations Board*, Labor Law Journal 395 (July 1993), and cases cited therein.

Counsel for the General Counsel also cites *Associated General Contractors*, 290 NLRB 522, 528–530. In *Associated General Contractors*, the criteria for determining independent contractor status is set forth therein by the Board. The General Counsel's evidence above clearly satisfies most of the criteria enunciated therein, including the daily hauling arrangement between Kasper Trucking and the owner-operator drivers, which is generally an oral agreement concluding with the broker, subcontractor (Kasper) making the referral. Independent contractors never acquire seniority and independent owner-operators, as here, submit their bills to the broker or subcontractor (here Kasper), who pays the owner-operators. The contractor here, Rockford Blacktop, did not pay the owner-operator truckdrivers on the Dixon and Amboy jobsites. In *Associated General Contractors*, the independent owner-operators were found to be independent contractors with Board approval.

However, prior to making my determination on the ''employee-independent'' contractor status of the owner-operators at the Dixon and Amboy jobsites in the instant matter, I will now consider the Respondent's evidence and legal arguments, in conjunction with the above evidence and legal arguments of counsel for the General Counsel. This is in accordance with the Board's evaluative test for determining ''employee-independent contractor'' status. Specifically, the Board and the courts have repeatedly held that ''the total factual context'' and ''all the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' *NLRB v. United Insurance Co*., 390 U.S. 254, 258 (1968); *Associated General Contractors of California*, 280 NLRB 698 (1986); *Democratic Union Organizing Committee, Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1979); *Teamsters Local 525 (Helmkamp Construction)*, supra; *Scott Culpepper, Independent Contractors or Employees, The View of the National Labor Relations Board*, Labor Law Journal 395 (July 1993), and cases cited therein.

The Law and the Evidence

During the instant hearing O'Hara requested that I take administrative notice of provisions of Illinois Commerce Transportation Law, copies of which he did not supply me with during the hearing. His request for administrative notice was denied because he had failed and refused to clearly show the relevance of such law to the issues involved, or to state his theory of defense in the instant Board proceeding.

However, since O'Hara has furnished a copy of what he deems the pertinent provisions of the Illinois regulations or law, and has stated some semblance of relevance with respect to his theory of defense in his posthearing brief to me, I reverse his prior denial and take administrative notice of all the subject Illinois law or regulations submitted by counsel, for purposes of analyzing and considering its relevancy

and/or its merit in conjunction with all the evidence and arguments of record on ''employee or independent contractor'' status.

Correspondingly, for the same purposes, I will treat Respondent's proffer as O'Hara stated on the record what Freedland would have testified about if he had been permitted to testify.

Illinois Law

According to O'Hara, pertinent provisions of Illinois law provide as follows:

> ''broker'' means any person other than a motor carrier of property, that arranges, offers to arrange, or holds itself out, by solicitation, advertisement, or otherwise, as arranging or offering to arrange for hire transportation of property or other services in connection therewith by a motor carrier of property which holds or is required to hold a license issued by the [Illinois Commerce Commission] . . . .
>
> It shall be unlawful for any person:
> 1. To act as a broker without a license in good standing issued to it by the [Illinois Commerce Commission];
> . . . .
> 6. To act as a broker in connection with transportation by a person other than an authorized common carrier of property by motor vehicle unless the carrier does not require authorization to transport the shipment; . . . .

I also reverse his denial and take administrative notice of a ''Certificate,'' certified by the Illinois Commerce Commission, which O'Hara says in his brief specifically states that:

> [t]o date Kasper Trucking has not applied for an intrastate Brokers License.

O'Hara argues that more curiously still, immediately subsequent to the commencement of the Union's picketing, Kasper provided contracts to the Board indicating Kasper was acting as a ''broker,'' and the Board alleged Kasper was acting as a broker at all times herein. While O'Hara's above observations may or may not be correct, it is not unreasonable to consider the possibility that after the Union appeared on the jobsite, Kasper might have been alerted that he had not filed, or that he had neglected to provide the Board with copies of the contracts indicating he was acting as a ''broker,'' and if so, possibly, the Board simply updated its allegations by amendment, that Kasper was acting as a ''broker.'' However, all of these probabilities or possibilities are conjectural and insignificant to this Board proceeding, in the absence of relevant evidence supporting them.

