

**District 23, United Mine Workers of America and
Kentucky Lake Dock Company, Inc. Case 9-
CP-269**

31 July 1984

DECISION AND ORDER

**BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS**

On 13 September 1983 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

¹ The Respondent alleges that Kentucky Lake Dock is either an alter ego of or a successor employer to Badgett Terminal. In determining whether any such relationship exists the Board weighs several factors deemed to be critical in this area. We have found an alter ego relationship where the new employer is a "disguised continuance of the old employer . . . ; or was in active concert or participation in a scheme or plan or evasion . . . ; or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . . ; or so integrated or intermingled [its] assets and affairs that 'no distinct corporate lines are maintained.'" (Citations omitted.) *Contris Packing Co.*, 268 NLRB 193, 194 (1983), citing from *Riley Aeronautics Corp.*, 178 NLRB 495, 501 (1969). The Board has also found an alter ego relationship based on substantially identical business purposes, equipment, type of customers, actual joint day-to-day operations, joint labor relations, a favorable lease agreement, and the transient nature of the relationship between the companies. *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1226 (1982). In some instances the criteria have been equated with the "basic indicia for finding a 'single employer,' i.e., interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control," although "more must be shown to establish that one organization is the alter ego of another." *Victor Valley Heating*, 267 NLRB 1292 (1983). See also *Offshore Express, Inc.*, 267 NLRB 378 fn. 1 (1983). We have also found an alter ego relationship to exist "even though no evidence of actual common ownership was present." *All Kind Quilting Inc.*, 266 NLRB 1186 fn. 4 (1983).

Regarding successorship, Members Zimmerman and Dennis note that the Board has held (*Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978)):

The Board considers a variety of factors in determining whether the new employer has succeeded to the former employer's bargaining obligation. Certainly a prime factor is whether the purchaser has hired a sufficient number of former employees of the seller to constitute a majority of the employee complement of the appropriate unit. Once it has been found that the purchaser has hired such a majority, the Board considers such circumstances as whether or not there has been a long hiatus in resuming operations, a change in product line or market, or a change of location or scale of operations. [Footnotes omitted.]

Member Hunter notes that, regarding successorship, the Board has held that "there must be an affirmative showing of a purchase, transfer, or takeover of the predecessor's business; and a continuation of that particular operation without a hiatus or significant change with substantially the same employees." (Citations omitted.) *Longshoremen ILA (Rukert Terminals Corp.)*, 266 NLRB 846, 848 (1983).

In the instant case, Kentucky Lake Dock is engaged in the blending of coal and the transloading of coal from rail cars to barges, while Badgett was engaged solely in transloading. Thus, the alleged alter ego employer

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, District 23, United Mine Workers of America, Madisonville, Kentucky, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice² is substituted for that of the administrative law judge.

is engaged in a distinct business. It is true that Kentucky Lake Dock's president owns a share in a third company which in turn owns a share of Badgett. However, that participation amounts to an insignificant 1-1/2 percent of the total assets of Badgett. The employees of Kentucky Lake Dock, save for one exception, were never in Badgett's employ. Moreover, the record also shows, contrary to the judge's findings, that Kentucky Lake Dock has never performed any work for Badgett's former customers. Finally, the fact that there exists family relationship among the old and new companies' officers and stockholders is of minor importance and does not detract from the significance of the distinct business of the companies, the lack of common ownership or control, the lack of identity among the companies' work forces, and the lack of identity among the companies' customers.

Accordingly, we find that there is insufficient evidence to establish an alter ego or successorship relationship here. We further find it unnecessary to rely on the judge's alternative rationales that he would still find Kentucky Lake Dock to be a distinct employer even if engaged in the same business as Badgett, and that he would find a violation of Sec. 8(b)(7)(C) even if Kentucky Lake Dock is no more than a cover for Badgett.

