

**Oil, Chemical & Atomic Workers International  
Union, Local 3-689, AFL-CIO and Martin  
Marietta Energy Systems, Inc. Case 9-CC-1507**

June 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABUGH

On December 26, 1991, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed cross-exceptions and a supporting brief. The General Counsel filed limited exceptions and a brief in support. The Respondent filed an answering brief to the General Counsel'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 ruling, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing the north gate entrance to the Employer's facility despite the Employer's clear establishment of this gate as reserved for authorized neutrals only. The General Counsel agrees with the judge's 8(b)(4)(i) and (ii)(B) finding, but contends that the judge, in finding the gate was not tainted, should have specifically set forth the evidence upon which he relied. We agree with the General Counsel that the judge should have set forth more fully the evidence regarding the issue of alleged taint. The Union, in its brief to the Board, does not specifically set forth the evidence upon which it relies to establish taint. Based on our reading of the record, we have set forth below the evidence that could arguably be relied upon to establish taint. We conclude, however, that such evidence does not in fact establish sufficient taint.

<sup>1</sup>In agreeing with the judge that the Respondent violated Sec. 8(b)(4)(i) and (ii)(B) in picketing the reserved north gate, we find it unnecessary to pass on the General Counsel's allegation that the Respondent also unlawfully engaged in "signal picketing." In essence, that allegation is that the Respondent, after ostensibly stopping its picketing on July 3, left behind signs, and used cars to partially block the road, which "signalled" users of the neutral gate not to enter. Because this allegation, even if established, would not affect the remedy, we decline to pass on it.

<sup>2</sup>As noted in the General Counsel's exceptions, the judge incorrectly refers to the Employer as the Respondent. The Employer is the Charging Party. This correction does not affect the analysis of the unfair labor practice issues presented.

On June 14, 1991,<sup>3</sup> the Employer, in writing, notified the Union of designated reserved gates,<sup>4</sup> the gates were clearly marked, and the Employer posted guards at the entrance to the north gate to check persons or entities entering or exiting. On June 19, the Union, in writing, notified the Employer that it suspected that unauthorized persons were using the reserved north gate and, without identifying the basis for its suspicions, requested that the Employer provide to it a list of entities or persons authorized to use the north gate and a description of security measures being used there.

On June 20, the Employer responded to the Union's letter by requesting that the Union provide to it the identities of those persons suspected of violating the reserved gate system. Also, during subsequent conversations between the Employer and the Union, the Employer repeatedly and specifically requested this information from the Union so that the Employer could take appropriate action to correct any violation. The Union never provided the Employer with the identities of those persons or entities that it suspected of violating the neutral gate, and the Employer never turned over the requested information to the Union.

At the hearing, the Union presented specific evidence as to the identities of those persons that it suspected of tainting the reserved north gate. It asserted that a water truck used the north gate, and that Jake Bell, a former employee of the Employer, used the north gate. Further, the Union alleged that Belco Inc., a construction contractor, was performing bargaining unit work. The Union also introduced evidence that an unidentified geologist employed by service contractor Geraghty and Miller, a service contractor of the Employer, entered and exited the north gate.<sup>5</sup>

The General Counsel established that the water truck was a subcontractor of a construction company's subcontractor, and that Bell works as an "escort" for some construction contractors as he has the necessary security clearance. Further, Belco was doing work which had been performed by construction contractors in the past, and the contract for the work was awarded to Belco prior to January 23. The evidence does establish that the "geologist" entered and exited the reserve gate on approximately three occasions.

<sup>3</sup>All dates hereafter refer to 1991 unless otherwise indicated.

<sup>4</sup>The north (neutral) gate was reserved for construction contractors, their employees and suppliers, and the main (primary) gate was established for the Employer's employees, service contractors, vendors, and suppliers.

<sup>5</sup>In addition, a union witness testified that he observed persons entering the north gate that appeared to be "secretaries or young people," but could not specifically identify those persons by name or by employer, nor did the witness testify as to when and how often he observed them entering the north gate. We find that this vague testimony does not establish taint.

We find in agreement with the judge that the Employer has properly established and maintained a reserve gate system in compliance with the criteria enunciated in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950). In only the case of the geologist was it shown that a violation of the reserved north gate may have occurred. It is unclear as to whether the geologist continued to use the north gate after June 14 when the Respondent had clearly established the reserved gate system. However, even assuming that the geologist did use the neutral gate after June 14, record evidence supports a finding that he did so on only three occasions. In view of the uncertainty as to the dates, the minimal number of crossings, and the fact that only one individual was involved, we do not believe that this conduct establishes a pattern of destruction of the reserve gate system sufficient to justify the Union's resumption of picketing at the reserved north gate.

