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Boycott Law Bulletin

Timely news coverage and expert analysis of anti-boycott and anti-bribery laws, regulations and court developments for corporate executives, exporters, bankers, attorneys, accountants and U.S. and foreign government officials.

Commerce/Treasury Enforcement

"Commerce/Treasury Enforcement" is a regular monthly feature of the Boycott Law Bulletin. It provides news and information about the U.S. government's anti-boycott enforcement policies, procedures and actions.

By Mark A. Bruzonsky

Mark Bruzonsky, a consultant on Middle East Affairs with the Washington firm of International Associates, writes this column monthly for the Boycott Law Bulletin.

COMMERCE'S THIRD ENFORCEMENT ACTION: CAMERON IRON WORKS – $65,500 FINE IN CONSENT AGREEMENT

For allegedly providing 131 negative certificates of origin, the Houston-based Cameron Iron Works, Inc., has been fined $65,500 and ordered to undertake a number of internal corrective measures to ensure its future compliance with the anti-boycott provisions of the Export Administration Act.

It could have been much worse for Cameron. Had the company contested the Department's charges and been found guilty by the administrative law judge, the specified $10,000 fine "per violation" technically would have meant a total fine of $1,310,000.

The $65,500 fine is precisely 5 per cent of the possible total fine. Vincent J. Rocque, director of the Commerce Antiboycott Compliance Staff, declined to say how and why that percentage was arrived at in settling the Cameron consent agreement. And he cautioned that "we wouldn't want people to think that the $500 fine [per violation] in this case has any special significance. Each case is handled individually." In other words, the Cameron settlement is not to be taken as a rule-of-thumb guide on potential fines in future consent settlements.

The 5 per cent penalty ratio in Cameron is in marked contrast to Commerce's first enforcement action in September against the Continental Grain Co. subsidiary, Finagrain. The Swiss subsidiary signed a consent agreement involving two alleged violations similar to those in the Cameron case, yet Finagrain was assessed the maximum penalty of $10,000 for each. Asked about the contrast, Rocque said, "We always try to get the best deal we can. We are confident that in settling the Cameron case in this way the public interest is served."

Officials at Cameron Iron Works, Inc., in Houston would not discuss the Commerce action in detail, and the company will say only that "In the consent agreement, the company has not admitted any violations of the Act or regulations. The company settled the compromise in the belief that a resolution of the differences [between the company and Commerce] through the consent agreement process was the most expiditious and cost-effective way of forestalling a lengthy and costly legal dispute."

One company official was asked whether the action would affect Cameron's continued operations in the Middle East. "We don't know at the momment whether it will affect the company's Middle East business, but the company will continue to do business in the Middle East." The official declined to say what precentage of the firm's trade is from the Mideast.

In its Oct. 30 announcement of the Cameron action, the Department quoted Stanley Marcuss, Acting Assistant Secretary for Industry and Trade, as saying that the action indicates "how seriously the Department regards the continued issuance of negative certificates of origin." Another Antiboycott Compliance Staff official told the Bulletin that "some people tended to minimize the significance of negative certificates of origin. The Department does not consider them 'insignificant,' and the Cameron case is evidence of that view."

In addition to the fine, the Commerce Order specifies that Cameron take the following "corrective measures" to ensure its future compliance with the law:

—"Cameron shall instruct the [its] Legal Department to communicate Cameron's compliance policy and procedures to the various departments responsible for invoicing Cameron's customers."

—"Cameron shall verify proper distribution of memoranda and other communications regarding antiboycott legislation compliance measures by identification of appropriate recipients and acknowledgement of receipt by the designated recipients."

—"Cameron shall remove from the data bank of the Billing Department's data processing equipment the negative statement in question."

—"Cameron shall establish a final review procedure for all invoices to Middle East customers."

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—"Cameron shall review Sales Order Processing Procedures and instruct the Legal Department to educate the Sales Order Processing and Billing Departments as to the importance of following the designated procedures with respect to taking appropriate exception to requests for negative certificates."

—"Cameron's Legal Department shall conduct or cause to be conducted unannounced isnpections of documents in Leeds, England and Houston, Texas relating to randomly selected sales to insure that proper procedures have been implemented and are being followed."

