

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

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FEDERAL LABOR RELATIONS AUTHORITY

Notice of Oral Argument and Opportunity To Submit Amicus Curiae Briefs

AGENCY: Federal Labor Relations Authority.

ACTION: Notice of oral argument and opportunity to submit briefs as amici curiae in a proceeding before the Federal Labor Relations Authority in which the Authority is required to interpret and apply 5 U.S.C. 7116(a) (1) and (3).

SUMMARY: The Federal Labor Relations Authority gives notice that it is scheduling oral argument and providing an opportunity, pursuant to 5 CFR 2429.9 and .26, for all interested persons to submit briefs as amici curiae on significant issues arising in a case pending before the Authority. The Authority is considering this case pursuant to its responsibilities under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994) and its regulations set forth at 5 CFR part 2423 (1996). The proceeding concerns the extent to which an agency is obligated to furnish facilities and services, under 5 U.S.C. 7116(a) (1) and (3), to a labor organization that is seeking to represent the agency's employees.

ORAL ARGUMENT: The Authority will hold oral argument at 10:00 a.m. on Wednesday, July 10, 1996, in the Second Floor Agenda Room, 607 14th Street, NW., Washington, D.C. 20424-0001. Only the parties to the case will be provided an opportunity to be heard at oral argument, and attendance at the oral argument will be limited because of space constraints. Persons interested in attending the oral argument should notify the Office of Case Control by 5 p.m. on Friday, July 5, 1996. Telephone: FTS or Commercial (202) 482-6540.

BRIEFS: Briefs submitted in response to this notice will be considered if received by mail or personal delivery in the Authority's Office of Case Control by 5 p.m. on Friday, June 28, 1996. Placing submissions in the mail by this deadline will not be sufficient. Extensions of time to submit briefs will not be granted.

ADDRESSES: Mail or deliver briefs to James H. Adams, Acting Director, Case Control Office, Federal Labor Relations Authority, 607 14th Street, NW., Suite 415, Washington, D.C. 20424-0001.

FORMAT: All briefs shall be captioned "Social Security Administration, Baltimore, Maryland, Case No. 3-CA-10859, Amicus Brief" and shall contain separate, numbered headings for each issue discussed. An original and four (4) copies of each brief must be submitted, with any enclosures, on 8½×11 inch paper. Briefs must include a signed and dated statement of service that complies with the Authority's regulations showing service of one copy of the brief on all counsel of record or other designated representatives. 5 CFR 2429.27 (a) and (c). The designated representatives are: Elaine Kaplan, National Treasury Employees Union, 901 E Street, NW., Washington, D.C. 20004; Laurence Evans, Office of the General Counsel, Federal Labor Relations Authority, 1525 22nd Street NW., Suite 400, Washington, D.C. 20037; Charles A. Hobbie, American Federation of Government Employees, AFL-CIO, 80 F Street, NW., Washington, D.C. 20001; and Ed Novak, Social Security Administration, West High Rise Building, Room G-I-10, 6401 Security Boulevard, Baltimore, MD 21235.

FOR FURTHER INFORMATION CONTACT: James H. Adams, Acting Director, Case Control Office, Federal Labor Relations Authority, 607 14th Street, NW., Suite 415, Washington, D.C. 20424-0001, Telephone: FTS or Commercial (202) 482-6540.

SUPPLEMENTARY INFORMATION: The case presenting the issues on which oral argument will be heard and amicus briefs are being solicited is before the Authority on remand from the United States Court of Appeals for the District of Columbia Circuit. The Authority's decision that was reviewed by the court is Social Security Administration, 45 FLRA 303 (1992). The court's decision is *NTEU v. FLRA*, 986 F.2d 537 (D.C. Cir. 1993). Copies of these decisions will be provided, upon request, by mail or facsimile. However, the following summary is offered.

