ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
FEB 13 1999
NANCY DOHERTY, CLERK
By _____ Deputy

AMERICAN AIRLINES, INC.	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Case No. 7:99-CV-025-X
	§	
ALLIED PILOTS ASSOCIATION, et al,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing the evidence presented at the hearing on February 12, 1999 on Plaintiff's Motion to hold Defendants in contempt of court for having violated this Court's Temporary Restraining Order signed by this Court on February 10, 1999, and after having considered the pleadings and other materials on file herein, and after having heard the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. Any below-listed Conclusion of Law which should more properly be listed as a Finding of Fact is hereby incorporated by reference and adopted as a Finding of Fact.

2. All Findings of Fact are made by the Court, as the fact finder, by clear and convincing evidence, after assessing the credibility of witnesses called.

3. The Court finds that a Temporary Restraining Order was signed by the Court on February 10, 1999 (the "TRO") after both Plaintiff and Defendants had an opportunity to be heard in this Court on the issues presented therein. The Defendants subject to the TRO were therefore aware of and knew of the TRO. Counsel for the Defendants and Plaintiff conferred with the Court regarding the language and meaning of the TRO before its entry at 4 p.m. on February 10, 1999. The Court found the underlying labor dispute to be a minor dispute.

4. The Court finds that the Allied Pilots Association ("APA" or "Union") was informed by the Court in open Court on February 10, 1999 and through the issuance of the TRO that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease. Union President Richard Lavoy stated in open court that the Union would comply.

5. The Court finds that the TRO contained the following provisions:

"that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained pending a hearing on the preliminary injunction in this matter:

(a) From calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C., §§ 151-188 (1988).

AND IT IS FURTHER ORDERED:

(b) That the said Defendants and said other persons acting in concert with them shall take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions if commenced.

(c) That the said Defendants shall instruct all pilots to resume their normal working schedule, and provide Plaintiff a copy of all such instructions.

(d) That APA and the individually named Defendants notify, by the most expeditious means possible, all APA-represented pilots employed by American of the issuance, contents and meaning of this Temporary Restraining Order, and produce a copy of all such messages to Plaintiff.

(e) That the notice described in (d) above include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same.

(f) That APA and the individually named Defendants post the notice described in (d) above to APA's Internet web site, and provide a copy of the notice to the Plaintiff.

(g) That APA and the individually named Defendants include the contents of the ordering paragraphs of this Order on all recorded telephone hotlines under control

of Defendants or any of them, until such time as the Court has acted on Plaintiff's Motion for a Preliminary Injunction, and provide a copy of all messages to the Plaintiff."

6. The Court finds that at 7:30 p.m. Central Standard Time on February 10, 1999 (3½ hours after the Court's Order), Richard Lavoy, President of the Union, sent out on the "APA Information Hotline" and posted on the Internet a message (the "February 10 communication") which was unreasonable under the circumstances and which was wholly inadequate and non-compliant with the TRO. This message was drafted, in part, by Union Vice-President Brian Mayhew.

7. The Court finds that the February 10 communication intentionally gave the impression and further conveyed to the Union membership that individual Union members did not have to comply with the TRO. As such, the Court finds that the February 10 communication violated Section (a) of the TRO in that it "permitted," "authorized," and "encouraged" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. This was done by specifically stating that only the Union and the individual defendant Union leaders were "Defendants," thus sending the clear message that individual Union members were not covered.

8. The Court finds that the February 10 communication violated Section (b) of the TRO in that it did not represent the taking of all "reasonable steps within [Defendants'] power to prevent" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. Counsel argued that the Union had until 12:00 Noon on February 12 to comply. This is not true. By simply reading the TRO, it is clear that deadline was for a report to the Court of the Union's actions to get flight operations back to normal.

9. The Court finds that the February 10 communication violated Section (c) of the TRO in that it did not "instruct all pilots to resume their normal working schedule..."

10. The Court finds that the February 10 communication violated Section (d) of the TRO in that it did not "notify, by the most expeditious means possible, all APA-represented pilots employed by American of the. . .contents and meaning" of the TRO. Again, it was made clear to the Union that the issuance of the TRO meant that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease.

11. The Court finds that the February 10 communication violated Section (e) of the TRO in that it did not "include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging

same."

12. The Court finds that the February 10 communication violated Section (f) of the TRO, as it is the Court's understanding that the February 10 communication was posted verbatim on the APA's Internet web site.

13. The Court finds that the February 10 communication violated Section (g) of the TRO, as all of the ordering paragraphs of the TRO were not contained in the February 10 communication.

14. The Court finds that the steps taken by the Union to comply with the TRO on February 10, 1999 were foreseeably ineffective and would only give the impression and further convey to the Union membership that individual Union members did not have to comply with the TRO. As what should have been a surprise to no one, the sick-out actually increased. The Court finds not only that this result was foreseeable, it was intended.

15. The Court finds that the unlawful sick-out of APA pilots subsequent to the issuance of the TRO continued and actually increased in numbers, all in direct violation of the TRO.

16. The Court finds that the aforementioned violations of the TRO amount to a ratification of the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp. v. United Mine Workers of America, Dist. 20,* 598 F.2d 363, 365 (5th Cir. 1979), *reh'g denied,* 605 F.2d 555 (1979). The Court so finds ratification by the Union of the continued unlawful sick-out and charges the Union with responsibility for allowing the continued unlawful sick-out to continue in direct violation of this Court's TRO.

