

**Air Engineering Metal Trades Council and Affiliated Unions, AFL-CIO and Pan Am World Services, Inc. and Sverdrup Technology, Inc. Cases 26-CC-424 and 26-CC-425**

October 17, 1982

**DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND ZIMMERMAN

On November 17, 1981, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel, Sverdrup Technology, Inc., and Pan Am World Services, Inc., filed exceptions and supporting briefs, and the Respondent filed a brief in support of the Administrative Law Judge's Decision.

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, and conclusions<sup>1</sup> of the Administrative Law Judge and to adopt his recommended Order.

**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.

<sup>1</sup> We agree with the Administrative Law Judge's finding that the Respondent's picketing on the access road leading to the AEDC did not evidence an unlawful secondary object. Given the Respondent's attempt to comply with a state court injunction barring picketing at gates 1 and 2, gates at which the Respondent could lawfully picket, the access road picketing was "reasonably close" to the dispute within the meaning of *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547 (1950).

**DECISION**

FRANK H. ITKIN, Administrative Law Judge: Unfair labor practice charges were filed in the above-consolidated cases on February 3 and 4, and were amended on February 19, 1981. A complaint issued on February 25, and a hearing was later conducted in Nashville, Tennessee, on August 31, 1981.<sup>1</sup> General Counsel contends that Respondent Unions violated the statutory proscription against secondary boycotts, as contained in Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, by picketing at gates other than the one reserved for the

<sup>1</sup> At the hearing, the motion of Charging Party Sverdrup/ARO to amend the pleadings and caption, to show that its name has been changed to Sverdrup Technology, Inc., was granted.

use of Calspan Field Services, Inc. (the employer with whom Respondent Unions then had a labor dispute) and by also picketing along the access road of the Arnold Engineering Development Center near Tullahoma, Tennessee. General Counsel alleges that Respondent Unions, in further violation of Section 8(b)(4)(ii)(B), threatened Charging Party ARO with a work stoppage at the Arnold Center. Respondent Unions deny that they have violated the Act as alleged.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs of counsel, I make the following:

**FINDINGS OF FACT**

*A. The Arnold Center*

The United States Air Force maintains a research and testing facility near Tullahoma, Tennessee, known as the Arnold Engineering Development Center. The entire tract of land involved consists of some 40,000 acres; however, we are only concerned here with some 4,000 acres of this property which is improved and enclosed by a fence. Entrance to this enclosed area is from a roadway which runs across the southerly portion of the entire tract, known as the Access Highway. The various gates and entrances to the Center from the Access Highway will be discussed further below. See, generally, General Counsel Exhibit 2.

David Pickering, employed by the Air Force at the Arnold Center as chief of the operating contract division and director of contracting, explained that the Arnold Center has been situated at this location since 1950; that the mission of the Arnold Center was, and is, to perform testing and related support services; and that from 1950 to 1980 Charging Party ARO had a "single contract for operation of the Center." ARO's contract with the Air Force included the "testing work in all the test facilities" at the Center and the providing of all "supporting services." As Pickering noted, ARO "had what [is] sometimes called an umbrella contract for the operation of the Center—the Air Force was responsible for overall management of the Center [and] ARO was responsible through its contract for the operation of the Center." ARO's employees were, and are, represented by Respondent Unions.<sup>2</sup>

During late 1980, the Air Force divided the work performed at Arnold Center "into three distinct packages"—i.e., propulsion testing, flight dynamics testing, and mission support services. Propulsion testing involves the Center's engine testing facilities. Flight dynamics testing involves the Center's wind tunnel facilities. And, mission support involves "everything from cutting the grass at Arnold Center to operating the computer center . . . the machine shops . . . the laboratories . . . the supply system, [and] providing security and fire protection." The Air Force, as Pickering further explained,

<sup>2</sup> It is undisputed that Respondent Unions are a labor organization under Sec. 2(5) of the Act, as alleged, and that Charging Parties ARO and Pan Am are employers engaged in commerce under Sec. 2(2), (6), and (7) of the Act and, further, meet the Board's jurisdictional standards, as alleged.

awarded the propulsion testing duties to Charging Party ARO. The flight dynamics testing functions were awarded to Calspan. And, the mission support services were awarded to Charging Party Pan Am.<sup>3</sup>

ARO, Calspan, and Pan Am have each entered into separate contracts with the Air Force, effective from January 1, 1981, through September 30, 1983, which define their duties and missions at the Center. (See Resp. Exhs. 1, 2, and 3.) In addition, ARO, Calspan, and Pan Am have entered into, as Pickering explained, "associate contractor agreements" which also define their duties involving each other. (See, generally, Resp. Exhs. 4, 5, and 6.) Thus, for example, as the "associate contractor agreement between ARO, Inc., AEDC Group and Pan Am World Services, Inc." provides (Resp. Exh. 6, p. 1):

The purpose of this associate contractor agreement . . . is to provide the basis for the mutual consideration of the parties in their operation of the respective portions of the . . . [Arnold Center] consistent with each company's statement of work . . . responsibilities . . . .

