

Janet Lacasey, a sole proprietor, d/b/a Barca d'Oro and Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union. Case 32-CA-2340

August 15, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

Upon a charge filed on December 19, 1979, by Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union, herein called the Union, and duly served on Janet Lacasey, a sole proprietor, d/b/a Barca d'Oro, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on January 29, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

The original charge was filed on December 19, 1979, by the Charging Party, and duly served on Respondent by registered mail on or about the same day. A first amended charge was sent to Respondent on January 24, 1980, by registered mail but was returned unclaimed. The Regional Director on January 29, 1980, issued a complaint and notice of hearing, which was received and signed for by an employee of Respondent. Subsequently, on March 10, 1980, Respondent was served in person with another copy of the charge, the first amended charge, and transmittal letters for the same. Personal service was felt necessary in view of Respondent's continued refusal to respond to the charges, or to file an answer to the complaint and notice of hearing.

On April 22, 1980, counsel for the General Counsel contacted Respondent Janet Lacasey by telephone and explained the importance of filing an answer. Respondent Lacasey responded by stating that she saw no need to file an answer because there was money in an escrow account to pay off the Union. Respondent Lacasey concluded the conversation by stating that she did not intend to file an answer. Although the Regional Director for Region 32, *sua sponte*, granted an extension of time until April 28, 1980, to file an answer, Respondent has not filed an answer to the complaint.

On May 7, 1980, counsel for the General Counsel filed directly with the Board a motion for judgment

on the pleadings. Subsequently, on May 14, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motion should not be granted. Respondent has not filed a response to the Notice To Show Cause.

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.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides, *inter alia*: "All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board." As set forth above, Respondent has not filed an answer to the complaint; the time within which to file having passed, we find all allegations in the complaint to be true. There being no issues in dispute, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a sole proprietorship, with an office and place of business in Oakland, California, has been engaged in the operation of a restaurant. During the past 12 months, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000. During the past 12 months, Respondent, in the course and conduct of its business operations, purchased and received goods or services valued in excess of \$50,000, which originated from outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

1. The Employer and the Union are parties to a collective-bargaining agreement, effective from November 23, 1976, until July 6, 1982, which provides, *inter alia*, for the payment of moneys by the Employer into various fringe benefit funds established for the benefit of the unit employees. Since on or about November 1, 1979, and continuing to date, Respondent has unilaterally, and without notice to the Union, ceased making the fringe benefit payments required by the terms of the collective-bargaining agreement mentioned above.

Accordingly, we find that Respondent has, since November 1, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the unit employees, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

2. On or about November 16, 1979, Respondent, through Dagberto Bau, its Maitre d', impliedly threatened an employee with retaliation if that employee invoked the assistance of the union representative in the matter of payments due to be paid into the fringe benefits program by Respondent.

On the basis of the foregoing, we find that Respondent has restrained and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act, we shall order that it cease and desist therefrom, and make all fringe benefit payments owed to the various fringe benefit funds as required by the terms of the current collective-bargaining agreement with the Union as the exclusive representative of all employees in the appropriate unit.

Having also found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), we shall order that it cease and desist from threatening employees with retaliation if the assistance of the union representative is sought as the exclusive representative of all employees in the appropriate unit.

In view of the events alleged to have occurred subsequent to the unfair labor practices dealt with herein, and to ensure that all unit employees are apprised of their Section 7 rights, we shall also order that Respondent send a copy of the notice to all employees at his or her home address who were on the payroll at the time the unfair labor practices were committed. See *Cerro CATV Devices, Inc.*, 237 NLRB 1153, 1154 (1978).¹

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Janet Lacasey, a sole proprietor, d/b/a Barca d'Oro, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. Food servers, dishwashers, vegetable persons, porters, bar helpers, storekeepers, managers, head food servers, host persons, cashiers, and checkers employed by Respondent at its Oakland facility, excluding office clerical personnel, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 23, 1976, by virtue of a collective-bargaining agreement with the above-named Employer, the above-named labor organization has been the exclusive representative of all the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By ceasing on or about November 1, 1979, and at all times thereafter, to make the fringe benefit payments required by the collective-bargaining agreement with the above-named labor organization, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and Section 8(d) of the Act.

¹ In its Motion for Summary Judgment, counsel for the General Counsel alleges that, subsequent to the unfair labor practices dealt with in this Decision, Respondent sold its Oakland, California, facility. These allegations are not the subject of unfair labor practice charges by the Union, or a complaint by the Regional Director.

6. By impliedly threatening retaliation, through its agent, against one of its employees if the assistance of the Union was invoked, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Janet Lacasey, a sole proprietor, d/b/a Barca d'Oro, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union, as the exclusive bargaining representative of its employees in the appropriate unit, by unilaterally, and without notice to the above-named labor organization, evading, breaching, subverting, or modifying the terms of the current collective-bargaining agreement between Janet Lacasey, a sole proprietor, d/b/a Barca d'Oro, and the above-named labor organization, and without making the fringe benefit payments as required under the terms of such collective-bargaining agreement.

(b) Threatening employees with retaliation if the assistance of their union representative was sought regarding employee rights in the fringe benefit programs, pursuant to the collective-bargaining agreement between the Employer and Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make all fringe benefit payments owed to the various fringe benefit funds as required by the terms of the current collective-bargaining agreement with the above-named labor organization.²

² Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of the amounts Respondent must pay into the health and welfare plan

(b) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the unit described below, with respect to any modification of rates of pay, wages, hours, or other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

Food servers, dishwashers, vegetable persons, porters, bar helpers, storekeepers, managers, head food servers, host persons, cashiers, and checkers employed by Respondent at its Oakland facility, excluding office clerical personnel, guards and supervisors as defined in the Act.

(c) Forthwith mail a copy of the attached notice marked "Appendix" to each employee who was on its Oakland, California, payroll, at the time of the unfair labor practices herein found. Such notice is to be mailed to the last known home address of each employee.

(d) Post at its principal office in Oakland, California, and at all its other places of business, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

and pension plan in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund and, if there are no governing provisions, by evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *F. Pangori & Sons, Inc., and David Cavrell, Receiver in Bankruptcy*, 248 NLRB 405 (1980).

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union, as the exclusive representative of the employees in the bargaining unit described below by unilaterally, and without notice to the above-named Union, evading, breaching, subverting, or modifying the terms of our current collective-bargaining agreement with the above-named Union by not making required fringe benefit payments.

WE WILL NOT threaten our employees with retaliation if they seek the assistance of the Union, as the exclusive bargaining representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and payments due the various fringe benefit funds by Respondent, or any other terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employ-

ees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make all fringe benefit payments owed to the various fringe benefit funds as required by the terms of our current collective-bargaining agreement with the above-named Union.

WE WILL send to all our employees on the payroll at the time the unfair labor practices were committed, a copy of this notice at his or her home address.

We will, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

Food servers, dishwashers, vegetable persons, porters, bar helpers, storekeepers, managers, head food servers, host persons, cashiers, and checkers at our Oakland facility, excluding office clerical personnel, guards and supervisors as defined in the Act.

JANET LACASEY, A SOLE PROPRIETOR,
D/B/A BARCA D'ORO