American Radio Association, AFL-CIO *and* Watters Marine, Inc. Case 21-CP-589

September 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 26, 1981, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Respondent, the Charging Party, and the Intervenor Western Hemisphere Corporation filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party and the Intervenor have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Charging Party and the Intervenor have requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties. Additionally, on August 7, 1981, the Charging Party moved to reopen the record. The Charging Party contends that since the case was heard by the Administrative Law Judge it has hired another radio operator, that an election was held in Case 32-RC-1385, and that a Certification of Representative has been issued by the Regional Director for Region 32 to the Marine Engineers Beneficial Association as the bargaining representative. The Respondent, American Radio Association, opposes the motion, contending that the certification is invalid and that further it is irrelevant to the instant case. The Intervenor filed a response to the Respondent's opposition. The validity of the certification is an issue not properly before us and upon which we are not passing. In any event, the certification occurred subsequent to the events herein and therefore does not affect the outcome of this case. Accordingly, the Charging Party's motion to reopen the record is hereby denied.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard by me in Los Angeles, California, on November 4, 5, and 6, 1980. The charge was filed on August 6, 1980, by Watters Marine, Inc. The complaint issued on August 29, 1980, alleging that American Radio Association, AFL-CIO, herein called ARA, violated Section 8(b)(7)(A) of the National Labor Relations Act, as amended. By Order dated October 24, 1980, the Acting Regional Director for Region 21 of the Board granted the motion of Western Hemisphere Corporation to intervene in this case and to participate as if it were a party.

ISSUES

The threshold issue is whether recognition picketing in a one-person bargaining unit can come within the proscription of Section 8(b)(7)(A) of the Act.

If that question is answered in the affirmative then the issue is raised as to whether a union can defend against an allegation that it violated Section 8(b)(7)(A) of the Act by raising matters that it had unsuccessfully raised in 8(a)(1), (2), (3), and (5) charges that it had filed. If such defenses can be raised then issues are presented relating to successorship, joint employer, continued recognition of the picketing union, unlawful assistance to the incumbent union and discrimination based on union membership.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Watters Marine, ARA, and Western Hemisphere.

Upon the entire record[1] of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Watters Marine, a California corporation with its principal office in Santa Cruz, California, is engaged in the operation of an oceangoing maritime vessel, the *Lion of California*, which transports petroleum and petroleum products for customers of Western Hemisphere, between various seaports on the West Coast of the United States. During the year immediately preceding issuance of complaint, Watters Marine performed services valued in excess of $50,000 for customers located within California, which customers, during the same period of time, performed services valued in excess of $50,000 for customers located outside of California. The complaint alleges, the answer admits, and I find that Watters Marine is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, the answer admits, and I find that ARA and Marine Engineers Beneficial Association are, and each is, labor organization within the meaning of Section 2(5) of the Act.

[1] Certain errors in the transcript are hereby noted and corrected.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

This case involves the alleged unlawful picketing of Watters Marine by ARA for recognition in a one-person bargaining unit. That one person is the radio officer aboard the *Lion of California*. That ship is operated under a management contract by Watters Marine, the Employer and Charging Party in this case. Watters Marine only operates that one ship and that ship only has one radio officer. None of the parties disputes the fact that there is a one-person bargaining unit. The uncontested testimony of Watters Marine's president, Duane Watters, establishes that Watters Marine has employed only one radio officer since it went into business, except for temporary relief for that radio officer when he had to testify at this hearing. As is set forth more fully below, the contract with the incumbent union is in a unit consisting of "the Radio Officer on the tanker 'Lion of California.'" However, the dispute which led to this litigation is very wide in scope and involves a number of unions. Some background is therefore needed to put the case in perspective.

The Marine Engineers Beneficial Association, herein called MEBA, in addition to representing marine engineers, represents licensed deck officers on various vessels. The International Organization of Masters, Mates and Pilots, herein called MM&P, is a rival labor organization that also represents licensed deck officers on certain vessels. Two smaller unions, both of which represent radio officers[2] have become involved in that rivalry. They are the ARA, which is the Respondent herein, and the Radio Officers Union, herein called ROU. The ARA is in the process of merging with MM&P while ROU is in the process of merging with MEBA. The ROU and MEBA pension plans have already been merged.