And Cameron is also ordered to submit a report in six months to the Antiboycott Staff "specifying in detail the steps it has taken to implement the corrective steps specified in this Order."

According to Compliance Staff officials, such required compliance and monitoring programs will be a regular element of future consent agreements, and they may appear in other forms of enforcement as well. And the compliance programs ordered for Cameron and subsequent companies, said the official, will serve as an outline of what Commerce expects from companies. Said the official, "As we come out with these consent agreements, just taking from each agreement the kinds of things the companies involved did, or were accused of doing, and the kinds of comliance steps the Department mandates — it will of course vary with the nature of business involved — and someone could start to put together a pretty good picture of what it is we look to and for in a suspect company's activities."

(The full text of the charging letter, consent agreement, order and announcement in the Cameron case are presented in this issue.)

An additional interesting note concerning the Cameron case: the company's alleged provision of negative certifications in its invoices to boycotting country customers took place over a period from June 22, 1978, through January 9 of this year (the negative certifications became illegal under the EAA on June 21, 1978). The length of time involved and the volume of certifications indicate, according to one observer, that the company simply never took account of the anti-boycott law's coming into effect. Whether this was pruposeful or the result of negligence is not known. But in mid-January, according to sources, the company apparently altered its willingness to provide the negative certifications. Commerce will not say when its investigation of Cameraon began, but if the investigation began later than January, Cameron's eleventh hour change of policy did not stay Commerce's action — although the company's policy change may have had some bearing on the terms of the consent agreement.

SECOND COMMERCE ENFORCEMENT ACTION: LIBRARY BUREAU INC. IS CHARGED

In the second of three enforcement actions to date by Commerce, and the only one not settled thusfar initially with a consent agreement, is against Library Bureau, Inc., of Herkimer, New York. (The complete text of Commerce's charging letter and announcement in the Library Bureau case is presented in this issue.)

Library Bureau is charged with signing a contract stipulating that "The Contractor must further obey all laws and rules concerning the boycott." The contract involved a sale of library equipment to Libya. In that contract, said Vincent Rocque, Library Bureau is being accused "not with furnishing prohibited information, but with agreeing to refuse to do business with a boycotted country," an action prohibited by Section 369.2(a) of the EAA.

As the Bulletin was going to press, Library Bureau had not formally indicated whether it plans to contest the charge or seek a consent agreement. Should the company choose the later course, the only procedural difference between the other two consent agreements (Cameron and Finagrain) and what might be settled with Library Bureau would be that any agreement reached now would have to approved by the administrative law judge with whom Rocque's office has formally filed the case. Had the case not been turned over to the judge, any agreement reached would simply have had to have Stanley Marcuss' consent.

Asked whether Library Bureau was given the same opportunity as Finagrain and Cameron to settle without involving an administrative law judge, Rocque would only indicate that "It is our policy not to seek settlement, but rather to inform companies that we will be going forward with a charging letter," leaving it up to them what steps, if any, to take.

Officials at Library Bureau have declined to discuss the allegations, so there is no indication whether the company intends to contest the charges — or simply did not seek a settlement before Rocque handed the case over to the judge.

REVISED ADMINISTRATIVE PROCEDURES

The long-expected revised regulations on Administrative Proceedings governing the enforcement work

of the Antiboycott Compliance Staff at Commerce were issued and became effective October 12, 1979. (F " text of the regulations is presented in this issue.)

iese regulations "may be further revised in light of any comments received" by noon on December 11. Since these regulations relate to agency procedures, the relevant provisions of the Administrative Procedures Act requiring notice of proposed rulemaking, opportunity for public participation and delay in effective date are not legally applicable. But to accord with the public policy spirit of the APA, whatever comments are received will be given "fullest consideration" before these new procedures become final. The office of Cecil Hunt, Assistant General Counsel, is in charge of this matter. (See text for address for submission of comments.)

Among the changes in the new regulations: appeals from the decisions of an administrative law judge are transferred from an appeals board to the Assistant Secretary for Industry and Trade.

