Middle East Monthly
Volume III, Number XII
December 1979

Boycott Law Bulletin

...ely 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.

CORE LABS TO FIGHT COMMERCE; DALLAS COMPANY IS FIRST TO CONTEST ANTIBOYCOTT STAFF'S CHARGES; CASE NOW AWAITS HEARING DATE.

In the first contest of its kind, Core Laboratories of Dallas, Texas, has categorically denied charges of anti-boycott violations made by the Commerce Department and the company has requested a hearing.

In its Nov. 19 charging letter to Core, the Commerce Department Antiboycott Compliance Staff charged the company with 28 violations of the EAA ...i-boycott regulations. The staff alleged that Core provided 27 certificates to four Arab states between Jan. 21 and Aug. 1, 1978, stating that "Core Laboratories, Inc. has no direct or indirect connection whatsoever with Israel." A similar certification, Commerce alleges, was included in a bid quotation to Iraq. All 28 instances, says Commerce, constitute furnishing information about the company's business relations with a boycotted country in violation of the EAA regulations. (For complete text of charging letter, see November 1979 issue, page 330.)

Mr. Gould Whaley, Executive Vice President of Core, said that "We deny these allegations categorically, and we are prepared to let the judicial process unfold."

The company has had an anti-boycott compliance and monitoring program in operation since late 1977, and company officials say they have taken every possible step to ensure that appropriate personnel have been schooled in the anti-boycott requirements and that those personnel have received immediate notice of successive changes in the requirements. In some cases, say company officials, Core began compliance with EAA regulations before they were required.

"We are quite prepared to fight this [case] with all the resources at our command," Whaley said. "And ...eel fully confident that any objective hearing will show that there was no intent to violate the regulations."

"We wouldn't take this step or assume this position," he added, "without feeling entirely confident about our posture and the extreme efforts we have gone into in order to comply with the regulations."

Judge Hugh J. Dolan, Administrative Law Judge for the Department of Commerce, will hear the case. At presstime, Judge Dolan was about to initiate a conference call with the parties to set a hearing date. The judge could not say when a hearing might be held, but that it might come up as early as mid-February.

Core's case will apparently rest on the question of intent. The company says the certifications noted by Commerce were provided, but says that the intent necessary for a violation was absent.

The case will be an important one, both for Core and for Commerce — perhaps more important for Commerce. Core faces a potential fine of $280,000 if found guilty. But there is a lot riding on the case for Commerce as well. The Core case is only the fourth enforcement action initiated by the Antiboycott Compliance Staff, and sources say the staff did not expect a contest this early in its enforcment program.

If Core wins the case, that could steel other U.S. companies to resist Commerce's enforcement actions. "Intent" is at best a murky area of the law, and a win for Core on this issue may encourage other defendants to give more consideration to contesting charges rather than opting for consent agreements. At the very least, Core's decision to go to administrative proceedings will consume energies at the Antiboycott Compliance Staff that otherwise might be directed at other enforcement actions.

LIBRARY BUREAU INC. HAS EXTENSION FOR RESPONSE TO CHARGES.

Library Bureau, Inc., of Herkimer, New York, has received an extension of time in which to respond to the charges made against it by the Antiboycott Compliance Staff at Commerce. Its response is now due by January 7.

Informed sources say the company is negotiating a consent agreement with Commerce. The manufacturer of library equipment was charged with agreeing to comply with Libya's boycott requirements in an April 1978 contract.

Since the charges involve a single count of alleged violation of the regulations, Library Bureau faces a maximum fine of $10,000. It is understood that one of the settlement terms being considered involves an immediate payment of a $5,000 fine along with payment of a $5,000 "escrow fine" which would be held for a period of one year and then be refunded to the company if, during that year, it has not been found to be violating the anti-boycott regulations. If this is part of the expected consent agreement, it will be the first use of an escrow fine in anti-boycott actions.

REIMERS ELECTRA STEAM, INC. SEES LOSSES RESULTING FROM ANTI-BOYCOTT ACTION.