Kasper argues that more curiously still, is the fact that Kasper Trucking's ''Independent Contractor Agreement for Owner-Operators,'' provided to the Union at the time of the picketing and admitted in evidence, specifically provides:

> [t]his agreement and any dispute thereunder shall be governed by the laws of the State of Illinois . . . .

Without finally construing the above language on the agreement between Kasper and the owner-operators on the Dixon and Amboy jobsites, it appears that such language could have had reference to any contractual or other civil disputes between the parties to the agreement would be governed by the laws of the State of Illinois. It hardly could have meant any unfair labor practice dispute between the Union and Kasper Trucking, and Rockford Blacktop arising under the National Labor Relations Act would be governed by the laws of the State of Illinois. If the above language was intended to mean what counsel appears to be advocating it means, the parties should have used explicit language, including disputes arising under the National Labor Relations Act, even if such language might not have been enforceable. The instant dispute arose under and was brought before the National Labor Relations Board. When the bench asked counsel for Respondent did he have legal authority for the meaning he advocated, he said, ''[Y]es,'' but he did not have it with him.

Another provision of Illinois law for which O'Hara made his blanket request that I take administrative notice is section 18(c)–1113 of the Illinois Commerce Transportation Law, a copy of which he did not show or furnish me at the hearing. This section too was a part of my denial because Respondent had failed or refused to state the relevance of the Illinois law, or his theory of defense, to the issues in this proceeding. Notwithstanding, the above-cited section of the Illinois law, which O'Hara provided in his posthearing brief to me, clearly sets forth its legislative purpose as follows:

> [i]t is hereby declared to be the policy of the State of Illinois to actively supervise and regulate commercial transportation to persons and property within this State. This policy shall be carried out in such manner as to: (a) promote adequate, economical, efficient and responsive commercial transportation service, with adequate revenues to carriers and reasonable rates to the public, and without discrimination; (b) recognize and preserve the inherent advantages of, and foster sound economic conditions in, the several modes of commercial transportation in the public interest; (c) develop and preserve a transportation system properly supportive of the broad economic goals of the State of Illinois; (d) create economic and employment opportunities of commercial transportation and affected industries through economic growth and development; (e) encourage fair wages and safe and suitable working conditions in the transportation industry; (f) protect the public safety standards and insurance; (g) insure a stable and well coordinated transportation system for shippers, carriers and the public; (h) cooperate with the Federal Government, the several states, and with the organizations representing state and commercial transportation service providers and consumers.

The transportation law also regulates the leasing of motor vehicle equipment and personnel by for-hire motor carriers as follows:

> [t]he Commission may prescribe requirements for the leasing of equipment, with driver, and of equipment with driver to or by a motor carrier of property; [provided that such regulation shall not encompass the leasing of equipment, without drivers, from a bona fide equipment leasing company to a motor carrier of property. Such *leases shall be in writing, constitute a complete and exclusive statement of terms between the par-*

> *ties, specify the compensation for the lease and the duration of the lease, be signed by the parties thereto, be filed with the Commission, and be carried in each motor vehicle covered thereby.*

Thus, the objectives and purposes of the Illinois law governing transportation of common carriers and their ownership, leasing and transferring of equipment (motorized power units) only, or with drivers too, appears to attempt to enable the State of Illinois to actively supervise and regulate commercial transportation of persons and property within the State so as to promote adequate, economical, efficient, and responsive commercial transportation service, with adequate revenues to carriers at reasonable rates to the public without discrimination, etc., including to cooperate with the Federal Government, and the several States.

Federal Law

Comparatively, Section 1, Subsection 151 of the National Labor Relations Act sets forth the primary objectives and purposes of the Act, as pertinent herein as follows:

> Section 1, subsection 151: the denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety or operation of the instrumentalities of commerce; (b) occurring in the current or commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially impair or disrupt the market for goods flowing from or into the channels of commerce.

In keeping with the above-stated general purposes and objectives of the Act, the amendment, Section 8(b)(4)(i) and (ii)(B) specifically provides:

> (b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or *to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce*, where in either case an object thereof is—
>
> . . . .
>
> (B) *forcing or requiring any person to cease using*, selling, handling, *transporting, or otherwise dealing in the products of* any other producer, processor, or manufacturer, or *to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative* of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . . [Emphasis added.]