17. The Court believes language from *United States Steel Corp. v. United Mine Workers of America, Dist. 20,* 598 F.2d 363 (5th Cir. 1979), *reh'g denied,* 605 F.2d 555 (1979) is appropriately quoted here because of the language's applicability to this matter:

    The "return-to-work directives [are] 'so lacking in authoritative forcefulness that they either were not heard at all. . .or were discounted as being merely stage lines parroted for the benefit of some later judicial review.'" *United States Steel Corp.*, 598 F.2d at 366.

    The Court finds that the February 10 communication was "so lacking in authoritative forcefulness that [it] either [was] not heard at all. . .or [was]

discounted as being merely stage lines parroted for the benefit of some later judicial review." *Id.*

18. The Court finds that the Union's efforts on February 11, 1999, as evidenced in the Declaration of Richard T. Lavoy, filed on February 12, 1999, came too little too late and that the flouting of this Court's TRO by the Union on February 10, 1999 by virtue of the February 10 communication has led to the continued unlawful sick-out in increased numbers in direct violation of this Court's TRO.

19. The Court finds there is nothing said in the February 11, 1999 communication that was not known to the Union, its leadership, and counsel that could not have been said in the February 10 communication.

20. The evidence demonstrates and the Court finds that the Union ran a phone bank between February 7 and February 10 to call pilots and encourage them to call in sick when in fact they were not sick for the express purpose of economically damaging American Airlines (testimony of Captain Foster). This amazingly candid, and damaging, testimony confirmed what common sense already compelled: that this illegal sick-out was instigated by the Union and was not "spontaneous" as had been represented to the Court. This illegal activity, as admitted by this Union leader, was Union orchestrated, instigated, and driven, and continues to be so. It is the Union who is responsible for the consequent damages. Logic would thus dictate the Union could stop it if they chose to. At this point, they sadly have not.

21. The evidence further demonstrates that although a phone bank was operational to cause the sick-out, one has not been established to call pilots to get them to stop. This is so even though from the operation of the "phone watch," they have both the lines and manpower to take this very reasonable action to end this illegal sick-out and comply with this Court's Order.

22. The majority (12) of the individual defendant union leaders were on sick status at the time of the contempt hearing. They were not present for the hearing. The Court finds that this sends a loud and clear message to the rank and file members of the Union as to how seriously the membership should take the Court's Order and how seriously they should take the Union's judicially ordered statements to return to work.

23. As to the individual defendants, the Court finds and believes from the evidence that Union President Richard Lavoy and Vice-President Brian Mayhew could immediately end this sick-out and get American Airlines operational again if they chose to. The Court further finds that they are the individual defendants responsible for the February 10 communication and thus the APA's disobedience

of the TRO.

B. CONCLUSIONS OF LAW

1. Any above-listed Finding of Fact which should more properly be listed as a Conclusion of Law is hereby incorporated by reference and adopted as a Conclusion of Law.

2. "An order issued by the Court with jurisdiction over the subject matter and person must be obeyed until it is reversed." *United States Steel Corp. v. United Mine Workers of America, Dist. 20,* 598 F.2d 363, 368 (5th Cir. 1979), *reh'g denied,* 605 F.2d 555 (1979).

3. "The party seeking the contempt adjudication bears the burden of establishing the defendant's violation by clear and convincing evidence." *Black Diamond Coal Mining Co. v. Local Union #8460, United Mine Workers of America*, 597 F.2d 494, 496 (5th Cir. 1979).

4. This is a civil contempt proceeding. "The movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. Wilfulness is not an element of civil contempt. After the movant has shown a *prima facie* case, the respondent can defend against it by showing a present inability to comply with the subpoena or order." *Petroleos Mexicanos v. Crawford Enterprises, Inc.,* 826 F.2d 392, 401 (5th Cir. 1987) (emphasis original) (citations omitted). The Plaintiff has met its burden in this matter by clear and convincing evidence.

5. A fine for civil contempt is a means to enforce a court order of injunctive relief, which in this case is the TRO. A fine for civil contempt may be compensatory in nature or may be designed to coerce behavior. To give a court the power to issue injunctive relief without the power to fine those individuals who disobey the court order is to give a court the power to grant a remedy without effective means to enforce it. When the gauntlet is thrown down to the authority of the Court and its lawful orders, the Court has no choice but to pick it up.

6. A court can issue fines to enforce injunctive relief, including a TRO.

7. "The Court has broad discretion in the assessment of damages in a civil contempt proceeding. The purpose is to compensate for the damages sustained." The public rights that a court order seeks to protect are important measures of the remedy. *See Long Island Rail Road Co. v. Brotherhood of Railroad Trainmen,* 298 F. Supp. 1347, 1350 (E.D.N.Y. 1969).

8. A union can be held in contempt "if the strike was conducted or encouraged by its members functioning as a union, by its agents acting within their apparent authority, or by those whose acts the Union can be held to have ratified by its inaction." *Black Diamond Coal Mining Co. v. Local Union #8460, United Mine Workers of America*, 597 F.2d 494, 495 (5th Cir. 1979). The same reasoning applies, as here, in an illegal sick-out job action.

9. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp. v. United Mine Workers of America, Dist. 20,* 598 F.2d 363, 365 (5th Cir. 1979), *reh'g denied,* 605 F.2d 555 (1979). The "circumstances surrounding the strike may create an inference that the Union condones or ratifies the illegal activity and the Union will be held responsible by its failure to take measures to end the strike." *Black Diamond Coal Mining Co. v. Local Union #8460, United Mine Workers of America*, 597 F.2d 494, 495 (5th Cir. 1979). The APA Union is directly responsible for the damages suffered and for disobedience to this Court's lawful Order.

These findings of fact and conclusions of law are hereby adopted and made as the findings of fact and conclusions of law of this Court.

SO ORDERED this 13th day of February, 1999.

Joe Kendall

Joe Kendall
U.S. District Judge