IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendant.	§ § § § § § § § §	Civil Action No. 9:97 CV 063 (COBB)

PLAINTIFFS' REPLY TO LUFKIN'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR APPOINTMENTS

I. THE PROPOSED SPECIAL MASTER APPOINTMENT

Lufkin's Response in Opposition ("Opposition" or "Opp.") to Plaintiffs' Motion for Appointment of a Special Master and Court-Appointed Expert Witness ("Motion") is fundamentally flawed in that it argues against hypothetical positions that bear little resemblance to those taken in Plaintiffs' Motion as to both the roles of Special Master and Court and the nature of the Special Master proceedings sought.

Lufkin mischaracterizes what the Motion proposes as a further stage in trial proceedings. (Opp. at 1, 5, 8)[1] Plaintiffs' Motion seeks nothing of the sort, but rather a proceeding based on the trial record and the Court's findings and conclusions that tracks common modern practice in the use of special masters "to oversee issues arising after trial [including] … matters of crafting and overseeing the remedial stage of the litigation." Scheindlin and Redgrave, "The Evolution and Impact of the New Federal Rule Governing Special Masters," 51-FEB Fed. Law. 34 (Feb. 2004) ("Scheindlin"). The Court's January 19, 2005 Order [Dkt. 464] suggests the possible appointment of a Special Master "to determine specific details of non-monetary remedial measures and to enter such supplemental remedial orders as may be necessary and appropriate" – *not* to retry the case as Lufkin accuses Plaintiffs of wanting to do.

In the Memorandum and Order entered January 13, 2005 [Dkt. 461], at 38, the Court alluded to the prospect of more "specific" measures to achieve the goal of correcting the discriminatory practices it found and stated that it "may also appoint a monitor to oversee Lufkin's compliance efforts and ensure the smooth implementation of the listed requirements." Appointment of a Special Master post-trial to assist and advise the Court on what those specific measures should be and how they should be carried out neither usurps nor revisits the basic fact-finding and decision-making authority of the Court. See authorities cited in Motion at 3-4.

[1] Lufkin's Opposition erroneously accuses Plaintiffs of "mov[ing] essentially to reopen the trial record including the taking of evidence … re-litigat[ing] their claims and submit[ting] additional evidence after the trial has concluded." (Opp. at 1) These accusations set up a straw man target with no resemblance to the proceedings Plaintiffs seek.

Lufkin's attack on the Court's authority to appoint a Special Master is far wide of the mark. Lufkin relies principally on the narrow, restrictive view of the circumstances in which special masters may be used as articulated nearly half a century ago by the Supreme Court in La Buy v. Howes Leather Co., 352 U.S. 249 (1957). But Rule 53 has been amended since then, and modern practice has significantly evolved in the direction of broader and more flexible uses. See generally, Scheindlin, at 35-38.[2] The 2003 amendments to Rule 53 were specifically intended to adopt this more modern view. Id.[3] La Buy simply no longer expresses the intent of the amended Rule and practice under it. Scheindlin at 35.

The authorities Lufkin relies upon to attack the Court's authority to use a special master here do not support Lufkin's positions. Instead, they support Plaintiffs' proposals. The delegation disapproved in La Buy was for *trial* of the case, prior to any determination by the court of "the basic issues involved in the litigation," including the defendant's liability. La Buy at 250, 253. In contrast, this Court has already tried and decided the "basic issues" and found Lufkin liable and required to implement remedies. In United States v. Microsoft Corp., 147 F.3d 935, 940, 954-955 (D.C. Cir. 1998), the disapproved reference was "to propose findings of fact and conclusions of law" and there was no explicit reservation by the court of the right to *de novo* review of the special master's report. In this case the Court has entered detailed findings of fact and conclusions of law, and the Proposed Order submitted by Plaintiffs with their Motion explicitly provides (at paragraph 4c) for *de novo* review of the Special Master's report and

[2] The introduction to this article, whose co-author is Judge Shira Scheindlin of the Southern District of New York, aptly summarizes this evolution: "The modern practice and use of special masters gradually evolved from a strict and limited role for trial assistance prescribed by Rule 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of long-standing rule, the Advisory Committee on Civil Rules understood an effort to conform the rule to practice. The result is a new rule (effective Dec. 1, 2003) that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context." Id. at 35. Judge Scheindlin was, at the time of writing the article, a member of the Rules Advisory Committee and the former chair of its Rule 53 subcommittee. Id. at 38 FN a1.

