Sabin Towing & Transportation Co. *and* Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters Districts, AFL-CIO. Case 23-CA-6196

August 4, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On December 30, 1981, Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and the Charging Party and Respondent filed answering briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel also filed a Motion for Summary Judgment. We hereby deny this motion since we agree with the Administrative Law Judge's recommendation that the complaint be dismissed.

[2] The Administrative Law Judge found that SIU Organizer Peth made 60 percent of his contacts with Respondent's seamen at their homes, whereas the record shows that Peth contacted about 60 seamen at home either through visits or telephone calls and that about 20 individuals were actually visited at home. This inadvertent error does not affect our decision herein.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This matter was heard by me for 11 days between March 10, 1981, and July 1, 1981, in Houston, Texas. The case is based on a charge filed on August 31, 1976, by Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters Districts, AFL-CIO (SIU), and a complaint dated October 16, 1980, issued on behalf of the General Counsel of the National Labor Relations Board (the Board) by the Acting Regional Director for Region 23 of the Board which alleges that Sabine Towing & Transportation Co., Inc. (Respondent), violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). Respondent's answer of October 27, 1980, denies the commission of the alleged unfair labor practice and asserts the affirmative defenses of *res judicata*, collateral estoppel, and laches.

The issue presented was whether or not Respondent violated the Act by its admitted conduct in refusing to permit SIU nonemployee organizers to board its seagoing vessels while docked in port for the purpose of soliciting Respondent's unlicensed seamen to select the SIU as their collective-bargaining representative. More specifically, the General Counsel alleged in the complaint that at all times since March 3, 1976, the Respondent has denied access to its vessels by nonemployee SIU organizers notwithstanding that the Board in *Sabine Towing & Transportation Co., Inc.*, 205 NLRB 423 (1973), hereafter referred to as *Sabine I*, determined that Respondent violated Section 8(a)(1) of the Act by the same conduct in connection with the SIU's organizing drive in 1971. In addition, the complaint alleges that Respondent has refused to furnish the SIU with docking information (dates and ports) related to its vessels. In its answer, Respondent admits that it had declined to permit boarding but denies that it had refused to furnish docking information. At the conclusion of the General Counsel's case, and after the Charging Party was provided with the full opportunity to prevent supporting evidence and had likewise rested, Respondent moved to dismiss the complaint because: (1) the evidence presented failed to prove a *prima facie* case; and (2) a finding that Respondent violated the Act was barred because the Court of Appeals for the Fifth Circuit refused to enforce the access portion of the Board's Order.[1] See *Sabine Towing & Transportation Company, Inc.* v. *N.L.R.B.*, 599 F.2d 663 (5th Cir. 1979). As Respondent's motion presented a serious question concerning the application of the principles of *res judicata* and collateral estoppel, I requested that the parties brief the questions raised by Respondent's motion in the interest of administrative efficiency.[2] In its brief the General Counsel moved for summary judgment on the ground that as there was a reasonable basis for inferring that there were no issues of fact, and adherence to the Board's prior decision (as opposed to the Fifth Circuit's opinion in which, the General Counsel asserts, the Board has never acquiesced) compelled a finding that Respondent had violated Section 8(a)(1) of the Act, as alleged.

Upon the record made thus far, my observation of the witnesses who have testified in this matter, and my careful consideration of the briefs filed on behalf of the General Counsel, the SIU, and Respondent,[3] I make the following:

[1] In addition, Respondent moved to dismiss on the ground of laches and on the further ground that the General Counsel had abused his discretion by issuing the instant complaint. Respondent's motion grounded on these assertions was denied at the hearing.

[2] Respondent anticipates several additional sessions will be required for the presentation of its defense, if necessary, as it contemplates calling various seamen working on its vessels as witnesses when they arrive in port in the same manner as was done in *Sabine I*.

[3] By agreement of the parties, Respondent was permitted to file an opening brief, the General Counsel and the SIU responded thereafter, and Respondent then filed a reply brief. The briefing schedule was con-

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FINDINGS OF FACT

I. THE BOARD'S JURISDICTION

The complaint alleges that Respondent, a Delaware corporation which maintains its principal office and place of business in Port Arthur, Texas, is engaged in business, transporting goods among the various States of the United States and the Commonwealth of Puerto Rico by seagoing vessels. In the 12-month period preceding the issuance of the complaint, the Respondent transported goods and materials from various States of the United States to other States in interstate commerce and received in excess of $50,000 gross revenue from such operations. In addition to admitting the foregoing allegations in its answer, Respondent also admitted that, at the material times, it has been an employer within the meaning of Section 2(2) of the Act, engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act, and I so find. I further find that it would effectuate the policies of the Act for the Board to exercise its jurisdiction over the instant dispute. *H P O Service, Inc.*, 122 NLRB 394 (1958).