We also note that the Union did not present any evidence that the Employer failed to rehabilitate the reserve gate system when it discovered possible violations. In fact, in situations where a company guard attempted to enter through the north gate, he was counseled by the Employer and appropriately redirected to the primary gate. The Union never informed the Employer of the specific identities of persons suspected of entering or exiting the north gate, even when asked and told by the Employer that "immediate action would be taken." The Union thereby precluded the possibility of appropriate corrective action by the Employer against those suspected of violating the reserve gate system. It was only at the hearing that Respondent presented specific evidence of alleged violations and only one of these instances has any arguable merit.

The Union contends that the Employer's failure to furnish the Union with information concerning those neutrals who were authorized to use the reserved north gate and a description of security measures implemented at the north gate was in itself sufficient to establish that the Employer was not adhering to its established reserve gate system. We do not see how the Employer's failure to furnish the Union with information regarding possible taint can be used as a substitute for proof of taint. As indicated above, that proof is lacking. Therefore, we adopt the judge's finding that the neutral north gate has not been sufficiently tainted to warrant the Union's resumption of picketing at that gate.

#### AMENDED REMEDY

The judge, despite his finding that the refusal to supply the requested information concerning those neutrals authorized to use the reserve gate does not establish taint, nevertheless decided to withhold the Board's usual remedy because of the Employer's failure to provide this information. The judge found that

fairness dictates that the Union ought not be compelled to guess about the neutrality of a gate. In the judge's view, in the interest of fair play and openness, employers ought not be permitted to thwart a union inquiry into the gate's administration. Further, he found that the Employer's reluctance to furnish the information raised a question whether it was actually operating an untainted reserve gate. Accordingly, he recommended that the Order in this case be held in abeyance until such time as a joint monitoring system is established.

We disagree with the judge. The purpose of Section 8(b)(4)(B) is to protect neutral persons from becoming enmeshed in a labor dispute between a union and the primary employer. Thus, in the instant case, the fact that the primary Employer failed to furnish the Union with a list of neutrals cannot be used as a license for the Union to picket the neutrals. Even if the primary Employer had a contractual or 8(a)(5) obligation to furnish the information to the Union, that would simply add another basis for the Union's dispute with the primary Employer. However, that would not establish a separate dispute with otherwise neutral employers so as to privilege picketing such employers. In sum, the Union is free to use statutory or contractual measures to elicit the information from the primary Employer. But it cannot picket neutral employers simply because the primary Employer fails to supply the information.

Based on the above, we will not condition a remedy, designed for the protection of neutrals, upon the primary Employer's willingness to set up a joint monitoring system.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Oil Chemical and Atomic Workers International Union, Local 3-689, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified below.

Delete the last paragraph of the judge's recommended Order.

*Patricia Rossener Fry, Esq.*, for the General Counsel.

*John R. Doll, Esq.*, of Dayton, Ohio, for the Respondent.

*John Robert Uhlinger, Esq.*, of Piketon, Ohio, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The charge in this case filed by Martin Marietta Energy Systems, Inc. (the Employer) on July 1, 1991, was served on Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL-CIO (the Respondent or the Union), on the same date by certified mail. A complaint and notice of hearing was issued on July 17, 1991. In the complaint it was alleged that

the Respondent had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The case came on for hearing October 3, 1991, at Portsmouth, Ohio. All parties were afforded full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT AND REASONS THEREFORE

##### I. THE BUSINESS OF EMPLOYER INVOLVED

At all times material, the Employer, a corporation, has been engaged in the production and sale of enriched uranium at its Piketon, Ohio facility.

During the past 12 months, the Employer, in the course and conduct of its business operations described above, sold and shipped from its Piketon, Ohio facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Ohio.

The Employer is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR UNION INVOLVED

Respondent is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

On June 11, 1991, the Union engaged in a strike at the Employer's premises at Piketon, Ohio. At the commencement of the strike, the Union began picketing at the west main access, north access, east access, and south access gates of the Respondent. Thereafter, by letter dated, June 14, 1991, Respondent informed the Union:

###### Designation of Contractor's Gate

This supplementary notice will serve to advise you that the North Access Gate is reserved for the exclusive use of construction of Martin Marietta Energy Systems, Inc., and the Department of Energy and their employees and suppliers.

