IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 9:97-CV-063
	§	
LUFKIN INDUSTRIES,	§	
	§	
Defendant.	§	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO VACATE THE COURT'S ORDER OF JANUARY 18, 2005

I. Plaintiffs' Response Misunderstands the Waiver Issue.

Defendant's motion to vacate arises principally from its dilemma that to meet and confer with the objective of reaching "agreement on the specific details of non-monetary remedial measures" necessarily waives its right to appeal. As they have done in other briefing, without noting the contrary authority in the Fifth Circuit, Plaintiffs argue cases from other circuits for the proposition that Lufkin will not jeopardize its appellate rights by participating in a process to agree to additional injunctive relief. Had Plaintiffs actually addressed the Fifth Circuit caselaw (instead of burying it in a footnote), they would have discovered that a party cannot agree to a judgment and then appeal it, *even with an express reservation of the right to appeal*. *Amstar Corp.*, 607 F.2d 1100, 1100 (5th Cir. 1979).[1]

Thus even with a reservation of the right to appeal, under controlling law, any agreement to additional injunctive relief will preclude Lufkin from appealing those orders. It may also waive Lufkin's right to appeal the Court's original injunction to the extent Lufkin's agreement to

[1] Admittedly, this appears to be the minority view, however, it remains the controlling law in the Fifth Circuit. *See Downey v. State Farm Fire & Casualty Co.*, 266 F.3d 675, 683 (7th Cir. 2001) (noting that "[o]nly the fifth circuit gives no effect to an express reservation of appellate rights); *Verzilli v. Flexon, Inc.*, 295 F.3d 421, 423 (3d Cir. 2002).

additional injunctive relief necessarily subsumes the premise that injunctive relief was appropriate in the first instance. *See Strouse v. J. Kinson Cook, Inc.*, 634 F.2d 883, 883 n.1 (5th Cir. 1981) (stating that appeal cannot be taken from an agreed judgment, nor can party accept portions of judgment that operate in his favor while appealing those he finds detrimental to him).

Plaintiffs' waiver argument is equally unavailing. Plaintiffs cannot avoid Fifth Circuit precedent by purportedly agreeing to forego asserting waiver on appeal. Waiver is not an issue restricted to the parties but may also be raised by the Court. For example, in *White & Yarborough*, 228 F.2d 836, 837 (5th Cir. 1955), the Fifth Circuit affirmed the district court's award of attorney's fee to plaintiff in an amount less than that requested in an agreed order. On appeal, the Fifth Circuit *sua sponte* raised the issue of waiver and concluded that by agreeing to the judgment in the district court, plaintiff's counsel waived the right to complain about the failure of the court to award fees in the amount stipulated by the parties.

The instant situation is no different. Whether or not Plaintiffs raise waiver on appeal, the real issue is whether the Fifth Circuit has any basis even to consider the appeal if Lufkin has implicitly (by not opposing) or explicitly (by affirmative act) agreed to any additional injunctive relief. Judge Easterbrook of the Seventh Circuit succinctly summarized the point: "Waiver affects, not a court's power to hear the case, but whether as a practical matter it has any job to do." *Downey*, 266 F.3d at 683. Absent "any job to do," the Fifth Circuit will not take up a matter already agreed to by the parties, whether or not the issue of waiver has been raised or specifically reserved by the district court, as Plaintiffs suggest.

II. Plaintiffs Were Premature as Lufkin Had No Meaningful Opportunity To Comply.

Plaintiffs' motion was filed and granted only **4 days** after the Court's Final Judgment was entered. Four days was not enough time to “create and implement” the programs for promotion and initial assignment ordered by the Court; nor have Plaintiffs cited any case authority in which

the party enjoined was given only four days to comply with an injunction requiring it to "create and implement" such programs.

Nevertheless, without any finding that Lufkin had not complied with the Court's injunction, Plaintiffs moved to require additional relief. In any event, the reality is that in the six weeks since the Court entered a Final Judgment, Lufkin has in fact taken measures consistent with the Court's original injunction and, absent a stay, will continue to follow the Court's Order. Before requiring Lufkin to meet and confer, it first should have given a meaningful opportunity to effectuate compliance on its own. If Plaintiffs believe non-compliance becomes an issue in the future, they should raise it then.