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits that the SIU is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

III. THE MOTION TO DISMISS

A. *Background and Chronology of Prior Litigation*[4]

As noted, Respondent is engaged in the business of transporting goods (primarily petroleum products) by means of seagoing vessels. With the exception of voyages to Puerto Rico, Respondent's operations are confined to sailing the United States coastal waters along the Atlantic and Pacific Oceans, and the Gulf of Mexico. Since 1947, the unlicensed seamen who are employed aboard Respondent's vessels have been represented for purposes of collective bargaining by the Sabine Independent Seaman's Association (SISA) but Respondent has not had a collective-bargaining agreement with SISA since the expiration of an agreement executed in the late 1960s because there has been a question concerning representation pending continuously since 1971. Nevertheless, Respondent continues to deal with SISA concerning employee grievances and, according to representations of its counsel, Respondent has made periodic adjustments in the pay and benefits of its unlicensed seamen since the expiration of the aforementioned collective-bargaining agreement in an effort to remain current with industry standards.

In November 1970, the SIU commenced an organizing campaign among Respondent's unlicensed seamen seeking to supplant SISA as the collective-bargaining representative. This effort culminated in the filing of a representation petition before the Board on April 2, 1971, in Case 23-RC-3606 whereby the SIU sought to have the Board conduct an election pursuant to Section 9 of the Act. SISA intervened in that proceeding presumably on the basis of its status as the incumbent representative and, subsequently, the National Maritime Union (NMU) intervened on the basis of a showing of interest. On April 6, 1971, the SIU made a written request to Respondent seeking permission for its nonemployee organizers to board its vessels while they were docked in port in order to explain the benefits of being represented by the SIU. By letter dated April 8, 1971, Respondent denied the SIU's request. No action before the Board was commenced immediately. Instead, the petition was processed to an election which was held between June 9 and 23, 1971. In that election SISA received 93 votes; SIU, 60; NMU, 2; and the no union choice, 1. Thereafter, objections were filed by the SIU and unfair labor practice charges were filed by three individuals. One of the allegations in the charges and the objections related to the aforementioned denial of boarding privileges to SIU organizers. Following the issuance of a complaint on that issue and other alleged unfair labor practices, the objections and the complaint proceedings were consolidated for hearing before Administrative Law Judge Marion C. Ladwig. On November 27, 1972, Administrative Law Judge Ladwig issued his decision wherein he found, *inter alia*, that Respondent did not violate Section 8(a)(1) of the Act by denying boarding privileges to the SIU organizers. Administrative Law Judge Ladwig characterized the proffered evidence in the following fashion:

> [The General Counsel] offered testimony of two of the principal SIU organizers, Glidewell and Willard, who testified about the numerous "realistic problems" involved in organizing at the dock gates . . . and the unsuitability of "some waterfront bar or lounges" as a place to discuss union campaign issues when the seamen are "seeking pleasure and relaxation."

Administrative Law Judge Ladwig found that the evidence offered through Glidewell and Willard included the following: (1) when vessels docked in port seamen were eager to leave the vessels; (2) organizers could not talk to more than one seaman at a time as they exited the dock gates; (3) organizers were unable to identify some exiting individuals as crew members; (4) ship officers in the vicinity intimidated some crewmen against talking with organizers; (5) some seamen simply refused to talk at all; (6) some seamen were inaccessible because they do not go ashore; (7) organizers found it difficult to identify crewmen in bars and restaurants; (8) there were too many distractions in taverns to talk seriously; (9) seamen lived in a variety of cities and towns in nine different States which made home visits difficult; (10) approximately one-third of the seamen had no street addresses on the *Excelsior* list provided for the 1971 election; (11)

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cluded on October 5, 1981. On October 13, 1981, I issued an order postponing the resumption of the hearing then scheduled for November 9, 1981, indefinitely pending ruling on Respondent's motion.

[4] The findings herein are a composite of evidence presented at the instant hearing, the undenied pleadings in this matter, and matters previously found by the Board, its Administrative Law Judges, and the Court of Appeals for the Fifth Circuit in published decisions concerning the prior litigation among the parties herein. For purposes of the instant motion, the evidence offered by the General Counsel and the SIU has been viewed in the light most favorable to their position.

the SIU was able to obtain telephone numbers for only about three-fourths of the seamen; (12) it was difficult to learn when the seamen were accessible during vacation periods; (13) nearly half of the mailed literature was returned as undeliverable; and (14) literature aboard vessels was often confiscated by unfriendly seamen and supervisors. Overall, the evidence presented by the General Counsel indicated that 84 of 167 seamen employed during the critical period in *Sabine I* were contacted by organizers. The defense evidence when considered together with the General Counsel's evidence indicated that at least 107 of 167 seamen were contacted by SIU organizers in the same period. In these circumstances, Administrative Law Judge Ladwig concluded that the General Counsel had failed in his burden of showing that the attempts to contact Respondent's unlicensed seamen to discuss the issues of the representation campaign were ineffective and, therefore, Respondent did not violate Section 8(a)(1) of the Act by denying access to the SIU organizers.

