

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

# Advice Memorandum

DATE: February 23, 2005

TO : Helen E. Marsh, Regional Director  
Region 3

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

SUBJECT: International Brotherhood of Electrical  
Workers, Local 43 (Demco New York Corp.) 578-4025-0100  
Case 3-CP-400 578-6001  
578-6084

The Region submitted this case for advice as to whether the Union's picketing, in excess of 30 days and with signs proclaiming an unfair labor practice strike, was in pursuit of a recognition or organization object in violation of Section 8(b)(7)(C).

We conclude that the Union's picketing had a recognition object proscribed by Section 8(b)(7)(C). The Region should therefore issue complaint, absent settlement.

### FACTS

Demco New York Corporation (the Employer) is a nonunion contractor located in Syracuse, New York, and provides electrical contracting services throughout New York state. IBEW Local 43 (the Union or Local 43) is also located in Syracuse. IBEW Local 241 is located in Ithaca.

On September 1, 2004,<sup>1</sup> John Crance, a Local 241 member, began working for the Employer on one of its projects in Ithaca. On October 5, a Local 241 representative visited Crance at his jobsite and gave him a Union sweatshirt and Union authorization cards. During this visit, an Employer foreman allegedly told Crance that he could not solicit for the Union on the jobsite.

Crance did not return to work after October 5. He did not contact the Employer when he failed to report to work the next day; when contacted by the Employer, he stated only that his child was ill and needed his attention. On October 11, Crance called and told the Employer that he was going on an unfair labor practice strike. He did not tell

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<sup>1</sup> All dates are in 2004 unless noted.

the Employer the nature of the unfair labor practices he was striking over.

On October 20, Local 43 sent a letter to its members on Local 43 letterhead informing them that it intended to begin a multi-jurisdictional, statewide organizing campaign against the Employer. Specifically, the letter stated in part, "[o]ur intention is to either persuade Demco Electric to sign an agreement and become a union contractor or make things so miserable they go out of business." The letter stated that the Union intended to commence consumer handbilling at the grand openings of several Lowe's home improvement stores that contract with the Employer for electric services.

On November 1, Local 241 filed a charge (Case 3-CA-25131) against the Employer alleging that it violated Section 8(a)(1) by telling Crance on October 5 that he could not solicit for Local 241 at the jobsite. On November 5, Local 43 began picketing several of the Employer's jobsites, with picket signs that stated:

Unfair Labor  
Practice  
"Strike"

**DEMCO**

[A letter-sized attachment to the sign stated the following]

DEMCO NY Corp.  
Has been charged with  
Violating Federal Law by committing  
Unfair Labor Practices  
against its employee  
Who exercised his right thru  
The National Labor Relations Act  
To join and assist IBEW Local 241

Brought to you by IBEW Local 241  
for informational purposes  
only  
We are not seeking to endure (sic) any  
Person to secure work or to  
Refuse to make delivery

The Union did not handbill at the premises of neutral retailers, as it had previously stated in its October 20 membership letter.

Although the picket signs identified Local 241, the evidence indicates that the picketing was solely conducted by Local 43.<sup>2</sup> Most notably, Local 43 organizers and members were present at various Employer picket lines. For instance, Union "local organizer" Patrick Costello picketed in New Hartford, New York, where he handed out his business card to an employee, telling the employee that he could call him if he had any questions.<sup>3</sup> Although Costello noted that the reason for the picketing was a dispute between the Employer and a former employee (Crance), he also stated that Demco employees were taking jobs away from union employees. Local 43 representative Tom Kurak also picketed in Cazenovia and Cicero, New York. In Cicero, pickets, who picketed daily from November 8 to December 30, wore Local 43 hats and/or clothing. In addition, pickets carried a handwritten Local 43 picket sign in early November, prior to using the Local 241 signs described above. Local 43 member Karl Hildenbrand also picketed the Employer's project in Waterloo, New York.