\* \* \* \* \*

This agreement . . . will identify the support functions and related responsibilities which are to be performed by ARO and Pan Am.

Pickering testified that Pan Am and its employees, pursuant to the above contracts, "are located throughout the Center in their support rules." Pan Am provides, among other things, the following services for both Calspan and ARO at the Center: it runs the central machine shop; it runs a central instrument laboratory; it operates the motor pool; it operates the steam plant; it operates the carpenter shop; it operates the supply and "logistic system" warehouses; it performs the maintenance of the buildings; it is responsible for the maintenance of waterlines; it operates the fire department; it provides security guards and personnel; it operates the fuel farm or fuel metering facility; it procures and provides supplies such as machinery costing less than \$25,000; it provides motor vehicles; it installs signs, including the reserve gate signs discussed below; it provides "ongoing operation of" the waterplant, power system, and central computers; it provides janitorial services; it maintains photocopy machinery; it repairs typewriters; it operates a public information system; it provides photography or motion picture services; it operates the chemical, metallurgical, and non-destructive testing laboratory; it provides central engineering services; it provides postal and communication services; and it operates the library, printing plant, cafeteria, and central dispensary.

There was also testimony concerning the services performed between ARO and Calspan. Thus, for example, as Pickering testified, Calspan is responsible to supply high pressure air when needed by ARO. Ralph Ivey, employed by ARO and also serving as chief steward for the

<sup>3</sup> Pickering noted that the Air Force "is still responsible for the overall management of the AEDC" and "We've been moving in the direction of more Air Force involvement in the day-to-day operation of the Center."

Machinist Union, testified that he had "observed Calspan employees and Pan Am employees working side by side . . . on the same job" involving the restoration of a compressor. Ivey also observed the "interrelations between ARO and Calspan employees" "restoring the compressor to be used in tests." And, as Ivey noted, the personnel of both ARO and Calspan "obtain all of their . . . materials . . . supplies and support" for "all of these things" from Pan Am. Further, Henry Bevis, an employee of Calspan, recalled, *inter alia*, how "we installed a test that Calspan did for ARO . . . it is a real small test cell that uses . . . high pressure air to run, and we ran this test from approximately the middle of April until the middle of August." Bevis explained that Calspan supplied personnel "to aid ARO" in the project "they were doing." ARO utilized high pressure air obtained from Calspan. Bevis, in addition, explained how ARO supplied Calspan with distilled or deionized water for testing. Calspan, according to Bevis, could not carry on such a project "without the use of that material."<sup>4</sup>

Pickering, the Air Force's operating contract chief, on rebuttal, claimed that the research tests described above by Bevis and others "[are] certainly a very small part of [the] total technology effort" and constitute "generally less than 10 percent of the contract budget that we have at the Center." Pickering was "not familiar with any project that has been assigned as a joint project as such . . . . I'm not familiar with that terminology." Pickering, elsewhere, acknowledged that the services provided by Pan Am, ARO, and Calspan "must be provided" for "all three of the entities to function."

#### B. The Picketing

Respondent Unions, as noted above, continued to represent ARO's employees working at the Center during 1981. In addition, Respondent Unions also represented employees of Calspan and Pan Am. During late January 1981, a dispute arose over terms and conditions of employment between Calspan and Respondent Unions. As a consequence, the Air Force and other employers at the Center became involved in preparations to open up a "reserve gate" at the Center for use by Calspan employees and its subcontractors and suppliers. Thus, as Pickering explained, the two principal entrances to the Center off the Access Highway are gates 1 and 2. (See G.C. Exh. 2.) These gates are, and were, generally used by employees of Calspan, ARO, and Pan Am to enter the facility. There are also two gates which are "normally" closed, known as gates 3 and 7. These gates are utilized as so-called reserve gates when labor situations arise.<sup>5</sup>

<sup>4</sup> Also see the testimony of W. D. Coffelt, a Calspan employee at the Center, concerning "a joint project with ARO" involving "stereo photography in the test cell." The strike, described below, interfered with Coffelt or his coworkers performing this project and, when he returned, "it was already being done in parts by ARO technicians."