Exceptions were filed to the conclusions of Administrative Law Judge Ladwig and on August 10, 1973, the Board issued its decision wherein it declined to adopt the recommended Order of Administrative Law Judge Ladwig dismissing the boarding allegation. Instead, the Board concluded that Respondent had violated Section 8(a)(1) of the Act by refusing to permit the requested boarding of vessels. Relying on its prior decision in *Alaska Barite Company*, 197 NLRB 1023 (1972), the Board concluded that Respondent's employees were essentially housed within Respondent's premises and observed that the general legal proposition applicable in such circumstances is that, absent legitimate business considerations, an employer may not deny direct, personal access to its premises by nonemployee organizers for the purpose of soliciting employee allegiance unless other adequate channels of communication with the targeted employees are available. Addressing the basis for Administrative Law Judge Ladwig's conclusions that access was not warranted in the 1971 campaign, the Board further observed that, where, as here, the labor organization proceeds after being denied access to attempt organizational efforts through alternate channels, neither the General Counsel nor the labor organization assumes the burden of proving that the actual results of the attempt by alternate means were inadequate. Such a conclusion, the Board felt, would discourage alternate efforts and, in effect, promote litigation which could be avoided at least in those circumstances where a labor organization was successful by using the alternate channels of communication without regard to whether those channels could be considered, when viewed objectively, to be adequate. As perceived by the Board, the General Counsel's burden of proof in cases of this nature was satisfied by showing that the employees were housed on their employer's premises, that alternate channels of communication are "apparently inadequate," and that the employer refused to permit nonemployee access to its premises for the purpose of informing employees of the benefits of being organized for collective-bargaining purposes. According to the Board, where the General Counsel met this burden, it was the employer's burden to go forward by showing that the lack of alternative means of communications was "more apparent than real" and that, in so doing, the employer could show those steps a labor organization actually took to contact its employees and the success achieved thereby. However, the Board cautioned that proof with respect to the success (or lack thereof) of the actual steps taken was not the burden of the General Counsel and a showing that many of the employees were contacted was not necessarily sufficient to rebut the *prima facie* case. Using the foregoing standards, the Board concluded that the General Counsel had established a *prima facie* case that Respondent had unlawfully denied access in the 1971 campaign in circumstances indicating that alternate channels of communication were inadequate. Recognizing that Respondent had no obligation to provide the SIU with port and vacation schedules, telephone numbers, or names and addresses of employees in advance of the *Excelsior* list, the Board felt that Respondent's failure to do so was part of the reason the alternative channels of communication were not adequate.[5] As the SIU was left to contact employees on a catch-as-catch-can basis while the tankers were in port, the Board could not conclude that the SIU had an adequate opportunity to communicate its position to the employees especially in view of other unfair labor practices committed by the Employer and the legal activities of the incumbent SISA. By contrast, the evidence showing that a significant number, if not a substantial majority, of the employees had been contacted by the SIU was diminished by the fact that several of those contacts occurred in barroom circumstances under conditions of noise, drunkenness, and "other" distractions. Accordingly, the Board, contrary to Administrative Law Judge Ladwig, concluded that the actual personal contacts shown to have been made by the SIU were insufficient to rebut the *prima facie* case of the General Counsel. Based on this finding and the other unfair labor practices of Respondent during the critical period prior to the 1971 election, the Board directed a second election. For the time being, *Sabine I* was dormant and the parties proceeded to the second election directed by the Board.

Immediately preceding the second election, Respondent, in accord with the Board's order in *Sabine I*, permitted representatives of the competing labor organizations to board its docked vessels for organizational purposes. The second election—held in February 1974—again resulted in SISA receiving a majority of the ballots cast. Thereafter, timely objections and additional unfair labor practice charges were filed. There matters were eventually consolidated for a hearing which was presided over by Administrative Law Judge Ivar H. Peterson. On July 17, 1975, Administrative Law Judge Peterson issued his Decision and recommended Order wherein he found that the Respondent engaged in certain unfair labor practices. As the charges and the objections paralleled one another, he recommended that the Board set aside the second

[5] In view of this aspect of the Board's decision in *Sabine I*, it is my conclusion that the allegation herein that the Respondent independently violated Sec. 8(a)(1) of the Act by refusing to furnish docking information is, in fact, dependent on whether or not nonemployee access to the Respondent's vessels is warranted.

election and direct a third election. Exceptions were filed with the Board.

Apparently anticipating that Administrative Law Judge Peterson's recommendation for a third election would be adopted by the Board and that events would move swiftly toward that election, the SIU renewed its organizing effort among Respondent's seamen in January 1976. This drive was directed by the late Paul Drozak. Assisting Drozak were SIU patrolmen Thomas Glidewell and Carl Peth. As in past campaigns, MEBA Representative James Willard, who had formerly been a long-term employee of Respondent, was loaned to the SIU for the renewed effort. The essence of the General Counsel's case herein was presented through the testimony of Glidewell, Peth, and Willard.