[3] "By the end of the 20th century, . . . a master's role in complex litigation grew to include … implementation and enforcement of post-judgment orders and decrees." Id. at 36. The Rule 53 amendments were designed "[t]o conform Rule 53 to the contemporary practice of using masters during the … post-trial stages" of complex litigation. Id. at 37.

recommendations after a full opportunity for the parties to object to them. In Stauble v. Warrob, Inc., 977 F.2d 690, 691, 694-696 (1st Cir. 1991), the court held impermissible an order "referring fundamental issues of liability to a master for adjudication, over [the parties'] objection" without any procedure for *de novo* review by the court; and further noted, with regard to the type of reference sought by Plaintiffs here, that special masters may "appropriately perform a variety of consummatory functions, e.g. superintending … the implementation of structural injunctions." In Sierra Club v. Clifford, 257 F.3d 444, 445, 447 (5th Cir. 2001), the improper reference was to adjudicate cross-motions for summary judgment on basic liability and remedy issues, with no provision for *de novo* review by the court. In re Bituminous Coal Operators' Ass'n, 949 F.2d 1165 (D.C. Cir. 1991), was characterized in the same court's later opinion in Microsoft, 147 F.3d at 956, as '"effectively rul[ing] out nonconsensual references in nonjury cases *except as to peripheral issues such as discovery and remedy* (emphasis added)." The reference Plaintiffs propose here fits squarely within that permissible exception.

There are also strong practical reasons to appoint a Special Master to conduct advisory proceedings on injunctive relief. Lufkin protests that there is no showing that it requires any supervision or further remedial directives with regard to initial assignments and promotions (Opp. at 1, 9-10); and asserts that there is no "evidence that Lufkin needs assistance or has failed to comply with any mandatory injunction entered by the district court" (Opp. at 1) and that it "has taken substantial steps to implementing the prescribed relief" (Opp. at 9). However, Lufkin does not disclose what if anything it has actually done to assure effective implementation of the Court's injunctive orders or to eradicate its discriminatory practices, either in its Opposition[4] or

[4] Lufkin's Opposition contains vague statements about purportedly remedial actions it has taken in three areas – retention of an unidentified expert to provide diversity training of an unspecified nature to unspecified "management" and to "advise Lufkin on its personnel policies and procedures;" instructing the TWC to refer applicants in the same way that Lufkin contended at trial they had always been referred to Lufkin during the liability period; and having a single unilateral bargaining session with the unions "to *consider* revisions to Lufkin's promotion processes," with unspecified, if any, results. (Opp. at 2) These "steps" that "Lufkin has taken" (id.) fail to provide any assurance that effective remedial actions have been taken or that the discriminatory practices found by the Court have been dismantled.

anywhere else in the record.[5] Given its decades-long record of resistance to change, Lufkin is unlikely to carry out such unspecified and unsupervised remedial steps unilaterally. See Plaintiffs' Motion, pp. 3-4 and fns. 3 and 4.