When Watters Marine took control of the *Lion of California* pursuant to a management contract on August 2, 1980, the ship was manned by a master and mates (also called licensed deck officers) who were members of MM&P, one radio officer who was a member of ARA, four marine engineers who were members of MEBA, and 24 unlicensed personnel who were members of Sailors Union of the Pacific, herein called SUP. When Watters Marine took over the vessel it hired the existing crew except for the master, mates, and radio officer, all of whom were summarily ordered off the ship. Watters Marine openly admits that the licensed deck officers were replaced by MEBA members because it had a prehire contract with MEBA. It was stipulated that the master, mates, and marine engineers were supervisors within the meaning of the Act. There is no assertion that Watters Marine's actions with regard to them were in any way unlawful. However, the radio officer who was replaced was an employee within the meaning of the Act. Watters Marine contends that it hired a new radio officer without any regard to union considerations, that that radio officer authorized MEBA to represent him, and that it executed a contract with MEBA covering that radio officer. ARA contends that Watters Marine lumped the radio officer's job together with those of the licensed deck officers and that Watters Marine's actions with regard to the radio officer were unlawfully keyed to union membership.

ARA thereafter picketed for what it contended to be continued recognition as the representative of the radio officer. The General Counsel contends that Watters Marine has a lawful contract with MEBA covering the radio officer, that no question concerning representation can be raised and that ARA's picketing was for initial recognition and was therefore in violation of Section 8(b)(7)(A) of the Act.

B. *The Sequence of Events*

1. The operation of the ship by Phillips Petroleum

Tosco Corporation refines and distributes petroleum products. Western Hemisphere is a wholly owned subsidiary of Tosco and acts as Tosco's shipping arm. Western Hemisphere owns only one vessel, the *Lion of California*, which is used to transport petroluem products along the West Coast.

Prior to August 2, 1980, when Watters Marine took control of the *Lion of California*, that ship was operated by Phillips Petroleum Company pursuant to a management contract with Western Hemisphere. Under that management contract, Phillips Petroleum was responsible for hiring and paying the crew, purchasing supplies, and maintaining the ship. Phillips Petroleum received a management fee for managing the vessel. It sent a periodic statement to Western Hemisphere setting forth expenses incurred in managing the vessel including labor costs, and Western reimbursed it for those expenses. Western Hemisphere decided for whom the ship would transport petroleum products and also scheduled the movement of the ship. Phillips Petroleum was responsible for the day-to-day operation of the vessel as well as for handling labor grievances and negotiating with the various unions. The management contract provided that changes in wage scales would be submitted by Phillips Petroleum to Western Hemisphere for written approval before being put into effect. That provision was never honored. Phillips Petroleum submitted labor contracts to Western Hemisphere only after they had been executed and only for file purposes. The management contract specifically provided that the crew would be employees of Phillips Petroleum and that Phillips Petroleum would negotiate labor contracts directly with the various unions.

Phillips Petroleum negotiated contracts with SUP as the representative of the unlicensed personnel, with MEBA as the representative of the marine engineers, with ARA as the representative of the radio officers, and with MM&P as the representative of the master and mates. With regard to the radio officers, the contract, which was effective by its terms from November 1, 1978, to November 1, 1981, covered a two-ship bargaining unit.[3] One of the ships was the *Lion of California* and the

[2] The parties stipulated and I find that such radio officers are employees within the meaning of the Act.

[3] The contract indicates that the ARA was certified by the Board on March 2, 1950, as the bargaining representative of all licensed radio officers employed by Phillips Petroleum on its oceangoing tankers operating out of Pacific Coast ports.

other was a ship owned by Phillips Petroleum named the *Phillips Washington*. Phillips Petroleum employed three radio officers. One worked on each of the ships and one filled in during vacations, illnesses, and other absences. The three radio officers were sometimes rotated from one of the ships to the other.

2. The preparation for the assumption of control by Watters Marine

Before June 16, 1980, Duane Watters was director of marine operations for Phillips Petroleum. His headquarters was Bartlesville, Oklahoma. Watters had some responsibility for the operation of the *Lion of California*. He signed the union contracts on behalf of Phillips Petroleum.

Sometime in the early spring of 1980 Western Hemisphere decided that it was going to cancel Phillips Petroleum's management contract. Ronald Martin, vice president and general manager of Western Hemisphere, approached Duane Watters with the suggestion that Watters leave Phillips Petroleum and set up his own concern to manage the *Lion of California*. Watters agreed to the proposal. He left his employment with Phillips Petroleum and moved from Oklahoma to Santa Cruz, California, where he incorporated on May 20, 1980, as Watters Marine. Duane Watters and his wife are the owners, officers, and board of directors of that corporation.