For purposes of the 1976 organizing effort, Glidewell and Peth were assigned to geographical areas of responsibility along the gulf coast—the so-called loading ports for the Respondent's vessels. In general, Glidewell's area of responsibility was from Port St. Joe, Florida, to Freeport, Texas, and Peth was assigned an area from Corpus Christi, Texas, to New Orleans, Louisiana. In addition, SIU port agents or patrolmen in Jacksonville, Florida, San Francisco, California, and New York, New York, were called to meet certain of Respondent's vessels which docked in the vicinity of the SIU offices in those cities but there is a paucity of evidence concerning the activities of these and other SIU agents who participated in the 1976 campaign.[6]

Between 1971 and the beginning of 1976, the principal changes in Respondent's operations related to the expansion of its fleet and the reduction of crew sizes. In this period Respondent's fleet grew from five vessels to eight vessels. A ninth vessel was added in November 1976. All of Respondent's vessels, save the *Pecos*, loaded from U.S. ports along the Gulf. The *Pecos* was based in California. The size of Respondent's crews had been reduced in this period from 25 to 19. The total complement of unlicensed seamen grew from approximately 167 at the time of the first election in 1971 to 227 in August 1976. Presumably, approximately 30 additional seamen were added in November 1976 when the *San Marcos* began sailing. Apart from the foregoing, there is no evidence of fundamental changes in Respondent's operation between 1971 and 1976.

Using the *Excelsior* list from the 1974 campaign as their starting point, Glidewell and Peth initially attempted to piece together a current crew list and to obtain the addresses and the telephone numbers of the crewmembers.[7] Thereafter, in February and March 1976, some effort was made to contact the seamen at their homes. Glidewell testified that approximately 5 to 10 percent of the individuals he contacted throughout 1976 were contacted at their homes; Peth testified that he made about 60 percent of his contacts at the homes of the seamen. Although it is true that the geographic distribution of employees made it unreasonable to attempt home visits in some instances,[8] in other instances it is clear that there was a conscious decision not to visit a seamen's home.[9] Moreover, Peth testified that, after approximately 2 months, he was instructed by Drozak to concentrate on meeting the incoming ships as opposed to attempting home visits.

According to Respondent's records in the 6-month period from March through August 1976, the seven vessels in the Gulf waters docked at ports in the geographical area assigned to Glidewell and Peth an average of approximately 20 times a month. The average time in port in this geographical area during this 6-month period was 29 hours.[10] Although Glidewell emphasized in his testimony the difficulties encountered in meeting vessels as they docked in view of Respondent's acknowledged refusal to provide information about docking times, the only fair inference which can be made from this record is that the SIU met with considerable success in obtaining this information from alternate sources. Otherwise, it is highly unlikely Peth would have been instructed to concentrate on this opportunity to contact individuals or that Glidewell would have been (as he testified) on time on approximately 80 percent of those occasions when he undertook to meet vessels. One compilation prepared by Glidewell shows that he met Respondent's vessels on 33 separate occasions in the period from February through August 1976. In the same period, it appears that Peth met vessels in approximately 50 occasions. Nevertheless, in most instances along the Gulf ports the organizers were unable to approach the vessel dockside because of the fenced docking areas. Accordingly, in most instances, the organizers had their first opportunity to approach seamen as they departed the dock enclosure. On occasion, this was not soon enough as taxis and relatives were often admitted to the vicinity of the docks and the seamen were transported beyond the waiting organizers in vehicles. Where Glidewell and Peth did have the opportunity to approach the seamen before they had an opportunity to arrange for transportation, they offered to transport the seamen wherever they desired to go in the port city with the expectation that this would provide an opportunity to discuss the merits of the SIU. Moreover,

[6] The SIU maintains offices in or near a number of ports frequented by the Respondent's vessels including Houston and Port Arthur, Texas; Wilmington and San Francisco, California; Baltimore and Piney Point, Maryland; Jacksonville and Tampa, Florida; Boston, Massachusetts; Jersey City, New Jersey; Mobile, Alabama; New Orleans, Louisiana; Norfolk, Virginia; Seattle, Washington; and Santurce, Puerto Rico. The SIU's headquarters is located in Brooklyn, New York.

[7] A comparison of an August 1976 employee list against the 1974 *Excelsior* list shows that 83 of the 227 employees on the August list were employed at the time of the second election.

[8] By comparison, in 1971, 107 of Respondent's seamen lived in Texas and 61 had addresses in 8 other States. In August 1976, 141 seamen had Texas addresses and 86 had home addresses in 21 other States. No significant attempt was made to show that the listed addresses were other than the actual homes of the seamen.

[9] On cross-examination, Peth was questioned at length about his efforts to contact certain seamen. In some instances Peth was fearful of attempting home contacts because of a high level of animosity; in other instances Peth feared his presence would be interpreted as an invasion of privacy; in other instances Peth had information leading him to believe such a visit would be fruitless; and in other instances Peth could not explain why he made no effort to visit a seamen at home.