² The judge's Conclusions of Law, Order, and notice suggest that recognition picketing without filing a petition for a period of exactly 30 days would be unlawful, although 30 days is the maximum permissible time. See *Carpenters Local 383 (Colson & Stevens Construction)*, 137 NLRB 1650 (1962), *enfd.* in pertinent part 323 F.2d 422 (9th Cir. 1963). We find no issue raised here whether the permissible time was less than 30 days. We, therefore, substitute "for a period exceeding 30 days" in place of "for a period of 30 days," wherever the latter phrase appears.

APPENDIX

**NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket or cause to be picketed the premises of Kentucky Lake Dock, where an object thereof is to force or require that employer to recognize or bargain with us as the collective-bargaining representative of its employees, under circumstances where such picketing is conducted without the prior filing of an election petition with the National Labor Relations Board for a period exceeding 30 days.

DISTRICT 23, UNITED MINE WORKERS OF AMERICA

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held on August 3, 1983, at Owensboro, Kentucky, on a complaint of the General Counsel against District 23, United Mine Workers of America (the Respondent or the Union). The complaint issued on June 16, 1983, based on a charge filed on May 23, 1983, by Kentucky Lake Dock Company, Inc. (the Charging Party). The sole question presented is whether the Respondent picketed the premises of the Charging Party in violation of Section 8(b)(7)(C) of the Act. Briefs were filed by all three parties.

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Kentucky Lake Dock Company, Inc., a Kentucky corporation, with its place of business at Grand Rivers, Kentucky, has been engaged in the operation of a rail-to-barge transloading facility. During the 12 months preceding issuance of the complaint, it purchased and received at this facility goods and materials valued in excess of \$50,000 from other than nonretail enterprises, including Cadiz Motor Company, The System Specialist, Madisonville Recapping, Levinson Metal Company, Princeton Oil Company, and Werris Creek Company, all located in the State of Kentucky, each of which other enterprises had received said products and materials, directly from points outside the State of Kentucky. Based on a projection of its operations since March 10, 1983, when this Company started its operations, it will annually derive gross revenues in excess of \$50,000 for the handling of freight and commodities in interstate commerce pursuant to arrangements with other shippers of freights and commodities. This Company is an essential link in the transportation of freight and commodities in interstate commerce. I find that the Company is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that District 23, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Case in Brief*

On March 1, 1983, Kentucky Lake Dock Company, a private corporation, leased water front facilities, referred to by the parties as the Grand Rivers facility, from a company called Badgett Terminal. Badgett Terminal had done business at that site from the 1970's to January 1980, when the place was shut down. It remained closed, without a single employee working there, for over 3 years, throughout 1980, 1981, and 1982, until the arrival of the new lessee, Kentucky Lake Dock, in March 1983.

On March 10 Kentucky Lake Dock started its operations with its own regular employees, all but one of whom had never worked for the old company. That very day District 23 of the Mine Workers, the Respondent, picketed the place, and it continued to do so until June 15, when the picketing was stopped by a state court injunction.

The complaint alleges that the object of the picketing was to compel Kentucky Lake Dock to recognize that union as the bargaining agent of its employees. The Union never filed a petition with the Labor Board for an election among those employees, and therefore, if the complaint is correct, the Union violated the applicable statute, Section 8(b)(7)(C), which reads as follows:

It shall be an unfair labor practice for a labor organization or its agents . . . 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 . . . where such picketing has been conducted without a petition under Section 9(c) being filed with a reasonable period of time not to exceed 30 days from the commencement of such picketing

The Union admits its object in the picketing was to be recognized as bargaining agent by somebody. Just whom it wanted to bargain with is a question merged into the defense arguments which, although variously stated, really end up with one main contention. And it is that the new company doing business in 1983 was the alter ego of the old one from 3 years earlier. I find the defense, however stated, unpersuasive.

B. *Evidence*

In December 1979 the Union was certified by the Board, after a regular election, as bargaining agent for the approximately 10 employees of the Company then doing business at that location, Badgett Terminal. One month later all the employees struck and that company discontinued operations completely. It never resumed business at that location. Later in the year it tried to find some other company that might take the property under lease and use it somehow. When the Union learned of these intentions it met with representatives of the Badgett Terminal Company "For the purpose of negotiating the effects of the closing of that terminal." This is from the testimony of Lee Roy Patterson, who later became president of District 23.