Furthermore, Local 43 itself does not deny that it picketed the Employer starting in November 2004, but merely argues in its January 3, 2005 position statement that, "[t]he picketing in question has at all times been in protest of Demco's unfair labor practices" and "[t]he [U]nion here did not engage in any previous picketing..."

The Union picketed from November 8 until February 2, 2005, a period in excess of 30 days. The Union was not currently certified by the Board to represent the employees of the Employer. No petition under Section 9 of the Act was filed at any time during the picketing.

The Region dismissed Local 241's Section 8(a)(1) charge against the Employer as nonmeritorious on January 31, 2005. Local 43 ceased picketing at all jobsites on February 2 and has given the Region assurances that (1) it does not intend to resume picketing over the dismissed Section 8(a)(1) charge, and (2) any future picketing of the Employer will be done strictly in accordance with the law.

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<sup>2</sup> There is no evidence that any Local 241 members, including employee Crance, participated in any of the picketing at the Employer's jobsites.

<sup>3</sup> It is unclear whether other employees were present during this conversation.

**ACTION**

We conclude that Local 43 is responsible for the picketing of the Employer's jobsites, and that such picketing, carried on in excess of 30 days without a petition being filed under Section 9(c) of the Act, had an object of forcing or requiring the Employer to recognize or bargain with the Union as the employees' representative in violation of Section 8(b)(7)(C). The Region should therefore issue complaint, absent settlement.

I. Local 43 is responsible for the picketing

Union responsibility for violations of Section 8(b) of the Act is governed by the ordinary common law rules of agency.<sup>4</sup> Agency can be proved by circumstantial evidence.<sup>5</sup>

Here, the evidence establishes that Local 43 is responsible for the picketing at the Employer's locations. First, on October 20, Local 43 announced to its members its intent to engage in economic activity in its recognitional dispute with the Employer; the picketing followed soon after. The fact that the conduct was picketing, rather than the announced consumer handbilling, does not sever a connection with the letter but may merely reflect a sudden change of tactics on the part of Local 43. Indeed, Local 43 never engaged in any consumer handbilling during the period of the picketing.<sup>6</sup> The presence of Local 43 representatives and members on various Employer picket lines, wearing Local 43 clothes and/or hats, is further evidence that Local 43 was responsible for the picketing. Indeed, the pickets initially carried a Local 43 sign at the Employer's Cicero project. Although Local 241 was referenced on the picket signs used at the other locations, that reference was not an official, pre-printed Local 241 label, but rather only a reference contained in a letter-

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<sup>4</sup> See, e.g., ILWU (Sunset Line and Twine Co.), 79 NLRB 1487, 1507-1508 (1948); IBEW Local 98 (MCF Services, Inc.), 342 NLRB No. 74, sl. op. at 3 (2004); SAIA Motor Freight, Inc., 334 NLRB 979, 979 (2001).

<sup>5</sup> See Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 748 (7th Cir. 1976), and the cases there cited.

<sup>6</sup> There is no evidence during the relevant period that any other union had announced an intention to engage in economic activity directed against the Employer.

size attachment to the signs. The fact that the same signs were used at the various picket sites further establishes a pattern of picketing that had a common purpose. Additionally, counsel for Local 43 does not dispute the fact that Local 43 picketed the Employer. Finally, there is a complete absence of evidence that Local 241, including employee Crance, participated in, or was responsible for, any of the picketing.