[10] This computation excludes one occasion when the *Colorado* was shown to be in port at Port Arthur, Texas, for 163 hours in April 1976; another occasion when the *Guadalupe* was shown to be in port at Beaumont, Texas, for 350 hours in May and June 1976; and a third occasion when the *Sabine* was shown to be in port at Port Arthur, Texas, for 244 hours in April 1976.

it is clear that Glidewell and Peth became acquainted with the bars and restaurants frequented by the seamen in some of the port cities and contacted a considerable number of Respondent's seamen in these establishments. Glidewell was particularly bitter in his testimony about the quality of such contacts because of the lack of adequate lighting, and the presence of such distractions as loud music, immoral women, and boisterous inebriates. However, Respondent elicited testimony from both Glidewell and Peth that no attempt was ever made to arrange and publicize alternate meeting locations such as the SIU's offices or available motels.

There is evidence that literature mailed directly to seamen aboard the vessels was received but mailings which were directed only to the vessel were not. In addition, Glidewell and Peth were successful in developing an ongoing rapport with several seamen so that they were able to receive and pass along information to others. In certain instances, these seamen took SIU literature aboard the vessels and distributed SIU authorization cards to other seamen. Glidewell's written reports concerning his vessel contacts disclose that he was successful in compiling a significant amount of detailed information about the attitude and leanings of a considerable number of seamen. Altogether, the SIU was successful in obtaining 109 signed authorization cards during its 1976 campaign.

On June 16, 1976, the Board issued its decision in *Sabine Towing & Transportation Co., Inc.*, 224 NLRB 941 (*Sabine II*). On June 22, SIU's counsel made the following written request of Respondent's counsel:

> In connection with the decision of the National Labor Relations Board rendered on June 16, 1976 (224 NLRB 941), demand is hereby made for immediate access of representatives of the Union to each of the vessels owned and operated by Sabine. Consistent with past practice, we further demand that Sabine notify the Union at its Houston address of the location, dates and ports of arrival of each and all of Sabine's ships so that the Union's representatives may have an adequate opportunity to visit with Sabine's crew members.
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> Finally, in order to facilitate access to Sabine's employees, many of whom are on vacation or off Sabine's vessels, we demand a current list of all of Sabine's employees, including their home addresses. Your prompt cooperation with the foregoing will be greatly appreciated as will your reply to this letter.

It is acknowledged that Respondent declined to comply with the request. Shortly thereafter, the SIU filed a motion with the Board seeking, *inter alia*, to advance the time accorded to Respondent to make the *Excelsior* list available for the third election. The Board in a supplemental decision published at 226 NLRB 422 (1976) declined this request.

In the meantime, following the Board's decision in *Sabine II*, Respondent petitioned the Fifth Circuit for review of both *Sabine I and II*. The Board cross-petitioned for enforcement of both orders. With the exception of the access issue in *Sabine I* the Fifth Circuit enforced the Board's orders in those cases. As to the access issue, the court felt that the Board had misallocated the burden of proof and observed that if the burden had been properly allocated, the Board would have been required to find for Respondent. In the court of appeals' view, the language in the U.S. Supreme Court's decision in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), clearly allocated to the labor organization denied access (and thus to the General Counsel in prosecuting a complaint) the burden of showing that no other reasonable means of communicating its organizational message to the employees existed before access by nonemployee organizers could be ordered. Further, the court felt that the risk of nonpersuasion as to the question of the lack of alternate channels of communication rested with the labor organization and not the employer. In the Fifth Circuit's view, there was considerable evidence that the SIU organizers were able to effectively communicate its message to the Respondent's seamen. Thus, that court observed (599 F.2d 665):

> The ALJ noted considerable evidence that SIU organizers were able effectively to contact Sabine seamen and convey their organizational message. Although on-duty Sabine employees did reside aboard ship, they went ashore during the frequent occasions when the tankers were in port (about eight times per month for seventeen to thirty-five hours at a time). *SIU was able to contact the seamen when they passed through the docks and gates, meet with them in taverns and restaurants, reach them at their homes (Sabine provided SIU with Excelsior lists approximately one month prior to the election), and send campaign literature onto the tankers* . . . . As the ALJ correctly concluded, in the face of substantial unrebutted evidence that the SIU had a reasonable opportunity to convey its message, and did so, he could only hold that the General Counsel had "failed to meet [his] burden of proving ineffective the attempts to contact and discuss the campaign issues with the crewmen at the gates or docks, at the bars and taverns, while providing them transportation, or in telephone conversations or home visits during the critical period." Case No. 77-1261 Record, vol. IV, at 2739, *reprinted at* 205 NLRB 431. This is clearly not one of the rare situations where nonemployee access to an employer's property is required by *Babcock & Wilcox*. See *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. at 180, 98 S.Ct. at 1745. [Emphasis supplied.]

Moreover, the court of appeals was of the view that Respondent's union animus was irrelevant to the denial of access by nonemployee organizers.[11] Subsequent to the

[11] The General Counsel asserted that the Board has never acquiesced in the Fifth Circuit's views in *Sabine I*. In a subsequent case of this nature, *Belcher Towing Company*, 256 NLRB 666 (1981), the Board accepted a further remand from the Fifth Circuit. Although the Board

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judgment of the Fifth Circuit, the Board notified Respondent that it did not intend to seek certiorari in *Sabine I.*

B. *Additional Findings and Conclusions*

There can be no question but that the purpose of the litigation in *Sabine I* involving the same parties and the same group of targeted employees was identical with the purpose here.