On May 30, 1980, Western Hemisphere entered into a management contract with Watters Marine covering the operation of the *Lion of California*. The management contract was to become effective August 1, 1980. Phillips Petroleum's management contract was to end on that date. Watters Marine's responsibilities under its management contract were substantially the same as those that Phillips Petroleum had been under the previous management contract. Watters Marine's original management contract had a provision similar to that contained in the Phillips Petroleum contract relating to prior approval by Western Hemisphere before wage increases were put into effect. As with Phillips Petroleum, that clause was never enforced. In mid-July 1980, Western Hemisphere and Watters Marine agreed to delete that clause from the contract. That agreement was not actually typed and sent to Duane Watters until August 28, 1980.

Duane Watters testified that at the time he signed the management contract he had not yet made a decision whether to retain the personnel then working on the *Lion of California* or whether to hire new personnel.

On or about July 8, 1980, John Nelson, the administrative superintendent for Phillips Petroleum, who was primarily responsible for supervising the operation of the *Lion of California*, told Ralph L. Baird, the West Coast representative for ARA, that Duane Watters would be taking over the *Lion of California* on or about August 1, 1980. Prior to that Baird had received a letter dated June 27, 1980, from Phillips Petroleum saying that the Phillips Petroleum management contract for the *Lion of California* was ending. Nelson gave Baird Duane Watters' telephone number, and Baird called Watters the same day. Baird asked Watters if Watters expected to continue with the ARA and Watters replied that he would if he could have the Phillips Petroleum agreement. Baird replied that Watters could have that agreement. Baird asked Watters whether there was anything that Watters wanted that was special or outside the agreement and Watters answered that he was satisfied if he could have the Phillips Petroleum agreement. Watters said that he would call Baird in a few days to determine where they should meet to conclude the business of signing the agreement.

Baird prepared a contract for Watters to sign. It was the same as the Phillips Petroleum contract except for the names and dates.

On or about July 14, Baird called Watters and told him the contract was ready. Watters indicated his approval and said that he would call in a few days to sign the agreement. In that conversation, they also discussed benefits that would apply to Kerby Elton. Elton was the radio officer aboard the *Lion of California*. Since about 1958, Elton had worked about half his time aboard the *Lion of California*[4] and about half aboard the *Phillips Washington*. He was the ARA radio operator who was replaced on August 2, 1980, by George Callas, who was an ROU member represented by MEBA. Baird and Watters discussed the fact that the Phillips Petroleum health plan would no longer be in effect. Baird informed Watters that the union welfare program required a person to be employed for 360 days before full benefits including hospital coverage were operative. Baird suggested that they use Kaiser to cover Elton immediately. He asked Watters whether Watters would pay the $60-a-month Kaiser fee on behalf of Elton for some time until they could resolve the matter of union coverage. Watters said that he would be glad to. They ended the conversation by agreeing to meet to sign the agreement on July 18, 1980.[5] Watters did not contact the union on July 18 so Baird telephoned him on July 19. Watters told Baird that there was sickness in his family and he would come in as soon as he could.[6] Baird called Watters again on July 29 but was unable to reach him. Watters never did sign the agreement. Instead he signed an agreement with MEBA and the ARA radio officer was replaced by an ROU radio officer who was represented by MEBA.

[4] During some of those times, the ship now known as the *Lion of California* had different names and owners.

[5] On July 17, 1980, Duane Watters had a meeting with John Nelson, the administrative superintendent for Phillips Petroleum who was in charge of the day-to-day operation of the *Lion of California*. Before that meeting, a number of the ship's personnel had asked Nelson about the benefits that would be carried over after the transfer of management and about the unions that would be involved after the transfer. Nelson asked Watters if Watters was negotiating with the SUP, ARA, MEBA, and MM&P. Watters replied that he was. Nelson asked what the agreements were like and Watters replied that they were similar to the ones that Phillips Petroleum had. These findings are based on the testimony of Nelson. To the extent that Watters' testimony differs from that of Nelson, I credit Nelson.

[6] Sometime in July 1980, Duane Watters had a meeting with Ronald Martin, the vice president and general manager of Western Hemisphere. Watters said that he was considering the possibility of changing the relationships with some of the unions that had represented employees under the Phillips Petroleum agreement. He spoke about the possibility of utilizing MEBA as the representative for all the supervisory personnel. They discussed the possibility of a vertical contract in which one union would cover the whole ship. Watters said that if he had fewer players the unions could not keep chasing him around. Martin told Watters to go ahead and do whatever he thought was best.

The findings with regard to the conversations between Baird and Watters are based on the testimony of Baird. Watters' testimony concerning those conversations was very different than Baird's. Watters testified: Baird asked Watters whether it was true that Watters was going to assume operation of the *Lion of California* and Watters said that it was true; Baird asked about the Phillips Petroleum position with regard to certain medical problems and Watters replied that he did not know; there was no mention of Elton in the conversation; and Baird did not ask Watters to recognize or sign a contract with ARA. Watters also testified that there was a second conversation with Baird a few days later when Baird again asked about the Phillips medical program and asked whether it would be extended to the people after the takeover by Watters. Watters averred that he answered that he did not know.