<sup>5</sup> Pickering also noted, *inter alia*, that there is a gate 1A "established especially for a construction contractor who had an Air Force contract to build a small commissary . . . just inside the fence at that point. To get to gate 1A, you must go in the entrance to gate 1." Pickering further noted that there is a gate A "for the construction" of a large facility at the Center. This gate was established because:

*Continued*

On Sunday February 1, 1981, it was determined that gate 3 would be reserved for Calspan employees and its suppliers and subcontractors. Mailgrams were dispatched to Respondent Unions containing such notification. (See G.C. Exhs. 5 and 6.) Further, Pan Am posted signs at the gates to the Center apprising employees, subcontractors, and suppliers of Calspan to use gate 3, and "others" to use gates 1 and 2. (See G.C. Exh. 3.<sup>6</sup>) Further, Horace Cheshire, Jr., labor relations administrator for ARO, testified that he telephoned Charles Helton, an employee of Calspan and recording secretary of Respondent Council, on Sunday, February 1:

. . . and I [Cheshire] told him [Helton] that . . . I expected that if there was a reserve gate set up that the pickets would only be set up at gate 3, so there wouldn't be any problem with the employees represented by [Respondent Unions] and working for [ARO] and Pan Am coming in and honoring the contract they had with the various companies, and that regardless of where the pickets were set up . . . I expected our employees to report to work.

Helton responded: "He [Helton] said that he thought the good brothers would stay out, and he would expect them to do this."

It is undisputed that commencing on the morning of Monday, February 2, Respondent Unions picketed gates 1, 2, 3, and 7 of the Arnold Center with signs stating (G.C. Exhs. 8 through 13):

AEMTC  
ON STRIKE  
AGAINST CALSPAN

A temporary restraining order was entered by a state court later that same day, and picketing was confined to gate 3. Subsequently, however, pickets carrying the same signs were moved out "at the ends of the Access Road." A large number of employees of both ARO and Pan Am did not report for work during the strike. The dispute between Calspan and Respondent Unions was settled on February 10 and all picketing ceased on the next day.

Charles Helton, a Calspan employee and recording secretary for Respondent Council, testified that, "as an official of the Council . . . I advise[d] the members of the Council who weren't on strike to go to work." In short, Helton apprised ARO and Pan Am employees "to go to work." Helton acknowledged that, in a letter later issued from the Council on February 24, after the strike had ended, he thanked the employees "for the job well done" and also stated (G.C. Exh. 7):

. . . we knew there would be over 1000 people using or entering that facility. And, rather than clog up the traffic at the other gates, and in case they had any kind of labor disputes with the construction people in that activity, that gate was established for the ASTF construction only.

Other gates depicted on G.C. Exh. 2, as Pickering observed, are either inside gates or do not generally provide access to the Center. Also see the testimony of John Hirschman, labor relations administrator for Pan Am.

<sup>6</sup> The references in the posted signs to "Smith and Waller" are not, as the parties generally acknowledge, material here.

Also, I wish to express my appreciation to you members who work for ARO, Inc. and Pan Am World Services.

Helton further explained that "while the pickets were on the Access Road, there were no pickets behind the picket line at gate 3."<sup>7</sup>

C. Discussion

The principles of law pertaining to "separate" or "reserve gate" picketing and the secondary boycott provisions of the National Labor Relations Act were restated by the court of appeals in *Linbeck Construction Corporation v. N.L.R.B.*, 550 F.2d 311, 315-316 (5th Cir. 1977), as follows:

Section 8(b)(4) of the National Labor Relations Act seeks to carry out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes . . . [while] shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951). The common situs situation, in which primary and neutral employers work at the same site, has required the Board and reviewing courts to draw lines "more nice than obvious." *Electrical Workers (IUE), Local 761 v. N.L.R.B. (General Electric)*, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed. 2d 592 (1961), in determining when primary conduct ends and impermissible secondary activity begins. In *Moore Dry Dock, supra*, the Board articulated four guidelines that have served as the standard by which the legality of common situs picketing has been gauged. Thus, to be classified as primary activity, the picketing must meet the following conditions: (a) the picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. 92 NLRB at 549. The Supreme Court has authorized employers at a common situs to set up separate gates through which the primary employees and secondary employees may enter. *General Electric*, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed. 2d 592. By maintaining a separate gate for access to the site, the employees, suppliers, and deliverymen of neutral employers operating at a common situs, thus, can be insulated from disputes involving other em-