Employees of Martin Marietta Energy Systems, Inc., its suppliers and vendors, service contractors business visitors, DOE employees and Ohio Valley Electrical Company employees will use the West Gate to enter the plantsite.

It is expected that OCAW Local No. 3-689 will observe the provisions of the National Labor Relations Act and remove their pickets at the reserved gate.

The Respondent posted a sign which read as follows:

NOTICE  
NORTH ACCESS ROAD  
RESERVED FOR USE BY:  
\* CONSTRUCTION CONTRACTORS  
\* THEIR EMPLOYEES & SUPPLIERS  
ONLY  
MMES EMPLOYEES, SUPPLIERS, VENDORS  
& ALL OTHERS  
USE THE CLOVERLEAF ENTRANCE

The Union removed its pickets at the north access gate. On June 19, 1991, the president of the Union wrote the Respondent:

This is in reference of your letters that you sent me dated June 12th and 14th, 1991, designating a reserved gate. I informed Mr. Uhlinger verbally at that time that we questioned the legitimacy of this reserved gate but that we would pull the pickets pending our investigation.

Our investigation had indicated that persons other than contractors and their employees and suppliers have utilized the North Gate. As a result, we now, respectfully, request you supply us with a list of those people and or companies you have designated to use this gate and what means you have implemented of guaranteeing the integrity of the reserved gate.

We need this information by close of business, June 20, 1991, with sufficient proof that the Company can maintain the integrity of the reserved gate. If the requested information is not provided the pickets will be again placed upon the gate.

The Respondent replied by letter dated June 20, 1991:

This is in response to your letter dated June 19, 1991 concerning the designated reserve gate. The Company is unaware that the North Gate is being used by anyone other than the contractors and/or their employees, subcontractors and suppliers for whom it has been specifically established. If you have information that this gate is being used inappropriately, please let me know so that the Company may take immediate action.

You are advised that we will consider any resumption of picketing at the North Gate to be a violation of the National Labor Relations Act.

Because the Respondent refused to furnish the Union with "a list of those people and or companies you have designated to use this gate and what means you have implemented of guaranteeing the integrity of the reserved gate" the Union replaced the pickets at the north gate on June 21, 1991.

A 10(e) injunction was sought an a consent order entered on August 13, 1991, enjoining the the Union from:

(a) Engaging in any form of picketing at the "North Gate" to the premises of Martin Marietta at Piketon, Ohio.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests or appeals, however given, made or imparted, or by any like

or related acts or conduct or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by the contractors of Martin Marietta or any other persons engaged in commerce or in industries affecting commerce, to engage in a strike or refusal in the course an of his employment to use, manufacture, process, transport or to perform any service, or any manner or by any means, threatening, coercing or restraining any of the contractors of Martin Marietta or any other person in commerce or in any industry affecting commerce where, in either case, an object thereof is to force or require the contractors of Martin Marietta or other persons to cease contracting or doing business with Martin Marietta.

Additionally it was further ordered that:

[F]or the sole purpose of monitoring and assuring compliance with the use restriction of the North Gate to the United States Department of Energy, Piketon, Ohio Facility operated by Martin Marietta, respondent shall be permitted to station two (2) observers in the area of the said North Gate, subject to the following restrictions:

(1) Vehicles used by the observers shall be parked on the outside berm of the outbound (northbound) lanes, facing north.

(2) The portable toilet facilities utilized by the observers shall be placed off the paved roadway on the outside berm of the outbound (northbound) side of the roadway.

(3) There shall be no signs of any kind of description at the North Gate other than the sign placed by Martin Marietta to advertise the use restrictions for said gate.

(4) A maximum number of four (4) observers may be present at the North Gate for reasonable periods for shift changes, not to exceed fifteen (15) minutes in any four (4) hour period. Union coordinators or shift captains may make necessary visits to the North Gate for the periods not in excess of five (5) minutes to deliver messages and/or to assure the health and welfare of observers.

(5) Observers shall not block ingress or egress at the North Gate by any means.

According to the General Counsel, picketing activity continued as late as September 18, 1991. According to the Union, the Union pulled the pickets at the North Gate on July 3, 1991,<sup>1</sup> and since that date no authorization has been given by the Union to picket the north gate. Observers have only been in the vicinity.