I do not believe that Watters was a candid witness. ARA was the longstanding representative of the radio officer aboard the *Lion of California* and it has given rather dramatic indications that it fully intends to continue to be the representative. Both Watters and Baird agree that there was a conversation between them a matter of weeks before Watters' takeover of the *Lion of California*. It is most difficult to believe Watters' assertion that Baird said nothing about continued recognition or a contract with the ARA. This is particularly true in the context of a situation where it was widely known in the industry that there were serious jurisdictional conflicts between the ARA which was in the process of merging with MM&P and the ROU which was in the process of merging with MEBA. In addition, I believe that Watters was less than straightforward in his testimony concerning his hire of radio officer Callas to replace Elton. As is set forth in more detail below, his attempt to give the impression that he was innocent of knowledge with regard to union considerations surrounding the hire of Callas was so unconvincing that it shed doubt on his candor generally. Watters was the one who told Callas to meet him at the MEBA offices.

On July 18, 1980, Kerby Elton, the radio operator aboard the *Lion of California*, called Duane Watters on the telephone. As radio officer, Elton was responsible for payroll and other bookkeeping work. Elton asked Watters whether there was going to be any change in the paperwork after Watters took over the vessel and whether they were going to continue to use the Phillips Petroleum forms. Watters replied that he did not plan to use any new forms at that time. Elton asked Watters whether company benefits would be comparable to those given by Phillips Petroleum. Watters replied that there would be no benefit plans other than the union medical.[7]

3. The hiring of radio officer Callas and the bargaining contracts between Watters Marine and MEBA

Sometime prior to July 31, 1980, Watters agreed to enter into a bargaining contract with MEBA that would cover the licensed deck officers as well as the marine engineers aboard the *Lion of California*. MEBA already represented the marine engineers and as a result the marine engineers aboard the *Lion of California* continued to crew the vessel after Watters Marine took control. The agreement led to the replacement of the MM&P licensed deck officers by MEBA deck officers.

Duane Watters testified that he did not discuss the radio officer position with MEBA during the conversations that preceded July 31, 1980. In the light of the working relationship between MEBA and ROU as well as the circumstances surrounding the hire of Callas, I am unable to credit that testimony.

Sometime in July 1980, MEBA Business Agent Chester Ferguson called ROU Business Agent St. Clair Barrymore. Ferguson told Barrymore that Watters was favorably considering the proposal that MEBA represent the licensed deck officers. Ferguson suggested that Barrymore have some of his members apply for the radio officer job. Barrymore then called George Callas, who had been a member of ROU for the last 10 years.[8] Barrymore told Callas that the position of radio officer for the *Lion of California* was up for grabs. He gave Callas Watters' address and suggested that Callas write to him. On July 26, 1980, Callas wrote to Watters applying for the job. Some five other radio officers also wrote applying for the same job. Watters attempted to phone all the applicants, and he spoke to some of them. On June 30, 1980, Duane Watters called Callas on the telephone and spoke to him about the job and Callas' availability. Watters said that he would call him back later that day. Watters then spoke on the telephone to some of the other applicants. Later that day Watters called Callas again and offered him the job of radio officer aboard the *Lion of California*. Callas accepted. Watters had an appointment to be at the MEBA headquarters in San Francisco the following day, and Callas lived in the San Francisco Bay Area. Watters asked Callas whether Callas could meet him in San Francisco the next day and they agreed that Watters would call Callas from San Francisco and let him know where to meet.

Later that day, July 30, 1980, MEBA Business Agent Ferguson received a call from ROU Business Agent Barrymore. Barrymore said that one of his members, Callas, had been hired by Watters. Ferguson said that he wanted to go for the whole thing—deck, engine, and radio, and Barrymore replied "have at it." Barrymore said that he would encourage Callas to authorize MEBA to represent him in dealing with Watters. Thereafter, Barrymore asked Callas whether it would be all right with him if MEBA represented him. Barrymore told him that ROU and MEBA were merging. Callas replied that it was agreeable to him.

On July 31, 1980, Duane Watters went to San Francisco to review the MEBA contract covering marine engineers and licensed deck officers. He arrived at the MEBA office in San Francisco about 9:30 a.m. and discussed changes in the proposed contract with MEBA Business Agent Chester Ferguson. They agreed on the changes. While Watters was waiting for the secretarial

[7] These findings are based on the testimony of Elton. To the extent that Watters' testimony differs from that of Elton, I credit Elton.

