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WRITERS DIRECT DIAL

October 29, 2004

Re: District Council for New York City and Vicinity,
United Brotherhood of Carpenters and Joiners of America
Comments on Report #3 – The Request System

Dear Walter:

We have reviewed your Draft Report on the Request System ("Report") and share the following comments for your consideration. The version of the Report we were able to download did not have page numbers, so we have arranged our comments according to the sections in your Report.

Introduction

The Independent Investigator ("II") accurately observed at page 9 of his First Report on the Anti-Corruption Program that the "OWL office plays the first, essential role" in fully and completely investigating corruption or other misconduct, a role that it fulfills by "handling the job dispatch requests and tracking assignments from the OWL." It is beyond cavil and your understanding is correct that the OWL office performs its function of dispatching members to jobs in a fair and non-discriminating basis. That is

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to say, it performs its dispatch and tracking functions, under the direction of the OWL supervisor, according to the approved dispatch rules. These rules were established and implemented during the UBC's supervision and Judge Conboy's monitorship, which ended in 1999. The only material changes to those rules since that time were negotiated with and approved by the Justice Department and Judge Haight as part of the December 14, 2002 Order, pursuant by which the Independent Investigator was appointed.

Among the rules governing the operation of the OWL approved as Exhibit A to the 1994 Consent Decree (cited in footnote 2 of the draft Report) was recognition of an employer's right to request specific workers from the OWL. That rule states, "Requests by an employer for specific members employed by the employer within the previous six months shall be fulfilled, as required by applicable collective bargaining agreements.

Indeed, this "request system" was recognized and monitored by IRO Conboy and his staff during his term of appointment. In Decision by the Investigations and Review Officer Decision No. 1 Regarding Job Referral Rules March 30, 1994, IRO Conboy wrote:

To summarize, there are only three instances in which an individual may be referred to a job in an order that does not reflect his or her position on the out-of-work list: (1) when there is a request for a specific individual pursuant to section.

5B of the Job Referral Rules. (2) when there is a need for an out-of-order referral in response to a lawful request for a

¹ Those changes affect neither employer requests nor the 50/50 systems at issue herein.

each Local Union office. These operations were transferred and consolidated in a newly created OWL office at the District Council in September 1998.

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minority or women employees, pursuant to Section D of this Decision or (3) when there is a need for an out-of-order referral to ensure the assignment of a qualified shop steward to a job, pursuant to Section E of this Decision.

(Emphasis added.)

Unlike the employer request system, the 50/50 system was not a part of the Referral Rules or the Consent Decree. It was a product of collective bargaining between the Union and its signatory employers contained in collective bargaining agreements over the years. Collective bargaining agreements with employer associations during 1996-2001 typically provided, with respect the 50/50 requirement and OWL referrals by the Union:

50/50 - The first carpenter on the jobsite shall be referred by the Union. The second carpenter shall be the Employers selection. The balance shall be 50% from the Union and 50% from the Employer. The Union will cooperate, in order to meet all legal requirements, and furnish qualified carpenters when requested. (Source: CBA with the Association of Wall-Ceiling and Carpentry Industries of New York, Inc., June 1, 1996-June 30, 2001, Article VI, Sec. 2).

Job Referrals - In selecting applicants from the referral list, the Union shall use the following criteria: (a) Requests from Employers for specific workmen. (b) Experience in performing the particular type of work to be done. (Source: Association of Wall-Ceiling and Carpentry Industries CBA, article VII Sec. 4, 1996-2001).³

³ The 1996-2001 Independent Building Construction Agreement covering many non-employer association signatories provided, at Article VI, Sec. 5, "In selecting applicants from the referral list, the Union shall use the following criteria:

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The contractual provisions regarding employer requests were modified in the 2001-2006 collective bargaining agreements. The employer association contracts were changed to require that requests be only for members of the New York City District Council. Non-District Council member carpenters on the job would have to be matched, one for one, from the OWL and the employer could not make a specific request for this match. Employer requests from the OWL were eliminated for the non-employer association signatory contractors to the Independent Building Construction agreement.

It is important to remember (as noted in footnote 4 of the draft Report) that while the request system has been recognized as a part of the OWL rules throughout this history, the 50/50 issue has always been purely a creature of the collective bargaining agreement. As the II has been informed during his tenure, many UBC District Councils do not have a 50/50 provision and it is inconsistent with a UBC policy, as understood by the District Council, favoring the free and unfettered employment rights of carpenters. Moreover, as a product of collective bargaining, the Union is not free, as a matter of law, to unilaterally change its provisions. Any changes must be agreed to with the signatory employers, who are under no obligation to even discuss the issue during the term of the contract.

We will offer some additional comments on the consequences of not viewing this subject in its historical context in the Conclusions section, below, because there are additional comments about it in that section of the Report.

(a) Requests from Employers for specific workmen previously employed by the employer within the previous six months;
(b) Experience in performing the type of work to be done.

