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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.

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SECRETARY KLUTZNICK TO DISCUSS ANTIBOYCOTT IN BULLETIN INTERVIEW.

The new Secretary of Commerce, Philip M. Klutznick, has agreed to discuss the Commerce antiboycott program in an exclusive interview with the *Bulletin*.

The Klutznick interview will appear in the coming March issue.

RUMORED CHANGES AT COMMERCE MAY DECREASE ANTIBOYCOTT ACTION.

Commerce has been greatly reorganized as part of the general trade reorganization effort within the government.

Luther Hodges is now Deputy Secretary rather than Under-Secretary. There is a new Associate Deputy Secretary, Pug Ravenal. And Bob Herzstein, formerly of the law firm of Arnold & Porter, is the new Under Secretary for International Trade. Herzstein's confirmation by Congress is expected soon.

Under Herzstein is Deputy Under Secretary Donald Furtado, now the Acting Under Secretary until Herzstein's confirmation hearing.

Three Assistant Secretaries are responsible directly to the Under Secretary — Assistant Secretary for Trade Administration (a position now held by the outgoing Stan Marcuss), Assistant Secretary for International Economic Policy (Abe Katz, who is now in an Acting capacity) and designate Assistant Secretary for Trade Development Herta Seidman.

It is the Assistant Secretary for Trade Administration who is in charge of the antiboycott program and who has all final appeal decisions within the Department in matters relating to antiboycott enforcement. Thus, whoever replaces Marcuss (who is leaving Com-

merce after what many describe as rather shabby treatment) will be the key personality responsible for further evolution of the antiboycott program.

Working directly under Marcuss is another new appointee, Eric Hirschorn, Deputy Assistant Secretary for Export Administration. Hirschorn has responsibility for three offices:

1. Office of Export Administration
2. Office of Industrial Mobilization
3. Office of Antiboycott Compliance

Formerly known as the "Antiboycott Compliance Staff," antiboycott affairs have grown so significantly that an "office" designation has been deemed appropriate. Richard Seppa is the new "Interim Acting Director" of the Office of Antiboycott Compliance, while Vincent Rocque, former Acting Director, has become, in effect, Hirschorn's assistant.

So much for factual changes.

Potentially much more important is the rumored shift which might result in all antiboycott affairs being placed in the Office of Export Administration.

Acting Under Secretary Furtado is currently supervising an important study — being carried out by Mike Doyle and Bob Taft — a study which appears to be leaning in the direction of reducing antiboycott matters from "Office" status, a change which implies much more than bureaucratic labels.

OEA has traditionally given antiboycott matters little attention. Its real responsibility is export licensing and short supply controls. But bureaucratic shuffling in anticipation of Marcuss' departure apparently has some people within Commerce thinking that since antiboycott matters are regulatory they can easily fit under OEA's umbrella.

Rumors of such an impending shift have caused considerable consternation among many antiboycott experts and advocates who believe that the program designed by Marcuss and built up by Rocque over the past year will be endangered. The basic fear is that OEA would not give the antiboycott side of its new responsibilities sufficient attention or visibility. (And insiders say that OEA's record as a hard-charging enforcement agency is less than spectacular.) If OEA should take over antiboycott matters, real responsi-

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bility would flow to the General Counsel's office and away from the case lawyers who have been handling the day-to-day investigations and actions.

More on this matter next month.

CORE LABS CASE TO BE SCHEDULED SOON.

A hearing before Administrative Law Judge Hugh J. Dolan in the Core Labs case may not be held for some weeks yet. Judge Dolan is currently involved in reserve military activities, and several higher-priority hearings will combine to push the Core Labs hearing into late March or early April.

IN TRANE CASE DEPOSITION, MARCUSS DISCUSSES TRADE LOSSES DUE TO ANTI-BOYCOTT ENFORCEMENT...

As part of the Trane Co. suit against the Department of Commerce contesting the constitutionality of the EAA antiboycott provisions and regulations, counsel for Trane last summer took a deposition from Stanley Marcuss, who at that time was Senior Deputy Assistant Secretary for Industry and Trade and Deputy Assistant Secretary for Trade Regulation. His deposition was just recently made available to the Bulletin.

As the government official who had primary responsibility for drafting Commerce's antiboycott regulations (and before that, a principal figure in the drafting of antiboycott legislation on the Hill), Marcuss' views on various aspects of antiboycott are important.