II. An object of Local 43's picketing was to achieve recognition or bargaining from the Employer in violation of Section 8(b)(7)(C)

Picketing by an uncertified union of an unorganized employer, which has as an object either the organization of the employer's employees,<sup>7</sup> or recognition or bargaining by the employer,<sup>8</sup> violates Section 8(b)(7)(C), when it is conducted without an election petition being filed within a reasonable period of time, not to exceed 30 days, after its commencement.<sup>9</sup> In determining whether union picketing is for an object regulated by Section 8(b)(7)(C), the Board considers the totality of the circumstances.<sup>10</sup> Recognition or organization need not be the sole object of picketing for a violation of Section 8(b)(7)(C) to arise; rather it is sufficient if it is "an" object of the picketing.<sup>11</sup> Therefore, the prohibitions of Section 8(b)(7) "do not encompass picketing which is solely in protest against

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<sup>7</sup> See e.g., Chefs, Cooks Local 89 (Cafe Renaissance), 154 NLRB 192 (1965); Hospital and Institutional Workers Union (Independent Acceptance Company), 187 NLRB 218 (1970); Knitgoods Workers' Union Local 155 (Boulevard Knitwear Corp.), 167 NLRB 763 (1967), *enfd.* 403 F.3d 388 (2d Cir. 1968).

<sup>8</sup> See e.g., Building Service Employees Union, Local 87 (Liberty House/Rhodes), 223 NLRB 30, 33-34 (1976).

<sup>9</sup> See generally NLRB v. Suffolk County District Council of Carpenters, 387 F.2d 170 (2d Cir. 1967).

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

<sup>11</sup> See St. Helens Shop 'N Kart, 311 NLRB 1281, 1286 (1993), citing Stage Employees IATSE Local 15 (Albatross Productions), 275 NLRB 744, 744-45 & n.5 (1985); NLRB v. Suffolk County District Council of Carpenters, 387 F.2d at 173.

unfair labor practices."<sup>12</sup> Conversely, ostensible unfair labor practice picketing which also has a recognitional and/or organizational object may violate Section 8(b)(7).<sup>13</sup> The burden would be on the General Counsel to prove that at the relevant times the picketing at issue carried with it the proscribed object.<sup>14</sup>

There is sufficient circumstantial evidence present in this case that the Union's asserted reason for the picketing, i.e., to protest the Employer's alleged Section 8(a)(1) violation directed against employee Crance, was pretextual, and that the sole object of the Union's picketing was to force recognition or bargaining from the Employer. Where, as here, the asserted reason for the picketing is found to be a pretext, the Board may infer a proscribed motivation for the real reason for the picketing.<sup>15</sup>

We believe that all the circumstances in this case reveal that the Union's asserted "ULP-protest" objective was a sham and the real motive was an object proscribed by Section 8(b)(7)(C).

First, Local 43's October 20 letter demonstrably establishes a recognitional object by asserting that the Union intended to persuade the Employer to sign a

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<sup>12</sup> See Waiters & Bartenders Local 500 (Mission Valley Inn), 140 NLRB 433, 437 (1963) (emphasis added). See also Plumbers Local 32 (Robert E. Bayley Construction), 315 NLRB 786, 789 (1994).

<sup>13</sup> See Plumbers Local 32 (Robert E. Bayley Construction), 315 NLRB at 789.

<sup>14</sup> See, e.g., Local Union No. 741 Plumbers (Keith Riggs Plumbing), 137 NLRB 1125, 1128 (1962); Waiters & Bartenders Local 500 (Mission Valley Inn), 140 NLRB at 438.

<sup>15</sup> See, e.g., General Laborers Local 1207 (Austin Construction Co.), 141 NLRB 283, 284 (1963); Carpenters Local Union 1260 (Seltzer Constr. Co.), 210 NLRB 628, 631 (1974), enfd. mem. 513 F.2d 637 (8<sup>th</sup> Cir. 1975) and cases cited therein (pretextual nature of union's purported area standards object buttressed other indicia of 8(b)(7) object of picketing). Cf. Shattuck-Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (where stated legitimate reason for employee discipline cannot withstand scrutiny, Board can infer proscribed motivation).

collective-bargaining agreement and become a union contractor. At no time has the Union ever disavowed this objective. A logical inference is that the Union's picketing, commenced only 19 days later, was the means chosen to achieve the objective specified in its October 20 letter, and the Union's asserted reason for the picketing was pretextual. The fact that the letter announced an intent to handbill and does not discuss picketing does not negate this conclusion. The Union never engaged in any consumer handbilling directed at customers of the Employer. These circumstances support the conclusion that the Union merely shifted its economic strategy from handbilling to picketing, in furtherance of the Union's recognitional objective announced in October.