Thus, it is therefore clear that unlike the above-described statute or regulations of Illinois, Section 1, Subsection 151 and Section 8(b)(4)(i) and (ii)(B) of the Federal Act is designed to prohibit any union involved in a dispute with a primary employer (Kasper here) who refuses to recognize, join, or sign a contract with the union, to enmesh a secondary employer (Rockford Blacktop here) and other neutral persons (Dobbs, Fadness, and Leiser, etc.) in its dispute with the primary business employer (Kasper), by picketing the jobsite of the secondary business (Rockford Blacktop) where the primary company (Kasper) is not present, causing a disruption in work progress of the secondary business (Rockford Blacktop), and having the *intent* or *necessary effect* of burdening, obstructing, or materially affecting commerce, by impairing efficiency, restraining (work) or controlling the flow of materials and services in commerce.

It is unequivocally clear that the objectives of the Federal law are totally different from the objectives of the Illinois law.

There is support in law of the statement by counsel for the Charging Party that ''government constitutes supervision by the State and not by the employer,'' citing *Don Bass Trucking*, 275 NLRB 1172 (1985), with respect to employee verses independent contractor status, where the Board commenting on *Air Transit*, 271 NLRB 1108, 1110 (1984) stated:

> Government regulations constitute supervision not by the employer but by the State, the courts reasoned that more extensive governmental regulation afford less opportunity for control by the pugative employer because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the driver.

A reading of *Don Bass*, supra, shows that the state regulation there, constituted supervision by the State of lessee and lessor employers and their employees, not of independent contractors utilized by them, as the drivers there were found to be.

More specifically, here, the first sentence of section 18(c)–1103 of the above-described Illinois Commerce Transportation Law specifically states:

> [i]t is hereby declared to be the policy of the State of Illinois to actively supervise and regulate commercial transportation within the State.

In *Yellow Cab Co*., 229 NLRB 1329 (1977), the owner-operators there, unlike the independent owner-operators here, were not found to be independent contractors because the employer there had adopted the State's regulations as an enforceable part of the contract with its leased drivers, and it had a long list of requirements for the leased drivers for

which the employer (Yellow Cab) could terminate the drivers for failure to comply therewith. Because of the enormous amount of control the employer possessed and/or exercised over the leased drivers, they were found to be employees of employer, Yellow Cab.

However, the Independent Contractor Agreement for Owner-Operators between Kasper and the drivers on the Dixon and Amboy's jobsites contained no enforceable part of the State's regulations nor a long list of employer requirements by Kasper Trucking, for which Kasper could terminate or discipline those drivers. Therefore *Yellow Cab*, supra, is not applicable to the facts in the instant matter.

Findings

Thus, after carefully considering and evaluating all the essentially uncontroverted and credited evidence of record, including Illinois Commerce Transportation Law provided by Respondent, as well as the proffered testimony of Freedland, I find that pursuant to oral agreement, Kasper Trucking agreed to refer owner-operator truckdrivers to the Dixon and Amboy jobsites of contractor Rockford Blacktop; that both jobsites are within the organizational jurisdiction of Respondent Union; that Kasper Trucking referred only owner-operator drivers to the Dixon and Amboy jobsites; that Respondent Union told Rockford Blacktop it could not use the referred owner-operator drivers on the jobsite unless it (Rockford Blacktop) made Kasper Trucking right with Respondent Union; and that Respondent Union asked Kasper Trucking to sign a contract but the latter refused to do so.

In order to induce and encourage individuals employed by Rockford Blacktop to cease doing business with Kasper Trucking, Respondent Union proceeded to picket Rockford Blacktop's jobsites at Dixon and Amboy, even though Respondent Union did not have a dispute with Rockford Blacktop, and Kasper Trucking was not present on either the Dixon or Amboy jobsite; that Kasper Trucking's attorney advised Respondent Union that the drivers referred to the two jobsites were independent contractors and specifically not employees of Kasper Trucking; that upon request of attorney for Respondent Union, attorney for Kasper Trucking sent signed copies of the Independent Contractor Agreement for Owner-Operators to the attorney for Respondent Union; that Respondent Union nevertheless continued to picket both jobsites of secondary employer Rockford Blacktop, thereby, causing the backhoe operator to walk off the job, which resulted in work interruption at both jobsites on several days in either December 1992 and January and February 1993; that the object of the picketing conduct by Respondent Union was to cause secondary employer Rockford Blacktop and the several neutral independent contractor owner-operator drivers, to cease doing business with primary employer, Kasper Trucking; that the evidence clearly established that all the drivers referred by Kasper Trucking to the Dixon and Amboy jobsites were independent contractors under the Board's criteria, and not employees of Kasper Trucking; that the Illinois law defining possession and supervisory control over leased equipment and the drivers, has no force and effect upon the National Labor Relations Act's definition of ''employee'' and the Board's established criteria for determining ''independent contractor'' status; and that by picketing both jobsites of Rockford Blacktop, the secondary employer, and other neutral persons, including the independent contractors who were engaged in commerce or in an industry affecting commerce, Respondent Union has threatened, coerced, and restrained Rockford Blacktop, and other neutral persons (referred independent contractor drivers) engaged in commerce or an industry affecting commerce, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