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It is simply wrong for the Report to state, at the sentence ending with footnote 4, "The 50/50 rule as described in most of the CBA's is diluted by language, inserted within the last few years, permitting the contractor to satisfy the requirement of hiring 50% of the carpenters from the OWL by requesting a particular carpenter from the list..." (emphasis added). First of all the II did not study the 50/50 on any job sites prior to 2001. Indeed, the II has maintained he is not interested in "history" and only seeks to describe "the way things are operating now". Second, the anecdotal information given to the II have always indicated there was a historical lack of vigor of strict 50/50 enforcement since at least the 1990's. Third, the District Council has taken palpable steps to improve 50/50 monitoring and evaluation for shop stewards and business representatives (and *yes*, even anti-corruption committee and II analysts) by changing the shop steward report forms to make carpenter classifications as "Union" or "Company" easier to record and ultimately by bringing that function in house. "Union/Employer" classifications are now made at the OWL office and stamped on dispatch reports sent to the Local Unions each night. Further, employer requests, for any purpose, have been eliminated for independent contractors and measures have been introduced to curtail requests by contractors starting jobs under an International Agreement. Thus, rather than diluting the 50/50, the District Council has acted to strengthen it where possible, expose it as it is and highlight its practice.

The draft Report observed, with obvious disapproval, that Carpenters may be requested from the list "without regard to how long they have been on the list." There.

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has never been a rule prescribing that any Carpenter must be on the list for any period of time before being referred out for work. The District Council does not believe such a rule should be imposed, for even a day. Whether there should be a waiting time before a "lawful request" could be made for a particular Carpenter is a separate issue to be considered by the District Council, but must be evaluated in light of the legal constraints on mid-term contract changes discussed above.

These are the rules prescribed for the OWL and these are the rules the OWL office has applied to all carpenters on a non-discriminatory basis. The history of the rules' existence and the application of the 50/50 is/was known and available to all who have inquired or have been involved in the operations of the District Council. In footnote 5 "favorite" should be replaced with "any", as we have seen that manipulation of the list has not been limited to "favorites"(whatever that may mean). Moreover, the District Council disagrees that job assignments can be manipulated with "impunity". While the II has not yet issued a report on violations and their consequences, you are aware that fines and suspensions have been issued to violators after some "waivers" were offered in error, which are obviously being referred to by this comment (obvious, at least, to those attending the weekly anti-corruption committee meetings), were issued, It would be imprudent to foretell what may or may not be the conclusions of some future report, as there is already some evidence that even

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preliminary comments contained in an IT report is seized on and reported as conclusions by some members of the press.⁴

A. Employed Carpenters Putting Their Names on the OWL and Employers' After the Fact Requests.

A Carpenter who is actually working while having his/her name on the OWL, whether they are a rank and file journeyman or a shop steward, violates the OWL rules. The Report fails to reflect and would give Judge Haight and other readers of this Report the wrong impression that the District Council has not taken steps to expose and punish such violators.

To police these violations, OWL office personnel are assigned to perform random reviews of shop steward reports and check if Carpenters reported as working have their name on the OWL. Violators are routinely charged with violating Article 15 of the By-Laws and their obligation as UBC members under the UBC Constitution. The OWL supervisor has filed charges against an average of 75 Carpenters each month for these violations, since in or about 2000, years before the arrival of the II. Charged members face penalties ranging from a warning to substantial monetary fines for these violations.⁶ Additionally, shop stewards who are the subject of complaints to the anti-

⁴ Village Voice reporter, Tom Robbins, reported the results of this Report, based on the preliminary comments on this subject contained in the Its Second Report on the activities of shop steward, John Corrigan.

⁵ The exception to this rule is working at the Javits Center or exhibition jobs - a separate issue being examined by the II.

⁶ The effectiveness of the warnings and fines as a deterrent to future violations is up for debate. It may well be worth a \$300-5500 fine for a carpenter to have secured steady employment for an extended

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corruption hot-line are subjected to enhanced, "Level 5", scrutiny which evaluates their entire work history since the OWL was centralized at the District Council,

Indeed, while this enhanced scrutiny may be applied to any Carpenter, only shop stewards have thus far been subject to this enhanced scrutiny. It has become the policy of the District Council, with the II's knowledge, that a steward found to have secured their position while "riding the list" will be removed from that job and charged. A shop steward properly dispatched to a current job will not be removed as a consequence of prior infractions. This is akin to the treatment of a steward who has secured a referral with unnecessary or inappropriate job skills - as provided by the approved OWL rules.

