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MM. 1100



Memorandum

TO : Francis E. Dowd, Regional Director  
Region 12

DATE: DEC 27 1990

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

SUBJECT: Air Line Pilots Asso. (Keg South of Kendall, Inc.)  
Case 12-CC-1217

This case was submitted for advice as to: (1) whether a union that is not a Section 2(5) labor organization may nonetheless violate Section 8(b)(4)(B), and (2) whether an employer that is wholly-owned and operated by non-striking employees of a primary employer is a wholly unconcerned neutral third party entitled to protection under Section 8(b)(4)(B) from unlawful secondary pressure.

FACTS

On March 4, 1989, the International Association of Machinists and Aerospace Workers (IAM) commenced an economic strike against Eastern Airlines (Eastern). On that same day, the Air Line Pilots Association (ALPA) advised its pilots to engage in a sympathy strike with the IAM and to refuse to cross IAM picket lines. ALPA's strike activities are conducted by its Eastern Airlines Master Executive Council Strike Operations Committee and its Local Councils. 1/

[REDACTED], an Eastern pilot, continued to work during the strike. [REDACTED] also works as manager of Fleet Support, a company that trains instructors and students on L-1011 and DC-10 aircraft. [REDACTED], is an Eastern flight attendant who also continued to work after the strike began. The [REDACTED] jointly own Keg South of Kendall, Inc. (Keg South), a Florida corporation doing business as a restaurant and bar near the Miami airport. Keg South employs 12 employees whose terms and conditions of employment are set by the [REDACTED]. Other than the [REDACTED] employment relationship with Eastern, Keg South has no business relationship whatsoever with Eastern. 2/

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- 1/ The membership of ALPA is composed entirely of pilots, co-pilots and flight engineers employed by air carriers subject to the Railway Labor Act (the RLA).
  - 2/ The Region has concluded that Keg South is an NLRA employer that meets the Board's discretionary jurisdictional standards.

On June 29, approximately 15 picketers, identifying themselves as striking pilots, flight attendants and machinists of Eastern, picketed Keg South for 1 and 1/2 hours. The picket signs stated:

██████████ makes millions at Eastern's expense  
Scab bar don't drink here; Scabs have no  
integrity;  
The Owner is a scab; Don't support scab bar;  
I.A.M.A.W. on strike against Continental, Eastern  
and Texas Air

██████████ states that the picketers at times obstructed vehicles attempting to enter and leave the Keg South parking lot. The picketers also distributed handbills.

On July 7, Keg South filed the instant Section 8(b)(4)(i)(ii)(B) charge, alleging that ALPA had violated the Act by inducing or encouraging individuals employed by Keg South and other persons in commerce to withhold their services, and by restraining or coercing Keg South and other persons in commerce with an object of forcing Keg South and/or ██████████ to cease doing business with Eastern Airlines. On July 11, Keg South amended its charge to also name ALPA's Master Executive Council and its Local Council 18 as respondents.

On July 13, Keg South was again picketed and handbilled for 1 and 1/2 hours. The picketers briefly milled in front of one of the entrances to Keg South, and on two occasions a picketer spoke to drivers of vehicles seeking to enter Keg South, who then turned around and left. One picketer yelled at a family seeking to enter the restaurant, "you don't want to take your family to a scab restaurant, do you?" and "bring them up right, don't start them off wrong." No other instances of picketing have occurred. The Region has concluded that ALPA is responsible for the incidents of picketing that did occur. 3/

#### Action

We conclude that the instant charge be dismissed, absent withdrawal.

Section 8(b) proscribes certain conduct engaged in by a "labor organization or its agents." As defined by Section 2(5) of the Act, a "labor organization" is an organization in which employees as defined in Section 2(3) participate. If a union consists only of non-statutory employees, it is not a Section 2(5) labor organization, and it is not covered by Section

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3/ There is no charge against the IAM.

8(b)(4)(B) of the Act. Accordingly, under a literal reading of the statute, ALPA did not violate the act.

The legislative history does not require a contrary result. Prior to the 1959 Landrum-Griffin Amendments, if a labor organization caused a secondary boycott by nonstatutory employees, there was no unfair labor practice. See, e.g., Teamsters Local 201 (International Rice Milling), 84 NLRB 360, 361 (1949), aff'd. 341 U.S. 665 (1951) and Teamsters Local 87 (DiGiorgio Wine Co.), 87 NLRB 720, 746 (1949), enfd. 191 F.2d 642 (D.C. Cir. 1950), cert. denied. 342 U.S. 869 (1950). However, in 1959, Section 8(b)(4)(B) of the Act was amended to preclude a labor organization from inducing or encouraging any person to withhold services and from threatening or coercing any person in commerce to cease doing business with another. In essence, the terms "employee" and "employer" were changed to "person."