[8] It is likely that he also called other members of ROU, but there is no evidence in the record with regard to such calls.

work to be done, he called George Callas on the telephone and asked Callas to meet him at the MEBA office. Callas arrived at the MEBA hall about 10:30 or 11 a.m. He spoke to the receptionist and asked to talk to Watters. Ferguson then approached Callas and asked to talk to him when Callas was through speaking to Watters. Callas agreed to do so. Callas then went into an office where Watters was waiting for him. They spoke about the operation of the ship and Callas signed the necessary employment papers. Callas then went to Ferguson's office. Ferguson asked Callas to sign a pledge card authorizing MEBA to be his bargaining agent. Callas said that it was fine with him because Barrymore, the business agent for ROU, had told him about the situation and he was in favor of a merger of the ROU and MEBA. Ferguson signed the authorization card.[9]

At or about 3 p.m. on July 31, 1980, Ferguson showed Watters the union authorization card that had been signed by Callas and told Watters that Callas had agreed to being represented by MEBA. Ferguson said that Watters would have to sign an agreement with MEBA covering the radio officer aboard the *Lion of California*. Watters agreed and they both signed a memorandum of agreement covering the radio officer aboard the *Lion of California*.

The agreement reads: "Having been presented with proof of such representation, the Company recognizes the MEBA as the sole representative for collective bargaining of the Radio Officer on the tanker 'Lion of California.'" The memorandum of agreement, which was by its terms effective until September 1, 1981, provided that wages, hours, fringe benefits, and other working conditions were to be the same as in those provided for tanker radio officers in an agreement dated June 16, 1978, between ROU and companies owning or operating oceangoing U.S. flag tanker vessels. Though Watters signed the memorandum which incorporated the terms of the ROU contract, he was not shown and he had never seen that contract. He did not even discuss with Ferguson the wages and other provisions contained therein.

4. The replacement of radio officer Elton

Watters Marine was scheduled to take over the operation of the *Lion of California* when it arrived in Los Angeles on August 1, 1980. The ship arrived shortly before midnight on August 1 but was not secured until the early morning hours of August 2, 1980. At that time, Duane Watters and MEBA Business Agent Ferguson boarded the vessel. Watters told the licensed deck officers that their jobs were being filled with MEBA members and that they should leave the vessel. Radio officer Elton overheard part of the conversation and asked Watters how it would affect him. Watters told him that he had found a replacement for him. Elton was told to leave the vessel. Elton replied that he was going to contact his union representative.[10] After some delay the licensed deck officers and Elton left the vessel. The 24 unlicensed personnel, all of whom were members of SUP, continued to work on the vessel as employees of Watters Marine. Watters testified that he decided to hire those unlicensed crew members on August 2 and that he had not indicated to any of them before then that he had wanted to hire them. On August 2, Watters gave a pad of employment application forms to Paul Dempster, an official of SUP, and Dempster distributed them among the unlicensed crew. Thereafter, Watters Marine recognized SUP as the representative of those employees. The four marine engineers continued to work on the vessel as employees of Watters Marine. The four licensed deck officers who left the vessel were replaced by MEBA members who had been referred to him by MEBA and who had signed employment applications on August 1, 1980. Radio officer Elton, who had been represented by ARA, was replaced by radio officer Callas who was a longstanding member of ROU and who had authorized MEBA to represent him.

A brief recapitulation of some of the facts puts Elton's discharge in perspective. ARA had represented the radio officer aboard the *Lion of California* for many years. Duane Watters, when he was director of marine operations for Phillips Petroleum was fully familiar with the situation aboard the *Lion of California* and also with the claimed jurisdictions of the various labor organizations in that industry. ARA was in the process of merging with MM&P. ROU was in the process of merging with MEBA. In mid-July 1980, Watters reached an agreement with ARA to execute a bargaining agreement with ARA that would apply to his operation of the *Lion of California* when he assumed that role on August 1. That agreement constituted recognition of ARA as the representative of the radio officer aboard the *Lion of California*. In discussing the agreement, Watters agreed to pay the costs of a Kaiser health plan for Elton who was the radio officer aboard the *Lion of California*. Implicit in that agreement was the understanding that Elton would remain as radio officer after Watters Marine took control of the ship. After agreeing to sign the contract with ARA, Watters found excuses not to sign the agreement. At that time, he was negotiating with MEBA. Those negotiations with MEBA led to Watters' decision to replace the licensed deck officers of the *Lion of California* with MEBA members. However, MEBA and ROU were tied together. They were in the process of merging and their pension plans had already merged. MEBA and ROU got together in an attempt to have an ROU member replace the ARA radio officer. A MEBA official suggested that ROU members apply for the job. ROU had radio officer Callas apply for that position. Watters asked Callas to come to the MEBA office to speak to him and while Callas was there a MEBA official obtained an authorization card from him. Shortly thereafter, the authorization card was shown to Watters and Watters recognized MEBA as the representative of the radio officer on the *Lion of California*. I do not believe that Watters called Callas to the MEBA office simply as a casual matter of convenience. That call indicated that Watters knew what was going on and was

