United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 24, 2001

TO : Rochelle Kentov, Regional Director
Margaret Diaz, Regional Attorney
Karen K. LaMartin, Assistant to Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Courage Productions, LLC
Cases 12-CA-21077, 21097

506-6080-8700
506-6090-4900
512-5012
512-5012-6737
512-5081-7000

These Section 8(a)(1) cases were submitted for advice as to the legality of (i) certain confidentiality provisions maintained by Courage Productions, LLC ("the Employer"), and Employer threats to discharge any employee for breach thereof; (ii) the Employer's provision concerning forum selection and choice of law that allegedly interfered with employee access to the Board; and (iii) the Employer's mandatory arbitration provision that allegedly interfered with employee access to the Board.[1]

FACTS

The Employer is a Tampa, Florida motion picture production company. Between June and August 2000,[2] the Employer hired approximately 50 production employees, a significant number of whom belonged to IATSE ("the Union"), to work on a full-length feature film entitled "The Profit." Filming began on August 7 and ended on about October 2.

---

[1] The Region is withholding action on these cases pending resolution of the issues submitted for advice. Absent settlement, the Region intends to issue a Section 8(a)(1) and (3) complaint regarding various other charge allegations.

[2] All dates are 2000 unless otherwise indicated.

As a condition of employment, each employee was required to execute an Employment Agreement, which provided in relevant part:

> 14. Any legal action in connection with this agreement shall be brought in Hillsborough County, Florida, USA, and the laws of the State of Florida shall govern said actions.
>
> 15. Confidentiality: Employee shall not divulge to any third party any information concerning Courage Productions, the Photoplay or the motion picture created therefrom tentatively titled, "The Profit," including but not limited to information concerning the script, story, characters, identities of actors, crew, production or management personnel, production schedules, budgets, locations, sets, props, [or] costumes, without the express written consent of Courage Productions. Employee recognizes that divulging information to any third party regarding the production will result in irreparable harm to Courage Productions, including delay and additional cost with respect to production and distribution of the motion picture, and that Employee will be liable for costs and damages associated with such harm should an unauthorized divulging of information occur.

As a condition of employment, each employee was also required to execute a Non-Disclosure Agreement, which provided, in relevant part:

> [A]ll information ... relating to the "Entertainment Property, the film, script, title, characters, character names or activities," both detailed information and <u>even the basic nature of our business shall not be disclosed to any other parties by you</u>. You agree to make no use, nor authorize any use, for (sic) such information for any purpose whatsoever, whether for your own benefit or the benefit of others. (Emphasis in original.)
>
> * * * *
>
> Any use or disclosure of information disclosed under this agreement without our prior written consent shall entitle us to injunctive relief restraining such unauthorized use of (sic) disclosure, together with damages, costs, and

> attorney's (sic) fees. It is further agreed that any breach of this Agreement will result in liquidated damages due to Courage Productions of Five hundred thousand dollars ($500,000.00) per occurrence.
>
> * * * *
>
> Any disputes arising from this Agreement shall be heard in Tampa, Florida, and decided by a panel of three arbitrators selected from a pool of arbitrators of the American Arbitration Association ("AAA"). All substantive law shall be that of the State of Florida, United States, and all procedural rules shall be those promulgated by the AAA. All attorneys (sic) fees and arbitration costs, including interest thereon, shall be borne by the losing party of said arbitration.

In an August 8 meeting with producer Patricia Greenway, the Union demanded that Greenway sign a Union contract, and informed her that it knew who was on the crew, how many crew members the Employer employed, and the size of the film's budget. After Greenway refused to sign a contract, the Union representatives left.

Later that day, Greenway and director Peter Alexander called an employee meeting to reiterate the importance of the confidentiality provisions and to remind employees of their attendant legal obligations. Greenway and Alexander told employees that anyone providing information to any third party, including the Union, would be in violation of these provisions and would be terminated for cause. The Employer added that, in light of the Union's visit, someone had in fact violated the non-disclosure provisions. Greenway also asked which employees belonged to the Union; when no one responded she said, "We'll find out." Greenway then asked which employees had spoken with the Union; when no one responded, she said the Employer would find out and each such employee would be discharged.

The Employer maintains that its confidentiality provisions were lawful because they reasonably addressed its legitimate interest in protecting proprietary information and did not implicate Section 7 rights. The Employer further asserts that Paragraph 14 of the Employment Agreement neither chilled nor precluded employee access to the Board because it applied "only ... to legal actions based on the terms of the contract," and not to administrative actions to enforce statutory rights. The Employer did not address the mandatory arbitration provision set forth in the Non-Disclosure Agreement.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, alleging that Paragraph 15 of the Employment Agreement was overbroad in that it prohibited disclosure of information concerning the "identities of actors, crew, production or management personnel, production schedules, [or] locations," and that the Employer's August 8 threats to discharge any employee who breached this confidentiality provision likewise violated Section 8(a)(1).

We also conclude that a plain reading of Paragraph 14 fails to support a finding that it would have interfered with employee access to the Board. Finally, because we conclude that the Non-Disclosure Agreement does not proscribe protected, concerted activity, we need not consider the lawfulness of its mandatory arbitration provision under the Act. Thus, absent withdrawal, the Region should dismiss the charge allegations relating to Paragraph 14 of the Employment Agreement and to the Non-Disclosure Agreement.

A. Paragraph 15 of the Employment Agreement Was Overbroad Because It Prohibited Employees from Engaging in Activity Protected by Section 7, and the Employer's August 8 Threats to Discharge Any Employee Who Violated the Provision Were Unlawful.

