

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS,

Plaintiff,

v.

C.A. No. 03-2464(GK)

ELAINE L. CHAO, SECRETARY
OF LABOR,

Defendant.

MOTION FOR RECONSIDERATION
OR CLARIFICATION OF PRELIMINARY INJUNCTION

The Secretary of Labor, Elaine L. Chao, hereby moves the Court to reconsider or clarify the order preliminarily enjoining the Rule entitled "Labor Organization Annual Financial Reports" issued pursuant to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* (hereinafter, "the Rule"), to limit the duration of the injunction to reflect the harm found by the Court.¹ For the reasons articulated in the Preamble to the Rule and her submissions to this Court, the Secretary respectfully disagrees with the Court's assessment of the purported harm to labor organizations that would occur had the Rule become effective on January 1, 2004, and the Court's conclusion that no harm results from delaying the Rule's implementation. Although the Secretary believes that Plaintiff has failed to demonstrate any of the prerequisites for injunctive relief, this motion concerns Plaintiff's demonstrable failure to offer any basis for an injunction that would preclude the Rule from becoming effective with respect to labor

¹ Pursuant to Local Rule 7(m), undersigned counsel conferred with but did not obtain the consent of Plaintiff's counsel before filing the instant motion.

organizations with fiscal years beginning on or after July 1, 2004, provided that the Department's reporting software is available at least 90 days before that date.

Following a December 30, 2003, hearing, this Court, by order dated December 31, 2003 ("Order"), preliminarily enjoined the Secretary from implementing changes in union financial reporting rules that proposed to provide union members with more detailed and transparent reporting of their labor organizations' financial conditions and operations. Although the Order does not specify a time period for the injunction, it is based in part upon the finding that "[a] one-year postponement of the effective date of the new Rule will cause no harm to the Department of Labor." Order at 2. In its accompanying Memorandum Opinion, the Court states: "A one-year postponement of the effective date of the new Rule will cause no harm to either the Department of Labor or to union members." Mem. Op. at 2-3. The Memorandum Opinion also notes that "the parties agreed that a one-year postponement was appropriate, if any delay was to be ordered." *Id.* at 3 n.4.

Preliminarily, the Secretary did not acquiesce to a year-long injunction. Counsel for the Secretary agreed at oral argument that an annual financial report filed by a union should reflect its finances under a single reporting system for a full fiscal year (rather than splitting for a particular fiscal year the reporting obligations under the old rule and the new rule) should the Court's preliminary injunction be lifted before December 31, 2004. For this reason, the Secretary's counsel agreed that an order providing extended preliminary relief would likely result in a one-year postponement for unions whose fiscal year began during the course of the injunction. The Secretary did not agree to a one-year delay of the effective date of the Rule.

1. There is no basis in the record for a year-long injunction. The Rule requires that the revised Form LM-2 be used by covered labor organizations that have \$250,000 or more in annual receipts to file their annual financial report for fiscal years beginning on or after January 1, 2004. Thus, any covered union with a fiscal year that began on January 1 (approximately two thirds of the estimated reporting unions), would be required to record financial information, including certain individually identified disbursements and receipts, from that date forward in the detail and format specified by the Rule. The remaining unions, however, including Plaintiff AFL-CIO, which have fiscal years that begin later in the calendar year, would not have to begin tracking financial information required by the revised Form LM-2 until the date on which their next fiscal year begins, *e.g.*, July 1 or October 1. For these unions, the January 1, 2004, effective date of the Rule did not require any change in their current recordkeeping or reporting practices until their next fiscal year commenced, later in 2004. As the Court acknowledged, "Unions that have fiscal years that begin on a date other than January 1 (such as April 1 or July 1) will have a concomitant amount of additional time to comply with the Rule." Mem. Op. at 10.

Because the annual reports are intended to reflect a full fiscal year's information, neither partial reports, nor split reports (filing the old form for part of the year and the new form for the remainder of the year) are reasonable alternatives. Accordingly, the practical effect of a significant delay of the effective date of the Rule is to permit unions with a January – December fiscal year to use the old Form LM-2 for the fiscal year that began on January 1, 2004. It was on this basis that the parties agreed that an order providing extended preliminary relief would likely result in a one-year postponement for January 1 filers. But no similar reasoning renders

impractical the use of the revised Form LM-2 specified by the Rule by unions whose fiscal years begin later in 2004. Accordingly, absent any particularized showing of harm to these unions caused by the Rule becoming effective, there is no basis for an order that preliminarily enjoins the Rule's effective date for labor organizations that begin their fiscal year on any date other than January 1. *See, e.g., Gulf Oil Corp. v. Brock*, 778 F.2d 834, 839 (D.C. Cir. 1985) ("an injunction must be narrowly tailored to remedy the harm shown"); *Sanjour v. United States Env't'l Protection Agency*, 7 F. Supp. 2d 14, 19 (D.D.C. 1998) (same).