The Draft Report also describes the Employers' practice of changing a Carpenter's description from "Company" to "Union" by having a Carpenter on the job site who arrived as a "Company man" put his name on the OWL and be requested back to the job later that day. Employers would argue that if they could have requested the carpenter in the first place, why shouldn't they be able to do so "now for then" to comply with the 50/50. There may have been some agreement with this on the part of some business representatives as well, as there have been reports that companies have been advised by some business representatives this is an appropriate way to rectify a 50/50 problem. The District Council has determined, however, that this is not an acceptable approach and has established a policy that the way a Carpenter first arrives at a job is

period of time. Barring a carpenter from the OWL for such violations, a more drastic approach, would surely require Governmental approval,

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the way he/she must stay.? Nevertheless, managing the 50/50 on a daily basis is a near impossible task to demand of business representatives in the field,

C. Failure to Even Perform Paperwork Requirements

In this section the II questions efforts to enforce or otherwise remedy recognized 50/50 violations. Our first comment is that I a Business Representative's name] response to DiFama Concrete should not be singled out for report. [The Business Agent] has been recognized by the II as a hard nosed, no nonsense Business Representative, He has worked with the same understandings and misunderstandings of sometimes ambiguous and debatable policies as other Business Representatives. It is unfair to single him out for criticism,

But perhaps more important is that [the Business Agent] is not deserving of undue criticism for this matter. [The Business Agent] urged DiFama to correct its 50/50 imbalance at its [construction] Project ... and offered it ways to do so by referring workers to the job from the OWL. Following its failure to correct the situation [the Business Agent] filed multiple grievances for the company's failure to adhere to the 50/50, claiming pay for 20 workers for 4 weeks, as well as compensation for workers who reported to work there as pure dispatches and were turned away.

Similar grievances were filed against DiFama with respect to its [other] job

Following a constructive dialogue regarding the company's hiring

⁷ Even this is just a threshold answer to a complicated issue. What should he done, for example, with a Carpenter arriving on the job as a "Union" dispatch, who gets laid-off or reassigned at some point only to return to the job later? How should a company man who is laid-off as the job slows down, then puts his name on the OWL and is lawfully requested by the company back to the job when it picks up again be treated? These arc by no means the only scenarios that complicate the application of these rules. They change daily on the hundreds of jobs staffed by the approximately 17,000 working carpenters.

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practices and the 50/50 rule between the Union and company representatives in July 2003, [the Business Agent] has reported the company left with a better understanding of its obligations has not repeated these violations. In addition, DiFama compensated seven (7) carpenters for show up time on these grievances.

Our same comment would apply to the reference to [the Business Agent] in Section II of the Draft Report. There are other examples of grievances being brought for 50/50 violations - Global Interiors and NicDrew being among them. These are two cases Union field representatives did everything right and for which they should be applauded.

Conclusion

The II concludes that while he has avoided tracing the evolution of the 50/50 rule into the present system, he is "mystified" as to the system's efficiency in realizing what he understood its goals to be. This conclusion flows logically from the false paradigm created by the avoidance of historical context. In 1998, as the OWL was being brought into the District Council, IRO Conboy wrote in his Tenth Interim Report,

The centralized computer dispatch system was put into operation in the first week of September. This is a very significant reform in the restructuring of the District Council, as the central dispatch system should conclusively end the ability of business agents to dispense jobs and control the livelihoods of rank and file carpenters according to personal preferences or corrupt motives. The system will also end the ability of racketeers and their fellow travelers to influence business agents as to how referrals are made.

Id. at p.15 (emphasis added).

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With the focus at that time on limiting business agents' control of job referrals it should not be surprising that greater control over employment decisions was shifted to employers. That was a period of institutional reform both internally, via the supervision by the UBC and externally, via the IRO and Government. This goal is reflected in the interplay of the request and 50/50 systems. Has the pendulum swung too far? Have the remedies of the 1990's created new and different problems for a new era? Surely, many business representatives urge a return of greater control over job and shop steward referrals to the Locals. But history and some more recent cases discussed in previous II reports and known to the District Council will argue against that, Yet it must also be considered, why should this industry be exempted from free market forces that exist in other industries? Why shouldn't employers be able to hire whom they believe will make them most productive and competitive - within the confines of the collective bargaining agreement?

Every referral from the OWL should be an opportunity for a carpenter to impress a new employer and secure for his or herself steady employment with that company - being ever mindful of their continuing obligation to uphold the contractual standards negotiated by the Union on their behalf. Perhaps the answers to this dilemma lie in better policing of the core aspects of the collective bargaining agreement, proper wages and benefits and the reporting of same, than in which Carpenters are on which jobs.

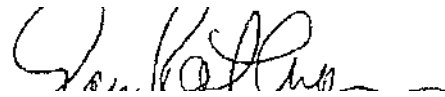
The contradictions of purpose evident in the analyses of the interplay of these two systems are manifest by the II's agreement with shop steward John Corrigan's view that

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the request system "works to the serious detriment of carpenters who are either new or who have not developed contacts in the industry." It is this Carpenter about whom the TT wrote as an abuser and deceiver of the OWL, who capitalized on his own contacts and experience in the industry to gain job assignments at the expense of his brother and sister carpenters waiting their turn on the OWL.

The issues and comments raised by the Independent Investigator continue to be matters of great concern and deliberation by the District Council as it evolves to confront and resolve the ever-changing circumstances of the workplace. The District Council stands ready to lead the discussions of these issues and the implementation' of their solutions.

Very truly yours,



GARY ROTHMAN

GR/yr

cc: Michael J. Forde, EST
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