Ruling on Counsel for Respondent's Motion for the Administrative Law Judge to Disqualify Himself and Grant Respondent a New Hearing

A careful review of the entire transcript in the instant proceeding does not support counsel for Respondent's charges that my rulings and comments demonstrated personal bias and/or prejudice against counsel for Respondent, or the Respondent, or that Respondent was deprived of due process of law.

Nor does the transcript reflect that I displayed animosity, antagonism, bellicosity, or hostility to O'Hara throughout the proceeding.

The transcript does, however, show that I made a patient and earnest effort to keep counsel for Respondent's cross and direct examination on the track of relevance, in the face of counsel's passionate and argumentative persistence to interrogate witnesses on matters patently irrelevant to the issues in this case. Under these circumstances, my comments were appropriate and reasoned responses to the numerous questions and arguments by counsel for Respondent, while the latter failed and refused to state the relevancy of his interrogation, even though he was repeatedly asked to do so.

Consequently, since O'Hara's motion failed to state in substantive detail, and an examination of the record fails to support the numerous charges of personal bias and/or prejudice against O'Hara and the Respondent, or that the Respondent has been denied due process of law, his motion for me to disqualify myself and grant Respondent a new trial should be denied.

Accordingly, counsel for Respondent's motion for disqualification and a new trial is denied.

The Test

A part of the total factual context in this case is Illinois Commerce Transportation Law and Respondent's legal arguments in reference to it, as they relate to the Board's criteria for determining the kinds and the amount of supervisory control Kasper Trucking possessed and/or exercised over owner-operator truck drivers at Dixon and Amboy, in determining whether they are ''employees'' of Kasper or ''independent contractors.''

In attempting to address this question, counsel for Respondent cites sections of Illinois Commerce Transportation Law which essentially provide that any person *other* than a motor carrier of property who arranges for hire, transportation of property by a motor carrier is a ''broker'' and is required to hold a license issued to perform such service by the Illinois Commerce Commission; and that it shall be unlawful to act as a ''broker'' without such a license.

Respondent argues that Kasper Trucking is not licensed as a ''broker'' and he is not a broker under Illinois law, even though the amended complaint herein describes Kasper as a broker. Notwithstanding, it is noted that section 2(d) of the complaint also alleges that Kasper is a contractor in the con-

struction industry hauling construction materials. Also section 2(g) of the complaint alleges Kasper is a subcontractor of owner-operators referred to the Rockford Blacktop Dixon and Amboy jobsites. As far as the complaint and the amended complaint are concerned, it appears to be immaterial to the issues in this case whether or not Kasper is lawfully or unlawfully a ''broker'' under the Illinois law. I make no determination on whether or not Kasper is a broker, lawfully or unlawfully. I will determine whether the drivers referred to the jobsites were ''employees'' of Kasper or ''independent contractors'' under the Board's standards.

The crucial question in this case is whether Kasper Trucking as ''broker,'' ''subcontractor,'' or any other business designation in which it is an employer engaged in commerce or in an industry affecting commerce, referred owner-operators to the Dixon and Amboy jobsites. The significance of the status of the referred owner-operators is whether or not they are employees of Kasper or independent contractors, not whether Kasper is a ''broker'' pursuant to Illinois filing laws. Consequently, whether or not Kasper is a ''broker'' under Illinois law may be relevant to an Illinois proceeding, but irrelevant to the alleged union conduct in this Board proceeding.