Reimers Electra Steam, Inc., of Clearbrook, Virginia, says its encounter with the Commerce Antiboycott Compliance Staff and the resulting $5,000 consent agreement fine will put a chill on its business in the Arab world.

Reimers signed a consent agreement Dec. 5, 1979, with Commerce, settling charges of two alleged violations of the EAA rules. Commerce alleged that the company provided two negative certificates of origin in sales to Syria. (Complete text of the charging letter, consent agreement, order and the Commerce announcement appear elsewhere in this issue.)

Company officials said that the firm, which manufactures electric steam boilers and pressing equipment for the garment industry, has had a healthy export business, primarily in Europe and the Far East. The company had only recently begun to enter the Arab market and was hoping for expansion in that market.

But officials say that the anti-boycott enforcement action will put a chill on its Arab world expansion. The boycott/anti-boycott conflict is now jeopardizing an order from Iraq. The company is holding up shipment of an order to Baghdad while its representative there tries to clear up letter of credit language that, as currently written, would place the company in violation of the EAA.

"We want more Arab world business," said a company official, "and we would try to get more — but we can't get it if there are going to be these boycott problems."

COMMERCE SEEKS "CREATIVE INSECURITY"; DEFENDS CONSENT AGREEMENTS.

The Commerce Department's Antiboycott Compliance Staff cannot hope to oversee every U.S. transaction with boycotting countries; like other enforcement programs, the anti-boycott actions are meant to have an in terrorum effect.

To date, anti-boycott violation charges have been brought against five diverse companies, involving a variety of business operations, alleged violations and types of remedies. This diversity reflects one of the staff's objectives.

An Antiboycott official at Commerce said that "We are looking at companies of all diferent sizes and shapes. We must create a form of creative insecurity — not uncertainty — but so that you just don't know if yours is the kind of company the Antiboycott Staff might look into."

With the exception of Core Laboratories of Dallas, Texas, four of the five companies charged thusfar by Commerce have or are about to sign consent agreements settling the charges. (Library Bureau Inc. of Herkimer, New York, is expected to conclude a consent agreement with Commerce shortly.)

The consent agreements have certain advantages for both the charged companies and Commerce. Both sides avoid potentially lengthy and costly hearings and perhaps even court trial. Each side avoids the risk of a formal finding against it. Obviously, a charged company would be hurt by an adverse ruling; but Commerce too would prefer to avoid the possibility of losing a case.

However, the consent agreements worked out thusfar have provoked concern in some quarters. Some observers complain that the comparatively light financial penalties assessed thusfar have been too mild, suggesting that Commerce is letting the companies off too lightly.

Yet Commerce officials questioned about the comparatively light fines (in the Cameron Iron Works case, a $65,500 settlement fine as compared to a potentially crippling $1.3 million fine) are quick to point out that specific requirements imposed by the consent agreements go far toward ensuring no further violations of the EAA anti-boycott provisions. Consent agreements have required companies to establish comprehensive anti-boycott monitoring and compliance programs and to report back to Commerce about implementation of the programs.

"That is the real goal," said an anti-boycott official. He added that penalizing companies becomes secondary unless a clear intent to violate the law can be established. Anti-boycott officials speak of their "education function."

Continued on following page

Continued from previous page

COMMERCE ANTI-BOYCOTT UNIT SAID TO BE SHY ABOUT LITIGATION; WILLING TO TRADE FINE SEVERITY FOR QUICK CONSENT SETTLEMENTS.

Attorneys who have been following the Commerce Department's anti-boycott enforcement thusfar suggest that the Department is not eager to go into administrative proceedings and prefers to settle with consent agreements.

These sources say that Commerce anti-boycott enforcement officials in their dealings with charged companies have clearly steered the firms toward consent agreements, in some cases offering considerably reduced fines. In one case, a charged company was told that Commerce would settle for $7,500 per violation and suggested that the Department would be willing to entertain a counter proposal. A short time later, when the charged company had not responded to the offer, Commerce made a new offer of $5,000 per violation and again suggested that a counter-offer would be entertained. The company ultimately settled for a much lower per-violation fine.