The nature of the alleged violation in Case 3-CA-25131 and its relationship to the picketing also supports the conclusion that the real object of the picketing was recognitional. First, employee Crance was not even a member of Local 43, and failed to specify to the Employer what alleged unfair labor practice he was protesting when he notified the Employer of his asserted unfair labor practice strike. Local 241 waited until November 1, nearly a full month after the alleged October 5 violation, to file an unfair labor practice charge. Moreover, neither Crance nor Local 241 engaged in any of the picketing that took place assertedly on their behalf. Further evidence of pretext is the delay between the alleged violation and the onset of the picketing purportedly in protest. Local 43 began to picket a full five weeks after the alleged unfair labor practice occurred, and seven days after the unfair labor practice charge was filed. Such delay is indicative that the Union was simply seizing upon the alleged violation to mask or lawfully cloak its proscribed recognitional object.

In addition, the Union's multi-location picketing of the Employer over the course of several months was grossly disproportional to the alleged commission of a single, isolated Section 8(a)(1) statement by an Employer foreman regarding employee Crance's solicitation at the Ithaca jobsite.<sup>16</sup> Finally, the Section 8(a)(1) charge was

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<sup>16</sup> Cf. NLRB v. Mini-Togs, Inc., 980 F.2d 1027, 1036 (5th Cir. 1993) (employee Coler); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 570 (4th Cir. 1977); NLRB v. Cousins Associates, Inc., 283 F.2d 242, 243 (2d Cir. 1960) (minor nature of employee infraction, compared to the harsh employer discipline imposed, carries with it the strong inference of unlawful motive).

ultimately dismissed by the Region as lacking in merit. While it would not be argued that this charge was filed in bad faith, its lack of merit can be considered as indicative that the Union was looking for an excuse to picket the Employer during the investigation of the charge. The Union's cessation of picketing two days after the Region's dismissal of Local 41's charge does not, standing alone, support the conclusion that the picketing was solely to protest a perceived unfair labor practice. The Union's prompt termination of the picketing does not outweigh the totality of evidence establishing that the Union's asserted "ULP-protest" was a pretext to mask the Section 8(b)(7) recognitional object that was announced in the Union's October 20 letter to its members.

In analogous circumstances, the Board has found an 8(b)(7)(C) violation where a union's avowed "area standards" picketing object was used as a pretext to disguise a recognitional object.<sup>17</sup> Here, the demonstrably pretextual reason offered by the Union for its picketing, i.e., that it was protesting an isolated, minor Section 8(a)(1) violation against a single employee, a member of a different local union of the IBEW, allows the Board to infer another object, i.e., the proscribed recognitional object which had been announced to Local 43 members on October 20.<sup>18</sup>

We conclude that it is not determinative, as argued by Local 43 in its January 3, 2005 position statement at p. 3, that the October 20 letter to its members did not reveal a present demand for recognition from the Employer. An immediate recognitional demand is not necessary for a violation of Section 8(b)(7)(C). For instance, when a non-

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<sup>17</sup> See, e.g., Building Service Employees Union, Local 87 (Liberty House), 223 NLRB at 34, citing Retail Clerks Int'l (State-Mart, Inc.), 166 NLRB 818, 822 (1967), enfd. 404 F.2d 855 (9<sup>th</sup> Cir. 1968) (union's picketing employer's alleged failure to meet "area standards" pretextual where record showed that employer paid prevailing wage and where union made no effort to learn employer's wage rates). Accord: Automotive Employees, Laundry Drivers, Local 88 (West Coast Cycle Supply Co.), 208 NLRB 679, 679-80 (1974); Sales Delivery Drivers, Local 296 (Alpha Beta Acme Markets, Inc.), 205 NLRB 462, 473-74 (1973).