PUBLIC SURVEY ON BOYCOTT PARTICIPATION BY FOREIGN SUBSIDIARIES OF U.S. FIRMS

Under the foreign boycott provisions of the EAA, the Commerce Department is preparing to "survey domestic concerns for purposes of determining the worldwide scope of boycott requests received by · controlled foreign subsidiaries and affiliates with respect to their activities outside United States commerce." (Full text of the proposed survey is presented in this issue.)

Since the transactions that are the subject of the survey are outside U.S. commerce, they are not reportable under the anti-boycott provisions of the EAA. The information to be requested will include:

1. The number and nature of non-reportable boycott requests received.
2. The boycott-related actions requested.
3. The actions taken by subsidiaries in response to the requests.
4. The countries in which the requests originated, and the boycotted country involved.
5. The nature and value of the product or service involved.

The survey will cover the year 1980 and will focus on the 100 domestic concerns that have the most business with or in boycotting countries. The requests for information in response to the survey are to be complied with "on a voluntary basis," and the results of the survey will be made public, including the names of the companies surveyed and an aggregate mmary of each company's responses.

Although this upcoming survey is exempt from the notice and comment procedures of the Administrative Procedures Act, "because of the importance and complexity of the issues involved, the Department is inviting public participation in its development." Comments must be received by noon on Dec. 3, 1979. (See text of survey proposal for address for submission of comments.)

PENDING TREASURY GUIDELINES ON SAMA REQUIREMENTS WILL "REFLECT TREASURY'S LONGSTANDING POSITION"

A Treasury official central to the development of the Department's long pending new guidelines dealing with the Saudi Arabian Monetary Agency's (SAMA) boycott-related letter of credit and shipping documentation requirements told the Bulletin that "there has never been any question in our minds that the new guidelines would be issued." And, that while there is still no projected publication date, the new guidelines when published will reflect "that the Treasury position on this has not changed since we first learned of this [SAMA] language. The new guidelines will confirm this."

In other words, the new guidelines would regard the SAMA requirements as prohibited boycott compliance. However, sources in the Department hinted strongly that the new guidelines will not present another boycott/anti-boycott conflict for U.S. businesses — that the Saudi Arabian government will instead adjust the SAMA requirements (yet again) to accommodate the U.S. anti-boycott rules (this time, Treasury's).

The new guidelines are ready, but their publication is being held off pending unspecified "events." In the words of one Treasury official, "Events upon which the publication depends have not yet occurred, so it would be impossible for anyone at Treasury to tell you on what date we would publish them. We do not know when the expected events are going to occur."

Although the Treasury official would not confirm it, there is speculation in the U.S. government that the Saudis have agreed to amend once again the SAMA requirements so as to avoid a conflict with the U.S. regulations.

Other speculation, in the U.S. business community and among some non-U.S. Western diplomats, has held that Saudi Arabia had firmly resisted suggested

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changes in their requirements as put forth during the recent visit to Saudi Arabia by Commerce's Stanley Marcuss and Treasury's Russell Munk, among others. Western diplomats with access to Saudi officials have told the Bulletin that they queried the Saudis on this subject and were informed that the Saudis, having already adjusted their policy once, were not going to change it again.

But the Treasury official was asked whether the new guidelines would place U.S. companies complying with the SAMA rules in violation of the TRA. His reply: "It may be that what we will address in the new guidelines [relating to SAMA] will be a somewhat different situation than has been the case up to now."

Meaning that the Saudis are going to make a further adjustment in the SAMA requirements?

"I really don't want to say because frankly I don't know how it's going to turn out. It's all still very much up in the air, and if anyone thinks they know how it's going to turn out, I wish they'd come and tell us because we'd like to know."

Informed sources said it would be fair to say that the situation is as follows: Discussions with the Saudis are continuing; there is at least a hoped-for possibility (in the U.S. government view) that the Saudis will make another adjustment in the SAMA requirements; but pending the outcome of these talks, no one can say what position U.S. taxpayers will be in regarding the U.S.-Saudi statutory conflict.

COMMERCE IS USING BOYCOTT LAWS TO HELP PROSECUTE VIOLATORS OF THE ANTI-BOYCOTT LAWS

In a deposition taken from a Commerce Department Anti-boycott Compliance Staff officer for the Trane case, it was revealed that the Commerce staff assembled a compendium of all available boycott laws, statutes or decrees from the various Arab boycotting countries for use in prosecuting violators of the U.S. anti-boycott laws.