2. While the Secretary believes that the Plaintiff has made an insufficient showing of irreparable harm to any union, the record most clearly cannot support the conclusion that unions with fiscal years commencing on or after July 1 will suffer any harm, particularly since the Department will have made the electronic filing software available no later than March 31, 2004. First, the potential harm related to the effective date of the Rule is extensively discussed in the Preamble to the Final Rule. At section III(I) of the Preamble, *see* 68 Fed. Reg. 58374, 58410-12 (Oct. 9, 2003), the Secretary listed the tasks that unions would need to complete in order to comply with the Rule and explained her assessment that the unions could make the transition before January 1, 2004. The Secretary amplified her reasons for selecting January 1 as the Rule's effective date in the Regulatory Flexibility Analysis, *see* 68 Fed. Reg. at 58422-23. Moreover, in the Paperwork Reduction Act section of the Preamble, the Secretary detailed at length her burden estimates, specifically the "front end" burdens associated with unions' compliance with the Rule.

See 68 Fed. Reg. at 58431-46.² In light of these analyses, the Court's finding that a "two month transition period" is likely arbitrary and capricious, Mem. Op. at 22, does not, in any way, suggest that an eight or nine-month transition period, as available to those labor organizations whose fiscal year begins on July 1, is insufficient.

Second, in the Secretary's view, the Court's heavy reliance on the Declaration of Linda Jardine ("Jardine") is misplaced, and, more important here, while the Declaration does not support any delay, it certainly contains nothing to support a delay of the effective date of the Rule for any labor organization other than one whose fiscal year began January 1. In its Memorandum

² "The Department estimates that it will take unions an average of 76.8 (nonrecurring) hours to change their accounting structures; develop, test, review, and document accounting software queries; design query reports; and train accounting personnel. Unions that use a fiscal year beginning on January 1 will need to spend less than half of these hours (32.5) making changes before January 1, 2004, in order to be ready to begin the recordkeeping necessary to be able to file the revised Form LM-2. Unions will have until 90 days following the end of their fiscal year to spend the remainder of these hours (44.3) making changes that will be necessary to actually populate the Form LM-2, which will be due, at the earliest, at the end of March 2005. These estimates are based on the Department's review of a variety of accounting software packages, its evaluation of the recordkeeping requirements of the current Form LM-2, and its review of the public comments. The Department relied upon the expertise of investigators with first-hand knowledge of union financial reporting, including the use of software, to determine which four commercial off-the-shelf software packages were most commonly used by unions to maintain their finances and prepare financial reports. Using these four common off-the-shelf software packages, Department investigators determined that it was possible to set up categories or accounts tailored to capture the information necessary to comply with the requirements of the rule. The software packages tested utilize a common processing format. Many unions with commercial off-the-shelf accounting software will take less time and other, typically larger, unions with specialized accounting systems may take more time. Further, the public comments suggest that many unions already have accounting systems that maintain at least some, if not all, of the required information for disbursements and other receipts. Therefore, as discussed above, the Department continues to believe that unions will have adequate time to conform their accounting systems to the revised forms before the start of the first reporting period for which they will be required to report on the new Form LM-2 (no earlier than January 1, 2004)." 68 Fed. Reg. at 58437.

Opinion, the Court held that the Secretary offered "no rebuttal" to Ms. Jardine's Declaration, nor any "substantive explanation as to how the covered unions would be able to meet their obligations under the Final Rule in the brief period of time allotted." Mem. Op. at 21. The Secretary respectfully disagrees; the Secretary's explanation for the Rule's effective date is fully articulated in the Rule's Preamble and the Secretary's paperwork submission to OMB (Docket No. 35913 at 26-30, in the certified index to the rulemaking record). The Secretary respectfully submits that the Rule's implementation should be based on the record documents and the Secretary's estimates of the burdens relating to implementation, not a post hoc evaluation by an accountant employed by one of the interested parties.³ This is particularly true when, as here, the Court is no longer assessing the immediate impact of the rule on the filers. To the extent that the Court valued Ms. Jardine's declaration for its seeming insight into the actual post-promulgation effects of the Rule on certain unions in December 2003, the Court's regard should not extend to her predictive efforts, particularly in light of the lengthy, reasoned analysis in the Preamble concerning the time and tasks necessary to comply with the Rule.

3. In any event, the Jardine Declaration fails even to assert that allowing the Rule to become effective on July 1 will irreparably harm unions with fiscal years beginning on or after July 1, 2004. Indeed, neither Ms. Jardine, nor the AFL-CIO at argument (or in any of its

³ Ms. Jardine does not specify, either in her initial Declaration, or in her Supplemental Declaration, the number of unions represented by her firm or the number of unions for which she asserts she has prepared the approximately 150 Form LM-2s over the course of her career. Nor does she name a single union with respect to which she has any personal knowledge. By contrast, the Secretary draws, *inter alia*, upon the expertise of investigators that have conducted nearly 2,000 criminal investigations and 1,330 compliance audits reviewing the financial affairs of unions since October 1, 1998.