III. Plaintiffs Improperly Suggest The Court Has Jurisdiction To Rewrite Its Injunction.

To reiterate, Lufkin does not dispute the Court's continuing jurisdiction under Rule 62(c) to monitor compliance with its original injunction while its appeal is pending. However, this limited grant of jurisdiction does not authorize the Court to supplement or modify its original injunction in such a manner as to alter the status quo with respect to injunctive relief that is the subject of its ongoing appeal. *Compare Gryar v. Odeco Drilling, Inc.*, 674 F.2d 373, 374 (5th Cir. 1982) (no jurisdiction to enter amended judgment after parties had appealed) *with Farmhand, Inc. v. Anel Engineering Indus.*, 693 F.2d 1140, 1146 (5th Cir. 1982) (concluding that court retained jurisdiction to issue contempt order for violation of original injunction).

IAM v. Eastern Airlines, Inc., 847 F.2d 1014 (2d Cir. 1988), cited by Plaintiffs, provides an example of this principle. In *Eastern Airlines*, the district court initially denied the union's request for an injunction to prohibit the assignment of production work to one of its stewards. While on appeal, the district court entered a second injunction preventing Eastern from assigning the same employee production work when he claimed union business required his full attention. On appeal,

the Second Circuit specifically held that the district court was without authority to enter the second injunction, reasoning that it altered the status quo and provided additional injunctive relief.[2]

This Court need look no further than the proposed Order attached to Plaintiffs' original motion to see that what Plaintiffs want through the "meet and confer" process is the same thing the union sought in *Eastern Airlines* -- additional injunctive relief, in excess of that already ordered (or denied) by the Court. For example, in paragraph 3 of the proposed Order that the Court signed, Plaintiffs specifically included language regarding the Court's jurisdiction to order "other relief," in addition to jurisdiction to oversee compliance.[3] The only jurisdiction this Court retains is "to oversee and enforce compliance;" it cannot enter further injunctive relief as such an order would effectively change the issues on appeal.

More directly, the proposed Order attached to Plaintiffs' Response flatly admits that they intend to seek additional injunctive relief of the form that will require the Court "to supplement or modify" its original injunction and its Final Judgment. This request, like the entire "meet and confer process," expressly contemplates additional injunctive relief, not included in the Court's original injunction. For the reasons and authority previously stated, this is improper.

Finally, page 5 of Plaintiffs' Response suggests, without the benefit of any authority, that additional affirmative relief is perfectly appropriate at this time to supplement the Court's original "prohibitory" injunction. This suggestion is entirely disingenuous as the Court's original injunction was not simply "prohibitory," but also ordered Lufkin to take affirmative actions to create and implement non-discriminatory assignment, promotion and training systems.

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[2] The Court went on to consider the injunction on the merits based on the stipulation of the parties that the second injunction would be treated as arising from a new lawsuit.

[3] Plaintiffs' cross-notice of appeal, filed on February 28, 2005, similarly describes the "meet and confer" proceedings as necessary to address the "adequacy and completeness" of the injunctive relief originally ordered by the Court. Plaintiffs cannot on one hand appeal the Court's injunction as "inadequate[]" and "incomplete" and on the other contend that the "meet and confer" conference is purely for compliance purposes.

IV. Plaintiffs' Response Misconstrues The Role of the Unions.

Plaintiffs' Response perpetuates their misunderstanding of federal labor law. Lufkin cannot agree *with Plaintiffs* to make changes in areas that are the subject of mandatory bargaining. Nor may Plaintiffs compel Lufkin to negotiate around the Unions by characterizing the proposed "meet and confer" *between the parties* as a "judicial" matter. The Union's interest in protecting its collectively bargained rights is no less important in a "judicial" setting than it would be in a private collective bargaining session. *See Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (recognizing virtually unfettered right to intervene where CBA at issue).

Alternatively, Plaintiffs question whether the Unions have a role in the "meet and confer" process, but declare they have no objection to the their participation. Plaintiffs' actions are to the contrary. The Unions have approached both parties about post-judgment intervention, concerned that the Court's injunction impacts portions of the collective bargaining agreement. Instead of simply agreeing to the intervention as they had previously indicated they would at this stage, Plaintiffs presented the Unions with a 2-page stipulation, requiring, in part, that the Unions waive certain appellate rights.[4] Ironically, that is also what they want Lufkin to do in the "meet and confer" process.

Respectfully submitted,

/s/

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[4] A copy of the stipulation is attached as Exhibit A.

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CERTIFICATE OF SERVICE

I certify that on this 1st day of March, 2005, a copy of the foregoing Defendant's Reply to Plaintiff's Response to Defendant's Motion to Vacate the Court's Order of January 18, 2005 was filed electronically though the Court's CM/ECF system and was automatically copied to Plaintiffs through the court's electronic filing system.

/s/
Attorney for Defendant

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