The parties met a number of times during 1980 and did discuss the effects of that closing. They met with a mediator and talked about vacation pay, severance pay, the Company's pension plan, wages due, etc. At the union lawyer's request the Company furnished all the necessary figures, and the Union finally decided to settle for a "lump sum payment," and the payments were made to those of the 10 employees who had been with the old company and who were entitled, in December 1981. These facts are established by the uncontradicted testimony of Charles Badger, the president of the old company, called by the General Counsel, and by the testimony

of Dathel Peek, one of the old company's employees who attended the meetings.

At the hearing the main contention of the Union was that when picketing the Kentucky Lake Dock facility in the spring of 1983, it was not picketing that company, or demanding recognition from that company. It was instead picketing the business of the Badgett Terminal Company, the one which had not been near the premises for over 3 years! Its witnesses also kept saying that what bargaining rights it was demanding were against the Badgett Terminal Company, and that the employees it sought to represent were the old employees who had not worked for 3 years. The Union's president kept denying that he wanted any bargaining rights vis-a-vis the Kentucky Lake Dock at all.

In the light of the relevant facts it was a meaningless play of words, sound and fury signifying nothing, as the old Bard said. It seems that the men who had worked for the old company in 1979, and who struck on January 31, 1980, started picketing that day. They continued walking about in front of the premises after payments were made by the old company in the form of pension rights. This continued until the arrival of the new company in March 1983. I find unconvincing the suggestion now made that, because these men who no longer had any jobs "picketed" the facility without interruption throughout the years, their conduct proves that even today the Union's only desire is to bargain with the Badgett Terminal Company. Having been paid off after regular bargaining over the effects of the closing and over the rights of employees who were finished because of that closing, there were no longer any employees of the old company in existence at all. The separated employees may have been venting their frustration at having lost their jobs, but it is farcical to call such gathering of union members a form of picketing when there was absolutely nobody at the "struck" premises at all.

Although the Union picketed Kentucky Lake Dock well beyond the 30 days permitted by statute, it never filed a petition for an election among the employees of that company. Was its purpose in the picketing to compel that company to recognize it as bargaining agent for whoever its employees might be? I think the answer is yes. One day, after the Kentucky Lake Dock had started its operations, Peek, one of the pickets, talked to Bentley Badgett II, the company president, on the picket line. Present at that conversation was Fred Burton, a union organizer. From Peek's testimony: "I approached him myself concerning maybe getting together and negotiating a contract He said . . . if we would come to him one at a time and come to his office one at a time, or call him personally one at a time, he would talk with a few of us concerning our jobs. I told him that I couldn't come one at a time, we'd have to come as a group because we came in as a group. And he refused to talk to us as a group . . . and I told him, yes, we would work with them if we had a contract." Peek also quoted the organizer, Burton, as telling the Kentucky Lake Dock president that day "that he would love to negotiate a contract for these 10 men."

In the face of this testimony by the Respondent's own witnesses, the defense assertion that the Union was not

seeking anything from Kentucky Lake Dock fails completely. Togetherness is but another word for unionism. What Peek was saying to Badgett that day was that unless he dealt with the Union with respect to what the pickets wanted, the picketing would continue. *Mine Workers District 30 (Terry Elkhorn Mining)*, 163 NLRB 562 (1967); *Service & Hospital Employees Local 399*, 206 NLRB 889 (1973).