Contrary to Respondent, the General Counsel and the SIU argue that the outcome of the litigation in *Sabine I* is of no moment to the instant proceeding. And to the extent that it may be concluded otherwise, the General Counsel and the SIU contend that I am bound to the findings and the conclusions reached by the Board in *Sabine I* rather than the judgment of the Fifth Circuit.

There is likewise no dispute among the parties that the fundamental principles applicable to cases involving nonemployee access has remained unchanged since 1971. Thus, in *N.L.R.B.* v. *Babcock & Wilcox Company,* 351 U.S. 105 (1956), the Supreme Court held at 112:

> It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.
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> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.
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> The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations.

In effect, Respondent claims that the Fifth Circuit's judgment concerning the accessibility of its unlicensed seamen in *Sabine I* is conclusive as to the instant litigation in the absence of evidence that the circumstances were materially altered between 1971 and 1976. Both the General Counsel and the SIU contend that the circumstances were substantially different in 1976. The SIU summarized the principal contentions in this regard as follows:

> It scarcely warrants extended discussion to show that the controlling facts had changed from 1971 to 1976. The decision of the Fifth Circuit rested upon certain objective facts about Sabine's business operation in 1971 and how and where the crew members with whom SIU representatives sought to communicate lived and worked. The Fifth Circuit relied upon the ALJ's findings that (1) Sabine operated 5 vessels; (2) there were 168 crew members living in 9 different states; (3) vessel crews were 25-28 in number; and (4) SIU used a current *Excelsior* to visit crew members' homes . . . . These facts had a direct and controlling impact on how many times Sabine vessels docked, how many crew members SIU representatives could contact at any one docking, how many crew members SIU representatives had to communicate with, and whether they could communicate with them at home. By 1976, these facts had changed dramatically.

With respect to the contention that to the extent that I may be bound by the prior litigation, I am bound to the Board's decision in *Sabine I,* it must be recognized that the problem presented by Respondent's motion to dismiss on the ground of *res judicata* or collateral estoppel is distinguishable from the doctrine of *stare decisis.* There is no question that, as used by the Board, the legal Doctrine of *stare decisis* binds me to follow Board precedent until altered by the Supreme Court. *Lenz Company,* 153 NLRB 1399 (1965); *Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Company of America),* 119 NLRB 768 (1957). This is so notwithstanding court of appeals' contrary precedent where there is no indication that the Board has acquiesced in that contrary precedent. *Iowa Beef Packers, Inc.,* 144 NLRB 615 (1963). Thus, in the instant case, were I to conclude that Respondent's motion to dismiss based on some doctrine of legal preclusion resulting from the prior litigation was without merit, I would be compelled to deny Respondent's motion to dismiss on the alternative ground that the General Counsel had failed to establish a *prima facie* case where, as here, I have also concluded that the evidence of accessibility remained essentially unchanged in the period from 1971 to 1976. However, that portion of Respondent's motion to dismiss on the ground of *res judicata* or collateral estoppel requires a determination as to what effect, if any, must be accorded to the Fifth Circuit's prior judgment which concluded that, under the circumstances extant in 1971, Respondent's unlicensed seamen are sufficiently accessible to reasonable efforts by outside union organizers to communicate with them so that it is unnecessary to order Respondent to admit union organizers to its vessels against its will in order for its employees to enjoy the full exercise of their Section 7 rights. To the

made numerous references to *Sabine I* in its reconsideration of *Belcher,* it did not explicitly acquiesce in the Fifth Circuit's views. The conclusion reached herein should not be construed as a recommendation that the Board do so now.

extent that the Board may be bound by a prior determination on that question, I too am bound. To conclude otherwise could result in the absurd exercise of an administrative law judge's recommending to the Board that it adopt an order which the Board is legally precluded from adopting. Accordingly, the argument that I am bound to apply the Board's decision in *Sabine I* if *res judicata* or collateral estoppel is applicable here is without merit.

Turning to Respondent's contention concerning *res judicata* and collateral estoppel, it is pertinent to observe that the Supreme Court recently noted in *Montana* v. *United States*, 440 U.S. 147 (1979), the technical difference between *res judicata* and collateral estoppel as well as the purpose of these doctrines. Thus, Justice Marshall's majority opinion in *Montana* recites at 153–154:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48–49 (1897). Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1877); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); 1B J. Moore, Federal Practice Para. 0.405 [1], pp. 621–624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments Section 47 (Tent. Draft No. 1, Mar. 28, 1973) (merger); *id.*, Section 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 5 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2–3 (1942); Restatement (Second) of Judgments Section 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction. *Southern Pacific R. Co., supra*, at 49; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.[4]

[4]See Hazard, Res Nova in Res Judicata, 44 S. Cal. L. Rev. 1036, 1042–43 (1971); Vestal, Preclusion/Res Judicata Variables; Adjudicating Bodies, 54 Geo. L. J. 857, 858 (1966); Note, Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 820 (1952).