<sup>18</sup> See, e.g., Local Joint Executive Bd. of Las Vegas (Holiday Inns of America), 169 NLRB 683, 684 (1968) (union's purported picketing for maintenance of area standards pretextual, where undertaken without ascertaining whether employer actually met area standards).

certified union pickets in excess of thirty days without filing an election petition, and that picketing is in support of interim objectives such as requiring the employer to make offers of reinstatement to employees, which, if accepted, would result in a bargaining obligation, the Board may consider that picketing recognitional in violation of Section 8(b)(7)(C).<sup>19</sup> Moreover, in New Otani Hotel,<sup>20</sup> the Board left open the issue of whether picketing for an object that is ultimately recognitional, such as for a neutrality/card check agreement, would violate Section 8(b)(7) even if the Union has not made a present demand for recognition.<sup>21</sup>

[FOIA Exemption 5

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<sup>19</sup> See HERE Local 737 (Jets Services), 231 NLRB 1049, 1053 (1977) (picketing violated Section 8(b)(7)(C) in large part because the picketing for mass reinstatement, if successful, would have reestablished the prior majority status of the union thereby creating a bargaining obligation); Retail Clerks Union Local 1557 (Giant Foods of Chattanooga), 217 NLRB 4, 10 (1975) (8(b)(7)(C) violation found where union's protest of successor's alleged discriminatory refusal to hire certain employees was inseparable from enforcing successor's alleged bargaining violation).

<sup>20</sup> New Otani Hotel & Garden, 331 NLRB 1078 (2000).

<sup>21</sup> New Otani Hotel & Garden, 331 NLRB at 1081 (union's requests that employer sign neutrality/card check agreement "do not constitute a present demand for recognition" under Section 9(c)(1)(B)); id. at 1080 n.6 (citation omitted) (but "picketing with an *ultimate* recognitional objective may, in some circumstances, violate Section 8(b)(7) even though it does not seek immediate recognition and therefore would not provide a basis for processing an employer petition under Section 9(c)(1)(B)" (emphases in original)).

<sup>22</sup> Operating Engineers Local 150 (R.J. Corman Derailment Service, LLC), Cases 26-CP-93, et al., Advice Memorandum dated October 7, 2002.

picketers in R.J. Corman, was the employer's unlawful refusal to hire paid union "salts."<sup>23</sup> Advice concluded that the union's picketing to protest this action constituted indicia of a proscribed organizational object because if the picketing achieved its objective of having the salts hired, they would begin organizing. Here, however, the only union activity affected by the alleged unfair labor practice was activity by a Local 241 member. Moreover, R.J. Corman was decided in the context of a lengthy and contentious union recognition campaign, in which the union had breached a prior settlement agreement alleging previous 8(b)(7)(C) picketing. Moreover, the picket signs used in R.J. Corman contained false messages.<sup>24</sup> Because R.J. Corman was decided in the context of these unique facts, it need not be read to stand for the broad proposition that any union protest picketing of an employer's treatment of union "salts" constitutes organizational picketing within the ambit of Section 8(b)(7)(C).

Accordingly, the Region should issue complaint, absent settlement, alleging that Local 43 picketed the Employer for a recognition object proscribed by Section 8(b)(7)(C). Local 43 has now ceased picketing, and has given the Region assurances that it does not intend to picket over the now-dismissed Section 8(a)(1) charge, and that any future picketing will be lawful. [FOIA Exemption 5

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B.J.K.

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<sup>23</sup> In R.J. Corman there were pending unfair labor practice complaints that alleged that the employer had discriminatorily refused to hire the union "salts." See R.J. Corman, at p. 4, n. 4 and accompanying text.

<sup>24</sup> The picket signs falsely claimed that the union was on "strike."