In an effort to establish that Kasper had sufficient control over the owner-operators he referred to the two subject jobsites, constituting them employees of Kasper, Respondent cites another section of Illinois law: *Direction and Control of Leased Equipment*. In this regard, the Illinois law in essence provides that the lessee of leased equipment (trucks) shall have exclusive possession and control of the leased equipment (trucks) during all periods of the lease, and such possession and control shall extend also to the drivers of the equipment.

The evidence of record shows that Kasper had authority from the Illinois Commerce Commission as a lessee of Motorized Power Units (equipment-trucks), but he did not have a lease for drivers of the trucks. However, even without a lease for drivers, Respondent argues that the above-cited law gave Kasper exclusive possession and control over the owner-operators he referred to the two subject jobsites. Even if Kasper Trucking did not have a lease for drivers, the fact that Illinois law conferred the authority upon it to direct and control leased equipment, as well as the drivers, does not mean that Kasper actually possessed and/or exercised such authority. In fact the above uncontroverted evidence of record shows that Kasper did not have or exercised exclusive possession and control over the equipment or the owner-operators referred to the subject jobsites. Again, no determination is made here on whether or not Kasper fully complied with the Illinois law, cited by Respondent. As pointed out below in this decision, the purposes and objectives of the cited Illinois statutes and regulations are decidedly different from the objectives and purposes set forth in the National Labor Relations Act and applied in Board and court decisions construing and enforcing that Act.

Although Illinois law requires agreements between owner-operators and brokers, lessees, possibly subcontractors to be filed with the State's Commerce Commission and a copy of the terms of such agreements to be posted in the cabs of the truck, as notice to the public of the contractual lease agreement between the parties, the fact that copies of such agreements were not filed with the Illinois Commission or posted in the cabs of the trucks of the owner-operators at the two subject jobsites does not mean that such drivers were ''employees'' of Kasper. Without deciding but assuming both Kasper and the owner-operators referred to the two subject jobsites did not comply with the said filing and posting requirements of Illinois, this would appear to be a matter for the State of Illinois and not the National Labor Relations Board.

In the absence of a showing of relevance, the primary concern of the Board is whether the subject owner-operators are employees of Kasper or independent contractors, irrespective of whether or not they are in compliance with Illinois law. There may be many lessees and lessors of leased motor equipment operating as owner-operators or independent contractors in the State of Illinois, who have not complied with the filing requirements of the State. However, this does not mean that they are not operating de facto, as broker, subcontractor or independent contractor.

Also, assuming, arguendo, that Kasper and the owner-operators had complied with all the filing requirements cited by counsel for Respondent, but nevertheless operated as broker, lessee, lessor, subcontractor, or independent contractors. If the Union under such circumstances picketed the secondary contractor employer (Rockford Blacktop), would the fact that the owner-operator, lessee, lessor, broker, subcontractor, or independent contractor met all filing and posting requirements of Illinois, excuse the Union from picketing the secondary contractor here (Rockford Blacktop). I think not, and this is one of the reasons that I find the Illinois filing laws and Respondent's arguments irrelevant to this proceeding.

Finally, Respondent, citing the court's language in *Mauts & Oren, Inc*., 882 F.2d 1117 (7th Cir. 1989), that ''picketing of *common jobsite* has substantial foreseeable secondary effects on secondary employer, but such conduct does not violate the Act unless the employer establishes that the Union intended to cause disruption of the secondary business.''

The picketing by the Union in the instant matter did not occur at a common jobsite. Both the jobsite at Dixon and the one at Amboy were the jobsites of the job contractor, Rockford Blacktop, a secondary employer. Kasper Trucking, primary employer with which Respondent Union had a dispute, was not present at either the Dixon or Amboy jobsite, but operated several miles away out of Poplar Grove, Illinois. Consequently, this aspect of *Mauts & Oren*, supra, does not support Respondent's argument and it is not applicable to the facts in the instant matter.

Also citing *Mauts & Oren*, Respondent appears to be arguing that since the Independent Contractor Agreement for Owner-Operators was not filed with the Commerce Commission, the owner-operators themselves did not file with the Illinois Commerce Commission as the law required, and a copy of those agreements were not posted in the cabin of the trucks of the drivers when Union Agent Lathrop stopped the drivers on the jobsite, the Union could not have ascertained the terms of the agreement and was thereby deprived of a window opportunity, so much for ''allowing the Union sufficient room to maneuver in the ambiguous legal environment in which it must operate.'' Respondent does not elaborate on this argument but the factual situation in *Mauts & Oren* is distinguished from the facts here, in that there, the workers and service people of both the secondary employer and the primary employer utilized the same neutral gate, and the

Union could not exclusively target the workers of the primary employer from the employees of the secondary employer. Here, the primary business (Kasper Trucking) was not present at the jobsites in Dixon or Amboy, but miles away in Poplar Grove.