Lastly, Lufkin protests that there is no need for a Special Master because the District Judge, or a Magistrate Judge, can fulfill any required functions in remedial proceedings (Opp. at 6-7, 10). Plaintiffs do not intend to suggest by their Motion that the Court is not capable of understanding the remedial issues or conducting the necessary proceedings itself, should it wish to do so. Plaintiffs' concern is that the Court's calendar may not provide opportunity for the type of sustained attention and concentrated commitments of time that may be required to fashion specific relief in the absence of any cooperation or participation by Lufkin.[6] Should this perception be inaccurate, Plaintiffs would welcome the conduct of the necessary proceedings by the Court. However, the Court should avoid delay due to the limited availability of time of the officer mainly responsible for gathering and focusing the proposed remedies for the Court's ultimate consideration. Appointment of a Special Master who could commit blocks of time to the effort, such as the experienced management labor lawyer proposed by Plaintiffs, would

[5] Lufkin has consistently taken the position that "[i]t is now up to Lufkin to implement the Court's injunction," Defendant's Motion to Vacate the Court's Order of January 18, 2005 [Dkt. 468], p. 7; and has rebuffed any attempts by Plaintiffs to find out what steps it is taking, much less to discuss them with Plaintiffs as required by the Court's January 19, 2005 Order [Dkt. 464]. Thus, as described in Plaintiffs' Status Report to the Court [Dkt. 507], at 3-4, after a day-long meeting of the parties in which Plaintiffs' counsel presented proposals for a variety of specific remedial measures to Lufkin, Lufkin's counsel told Plaintiffs' counsel that Lufkin would provide information on the remedial actions that Lufkin was working on, but never followed through by providing any such information. To this day, Plaintiffs remain in the dark on that subject. Moreover, just two days after the day long meet and confer session, Lufkin, without advising either the Court or Plaintiffs or seeking clarification from the Court regarding Lufkin's obligation under the January 13 Order, informed the unions that compliance with that Order required the modification of the seniority and other provisions of the Collective Bargaining Agreement. See letter dated March 3, 2005 from T. Demchak and T. Garrigan to Hon. H. Cobb, and Letter dated Feb. 18, 2005 from D. Hamel to counsel for the unions, attached thereto.

[6] In Plaintiffs' counsel's experience, at this stage of proceedings employers will almost uniformly find it in their interest to participate in fashioning a remedial order they can live with by reaching agreement with the plaintiffs. When this happens, the parties do almost all of the work and the Court has merely to review and approve their agreements. In this case, however, Lufkin has made it clear that it will fight every inch of the way, requiring an extraordinary degree of judicial involvement and intervention.

provide valuable additional resources to the Court. Moreover, Lufkin's bearing the cost for this process could create an incentive for Lufkin's cooperation.

II. THE PROPOSED EXPERT WITNESS APPOINTMENT

Lufkin's opposition to the appointment of an expert witness or consultant also mischaracterizes Plaintiffs' proposal. Plaintiffs do not seek to resume trial, as Lufkin suggests. Rather, Plaintiffs suggest appointment of a qualified person, such as the two professors identified in the Motion, who would "provide advice in the form of testimony in evidentiary proceedings in which the parties would participate." Motion at 8. Such testimony would not be directed at any review of the Court's prior findings of whether Lufkin is liable, or whether remedies should be granted. Lufkin's contention that the process proposed by Plaintiffs would deprive it of the opportunity to cross-examine the expert on his opinions or advice, or to present its own views, is contrary to Plaintiffs' actual proposals. See, Motion at 10, Proposed Order at paragraph 10c. Finally, Lufkin ignores Plaintiffs' alternative proposal that the Court order Lufkin to retain a qualified and impartial expert whose appointment and recommendations would be subject to review by Plaintiffs' counsel and approval by the Court, rather than subject to Lufkin's unilateral (and undisclosed) decision-making processes. See, Motion at 10, Proposed Order at paragraphs 6b-c.

III. CONCLUSION

If the Court believes a Special Master and/or court-appointed expert witness would be of assistance, it has authority to make those appointments as proposed in Plaintiffs' Motion.

Dated: May 20, 2005

Respectfully submitted,

By: /S/

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CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

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on this 20th day of May, 2005.

/S/
Teresa Demchak