<sup>7</sup> The testimony summarized above is essentially uncontroverted. I credit the testimony of Pickering, Ivey, Bevis, Coffelt, Cheshire, Hirschman, and Helton, as recited in secs. A and B, above. Their testimony, as recited above, fairly reflects the relationship of the parties and the pertinent sequence of events. There was a conflict between the testimony of Cheshire and Pan Am employee Henry Rogers concerning Rogers' alleged participation in the picketing. I am persuaded here that Rogers' denial of participation in the picketing is more accurate and reliable.

employers at the site, in that pickets can operate only at the gate of the employer with whom they have a grievance. In *General Electric*, however, the Supreme Court qualified the reserve gate doctrine by requiring that the work done by the "neutral" employers who maintain the separate gate be unrelated to the normal operations of the employer who is being picketed. *General Electric*, 366 U.S. at 681, 81 S.Ct. 1285. . . .

\* \* \* \* \*

Thus, in *General Electric*, the Supreme Court held that while a primary employer on a common situs could establish separate gates for the use of employees of neutral employers, he could not set up a separate gate for those making regular plant deliveries since "the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." 366 U.S. at 680-81, 81 S.Ct. 1285. Likewise, in *United Steelworkers of America v. N.L.R.B.* [*Carrier Corporation*], 376 U.S. 492, 84 S.Ct. 899, 11 L.Ed. 2d 863 (1964), the Supreme Court held to be primary that picketing of a gate that was used by neutral employees who made deliveries and pick-ups of goods at the primary's plant, but that was not on the primary's property and was not used by the primary's employees for access to the premises. . . .

\* \* \* \* \*

In addition, *Carrier* noted that ownership of a gate to the primary's premises is not the crucial factor in determining whether picketing there is primary, but rather the function of those using the gate is the significant indicator. Likewise. . . ownership of the materials is not controlling in determining whether a supplier is a proper subject of picketing, but instead we look to the employer to whose use the materials are committed.

In sum, as the Supreme Court explained in *Carrier Corp.*, *supra*, "The legality of separate gate picketing depended on the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity." Consequently, General Counsel and the Board, in applying this rationale, have determined that "maintenance workers who correct damage to property" and "guards" who "insure the availability of undamaged property for use in the employer's processes" are, in effect, "a regular part of the day-to-day operations of the employers, and their services. . . necessary to normal operations." See, generally, Advice Memoranda, *Oil, Chemical & Atomic Workers International Union Local 1-5 (Tosco, Inc. and Shell Oil Corp.)*, 103 LRRM 1497 (1980), and cases discussed.

The Board, however, has refused, with court approval, to extend the *General Electric* "relatedness" test to em-

ployers at common construction sites. For, as the court of appeals commented in *Linbeck*, *supra* at 316:

Relying on *Denver Building Trades*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 284 (1951), however, this Court has enforced a Board decision holding that the "relatedness" test established in *General Electric* does not apply to employers at a common construction situs, *Building and Construction Trades Council of New Orleans (Markwell & Hartz)*, 155 N.L.R.B. 319 (1965), enforced *Markwell & Hartz, Inc. v. N.L.R.B.*, 387 F.2d 79 (5th Cir. 1967), cert. denied, 391 U.S. 914, 88 S.Ct. 1808, 20 L.Ed.2d 653 (1968). That is, whether or not the work of the various subcontractors is "related" to that of the general contractor or to that of each other is not relevant in determining the validity of the separate gates. Thus, on construction sites occupied by two or more employers, *Moore Dry Dock* tests, alone, will be applied to allegedly secondary picketing so that picketing at the gate reserved for a neutral employer generally will contravene the third *Moore* guideline—that picketing be limited to places reasonably close to the location of the situs—and will result in a finding of secondary activity in violation of § 8(b)(4) of the Act.

The Board majority, in explaining this unwillingness to extend the *General Electric* rationale to common construction sites, stated, *inter alia*, that "by applying the 'close relation to normal operations' test of *General Electric*, the theory of the dissent, if logically extended, is one that would in effect reverse *Denver Building Trades*, not only where the overarching general contractor on the building site is the primary employer, but also where the intertwined work of a construction subcontractor is the primary target." Also see *Carpenters Local 470, International Brotherhood of Carpenters and Joiners of America, AFL-CIO (Mueller-Anderson, Inc.) v. N.L.R.B.*, 564 F.2d 1360 (9th Cir. 1977).