Thus, the legislative history of the 1959 Amendments indicates that Congress intended to change then-existing Board law regarding the inducement of nonstatutory employees and the restraint of nonstatutory enterprises. That is, Congress decided "to close certain loopholes in the application of the [secondary boycott provision] which had been exposed in Board and court decisions." NLRB v. Servette, Inc., 377 U.S. 46, 51 (1964).

However, those Amendments did not alter the statutory requirement that the actor be a Section 2(5) labor organization. The Board has adhered to the view that the unlawful inducement or restraint and coercion must be engaged in by a Section 2(5) labor organization. See, e.g., International Brotherhood of Electrical Workers (B.B. McCormick & Sons, Inc.), 150 NLRB 363 (1964), enfd. 350 F.2d 791 (D.C. Cir. 1965) (Section 2(5) labor organization and its agents unlawfully coerced nonstatutory neutral employer); International Ass'n. of Machinists (Lufthansa Airlines), 197 NLRB 232 (1972), enfd. 491 F.2d 367 (9th Cir. 1974) (labor organization and nonstatutory employer cannot enter into an 8(e) agreement); 4/ Internat'l Org. of Masters, Mates and Pilots (Westchester Marine Shipping Co., Inc.), 219 NLRB 26 (1975), enfd. 539 F.2d 554 (5th Cir. 1976) (mixed supervisory-statutory employee union violated 8(b)(1)(B) by picketing nonstatutory employer to force replacement of supervisory employees); Production Workers Union of Chicago, Local 707 (Checker Taxi Co.), 273 NLRB 1178 (1984) (conceded 2(5) labor organization violated 8(b)(4)(B) by picketing to coerce independent contractors to withhold services from alleged neutral), vacated and remanded on other grounds, 793

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4/ The Board has since reversed its Lufthansa position regarding the applicability of 8(e) to agreements with nonstatutory employers. See Local 3, IBEW (New York Electrical Contrs. Assn.), 244 NLRB 357 (1979).

F.2d 323 (D.C. Cir. 1986), vacated at 283 NLRB 340 (1987) (reversing prior factual finding that alleged secondary was neutral). 5/

One court has differed with the Board's analysis. In Marriott In-Flight Services v. Local 504, Transport Workers of America, 557 F.2d 295 (2d Cir. 1977), the Second Circuit held that Section 8(b)(4)(B) also precluded secondary boycotts induced or encouraged by a nonstatutory union. There, a union with a primarily RLA membership picketed an RLA employer to protest that employer's use of a nonunion subcontractor to supply flight meal services. The RLA employer filed a Section 303 damages suit. The Second Circuit held that, although the 1959 amendments did not change the statutory definition of a "labor organization," the legislative history of the Section 8(b)(4)(B) amendments indicated a clear Congressional intent to prohibit secondary boycotts by unions comprised of railway employees. The Court reasoned that limiting the coverage of Section 8(b)(4)(B) solely to conduct engaged in by a statutory labor organization, thereby permitting secondary activity by railway unions, would mean that "Congress ha[d] created a right without a remedy." 557 F.2d at 299 (citation omitted). 6/

Nonetheless, the General Counsel has followed Board law and has declined to follow the analysis of the Second Circuit in Marriott. 7/ With all due respect to the Second Circuit, we believe that the Board is clearly correct. In essence, the 1959 amendments provide that a labor organization violates 8(b)(4)(B),

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5/ Concededly, in its initial decision in Checker Taxi, 273 NLRB at 1180, n. 21, the Board cited to Marriott approvingly, but only for the proposition that "Section 8(b)(4) encompasses conduct on behalf of individuals found not to be statutory employees." Ibid. (emphasis added). In Checker Taxi, the union had admitted its Section 2(5) status. 273 NLRB at 1179.

6/ The record in Marriott indicated that the union may well have been a Section 2(5) labor organization because a substantial portion of its membership - 18% - consisted of NLRA employees. The Second Circuit decided that, "in view of [its] construction of Section 8(b)(4)(B), it [was] unnecessary to decide this issue." 557 F.2d at 300.

7/ See, e.g., International Longshoremen's Ass'n. (Armedco, Inc.), Case 8-CC-966, Advice Memorandum dated August 24, 1979, authorizing dismissal of charge alleging that RLA union violated 8(b)(4)(B). See also Airline Pilots Ass'n., Case 7-CC-1016, Appeals Letter dated February 28, 1979, reported in Quarterly Report of General Counsel, July 24, 1979, pp. 19-24, upholding dismissal of prior, similar charge against ALPA.

even if the induced persons are not statutory employees (e.g., pilots) and even if the restrained companies are not statutory employers (e.g., airlines). But the 1959 amendments did not change the requirement that the offending entity be a labor organization.

In the instant case, the picketing was not conducted by a Section 2(5) labor organization. Accordingly, the instant charge should be dismissed, absent withdrawal. 9/

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9/ Because of the disposition herein, we do not reach the issue of whether Keg South is a wholly unconcerned, neutral third party entitled to protection from unlawful secondary pressure.