Respondent probably cited *Mauts & Oren*, to analogize the ''window opportunity'' defense referred to in that case, with its contention that Respondent could not determine the status of the owner-operator drivers at the Dixon and Amboy jobsites, because the records of the Illinois Commerce Commission showed neither Kasper nor the owner-operators had properly complied with the filing and posting requirements of the Commission. Therefore, Respondent Union should not be at fault for *assuming* the owner-operators were employees of Kasper and picketing the jobsites at Dixon and Amboy.

This argument, however, is not meritorious under the circumstances in this case. It was certainly appropriate for Respondent to have checked with the Commission in its efforts to learn the actual status of the owner-operators on the Dixon and Amboy jobsites. Notwithstanding, I am not persuaded that inadequate compliance with the Commission's filing and posting requirements would ipso facto mean that the owner-operators are employees of Kasper; that Respondent had no alternative means for learning the status of the drivers; or that Respondent was totally and innocently unaware of their actual status.

When the picketing commenced at the Dixon jobsite, the picket signs clearly stated that Kasper Trucking did not have a contract with Respondent (Local 722), and that Rockford Blacktop was not involved in the dispute with Local 722.

On the first day of the picketing Union Agent Lathrop called Rafferty of Rockford Blacktop and told him in order for Rockford Blacktop to use Kasper Trucking, Rockford Blacktop had to ''make him [Kasper Trucking] right with the Union.'' Although witness Lathrop may have testified he did not recall calling Rafferty on that day, I discredit his lack of recall or implied denial and credit Rafferty's account because I was persuaded by his demeanor he was testifying truthfully in this regard, and subsequent events substantially supports his account, infra.

Additionally, the record shows that during the picketing (apparently in December or January) Respondent (Local 722) mailed to Kasper Trucking a letter requesting Kasper to complete and sign the following enclosures:

1. A Construction Agreement (G.C. Exh. 10).
2. A Participation Agreement for Health & Welfare (G.C. Exh. 11).
3. A Participation Agreement for Pension Benefits (G.C. Exh. 12).

Respondent, on several occasions (on its picket signs and by testimony of union agent Lathrop) stated that Respondent did not have a dispute with Rockford Blacktop when it picketed the Dixon and Amboy jobsites.

With respect to Respondent having additional information or knowledge about the status of the owner-operators on the jobsites, the record shows that in a letter dated January 12, 1993, Stuart I. Cohen, counsel for Kasper Trucking to union president Gerald Reilly, informed Reilly that only independent owner-operators have been engaged by Kasper for the Dixon jobsite. The letter further advised Reilly that the picketing at Dixon was unlawful and if it continued Respondent would sue for damages (G.C. Exh. 16).

In a letter dated January 14, 1993, counsel for the Union, Michael O'Hara, demanded counsel for Kasper Trucking to furnish him with documentation and agreements by Kasper and the owner-operators that the latter drivers were independent contractors; and that if such documentation was not received within 48 hours, the picketing would continue (G.C. Exh. 18).

In a letter dated January 15, 1993, counsel for Kasper Trucking (Cohen) informed counsel for Respondent Union (O'Hara), as follows:

> Enclosed are copies of the Independent Contractor/Owner-Operator Agreements for the Dixon job. Each of the independent contractor/owner operators working for Kasper on the Dixon job is a member of Teamsters Local 325. In addition, each independent contractor/owner-operator involved has executed an Independent Owner-Operator Agreement with Teamsters Local 325. We do not have copies of these agreements, but you should be able to obtain copies from Local 325.

The record does not show that counsel for Respondent made any effort to obtain copies of those agreements from Local 325.