Non-employee organizers of the National Treasury Employees Union (NTEU) sought a permit from the Social Security Administration (SSA) to distribute literature on the public sidewalks of SSA's headquarters complex at Woodlawn, Maryland. The headquarters complex, including the sidewalks, is the property of the General Services Administration (GSA) but, pursuant to a delegation of authority, is

managed by SSA. At the time of its permit request, NTEU had not filed a petition seeking to represent any of SSA's employees at the Woodlawn complex. SSA denied the request. NTEU alleged that, by the denial, SSA violated 5 U.S.C. 7116(a) (1) and (3).

The Authority determined that SSA, whose employees were exclusively represented by the American Federation of Government Employees, did not violate either 5 U.S.C. 7116(a)(3) or, in turn, 5 U.S.C. 7116(a)(1), when it denied NTEU's request for a permit. Instead, the Authority concluded that SSA would have violated 5 U.S.C. 7116(a)(3) if it had granted the permit.

The court found that the Authority's application of section 7116(a)(3) raised Constitutional concerns. Accordingly, the court remanded the case to the Authority to consider whether an alternative construction of the Statute can be fashioned that avoids the First Amendment implications raised by the Authority's original decision. In particular, the court directed the Authority to determine whether the sidewalks and other outside areas of SSA's Woodlawn complex constitute SSA's "facilities," within the meaning of section 7116(a)(3). Following the court's remand, the Authority remanded the case to the Regional Director for development of a sufficient record. Social Security Administration, 47 FLRA 1376 (1993), reconsideration denied, 48 FLRA 539 (1993).

In light of the court's order on remand, the Authority invites interested persons to address, *inter alia*, the following questions. Certain of the questions (1-3) are based specifically on the court's decision remanding the case. In view of the court's more general direction that the Statute be construed to avoid Constitutional concerns, question 4 examines whether and how the approach suggested by the court would apply to hypothetical cases varying certain facts presented in this case. Questions 5 and 6 concern alternative approaches to the one suggested by the court to resolve the issues present in this case. Questions 7 and 8 pose more general questions regarding the correct interpretation of section 7116(a)(3). The last question asks how resolution of the issues under section 7116(a)(3) affects whether SSA also violated section 7116(a)(1) of the Statute by interfering with rights of non-employee organizers to conduct organizing activity.

Interested persons are invited to respond to any or all of the following questions:

1. If the Authority were to conclude, as the court suggests, that SSA was not

acting as an employer but instead was acting as GSA's "building manager" when it denied NTEU's request for a permit, then what, if any, would be the effect of Authority precedent holding that a non-employer agency can be found to have interfered with protected rights on the issue of whether SSA violated the Statute? See Headquarters, Defense Logistics Agency, Washington, D.C., 22 FLRA 875, 883-84 (1986).

2. Is it relevant and, if so, how is it relevant whether non-labor organizations have been granted access to the areas for which NTEU sought the permit?

3. Is it relevant and, if so, how is it relevant that the "facilities" to which NTEU sought access were external, quasi-public areas?

4. If GSA were the employing agency at the Woodlawn complex and NTEU were seeking a permit for purposes of organizing GSA employees, how would the Constitutional concerns identified by the court be avoided by the "facilities" analysis it suggested?

5. The Authority, relying on the ruling announced in Department of the Army, United States Army Natick Laboratories, Natick, Mass., 3 A/SLMR 193 (1973) (Natick), has interpreted section 7116(a)(3) as prohibiting an agency from allowing a rival union, lacking equivalent status to an incumbent labor organization, access to the agency's facilities and services. How and why would such access always constitute unlawful sponsorship, control, or assistance under section 7116(a)(3)?

6. Is the approach used by the predecessor to the Authority, the Federal Labor Relations Council, to resolve similar issues under Executive Order 11491, as amended, more consistent with the Statute than the approach set forth in Natick? The Council's approach analyzed whether the agency conduct constituted control of, or interference with a union's independence. See Grissom AFB, 6 FLRC 406 (1978).

7. Is the portion of section 7116(a)(3) that refers to furnishing customary and routine services and facilities an exception to the prohibition on sponsorship, control, or assistance of a labor organization or are there any situations where it creates a requirement that such services and facilities be furnished? For example, in order to avoid "sponsoring" an incumbent labor organization, would an agency be required under any circumstances to furnish ordinary facilities and services to a rival?