In Lafayette Park Hotel,[3] the Board announced that an employer violates Section 8(a)(1) where it maintains a rule which would reasonably tend to chill employees in the exercise of their Section 7 rights. 326 NLRB at 825. The Board then held that the employer's rule prohibiting disclosure of "Hotel-private information" was lawful, because it was reasonably addressed to protecting proprietary information and did not implicate employee Section 7 rights. Id. at 826. In Flamingo Hilton-Laughlin,[4] however, the Board distinguished Lafayette Park and held that the employer's "code of conduct," providing that "[e]mployees will not reveal confidential information regarding our customers, fellow employees, or Hotel business," was unlawful to the extent that it prohibited employees from revealing information about "fellow employees."[5]

---

[3] 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[4] 330 NLRB No. 34 (1999).

Applying these principles to the instant case, we conclude that the Employer could lawfully prohibit employees from disclosing information "to any third party" concerning the "script, story, [or] characters" because this reasonably addressed the Employer's legitimate interest in protecting proprietary information about its film and did not implicate Section 7 rights. We also conclude that the Employer could lawfully prohibit such employee disclosure of "budgets," because budget information is not presumptively relevant for purposes of collective bargaining;[6] therefore this ban did not implicate terms or conditions of employment. In addition, we find that the Employer could lawfully prohibit such employee disclosure of information about "sets, props, [or] costumes" because any possible impact this proscription could have on terms and conditions (e.g. how an employee arranges props) is attenuated, and there is no evidence of such an impact.

However, we conclude that prohibiting disclosure of information "to any third party" about the "identities of actors, crew, production or management personnel" violated Section 8(a)(1) under Flamingo Hilton-Laughlin because it prohibited employees from sharing information about "fellow employees." In addition, we conclude that to the extent that Paragraph 15 prohibited employees from making such disclosures about "production schedules" or "locations," the rule was similarly overbroad. How long employees can expect to work on a production and where they work plainly concern terms and conditions of employment. These overbroad prohibitions therefore tended to chill employee discussion of matters protected by Section 7.[7]

---

[5] Id., slip op. at 2, n.3, 6 (1999).

[6] See, e.g., Dexter Fastener Technologies, 321 NLRB 612, 612, 613 (1996).

[7] In this regard, we find the Employer's reliance on IBM Corporation, 265 NLRB 638 (1982), misplaced. The Board there found that the employer's policy of classifying wage information was lawful, since it did not prohibit employees from discussing their own wages or attempting to determine what other employees were paid. Id. at 638. Here, however, the Employer's rule banned disclosure of matters implicating terms and conditions of employment to "any third party," including fellow employees, and therefore is distinguishable from the rule in IBM.

We therefore conclude that the Employer violated Section 8(a)(1) on August 8 when Greenway and Alexander threatened employees with discharge for disclosing information which implicated Section 7 rights to any party, including the Union. These unlawful threats, together with Greenway's interrogation of employees about their Union activity at that same meeting, provided a context and factual basis for reasonable employees to view Paragraph 15 as prohibiting Section 7 protected activity.[8]

B. Paragraph 14 of the Employment Agreement Did Not Interfere with Employee Access to the Board.

Based on the evidence adduced, we conclude that Paragraph 14 cannot reasonably be interpreted as interfering with employee access to the Board. Rather, the provision merely established the specific forum and governing state law for "any legal action" (e.g., breach of contract) "in connection with" the Employment Agreement. The types of legal action most reasonably contemplated are therefore state causes of action, since federal law obviously controls most charges or lawsuits filed under federal statutes, including NLRB charges. There is nothing in the language of this provision that clearly precludes or limits employee access to the Board. It is significant that the Employer has not asserted in either of its position statements that Paragraph 14 operates as a bar to the unfair labor practice charges filed over two employee discharges. We also note that the Employer specifically maintains that a Board charge filed by an employee would

---

[8] Compare Lafayette Park, 326 NLRB at 826-827 (in holding that employer's rule prohibiting "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community" did not to encompass Section 7 activity, Board distinguished its finding in Cincinnati Suburban Press, 289 NLRB 966, 967-968 (1988), where rule had been enforced against union activity in violation of Section 8(a)(3), because "[h]ere, there is no such context and no factual basis for reasonable employees to view the rule as prohibiting Section 7 activity." In light of the threats and interrogation here, we reject the Employer's contention that the rule was lawful because it was not enacted in response to Union organizing activity.

fall outside the scope of Paragraph 14. Therefore, we conclude that this provision was lawful because it was neither intended to interfere with employee access to the Board, nor can it reasonably be so interpreted.

C. The Non-Disclosure Agreement, Including Its Mandatory Arbitration Provision, Was Lawful Because It Did Not Implicate Section 7 Activity.

We conclude that prohibiting the disclosure of "both detailed information and even the basic nature of our business" (emphasis in original) is not overbroad because this language modifies the terms that precede it: "[A]ll information ... relating to the 'Entertainment Property, film, script, characters, character names or activities.'" Reasonably construed, the provision merely prohibited the disclosure of proprietary information in which the Employer unquestionably maintained a legitimate confidentiality interest under Lafayette Park. Thus, it did not implicate Section 7 activity. And, since the mandatory arbitration provision was limited by its terms to disputes that arose under the Non-Disclosure Agreement, we need not address its lawfulness under the Act. In these circumstances, we conclude that the mandatory arbitration provision did not unlawfully interfere with employee access to the Board.

D. Conclusion

Absent settlement, the Region should issue a Section 8(a)(1) complaint alleging that Paragraph 15 of the Employment Agreement was overbroad because it prohibited disclosure of information concerning the "identities of actors, crew, production or management personnel, production schedules, [or] locations," and that the Employer's August 8 threats to discharge any employee for breach of this provision were unlawful. However, absent withdrawal, the Region should dismiss the charge allegations relating to Paragraph 14 of the Employment Agreement and to the Non-Disclosure Agreement.

B.J.K.