Commerce, say the attorney sources, also uses the stick in pressing companies for consent settlements. When informing charged firms of the case against them, anti-boycott officials have on occassion threatened criminal charges. "The implication is quite obvious," said one source. "They're saying to companies, 'Look, we could bring criminal charges against you on this case, but we've decided to go with civil action only.' In other words, if the charged company is 'smart,' it is being warned to take the consent settlement offered or perhaps face an elevation of the charge from civil to criminal action."

The sources say that Commerce is apparently interested in piling up a series of quick consent decrees, and is not eager to get involved in administrative proceedings on a lot of cases. Going to administrative proceedings, say the sources, would mean that the anti-boycott staff would be tied up in litigation and not producing immediate results. The sources add that the staff appears to be under pressure to produce enforcement results quickly, and consent agreements offer the most speedy avenue of action.

HEARINGS WILL BE OPEN TO THE PUBLIC AND JUDGE DOLAN SUGGESTS SCHEDULING WILL BE FAIRLY PROMPT.

The Hon. Hugh J. Dolan, Administrative Law Judge for the Department of Commerce, has confirmed that anti-boycott hearings before him will be open to the public. Commerce's Office of the General Counsel was uncertain whether anti-boycott hearings under the proposed Administrative Proceedings regulations would be public. Section 388.22 of the proposed rules provides that the complete record for decision will not be available for public inspection until after a final disposition of a case. Because of this, the counsel's office was uncertain whether the hearings themselves would be public. The counsel's office said the question would be resolved at the discretion of Judge Dolan.

Judge Dolan told the Bulletin that "the fact that these [anti-boycott cases] are under the Administrative Proceedings Act [APA] indicates that they are to be public."

The judge indicated that the hearings would not go into closed session unless, as provided in the proposed regulations, it would be deemed necessary in order to protect either business proprietary information or government's national security interests.

Scheduling of anti-boycott cases apparently will be prompt. Judge Dolan noted that he has some 200 cases pending at present, and that he is often out of Washington on regional cases. The case load and his frequent trips away from Washington mean that it is difficult to say generally how long it would be for a given case to come up. But, said the judge, it is likely that anti-boycott cases could be scheduled within a matter of weeks.

Another variable in scheduling is the priority given to hearings that affect individual livelihood. At present, Judge Dolan has a healthy load of fisheries cases; in instances where a hearing may affect an individual's livelihood (for example, a fisherman's license), the case gets priority scheduling. This can of course delay action on other hearings.

The judge indicated that priority scheduling would not often be granted in anti-boycott cases, although it is possible. "Unless the business involved is threatened with an immediate loss of some kind or something else very traumatic as a result of the hearing, the cases will be scheduled as they come," he said.

Companies seeking a hearing, however, can request expeditious handling.

FOREIGN OWNERSHIP MAY RELIEVE U.S. FIRMS FROM SOME ANTI-BOYCOTT RESTRICTIONS.

In the last four years an increasing number of U.S.

companies, including many large concerns, have been purchased by foreign corporations. Some U.S. lawyers are examining the status of foreign-owned firms under the EAA rules, and they conclude that foreign ownership may facilitate transactions that otherwise would be prohibited by the EAA regulations.

Being foreign-owned, notes one attorney, raises the question of the extent to which the sales by the U.S. company can be picked up by the foreign parent. The U.S. subsidiary of the foreign parent obviously does not control its parent, so there may be greater flexibility available to the U.S. company in terms of the application of controlled-in-fact requirements of the EAA.

Under the EAA, a controlled foreign subsidiary of a U.S. company cannot provide prohibited information or enter into prohibited agreements in U.S.-commerce transactions without violating the EAA regulations. Nor can the U.S. parent make sales via the subsidiary to a boycotting country in participation with boycott requirements.