Based on the foregoing technical distinction between *res judicata* and collateral estoppel it is my conclusion that, as the instant matter resulted from a different request for access made in 1976, this could be regarded as a separate "cause of action" and, therefore, the application of *res judicata* effect to the outcome in *Sabine I* would not be appropriate.

However, the fact of the matter is that these parties have once before litigated the question of whether or not these seamen are accessible to outside organizers. It is this question which is always fundamental to the outcome of cases of this nature and which consumes so much time in proceedings of this type. Therefore, the essential question posed by this litigation is whether or not anyone will ever be bound by a judgment previously made which rests on the factual conclusion that these seamen are sufficiently accessible at locations away from Respondent's premises or must this issue be resolved each time a mere request for access is made and it is denied.

The Fifth Circuit—whose final and binding judgment was placed in issue here by Respondent's timely, affirmative defense—noted the traditional requirements necessary for the application of the doctrine of collateral estoppel as follows:

> (1) The issue to be concluded must be identical to that involved in the prior action; (2) in the prior action the issue must have been "actually litigated"; and (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

James Talcott, Inc. v. *Allahabad Bank Ltd.*, 444 F.2d 451, 458–459 (5th Cir. 1971), cert. denied 404 U.S. 940 (1971); See also *Stevenson* v. *International Paper Co., Mobile Alabama*, 516 F.2d 103 (5th Cir. 1975)

In their briefs, the General Counsel and the SIU call attention to *General Motors Corporation*, 158 NLRB 1723 (1966), where the Board held that *res judicata* and collateral estoppel did not apply to an unfair labor practice proceeding which questioned the legality of a contractual clause related to employee solicitation notwithstanding that a court of appeals had determined in a prior proceeding that the same clause in a predecessor agreement was lawful. Apart from the fact that the second unfair labor practice case in *General Motors* had been brought by a different charging party at a different plant of that employer, the Board also relied on the fact that the second proceeding was based on a different agreement albeit the particular clause in issue was identical. In so doing, the Board analogized the situation presented there to that described in the Supreme Court's dicta in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948), where it observed that neither *res judicata* nor collateral estoppel would bar a second proceeding involving an instrument or transaction which was "identical with, but in form separable from, the one dealt with in the first proceeding." On the other hand, Respondent calls attention to *Joint Council of Teamsters No. 42*, 248 NLRB 808 (1980). In that case, the Board held that the doctrines of *res judicata* and collateral estoppel precluded

it from again determining the status of a certain group of individuals which a court of appeals had determined in an earlier, unrelated proceeding were independent contractors and not employees where there was no evidence of any changes in the duties and functions of that group. The SIU believes *Teamsters No. 42* is distinguishable from the situation presented here because the factual basis relied on in the attempt to reargue the status of the group of employees in question was limited by stipulation to the record made in the prior proceeding. Nevertheless, the SIU agrees with Respondent's vigorous argument based on *Montana* v. *United States, supra*, that it is essential to demonstrate in the subsequent proceeding which seeks to relitigate a previously decided issue that the underlying facts have *materially* changed before it is appropriate to conclude that the doctrine of collateral estoppel is inapplicable to the parties to the prior litigation of their privies.

In my view there is an inconsistency in the SIU's position concerning *Joint Council of Teamsters No. 42, supra*, and *Montana* v. *United States, supra*. In *Montana*, the Supreme Court clearly rejected the argument that there must be an identical "factual stasis" between the first and second proceedings before collateral estoppel applies. Indeed, the two relevant proceedings in *Montana* were based on different contracts with different provisions but the Supreme Court concluded that this difference was not material to the outcome reached in the first proceeding which served to bar the second proceeding. By anology, if the parties had presented new evidence as to the independent contractor status of the individuals involved in *Teamsters No. 42*, collateral estoppel would have been appropriate unless there was a showing that the new evidence was materially different from the evidence relied on when the conclusive judgment was entered in the first case. Hence, the fact that the parties stipulated to the prior record evidence in *Teamsters No. 42* is not of controlling significance to the action taken by the Board there. In the instant case, it is obvious that the factual stasis is different by reason of what the SIU calls the "temporal difference." However, the ultimate factual question which must be resolved here—as it was in *Sabine I*—is whether or not Respondent's seamen are reasonably accessible to outside organizers at locations other than Respondent's premises. The rationale of the *Montana* case clearly suggests that, as this fundamental issue has previously been determined among the parties to this proceeding, the General Counsel has the added burden of showing that there was a material change in the circumstances between 1971 and 1976 which would warrant a redetermination of that issue at this time.

With the foregoing in mind, I cannot agree that the General Counsel's case presented here demonstrates that the underlying facts changed—either dramatically or materially—between 1971 and 1976 so as to warrant the relitigation of the question of the accessibility of Respondent's seamen. More particularly, between 1971 and 1976, there was practically no change in the nature of Respondent's business or its mode of operation. Although the size of Respondent's fleet increased from five to eight vessels in that 5-year period, Respondent continues to transport petrochemicals between many of the same port cities as was the case in 1971. The length of time Respondent's vessels spent in the various port cities has likewise not changed significantly. There is no evidence that the docking facilities at the various ports have been appreciably altered so as to make contacts with exiting seamen any more difficult than it was in 1971.