[9] Callas testified that it was his understanding that MEBA and ROU were working together so that if jobs opened through MEBA, ROU would be supplying the radio officers.

[10] The findings relating to the conversation between Elton and Watters are based on the testimony of Elton. To the extent that Watters' testimony differs from that of Elton, I credit Elton.

privy to a previously arranged plan to set up a pretext to disguise the fact that an ROU member represented by MEBA would replace an ARA radio officer. That conclusion is fortified by the manner in which Watters handled the replacements when he boarded the ship on August 2. Watters knew that Elton wanted to remain on the job. He had already agreed to pay the cost of a Kaiser health plan for Elton.[11] Yet Elton was summarily ordered off the ship together with the licensed deck officers. The unlicensed personnel, who along with Elton were employees within the meaning of the Act, remained on board and became employees of Watters Marine. Elton was treated in a strikingly disparate manner. I find that Elton was not considered for employment or employed by Watters Marine because he was a member of ARA and that Callas was hired to replace Elton as radio officer aboard the *Lion of California* because Callas was a member of ROU which was in the process of merging with MEBA. From all of the above, it follows that Watters Marine did not lawfully recognize MEBA as the representative of the radio officer aboard the *Lion of California* in accordance with the Act.

5. The picketing

On August 5, 1980, the *Lion of California* docked at San Pedro, California, to unload oil. The ship was picketed at that location with signs reading "Unfair. American Radio Association/AFL-CIO Lockout of their jobs. SS *Lion of California*. This picket is directed against SS *Lion of California* only." The new captain of the *Lion of California*, William Gibbs, asked a picket who seemed to be in charge the reason for the picketing. The picket told him that the picketing was for recognition and because a man had been locked out of his job. Because of the picketing, the dockside valves at the port were closed down and the bulk of the ship's cargo could not be unloaded. The ship moved on to San Francisco where it arrived on August 8, 1980. When it entered San Francisco Bay, two picket boats appeared carrying the same signs that had been used in San Pedro. The pilot refused to pilot the ship and the cargo could not be delivered. The ship then went to Eliot Bay in Seattle, Washington, where it arrived on August 11. Picket boats displaying the same picket signs were there when the ship arrived. The picket boats remained there until a temporary restraining order was served on August 27, 1980.

ARA does not contest the fact that it was responsible for the picketing. It takes the position that it was seeking continued rather than initial recognition.

6. The unfair labor practice charges filed by the ARA

On August 11, 1980, ARA filed charges against Tosco, Watters Marine, and Western Hemisphere in Cases 21-CA-19397, 21-CA-19398, and 21-CA-19399, respectively. Each of the charges alleged that the Employer violated Section 8(a)(1), (2), (3), and (5) of the Act by unlawfully withdrawing recognition and refusing to bargain with ARA, by discriminatorily locking out and discharging members of ARA, and by unlawfully assisting MEBA and ROU by entering into an unlawful prehire contract. Each charge alleged that the Employer was bound by a collective-bargaining agreement with the ARA.

By letters dated August 25, 1980, the Regional Director for Region 21 notified the ARA that he was refusing to issue complaints on those charges. The ARA appealed the action of the Regional Director to the General Counsel's Office of Appeals. On October 16, 1980, the Office of Appeals affirmed the action of the Regional Director.

The parties stipulated and I find that the ARA has not filed a petition for an election among the radio operators of Watters Marine and that no certification has issued by the Board concerning radio operators of Watters Marine.

C. *Analysis and Conclusions*

A number of questions are presented in this case. One key question is whether the ARA can raise defenses keyed to joint employer, successorship, refusal to bargain, discharge of its members, and assistance to MEBA where those defenses relate to matters which have been previously raised by the ARA in charges which were later dismissed by the General Counsel. However, there is one threshold question which must be answered before the General Counsel's *prima facie* case, the availability of defenses to the ARA, or the merits of the ARA's defense can even be considered. That concerns the one-person unit that is present in this case. Assuming for the purposes of argument that the General Counsel has established everything that he sought to and that the ARA had no defense, could a violation of Section 8(b)(7)(A) exist where the picketing was directed toward recognition in a one-person bargaining unit? As is fully set forth below, I believe no such violation can exist in such circumstances. Therefore all the other questions raised are moot.