In the instant case, General Counsel and Charging Parties Pan Am and ARO argue that Respondent Unions, by picketing gates 1 and 2 of the Arnold Center, ran afoul of the *Moore Drydock* criteria as quoted above and, consequently, engaged in proscribed secondary activity. Respondent Unions, citing *General Electric*, *Carrier*, and *Linbeck*, argue, *inter alia*, that the employees of Pan Am were, at all times pertinent here, permitted to use gates 1 and 2 to enter the Arnold Center and the duties of Pan Am's employees were connected with and related to the normal operations of the primary employer, Calspan. In reply, General Counsel and Charging Parties—relying in large part on common construction site cases—would not apply the *General Electric* "relatedness" test here. However, as demonstrated above, we are not involved in this case with the transitory presence and special relationships of contractors or subcontractors at construction sites. Instead, we deal here with a primary employer engaged in flight dynamics testing at the Arnold Center. Calspan will be engaged at this site in such a venture for at least a term of 33 months and, I note, its predecessor ARO performed, alone, the entire

operation of the Center, including Calspan's functions, for some 30 years.

General Counsel and Charging Parties Pan Am and ARO further argue that the primary, Calspan, does not own the real property or personal property and goods involved. However, as recited above, ownership of the real estate or chattels is not the decisive factor; instead, we must look "to the duties of those employees" using gates 1 and 2 and determine whether or not "these duties are connected with the normal operations of the" primary employer. See *Carrier, supra*. General Counsel and Charging Parties would, in effect, confine and limit the *General Electric* "relatedness" test "to a situs occupied solely by the primary employer and where any neutral employers on the situs are performing tasks solely for the benefit of the primary employer" (G.C. br. p. 7). The authorities cited do not support such a restrictive application of the Supreme Court's "relatedness" test, especially with respect to the facts of this case. Indeed, in *Carrier*, the Supreme Court noted: ". . . the picketed gate was . . . located on property owned by [the railroad] and not upon property owned by the primary employer"; nevertheless, "the location of the picketed gate upon [railroad] property has little if any significance"; for, the significant factor was that the "railroad's operations for the" primary employer "were in furtherance of its business."

Accordingly, in this case, Pan Am supplies Calspan with the services and goods necessary and essential for Calspan to maintain its day-to-day flight dynamics testing venture at the Arnold Center. The nature of the services and goods, as detailed *supra*, are undeniably necessary and essential for Calspan to operate at the site. To deny the Unions, on these facts, the right to picket gates to the primary site used by Pan Am employees would, in my view, improperly impinge upon traditional and lawful primary activity.<sup>8</sup> Moreover, since Respondent Unions

<sup>8</sup> Respondent Unions, in their post-hearing brief, cite the relationship between ARO and Calspan, as well as the relationship between Pan Am and Calspan, at the Arnold Center. I am not unmindful that Pickering generally acknowledged that, in effect, the services provided by Pan Am, ARO, and Calspan "must be provided" for "all three of the entities to function." However, I need not reach the question whether or not Respondent Unions, on these facts, could picket a gate reserved only for ARO. In this case, the employees of Pan Am and ARO used the same gates.

could lawfully picket gates 1, 2, and 3 during the strike, the temporary removal of the pickets (following the entry of the state court injunction prohibiting such picketing) to the boundaries of the Access Road, with signs clearly identifying the primary employer, did not run afoul of Section 8(b)(4). Respondent Unions could lawfully picket at all three gates. Respondent's attempt to accommodate the state injunction, which apparently enjoined primary activity, by moving out on the Access Road was not, under these circumstances, sufficient proof of secondary boycott activity.<sup>9</sup>

In conclusion, I find and conclude here that Respondent Unions, by picketing gates 1 and 2 and the access roadway to the Arnold Center, were not engaging in secondary boycott activity as alleged. I would therefore dismiss the complaint.

#### CONCLUSIONS OF LAW

1. Respondent Unions are a labor organization within the meaning of Section 2(5) of the Act as alleged.
2. Charging Parties are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act as alleged.
3. General Counsel has failed to establish by a preponderance of the evidence that Respondent Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act as alleged.

#### ORDER<sup>10</sup>

I recommend that the complaint herein be dismissed in its entirety.

<sup>9</sup> The complaint further alleges that Respondent Unions also engaged in a threat to ARO in violation of Sec. 8(b)(4)(ii)(B). General Counsel and Charging Parties apparently do not seriously pursue this claim in their briefs. In any event, I do not find that Calspan employee and council recording secretary Helton's response to the inquiries of ARO Labor Relations Administrator Cheshire, to the effect that Helton "thought the good brothers would stay out and he would expect them to do this," constitutes a threat under Sec. 8(b)(4)(ii)(B).

<sup>10</sup> 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.