submissions) has named a single union that would have been unable to make necessary changes to its recordkeeping procedures by January 1, much less by July 1. Ms. Jardine asserted that many of her clients would not have been ready by January 1, thereby acknowledging that some of her clients would have been ready even by that date. Ms. Jardine does not suggest that any union will not be ready by July 1.⁴ Most importantly, Ms. Jardine acknowledges that all of her clients will be able to complete the work by some time "well into 2004," further demonstrating that compliance is not a year-long enterprise. For all these reasons, there is simply no support for postponing the Rule's effective date for an entire year.⁵

4. Ms. Jardine asserts that it is desirable to have the Department's electronic filing software available for advance testing. *Compare* 68 Fed. Reg. at 58410 (indicating that a union

⁴ Although the Rule modifies and adds to the categories in which financial information has been reported by unions, the functional reporting approach embodied in the Rule reflects a longstanding practice, as explained in the Preamble, 68 Fed. Reg. at 58393-94, and confirmed in the Jardine Declaration. Jardine at 8, para. 16. Itemization of certain major receipts and disbursements by category is new, but the need to allocate such transactions by category is not a new concept for union reporting and the burden associated with such itemization is far less than suggested by the AFL-CIO. *See* 68 Fed. Reg. at 58385, 58390. Although the AFL-CIO emphasizes the need to code credit card transactions by vendor, (*see* Rutenberg Report at 14; *see also* 68 Fed. Reg. at 58391 (responding to this asserted "new" burden)), this requirement is not new. As explained by the Secretary in the Rule's Preamble, unions have always been required to separately track each credit card transaction in order to allocate it to the appropriate category on the old form; the new form merely requires that some additional information be recorded for the largest transactions. *See* 68 Fed. Reg. at 58391.

⁵ Although Ms. Jardine states that the "many" unions that are clients of her firm had a substantial amount of work left to revise their accounting systems on December 23, 2003, Ms. Jardine made no representation whatsoever with respect to another critical question: whether the unions that would not have been ready by January 1, 2004, were among the largest unions – i.e., those most likely to incur additional expenses if changes are not made before the Rule becomes effective – or among the smaller unions that are likely to have relatively few transactions early in the year and, thus, will incur little cost as a result of making the transition to a new system later in the year.

does not need to have the software in order to make the changes in its recordkeeping software because the Department made available a Data Specifications Document to facilitate preparation of recordkeeping systems to permit submission of electronic reports). But even Ms. Jardine does not suggest that unions are unable to implement the recordkeeping changes without the software or that its availability to unions by the end of the first quarter of 2004 would unreasonably burden unions in making the necessary changes to their recordkeeping systems. If the Rule is made effective only to fiscal years beginning on or after July 1, unions will have at least 90 days to test the software before they are required even to begin keeping track of information to be reported using the revised form, and over a year and a half before unions must use the software to file their reports.⁶

5. The Secretary fully recognized that some organizations, due to the complexity of their systems, or the volume of their financial transactions, would require more time than others to adjust their recordkeeping systems and that a systems review was necessary as part of the transition process. *See* 68 Fed. Reg. at 58437. The Secretary expressly considered these tasks in arriving at her burden estimates. Moreover, any concern about the need of some unions for additional time to make changes to their accounting systems is fully addressed by delaying the effective date of the Rule until July 1, 2004, especially since the Department will make the

⁶ As noted above, the Department will make the electronic filing software available by March 31, 2004. Unions with a fiscal year beginning on July 1, 2004, will not be obligated to file the revised Form LM-2 using the new filing software until September 28, 2005.

reporting software available in the first quarter of 2004. Under these circumstances, all covered unions will have ample time to make changes to their accounting systems and (if necessary) to assess the compatibility of their systems with the Department's software.

The practical impact of the injunction entered by this Court, therefore, is that the important goal of promptly providing union members with greater and more meaningful information about their unions' financial condition and operations will be delayed. Thus, the Court should avoid further and undue delay of the important goals of the Rule by clarifying that the effective date is enjoined only until the later of July 1, 2004, or 90 days after the Department makes the reporting software available, thereby permitting the Rule to take effect with respect to labor organizations' fiscal years that begin on or after the later of July 1, 2004, or 90 days after the Department makes the reporting software available.

CONCLUSION

Accordingly, the Secretary respectfully requests that the Order be modified to clarify that the Rule is enjoined only until the later of July 1, 2004, or 90 days after the Department makes the reporting software available.

Respectfully submitted,

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/s/

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ORDER

Upon consideration of the motions and oppositions filed by both parties, and the arguments of counsel, it is hereby ORDERED that the December 31, 2003, Order granting Plaintiff's Motion for Preliminary Injunction is modified, and the injunction against the Secretary implementing the Rule entitled "Labor Organization Annual Financial Reports" will cease the later of July 1, 2004, or 90 days after the Department makes the reporting software available.

Dated:

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Defendant's Motion for Reconsideration or Clarification of Preliminary Injunction to be filed electronically on this 8th day of January 2004 and that the document is available for viewing and downloading from the ECF system.

Jacqueline Coleman