The Union views this reaction by the Kentucky Lake Dock president as proof of union animus, refusal to hire any of the people standing outside the premises because they were pro-Mine Workers. It is a form of inverse reasoning, and is therefore very unpersuasive. Kentucky Lake Dock was doing business, with all employees needed at the moment already working. The president said he was willing to talk to the people walking outside and consider them if needed according to their individual qualifications. When Peek responded to the invitation by saying Badgett either talked to all 10 men together or none at all, he was talking about collective, or concerted action to be recognized by the prospective employee. It was the concept of recognition of the Union as agent that Badgett rejected that day, not the right of any individual employee to be pro- or antiunion. The Respondent's attempt, in its brief, to equate the refusal to bargain with a union demanding recognition, with pure union animus against an applicant for employment, merits no further consideration.

There is more. Not knowing exactly the name of the new company operating the facility, early in March Patterson, for the Union, called the number given him by the president of the old company, Charles Badger. He learned in that conversation the name was Kentucky Lake Dock. Bentley Badgett II, the president of KLD, testified directly that Patterson said to him on the telephone that "United Mine Workers represented the Badgett Terminal employees. And that he would like to sit down and talk to me and negotiate a contract for them." Asked, during his testimony, what he told Badgett, Patterson was evasive, not very convincing as a witness. Then came the following:

A. I identified myself and told him that I had been advised that they had purchased, or bought, the Kentucky Lake Dock—I mean, the Badgett Terminal. And that I would like to discuss with him what effects that that would have on ten employees of the former Badgett Terminal and discuss—set up a meeting at a future date.

Q. Did you tell him that you wanted to talk to him about negotiating a contract?

A. For the employees the former Badgett Terminal.

Badgett was not interested and refused to talk to Patterson further. Knowing that the new owner was Kentucky Lake Dock, and that he was speaking to a spokesman for that company, Patterson's admission that he demanded recognition as bargaining agent then is enough to put this case at rest. For him to have spoken to Badgett about the old employees of the selling company,

who severed their relationship with the earlier company 3 years before, was a meaningless phrase, even assuming he did use those words. It was the manager of the new company he was talking to, and with whom he wanted to bargain.

And after Badgett refused to talk to him, on May 17, 1983, Patterson wrote a letter to W. W. Corporation, the parent company of Kentucky Lake Dock. The critical language of this letter reads:

Since you are now the owners and operators of Badgett Terminal, the UMWA respectfully ask that you contact the District 23 office by mail or by phone 821-2774, to set a date, time and place for meeting and discussing a contract for the 10 employees of the former Badgett Terminal.

The Respondent's attempt to avoid the clear message Patterson passed to the Kentucky Lake Dock Company in this letter is as meaningless as the rest of the variously articulated defenses to the entire complaint. Patterson says he knows Kentucky Lake Dock is the new owner and operator of the facility, and demands bargaining rights from that company. When he added a reference to old, discharged employees of the ancient predecessor, he was fabricating a defense to the charge he knew was coming, and which in fact was filed 6 days later.

In its brief the Respondent puts all this defense in different words. It says that Kentucky Lake Dock is an alter ego of the Badgett Terminal Company, or a "single employer" with it for purposes of the statute. Again, the facts completely belie that assertion. Kentucky Lake Dock was incorporated as a legal entity on March 1, 1983. Bentley Badgett II is its president, Donald Bowles is its vice president, and Donna Deegs is its secretary-treasurer. Bentley Badgett II owns 70 percent of the stock and Bowles the other 30 percent. Not one of these three officers and operators of Kentucky Lake Dock had ever worked for, or been associated with, Badgett Terminal Company. The purpose of their corporation, of which Badgett II and Bowles are the sole money investors, is to do a business in blending high sulfur coal with low sulfur coal, an operation which had never before been done by anyone at this location. In March it leased the facility from Badgett Terminal, after that company had several times tried to lease it to other possible lessees without success. At the time of the hearing, Kentucky Lake Dock had five employees: Martin Welborn, the superintendent, two equipment operators, one watchman, and Ramsey, a licensed barge man. Only one other employee had worked for Kentucky Lake Dock since its inception, a third equipment operator. Of the total group only Ramsey had ever worked for the prior company, Badgett Terminal.