8. What meaning should be attributed to the phrase "having equivalent status" in section 7116(a)(3)?

a. Should this term be applied differently depending upon whether the employees in the agency from whom assistance is sought are represented by a labor organization?

b. Does an agency violate section 7116(a)(3) by furnishing, or failing to furnish, facilities and services to all nonincumbent labor organizations on an impartial basis?

c. Should the Authority reconsider its precedent that "a petitioning union acquires equivalent status for the purposes of section 7116(a)(3) when an appropriate Regional Director determines, and notifies the parties, that the petition includes a prima facie showing of interest and merits further processing[]"? U.S. Department of Defense Dependents School, Panama Region, 44 FLRA 419, 425 (1992).

9. If the Authority were to conclude on remand that section 7116(a)(3) did not require SSA to reject NTEU's request for a permit, would:

a. Section 7116(a)(3) require that SSA grant NTEU's permit request?

b. SSA's denial of the permit to NTEU's non-employee organizers violate 5 U.S.C. 7116(a)(1)?

c. it result in manifest injustice to hold SSA liable for a violation of either section 7116(a)(3) or section 7116(a)(1) based on approaches not previously articulated?

Dated: May 20, 1996.

For the Authority.

James H. Adams,

Acting Director, Case Control Office.

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FEDERAL MARITIME COMMISSION

[Docket No. 96-11]

Haewoo Air & Shipping Co., Ltd. (d/b/a Haewoo Shipping Co., Ltd.); Possible Violations of Section 10(b)(1) of the Shipping Act of 1984; Order of Investigation

Haewoo Air & Shipping Co., Ltd. d/b/a Haewoo Shipping Co., Ltd. ("Haewoo") is a non-vessel-operating common carrier located in Seoul, Korea. Haewoo maintains a tariff on file with the Commission which provides for service between various Asian countries and the United States.

A review of Haewoo's tariff showed that it contained only one commodity rate in addition to Cargo, N.O.S. rates. A review of invoices and freight payments for shipments moving under Haewoo bills of lading from June 5, 1994, to January 19, 1995, indicated that Haewoo did not charge the rates

contained in its tariff. On February 3, 1995, additional commodity rates were filed by Haewoo in its tariff.

Section 10(b)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1709(b)(1), provides that no common carrier may charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges in its tariffs. In regard to the activities of Haewoo, it appears that Haewoo charged less than its applicable tariff rates for the transportation of at least 36 shipments between June 5, 1994, and January 19, 1995, in violation of section 10(b)(1) of the 1984 Act.

Section 11 of the 1984 Act, 46 U.S.C. app. 1710, sets forth the Commission's authority to investigate violations of the 1984 Act. In the event violations are found, section 13 of the 1984 Act, 46 U.S.C. app. 1712, provides that the Commission may assess civil penalties and suspend tariffs as remedies for violations of section 10(b)(1). Section 14(a) of the 1984 Act, 46 U.S.C. app. 1713(a), empowers the Commission to issue orders relating to violations of the 1984 Act.

Now therefore it is ordered, that pursuant to sections 10, 11, 13 and 14 of the 1984 Act, an investigation is hereby instituted to determine:

1. Whether Haewoo violated section 10(b)(1) of the 1984 Act by charging, demanding, collecting, or receiving greater, lesser, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs;

2. Whether, in the event Haewoo violated the 1984 Act, civil penalties should be assessed against Haewoo and, if so, the amount of such penalties;

3. Whether, in the event violations are found, an appropriate cease and desist order should be issued; and

4. Whether, in the event violations are found, Haewoo's tariff should be suspended for a period of time not to exceed 12 months.

It is further ordered, That a public hearing be held in this proceeding and that this matter be assigned for hearing before an Administrative Law Judge ("Presiding Officer") of the Commission's Office of Administrative Law Judges in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61. The Hearing shall include oral testimony and cross-examination at the discretion of the Presiding Officer only after consideration has been given by the parties and the Presiding Officer to the use of alternative forms of dispute