Among the many topics covered in his deposition, Marcuss asked about U.S. companies losing business because of being blacklisted by Arab League states. There was this exchange:

"Q. Have you ever been made aware of a company that is losing business because they have been on a blacklist or put on a blacklist?

A. (Marcuss) I just don't know exactly what you mean by that. Let me answer it this way. From time to time companies do tell us that they are unable to conclude a particular business transaction because of the constraints of U.S. antiboycott law. There are certain things they can't do.

And they tell us from time to time that as a consequence of that, they are unable to conclude a particular business transaction. There is simply no way for us to evaluate the truth or falsity of those self-serving assertions.

They may be true or they may not. There may be many reasons why particular transactions are not concluded.

...Q. And [U.S.] companies have indicated to you that they have lost business as a result of not answering a boycott questionnaire?

A. I don't recall anyone being that specific about particular boycott requirements which they did not comply with.

Q. What do you recall.

A. What I said to you before, that is, from time to time companies tell us that they have lost business, have not been able to consummate a transaction because they have not been able to comply with American law with the boycott requirement.

And your question is, do you ever recollect circumstances in which someone made specific reference to the failure to respond to the boycott questionnaire? And my answer is no. I don't recall any specific reference to the boycott questionnaire.

Q. So you have no knowledge, either directly from your own contacts with American companies or from information from your staff about their contacts with American companies, of American companies reporting to the Commerce Department that they have lost business because they did not comply with the request for information from an Arab country?

A. Yes.

Q. You are not aware of that?

A. I have no knowledge.

...Q. This is — what I am reading from here is...[an] article entitled: 'Boycotts. Marcuss Reports Arab Flexibility on Boycott Practices.' And one of the statements that you made on September 14 of 1978 to the International Trade Club in Chicago...was that 'answering boycott questionnaires remains a troublesome area.' Do you remember referring to answering boycott questionnaires as a troublesome area?

A. Yes, I do.

Q. Why is that a troublesome area?

A. Well, it's troublesome because questionnaires are still, as I said before, still being sent to American companies on occasion, and in many circumstances there is no way under U.S. law to respond to those questionnaires.

Q. Why is that troublesome?

A. Because it puts the American company in a position of either violating the boycott requirements of the boycotting countries or violating U.S. law. And that's troublesome. That's a troublesome conflict for the company involved.

Q. Well, if we presume that the American company is not going to violate American law, which is certainly the Trane Company's viewpoint, that they will not

violate American law —

A. Talk about self-serving statements.

Q. I wanted to put that in the record.

Would this be troublesome to you because violating the regulations of the Arab countries [that are] sending the questionnaires would be damaging to the Trane Company in some way? I mean I'm trying to figure out why this would be troublesome.

If there are no consequences flowing from their complying with the American law, it wouldn't be troublesome. I'm trying to find out what it is that would be troublesome.

A. Because consequences would follow. There could be a loss of business. I have no idea what the Trane Company's circumstance is, but in general terms the failure to comply with the boycott requirement, as I said before, could result in the loss of business opportunity.

Q. Would you also say that one possible consequence of this troublesomeness is that it could result in the Trane Company's being put on a blacklist?

A. Without specific reference to Trane, since I don't know the circumstances at all, in general terms the failure to comply with boycott requirements could result in blacklisting."

AND MARCUSS ON "INTENT" IN ANTI-BOYCOTT VIOLATIONS.

The question of "intent" is central to almost any charge of anti-boycott regulations violation which the Commerce Department might make. Along with the jurisdictional requirements of involvement of a "U.S. person" and "U.S. commerce," the third threshold requirement for conviction on an anti-boycott charge is that the charged party had "intent" in making the alleged violation. The intent question lies at the heart of the only anti-boycott case now before an Administrative Law Judge at Commerce. Mr. Marcuss' comments on intent, taken from his deposition, may be of interest:

"Q. Is it your testimony that you are not today in a position to say that if the Trane Company wrote back to Kuwait and said, 'No. We don't have any plants in Israel,' that that would be a violation of the [EAA] statute? You don't know whether that would be a violation of the statute?

A. (Marcuss) The statute makes it a violation of the law to do certain things with intent to comply with the boycott. Intent is, therefore, an element in the violation. And since I don't know what the intent of the Trane Company would be in responding to that first [Boycott Questionnaire] question, as a matter of

fact, I can't reach — I can't draw a legal conclusion.