Section 8(b)(7)(A) reads:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

[11] In addition, Elton had asked him questions about forms to be used after Watters Marine took over control. Those questions only had meaning in the context of an assumption by both Watters and Elton that Elton would continue to fill out forms on board the *Lion of California* after Watters took control.

Section 8(b)(7)(A) along with Section 8(b)(7)(B) and (C) of the Act are inseparably intertwined with concepts relating to the Board's election procedure and an employer's duty to bargain. Indeed, the language of the Act incorporates such concepts. Section 8(b)(7)(C) proscribes picketing for recognition where the picketing union has not filed a petition for an election within a reasonable time not to exceed 30 days from the commencement of the picketing. For the picketing to be lawful the union must invoke the Board's election processes within a reasonable time. Under Section 8(b)(7)(B), a union may not picket where a valid election has been conducted under the Act within the preceding 12 months. Under Section 8(b)(7)(A), recognition picketing is unlawful where the employer has lawfully recognized in accordance with the Act another labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of the Act. The provision relating to lawful recognition of another labor organization in accordance with the Act is keyed to situations where the employer has a duty to bargain with the other labor organization. The provision relating to the question concerning representation is geared to the Board's contract-bar rules.[12] If an employer lawfully recognizes a union and has a contract with that union which bars an election, a rival union cannot obtain a Board election and cannot picket for recognition. A contract which because of its length or for any other reason does not bar an election proceeding[13] may not be used as a predicate for banning a rival union's picketing.

Section 8(b)(7)(A) of the Act proscribes recognition picketing where the employer has lawfully recognized another union and no question concerning representation can be raised. Those two concepts are interdependent. Lawful recognition is not in itself a sufficient basis for proscribing the picketing. The lawful recognition must be combined with a contract bar or an obligation to bargain with the recognized union which prevents a question concerning representation from being raised and therefore precludes the picketing union from obtaining access to the Board's election process. If there is no contract bar or bargaining obligation to prevent the question concerning representation from being raised then a union can lawfully picket for a reasonable time not to exceed 30 days. If during that time the picketing union does not file a petition for an election, the picketing can be proscribed by Section 8(b)(7)(C) of the Act. Section 8(b)(7)(B) comes into play if the union files a petition for an election and then loses that election. When read together Section 8(b)(7)(A), (B), and (C) is an attempt by the legislature to reconcile and seek a balance between legitimate interests. Those include the interest of the union in picketing for recognition; the interest of an employer and union in enjoying industrial stability where the employer has lawfully recognized the union and because of that recognition a rival union cannot raise a question concerning representation and obtain a Board election; the interest of all parties in honoring the results of a Board election for a given period; and the interest of the employer, the employees, and the public in requiring orderly election procedures rather than prolonged recognition picketing. The accommodation of those interests sought by Section 8(b)(7) cannot be achieved in a situation where by operation of law there can never be a bargaining obligation, where a valid question concerning representation can never be raised, and where a Board election can never be held. That is the situation that exists where there is a one-person bargaining unit.

These broad statements of law do not necessarily apply in a situation where a union's inability to raise a question concerning representation and to obtain a Board election is caused by its own action rather than because of Board policy. In *Drivers, Chauffeurs & Helpers, Local Union 639 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Dunbar Armored Express, Inc.)*, 211 NLRB 687 (1974), the Board found that a union violated Section 8(b)(7)(C) of the Act where it picketed for recognition in a bargaining unit of guards. There the union could not obtain a Board certification in the guard unit because of its own decision to admit nonguard employees to membership. That case involved a situation that is distinguishable from the instant one. Where a one-person unit is involved, a picketing union cannot be said to have lost its opportunity to raise a question concerning representation because of its own actions. As the Board held in the *Dunbar* case:

> Since Respondent's inability to obtain a Board certification in this guard unit results from its own action and not from any policy of the Board, this case is distinguishable from *Teamsters Local Union No. 115 (Vila-Barr Company)*, 157 NLRB 588, which involved picketing where there was only a one-man unit. Thus, in *Vila-Barr* the Board recognized that the union there was "disabled through no fault of its own from invoking the Board's election processes" because the Board would not entertain a representation petition for a one-man unit. In this case, the Union's inability to utilize the Board's election processes in this guard unit does result from Respondent's practice of admitting nonguards to membership. Furthermore, unlike the one-man unit in *Vila-Barr*, the unit here can be petitioned for and an election held if the petition is filed by a labor organization which admits only guards to membership.