In addition, between 1971 and 1976 there was no essential change in the living and working conditions of Respondent's unlicensed seamen. Thus, while at work, the seamen continued to be housed aboard Respondent's vessels. When the vessels are in port, as they frequently are, and the seamen are not on duty, they are free to go ashore and to associate with whomever they please. In the period since the last proceeding, the amount of vacation time accorded to Respondent's seamen has increased so that at the time this case arose, Respondent's seamen received 1 day of vacation for every 2 days of work. The fact that the number of seamen increased from approximately 167 to approximately 227 is not a demonstrably significant factor. By contrast, the fact that the crew sizes were reduced from 25 unlicensed seamen to 19 unlicensed seamen would, in some respects, favor the organizers because there would be a smaller group of seamen on each vessel to identify and solicit. The changed circumstances which I perceive to be the most significant pertains to the broader geographical distribution of the seamen's homes shown in footnote 8, above. It must be recognized, however, that by 1976 the SIU organizers were not strangers to Respondent's method of operation, their customers, and many of the Respondent's employees. The testimony of Glidewell and Peth in the instant hearing demonstrates that there were several employees whom they knew from the earlier campaigns. With this and similar knowledge, they made judgments as to whether or not it would be futile to approach certain individuals. Other evidence indicates that they made frequent contacts with individuals who solidly supported the SIU in order to obtain information and to provide them with literature to take aboard vessels. In some instances, the SIU organizers were familiar with the families of the seamen and obtained information from this source concerning docking times and other similar information which would aid in meeting vessels and contacting the seamen.

As noted above, during the 1976 campaign, Glidewell and Peth were able to obtain 109 signed authorization cards from Respondent's seamen, just short of a majority of those employed in August 1976. This achievement exceeds their estimates of their contacts in 1971. When this fact is considered together with the fact that SISA has heretofore enjoyed majority support in the past elections and continued to be active in performing its functions as the collective-bargaining representative throughout 1976, and other evidence that contacts were made with individuals who did not desire to commit themselves, it is difficult to conclude how it can be argued that Respondent's seamen were less accessible in 1976 than they were in 1971.

Based on the foregoing and the entire record thus far, it is my conclusion that the General Counsel has failed to show that the relevant circumstances were materially dif-

ferent in 1976 than they were in 1971. As a result, it is my conclusion that the instant case is no more than an attempt to relitigate the accessibility question previously determined in *Sabine Towing & Transportation Co., Inc.* v. *N.L.R.B., supra.* As the circumstances shown here are not materially different from those essential to the judgment previously reached, I find that the parties are estopped from seeking a reconsideration of the prior determination that Respondent's seamen are reasonably accessible away from its premises.[12] *Montana* v. *United States, supra; Joint Council of Teamsters No. 42, supra.* In view of this conclusion, it is axiomatic that Respondent did not violate the Act by refusing to permit the SIU organizers to board its vessels or refusing to provide the SIU with docking information in 1976. *N.L.R.B.* v. *Babcock & Wilcox, supra.* Accordingly, I shall recommend that the complaint herein be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The SIU is a labor organization within the meaning of Section 2(5) of the Act.

3. It has heretofore been determined in *Sabine Towing & Transportation Company, Inc.* v. *N.L.R.B.*, 599 F.2d 663 (5th Cir. 1979), that Respondent's seamen are reasonably accessible to nonemployee union organizers at locations away from Respondent's premises and that determination was necessary and essential to the judgment entered by the court of appeals in that matter.

4. There being insufficient evidence herein of any material circumstance which would affect the determination noted in 3, above, which involved the same parties as are involved in this proceeding, the parties are estopped from relitigating the prior determination that Respondent's seamen are reasonably accessible to nonemployee union organizers at locations away from Respondent's premises.

5. Respondent did not violate Section 8(a)(1) of the Act by refusing to permit nonemployee union organizers to board its vessels, or provide nonemployee union organizers with information as to the docking location and time for its vessels, as alleged in the complaint.

Pursuant to Section 10(c) of the Act and upon the foregoing findings of fact and conclusions of law, and the entire record herein, I hereby issue the following recommended:

ORDER[13]

It is hereby ordered that the hearing herein be deemed closed and that complaint be, and the same hereby is, dismissed in its entirety.

[12] In reaching this conclusion, I have not heretofore attempted to assess the impact of Respondent's prior unfair labor practices inasmuch as it is clear that such conduct was considered irrelevant by the Fifth Circuit on the access question. However, it should be observed that unlike *Sabine I*, the instant case does not involve an atmosphere of other serious unfair labor practices. The only direct evidence of animus offered thus far in this proceeding was the testimony of seaman Wiley Yarber who testified that the captain of the *Sabine* had threatened reprisals against the SIU supporters in 1976. Inasmuch as the issue presented here pertains to the binding nature of the prior determination and this aspect of the case obviously would not affect the determination previously reached, it is not relevant to determinating the application of collateral estoppel.

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.