...Q. If I were to tell you — and let's assume that if the Trane Company were to write back to Kuwait and answer those questions in whatever form they chose to answer them, that their intent would be to avoid getting put on a blacklist. Could the Trane Company, in your view, answer that first question by saying, 'No, we have no plants in Israel'? Would that be in violation of the statute and regulation?

A. Violation of the statute would occur if one were to provide information about one's business relationships, whether one had business relationships with a [boycotted] country — in this case, Israel — with intent to comply with the boycott.

And if the Trane Company were to respond to a boycott questionnaire with intent to comply with the boycott, and provide an answer to the first question, as I understand the law and the regulations, that would be a violation of the law.

...Q. When you say the question would be answered with intent to comply with a boycott questionnaire, how is that intent ascertained? Is it contingent on to whom the answer is sent or is it contingent on the company sending the information's understanding of why they received the questionnaire or how is intent determined in that kind of a situation?

A. Well, intent is a question of fact. And I believe, if I recall correctly, the regulations try to give examples of what facts would manifest the requisite intent. But intent ultimately depends on what is in the mind of the person responding and what he intends is something that's ascertained as a matter of fact by all the surrounding circumstances.

Q. If answers to questions such as this were sent to the Kuwait boycott office, would you consider that a relevant fact in determining intent?

A. It depends on all the other facts.

Q. Can you think of any circumstances under which a company could send answers to a boycott office in Kuwait without having the intent to comply with a boycott questionnaire?

A. I can imagine a company answering questions of this kind without knowing what it's doing. The person responding could be unaware of the fact that it's going to the boycott office of the particular country involved. It could be totally ignorant of the possible purpose.

I can imagine circumstances in which the mere sending of a piece of paper with responses to these questions do not rise to a violation of the law because of the absence of requisite intent."

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INCOMPLETE OR AMBIGUOUS BOYCOTT REPORTS PROMPT "FOLLOW-UP" INVESTIGATIONS BY ANTIBOYCOTT STAFF.

In responding to a Trane Co. interrogatory about the ability of some U.S. companies to negotiate elimination of prohibited boycott requirements, the Commerce Department has revealed that those companies submitting incomplete or ambiguous boycott reports (Form 621P) to the Antiboycott Compliance Office are sometimes the object of follow-up investigations by the antiboycott staff.

Following is the government's answer:

"Defendants understand that the Boycott Report Processing Unit, Office of Export Administration, performs "follow-ups" with respect to boycott reports submitted with incomplete or ambiguous information on an as needed — usually infrequent — basis, while the Office of Antiboycott Compliance has an ongoing investigative effort.

Defendants understand that U.S. persons have, on several occasions, indicated success in 'negotiating out' prohibited requests made in connection with transactions. Defendants lack sufficient information to provide an accurate or reliable answer as to the frequency or extent of attempts to eliminate prohibited requests, or the success of such attempts.

With respect to investigations, defendants understand that compliance officers in the Office of Antiboycott Compliance, Bureau of Trade Regulation, have on several occasions investigated companies that have reported receipt of prohibited boycott requests with which they were suspected of, but found not to be in, illegal compliance. Defendants understand that such companies were successful either in having the request(s) eliminated from the transaction, or in simply ignoring or not responding to the request(s) and that the transactions were nevertheless completed. Defendants understand further that some companies were able to provide responses that were not prohibited — for example, by substituting positive, in lieu of negative, certificates of origin."

NEW JEWISH ANTIBOYCOTT ORGANIZATION.

"Jews Against the Arab Boycott," a new organization in Washington, promises to keep a hawk's eye on antiboycott enforcement actions and policies at both Commerce and Treasury.

Dr. Julius Herman, a retired scientific adviser in naval intelligence, is the executive director of the new watchdog group. He told the "Jewish Week" in Washington that American Jews must support companies that invest in Israel. He indicated that the existing major Jewish organizations have not dealt effectively with the Arab boycott, among other issues, and that that is why JAAB has been established.

At this point, it is not known where Herman gets his support, or whether any significant elements in the Jewish community are backing him. Even so, the arrival of this new pressure group could herald a tougher Jewish attitude on boycott matters, at least from some quarters of the Jewish community in the U.S.