A union may lawfully represent an employee in a one-employee unit. *Louis Rosenberg, Inc.*, 122 NLRB 1450, 1453 (1959). However, the Board has long held that it will not certify a union as the representative of an employee in a one-person unit. As the Board held in *Luck-*

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[12] As the Board held in *International Hod Carriers Building and Common Laborers Union of America, Local 840, AFL-CIO (Charles A. Blinne, d/b/a C. A. Blinne Construction Company)*, 135 NLRB 1153, fn. 5 (1962):

> subparagraph [8b7] (A) affords protection to lawfully recognized unions which do not have certified status, and also incorporates, in effect, the Board's contract-bar rules relating to the existence of a question concerning representation.

[13] See *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990 (1958); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

enbach Steamship Company, Inc., 2 NLRB 181, 193 (1936):

> The National Labor Relations Act creates the duty of employers to bargain collectively. But the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify where only one employee is involved. This conclusion does not mean that a single employee may not designate a representative to act for him; he had such a right without the Act, and the Act in no way limits the right. By the same token, this conclusion in no way limits the protection which the Act otherwise gives such an employee. Nor will the Board find that an employer has unlawfully refused to bargain where the bargaining unit consists of one person. *Foreign Car Center, Inc., formerly Bob Snead, Inc.*, 129 NLRB 319 (1960).

No cases have been cited to me, and I have found none where a one-person bargaining unit problem arose in the context of an 8(b)(7)(A) case. However, the Board has considered such matters with regard to Section 8(b)(7)(C). In *Teamsters Local Union No. 115 (J. Stanley Thackerah and J. Charles Barr t/a Villa-Barr Company)*, 157 NLRB 588 (1966), the Board held:

> This statutory plan, designed to substitute Board elections for picketing of unreasonable duration as a means for resolving disputes over representation, is not applicable, however, where, as here, a one-man unit is involved. This is true because the Board has held that it is not empowered to certify a bargaining representative or by other procedures require bargaining in a unit comprising one employee and it therefore does not direct elections under Section 9(c) or 8(b)(7)(C) in such units.[5] In view of this construction of the Board's powers, a construction well established at the time Section 8(b)(7) was enacted, a union claiming recognition is disabled through no fault of its own from invoking the Board's election processes for purposes of resolving the question concerning representation raised by its picketing. In these circumstances, it would be inequitable, and be, we believe, not within the intention of Congress, to condition the lawfulness of the recognitional picketing in a one-man unit on the union's filing of a petition, since, if such petition were filed, it would be dismissed.[6]

[5] *Luckenbach Steamship Company, supra; Al Dick's Steak House, Inc., supra.*

[6] The Board has held that "it is only a petition that leads to an expedited election which warrants dismissal of an otherwise meritorious charge" of a violation of Section 8(b)(7)(C). *Chicago Printing Pressmen's (Moore Laminating, Inc.)*, 137 NLRB 729.

There are some marked similarities between the situation in the *Villa-Barr* case and the instant case. In *Villa-Barr*, the Board refused to find that picketing for recognition was a violation of Section 8(b)(7)(C) because the union had no access to the Board's election procedure in a one-person bargaining unit. In the instant case, the ARA could never utilize the Board's contract-bar rules, could never raise a question concerning representation, and could never secure an election, all because there was a one-person unit.[14]

Based on all the considerations set forth above, I find that picketing for recognition in a one-person unit cannot fall within the proscription of Section 8(b)(7)(A) of the Act. I therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Watters Marine, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. ARA and MEBA are, and each is, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the credible evidence that ARA violated the Act as alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

The complaint is hereby dismissed in its entirety.

[14] A finding that Sec. 8(b)(7)(A) applies to a one-person unit would also cause other anomalies in the law. Sec. 8(b)(7) applies only to initial as distinguished from continued recognition. It has no application where the employer has extended bargaining rights to the picketing union before the picketing began. *Building and Construction Trades Council of Santa Barbara County, AFL-CIO; International Brotherhood of Electrical Workers, Local No. 413, AFL-CIO; and International Union of Operating Engineers Local No. 12, AFL-CIO [Sullivan Electric Company] (Jones and Jones, Inc., and Interstate Employers, Inc.)*, 146 NLRB 1086 (1964). Nor would Sec. 8(b)(7) apply where the employer was successor to, *alter ego* of, or joint employer with such an employer. However, in a one-person unit a union could have no bargaining rights and therefore the distinction between initial and continued recognition would be lost.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.