It follows from these plain facts that Kentucky Lake Dock is neither the alter ego nor a single employer with, nor a successor to, Badgett Terminal. Cf. *Lauer's Furniture Stores*, 246 NLRB 360 (1979). Nor is this reality to be ignored merely because very little blending of coal had been done by the time of the hearing. Kentucky Lake Dock is still in the process of planning the installation of new equipment to do the blending, which will be

at very great cost and investment. It is true, as the Respondent points out, that the major amount of work performed thus far at that facility is very much like what Badgett Terminal once did, and that some of the work has been performed for customers who also gave business to the old company. These facts in no sense help the asserted defense. Even were I to assume, contrary to the facts, that Kentucky Lake Dock had planned to do exactly the same kind of business previously carried on by Badgett Terminal, it would still be a distinctly different employer, unconnected with the predecessor, and not a successor at all. An employer has no less a right to go out of business and to sell its property to someone willing to try harder at the same work, as he as to discontinue permanently and to sell, or lease, its property to someone who wants to try to do something else. What counts is that the two companies are not one and the same, or intimately related at all.

In support of its alter ego contention, the Union relies heavily on the fact that the principal owner of the new company is a second generation relative of the owners of the first one. It is apparently a rich family, but the fact still remains that the people who own and operate the new company simply are not, and never were, connected with the other in the owning or doing of any of the business. In 1982 the Badgett Terminal Company leased the facility to an outside company called Grand Rivers Terminal for a certain amount of monthly rent, and a percentage of its anticipated coal sales. At that price, that company was unable to get customers and walked away from the entire project without ever starting. The lease later made with Kentucky Lake Dock called for a much lower rent and a smaller percentage of the sales. Again, argues the Respondent now, this shows the two companies are not really separate. But if a company finds itself with valuable property on its hands, and is constantly paying for its upkeep with no return at all, it is to be expected it will settle for less when its earlier attempts to sell, or lease the property failed because it asked for too much. In order for the Board to find successorship, or alter ego in a case of this kind, more than mere suspicion is required.

And finally, even were I to believe, contrary to the proof of record, that Kentucky Lake Dock is no more than a cover for the old company, really the same people resuming the same old business, I would still find that the Respondent violated the statute by picketing for recognition for over 30 days without filing an election petition with the Board. A presumption of continued majority, like any other kind of presumption, must be based on reason. At least a large number, if not all, of the old employees no longer held employee status with this company. They had accepted their pensions, or severance pay. Three years had passed. And when the business was resumed, a new cadre of men was employed. There is no charge or allegation that the employer did anything wrong in hiring a totally new group of workmen, the Union's claim to the contrary notwithstanding. The presumption of continuing majority after the first year following the certification rests on uninterrupted employment and continued negotiations with the Union in some

form or other, either by successive contracts or unending bargaining. There is neither in the case at bar.

There is no point in belaboring it further. I find that the Respondent picketed the operation of Kentucky Lake Dock on March 10, 1983, for about 3 months for the purpose of compelling recognition as collective-bargaining agent for the employees of that company, without ever filing an election petition with the Board. By such conduct it violated Section 8(b)(7)(C) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The Respondent's unfair labor practices in violation of Section 8(b)(7)(C) of the Act, set forth in section III, above, occurring in connection with the operations of the employer described in section I, above, had a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. By picketing, or causing to be picketed, the waterfront facility operated by the Kentucky Lake Dock Company on and after March 1, 1983, with an object of forcing or requiring that company to recognize or bargain with the Respondent as the representative of its employees, while not filing a petition for an election with the Labor Board for a period of 30 days, the Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(7)(C) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law on the entire record, I issue the following recommended¹

ORDER

The Respondent, District 23, United Mine Workers of America, Madisonville, Kentucky, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing or causing to be picketed the operational premises of Kentucky Lake Dock Company with an object of forcing or requiring that company to recognize the Respondent and bargain with the Respondent as the representative of its employees, while failing to file an election petition with the Labor Board for a period of 30 days.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Post at all places where notices to employees, applicants for referral, and members are posted copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."