A compliance officer related to Trane Co. counsel that some time ago the staff sent cables to U.S. diplomatic posts in the Arab world, asking the posts to obtain, "without necessarily going to an Arab official," any decree, regulation or law that deals with the Arab boycott.

When asked why the compliance staff wanted to know what the local boycott laws were, the officer said, "So that we would be aware of the requirements of these countries for possible prosecution later."

"We wanted the laws," the officer continued, " that we would know what the requirement of a given Arab state is in order to help us with our prosecution later on. So that if a [charged] firm said, 'This is not a requirement,'...or 'This is not printed [presumably meaning not a formal requirement],' we would be able to say, 'Well, yes, here it is.' "

The officer also said that the compendium of local Arab boycott laws was helpful in giving firms advice on how to deal with boycott/anti-boycott conflicts.

COMMERCE SAYS NO REPORTS THUSFAR OF PARTICIPATION REQUESTS RELATED TO PRC-TAIWAN TWO-WAY BOYCOTT

The Commerce Department Anti-boycott Compliance staff reports that as of the momment there is no evidence that has come to their attention indicating that either the Peoples' Republic of China or the Taiwanese are requiring U.S. business to comply in any documentary manner with their mutual boycott.

The staff says that the PRC boycott of Taiwan and Taiwan's boycott of the PRC have yet to produce a report of a request to participate in either boycott.

Under a recent act of Congress, Taiwan was specified as being fully entitled to the protection of the U.S. anti-boycott laws. Presumably, a U.S. persor involved in a U.S. commerce transaction who is asked by the PRC to participate in its boycott of Taiwan would be subject to the EAA and EAR restrictions.

However, it is not clear whether the Peoples Republic might also be a beneficiary of the EAA, since it would appear to qualify as "a country friendly to the United States," in the words of the EAA. But, if Commerce or Congress were to term the Taiwan boycott of the PRC a "sanctioned" boycott, then the PRC would not be protected by the EAA.

THE FINAGRAIN CASE; LESSONS AND OBSERVATIONS

The Finagrain case, the Commerce Department's first anti-boycott enforcement action, is a lesson warning to U.S. companies that they had better be able to show some effort toward establishing an effective compliance program. If they do not have such evidence and they are targeted for an enforcement action, Commerce is likely to push for the maximum enforcement penalty.

On the other hand, the Finagrain case shows that, as might be expected, Commerce will probably emphasize civil enfrocement rather than criminal.

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In civil enforcement, the burden of proof lies with the defendant. The defendant is obliged to prove that he did not violate the law; thus it is easier for Commerce both to bring and to make stick civil enforcements.

In criminal enforcement, Commerce must first convince the Justice Department that there is a good case, and then go through the considerable task of assembling incontrovertible evidence to prove that the defendant intended to violate the EAA rules.

In the case of Finagrain, it is also likely that even if Commerce had a good criminal case, the department probably would not have pursued it; although a controlled foreign subsidiary is technically within the jurisdiction of the EAA, enforcing that jursidiction on criminal charges is another matter. If Commerce gets a criminal conviction against a foreign subsidiary, it might have some difficulty extraditing subsidiary executives. And if the foreign subsidiary does not have any assets in the U.S. and within Commerce's grasp, a criminal proceeding might be entirely fruitless. More importantly, the penalties available under civil proceedings — especially the complete revocation or suspension of export privileges — are much more threatening to companies than are the criminal penalties (however horrifying these may be to to any given individual involved).

The Anti-boycott Compliance Staff will want to establish its civil proceedings firmly with a good collection of enforcement actions before it brings its first criminal action. When the criminal action comes, educated guessers say it will likely be a significant and large case, probably involving evasion.

That may come sooner than expected. The Iraqi oil purchase agreements, which again contain EAA prohibited boycott language, will perhaps force some U.S. spot purchasers into need-of-the-momment shell company arrangements abroad in order to retain access to the Iraqi oil supply while avoiding the boycott/anti-boycott conflict. If these foreign arrangements are not carefully done — and odds are that someone will slip up somewhere — Commerce will have a large and perhaps iron-clad evasion case on its plate.