The enclosed copies of the Independent Contractor/Owner-Operator Agreements signed by the following owner-operators on the dates set opposite their respective names and six were sent to counsel for Respondent January 15, and one was sent January 18, 1993:

> David Coniglio—3–14–92 (G.C. Exh. 9(a))
> Richard B. Brown—3–13–92 (G.C. Exh. 8(a))
> Fyke Farms—8-7-92 (G.C. Exh. 7(a))
> Orval Dobbs—4–7–92 (G.C. Exh. 6(a))
> Fadness Trucking—3–17–92 (G.C. Exh. 5(a))
> John Leiser—4–13–92 (G.C. Exh. 4(a))
> Finner Trucking—3–31–92 (G.C. Exh. 3(a))
>
> signed: Kevin Finner

In a letter dated February 4, 1993, counsel for Kasper Trucking informed counsel for Respondent (O'Hara) more explicitly than he did in his letter of January 16, that the owner-operator drivers on the Amboy jobsite, which Respondent was picketing, were independent contractor owner-operator truckdrivers engaged by Kasper to perform work on the Green River Ordinance project north of Amboy. The letter named the owner-operator independent contractors as Douglas Fyke, Richard Brown, and David Coniglio, and copies of their agreement were sent to Respondent January 15 or 19. The letter also requested cessation of the picketing and informed Respondent that charges had been filed with Region 33 of the Board by Kasper Trucking and Rockford Blacktop.

Respondent did not present any evidence to show that any of the drivers on the Dixon and Amboy jobsites were employee drivers of Kasper Trucking.

In citing *Mauts & Oren*, Respondent may also be relying upon language of the court in addressing an alleged 8(b)(4) violation where the primary and secondary employer occupied a common worksite as follows:

> And there is an important distinction between *intending* to enmesh secondary employers in a dispute not their own, and acting with knowledge that secondary employers will invariably be affected by the Union's actions. Even if the Union's picketing has substantial (and foreseeable) secondary effects, that conduct does not violate section 8(b)(4) unless the employer satisfies its burden of establishing that the Union *intended* to cause disruption of the secondary employer's business.

As previously pointed out, the above language of the court was made in reference to common situs picketing, where both the primary and secondary employer occupied the same jobsite. Unlike here, only Rockford Blacktop occupied the jobsites in Dixon and Amboy, Illinois, while Kasper Trucking was not present at either jobsite, but operated miles away in Poplar Grove, Illinois. Consequently, although Rockford Blacktop need not establish Respondent intended to cause secondary disruption in work at the Dixon and Amboy jobsites, the evidence clearly shows that such disruptive result was what Respondent implied and intended, when Union Agent Lathrop called and told Rockford Blacktop (Rafferty) that in order for it to use Kasper Trucking, Rockford Blacktop had to make Kasper Trucking right with the Union (by Kasper signing a contract with Local 722). Moreover, the uncontroverted and credited evidence shows that the backhoe operator walked off the job at Dixon and Amboy, causing disruption in work of the owner-operators for Rockford Blacktop, the secondary employer. The trucks could not be loaded and the owner-operators could not haul on several days in December and January.

Additionally, Respondent was informed by letter dated January 12 and 18 and February 4, 1993, accompanied by enclosed copies of the signed Independent Contractor Agreement for Owner-Operators forwarded January 15 and 18, 1993, that the owner-operator drivers on both jobsites, were ''independent contractors'' and not ''employees'' of Kasper Trucking. Notwithstanding, Respondent apparently elected not to believe or accept the letter or the documents furnished by Kasper Trucking's attorney as sufficient evidence of the drivers independent contractor status, and it nevertheless continued to picket the jobsites of Rockford Blacktop in spite of such information. Apparently, Respondent elected to rely exclusively upon the technical filing requirements of the Illinois Commerce Commission as to whether Kasper and the drivers had not properly filed, when it elected to picket the jobsites. In so electing, I find that Respondent picketed at its peril.

Respondent's intention was made clear to Rockford Blacktop by Respondent's threatening telephone admonition to it, when Union Agent Lathrop told Rafferty that in order for Rockford Blacktop to do business with Kasper Trucking, he had to make Kasper right (by Kasper signing an agreement with the Union (Local 722)). Respondent even mailed copies of the collective-bargaining agreement along with agreements for benefits for Rafferty to sign, which Rafferty did not sign.