But in the case of a U.S. company being the subsidiary of a foreign concern, the U.S. firm might be able to make a sale to a boycotting country without providing prohibited information; the foreign parent, however, provides to the boycotting country the information required — negative certificates of origin, answers to boycott questionnaires — on behalf of its entire group. That activity of the foreign parent is an activity that is not controlled by the U.S. subsidiary, and therefore is an activity outside the jursidiction of the EAA.

The EAA regulations do prohibit a U.S. company from taking part in a transaction in which a third party is providing prohibited information, but the murky question of "reason to know" and the absence of control raise the possibility of greater flexibility that some U.S. lawyers are looking at with interest.

As one attorney put it, "Let's say it is the policy of a French parent to provide negative certificates of origin for its entire group to a country to which the group exports goods. If the U.S. subsidiary sells to the country under those circumstances, would that be a violation of the EAA regulations by the U.S. subsidiary?"

TREASURY SEEKING "CLARIFICATIONS" FROM KUWAIT AND U.A.E. ON SHIP ELIGIBLE AND INSURANCE CERTIFICATIONS.

As previously reported (See Commerce/Treasury Enforcement, November 1979 issue, page 344), the Treasury Department is currently conducting discussions with at least two other Arab states toward obtaining "clarifications" of their requirements for "ship eligible" and "insurer's resident agent" certificates. This follows the successful negotiation with Saudi Arabia regarding similar requirements and the subsequent new Treasury guidelines and the Commerce interpretation regarding such certifications.

While Treasury has declined to name the countries involved in the current talks, informed sources say that Kuwait and the United Arab Emirates are the countries involved.

The sources note that while both countries often follow the Saudi lead in these and other matters, there is no guarantee that Treasury will succeed in obtaining the hoped-for "clarifications."

Under the new Treasury guidelines, the Saudi ship eligible and insurer's local agent certificates do not constitute boycott participation. However, without similar clarifications regarding the non-boycott nature of the certification requirements in other Arab states, compliance with such requirements from countries other than Saudi Arabia will place U.S. persons in violation of the Treasury rules. (For full details, see article in this issue by John A. Gray, and the "How the Rules Apply" column by Howard O. Weissman.)

In addition to Kuwait and the U.A.E., other Arab states that require ship eligibility and/or insurance certificates are Syria, Qatar, Egypt and Libya.

When asked why Treasury was not also holding talks with those four countries as well, the source said that in the case of Egypt the problem may soon be resolved by Egypt's scheduled formal withdrawal from the boycott in January. As for Syria, Qatar and Libya, said the source, Treasury does not feel that the amount of jeopardized trade involved warrants initiating such discussions.

In the case of Kuwait, negotiations might be successful. As one attorney has pointed out, prior to the Saudi's shift from "vessel not blacklisted" to "vessel is eligible" certifications, the Kuwaitis did not have a boycott-related vessel certification requirment at all. It was only after the Saudis introduced their vessel is eligible requirement that the Kuwaitis adopted the same requirement. Thus, says the attorney, since Kuwait did not previously employ a "vessel not blacklisted" certification requirement, it is possible to argue that their current vessel eligible certification is not boycott-related. So even if the Treasury discussions with Kuwait fail, the boycott-related status of their vessel eligible certificates may be rebuttable.

Continued on following page

Continued from previous page

For the present, those U.S. companies that comply with Kuwaiti and U.A.E. ship and insurance certification requirements will violate the new Treasury guidelines, and suffer the tax consequences. And what if Treasury ultimately obtains clarifications from Kuwait and/or the U.A.E.? As in the case of Saudi Arabia, Treasury will probably rule the clarifications to be retroactive, covering all previous ship and insurance certifications to the country involved. Companies that have lost tax benefits prior to the clarifications would then, presumably, be eligible for refunds from Treasury.

Even so, it is unlikely that many exporters will want to risk tax penalties now against the uncertain prospect of getting refunds later – so the trade with Kuwait and the U.A.E., which Treasury apparently considers worth saving, is now in jeopardy.