The Respondent offered evidence to support its claim that the reserved gate was tainted because the Company allowed persons who should have been excluded to enter through the gate. Weighing evidence of the Union and General Counsel on this subject (although the Company is not without suspicion) I conclude that the reserved gate was not tainted to such a degree as to destroy its integrity. The Respondent's evidence was little more than surmise.

<sup>1</sup>According to Union President John Knauff the pickets were removed to accommodate other employees who were members of other labor organizations.

I find that the north gate reservation met the criteria of *Electrical Workers IUE Local 761 v. NLRB*, 366 U.S. 667 (1961), and *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950).<sup>2</sup>

Accordingly the picketing at the reserved gate by the Union was an unfair labor practice in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

2. The Union is a labor organization within the meaning of the Act.

3. By unlawfully picketing the lawfully reserved north gate of Martin Marietta Energy Systems, Inc., the Respondent violated Section 8(b)(4)(i) and (ii)(B).

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

#### REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

While the statute requires a union to honor a reserved gate properly installed and administered, the Employer may not use the gate for any other purposes than those sanctioned by the statute. This means that a reserved gate loses its reserved status if excluded employers or parties pass through it. In this regard the Union argues in its brief that the Union ought to be allowed access to information from which it can determine whether the employer had violated the integrity of the gate. The Union contends that "company's refusal to supply information regarding the neutral gate mechanism to maintain the integrity of the gate allowed the union to picket the tainted gate." I find merit in the Union's apprehension because, as the Company operated the reserved gate, keeping the Union wholly in the dark as to who could enter through the gate, the Union was unable to resolve whether its picketing would be lawful or unlawful. Cf. *Limbeck Construction Corp.*, 555 F.2d 311, 318 (5th Cir. 1977). The Union made the wrong guess.

The parties and the court in the court's consent decree realized that in order that the Union might be protected against the surreptitious slipping of excluded persons through the gate the Union should be given the right to monitor the gate. Obviously the monitoring system imposed by the consent decree could not be totally effective for without a means of identifying the parties passing through the gate the monitor

<sup>2</sup>In *Local 761* at 681, the criteria was thus stated:

In a case similar to the one now before us, the Court of Appeals for the Second Circuit sustained the Board in its application of § 8(b)(4)(A) to a separate-gate situation. "There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *United Steelworkers v. Labor Board*, 289 F.2d 591, 595, decided May 3, 1961. These seem to us controlling considerations.

was literally hogtied and the Union (as appears in the record) was left to speculate whether the Employer was tainting the gate and whether the persons going through the gate were violators of its integrity. While the Union was unable to prove tainting, its attempt to do so will demonstrate the problem. Fairness dictates that the Union ought not be compelled to speculate and surmise. Thus, in the interest of fairplay and openness, employers ought not be permitted to thwart an open disclosure of the gate's administration. The more openness the less chance for controversy over who is passing the gate. Had the Company responded to the Union's letter and acted with openness, no doubt the present lawsuit would have been averted. Indeed the Employer's reluctance to furnish the requested information raised a question whether the Company was actually operating an honest reserved gate. The Union predictably answered with a picket line. Hence, something ought to be done to prevent this type of situation.

Accordingly, I recommend that the Order in this case be held in abeyance until such time as there is established a joint monitoring system between the Union and the Employer, which will assure that there will be no violations of the north reserved gate by parties who are barred from passing through the gate without destroying its reserved gate status.

Certainly such a monitoring system will cause little hardship to the Employer who has derived substantial benefit from its rule at the expense of the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist at the north reserved gate of Martin Marietta Energy Systems, Inc., from engaging in or encouraging employees to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where the object is to force or require any other employees

<sup>3</sup>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.

or persons to cease doing business with Martin Marietta Energy Systems, Inc.<sup>4</sup>

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

(a) Post at its in Piketon, Ohio, copies of the attached notice marked "Appendix."<sup>5</sup> 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 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.

<sup>4</sup>See *Electrical Workers IUE Local 761 (General Electric)*, 123 NLRB 1547 (1959).

<sup>5</sup>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."

#### 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, at the north reserved gate of Martin Marietta Energy Systems, Inc., Piketon, Ohio, engage in or encourage employees to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where the object is to force or require any other employers or persons to cease doing business with Martin Marietta Energy Systems, Inc.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 3-689, AFL-CIO