Based upon the foregoing essentially uncontroverted and credited evidence of record, I find that, not only were the secondary disruptive effects of the construction operation of Rockford Blacktop *foreseeable* by Respondent, but that Respondent also *intended* to enmesh secondary employer Rockford Blacktop and the Independent Owner-Operators in the dispute it had with primary employer, Kasper Trucking. This conclusion was made clear to Rockford Blacktop by Respondent's threatening telephone admonition to Rafferty, about making Kasper right with the Union, as well as by Respondent electing to ignore or discredit attorney for Kasper's letter with enclosed copies of the signed independent contractor agreements. Respondent even mailed agreements to Kasper Trucking for Kasper to sign. When the latter did not sign the agreements, Respondent continued to picket the jobsites of Rockford Blacktop, the secondary employer. This secondary conduct is the very conduct that Section 8(b)(4) was designed to prohibit.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial Order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that in support of its dispute with Kasper Trucking, Respondent Union appealed to individuals employed by secondary employer Rockford Blacktop, and Independent Contractor Owner/Operators performing hauling services for Rockford Blacktop to engage in work stoppages, by inducing and encouraging neutral individuals employed by Rockford Blacktop, and independent contractors performing hauling services for Rockford Blacktop, to cease doing business with Kasper Trucking, Respondent has induced and encouraged individuals employed by Rockford Blacktop and other independent contractor owner- operators engaged in commerce or an industry affecting commerce, to engage in a strike or refuse to perform services and thereby, has threatened, coerced and restrained Rockford Blacktop, other neutral persons, and independent contractor haulers engaged in commerce, or an industry affecting commerce, with an object to force and require Rockford Blacktop, other neutral persons, and independent contractor drivers on its jobsite, to cease doing business with Kasper Trucking, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such conduct.

On the basis of the above findings of fact and upon the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Employer Rockford Blacktop Construction Company is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Employer Kasper Trucking, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 722, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. Truck owner-operators Finner Trucking, Inc., John Leiser, Fadness Trucking, Gary Hind, Orval Dobbs Trucking, Fyke Farms, Richard Brown, and David Coniglio, contracted and referred by Kasper Trucking, Inc., to the jobsites in Dixon or Amboy, Illinois, are independent contractors and

not employees of Kasper Trucking, Inc., and also persons engaged in commerce, or an industry affecting commerce, within the meaning of the Act.

5. By engaging in the afore-described secondary conduct, Respondent has threatened, coerced, and restrained Rockford Blacktop Construction Company and other neutral persons engaged in commerce or an industry affecting commerce, by means of threatening to picket, and in fact picketing, Rockford Blacktop jobsites, with an object of forcing individuals employed by Rockford Blacktop, and Independent Contractor Owner/Operators performing hauling services for it, to engage in work stoppages.

6. That an object of the acts and conduct of Respondent Union was to force and require Rockford Blacktop Construction Company, other neutral persons, and owner-operators to cease doing business with Kasper Trucking Inc.

7. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, Local 722, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Picketing or by other means, inducing or encouraging any individual employed by Rockford Blacktop Construction Company or by any other neutral person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to refuse to perform any other services where an object thereof is to force or require the named employer, or any other person engaged in commerce or an industry affecting commerce to cease doing business with Kasper Trucking, Inc.

(b) Picketing or by other means, threatening, coercing, or restraining Rockford Blacktop Construction Company or any other person engaged in commerce or an industry affecting commerce with whom Local Union 722 has no primary labor dispute where, in either case, an object thereof is to force or require the named employer, or any other person engaged in commerce or an industry affecting commerce, to cease doing business with Kasper Trucking, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at Respondent's business offices, meeting halls, and places where notices to members are customarily posted copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver additional signed copies of said notices to the Regional Director for Region 33, for Kasper Trucking, Inc., if willing, to mail to each of the independent contractor owner-operators referred to the Dixon and/or Amboy jobsites.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, by picketing or other means, induce or encourage any individual employed by Rockford Blacktop Construction Company or by any other neutral person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to refuse to perform any other services where an object thereof is to force or require the named employer, or any other person engaged in commerce or an industry affecting commerce to cease doing business with Kasper Trucking, Inc.

WE WILL NOT, by picketing or other means, threaten, coerce, or restrain Rockford Blacktop Construction Company or any other person engaged in commerce or an industry affecting commerce with whom we have no primary labor dispute where, in either case, an object thereof is to force or require the named employer, or any other person engaged in commerce or an industry affecting commerce, to cease doing business with Kasper Trucking, Inc.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 722