Ogden Enterprises Ltd., Employer-Petitioner, *and* Hotel, Motel & Restaurant Employees & Bartenders Union, Local 471, AFL-CIO. Case 3-RM-626

March 11, 1980

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Jon B. Mackle.[1] Following the close of the hearing the Regional Director for Region 3 transferred this case directly to the Board for decision. Thereafter, the Employer filed a brief in support of its position.

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 reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudical error. They are hereby affirmed.

On the entire record in this case the Board finds:

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

2. Hotel, Motel & Restaurant Employees & Bartenders Union, Local 471, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. On May 15, 1979,[3] Alfred E. McCormick, president of the Employer, was contacted by Robert Belanger, organizer for the Union, and a tentative meeting was arranged. McCormick later canceled the meeting and informed Belanger that all further communication should be through the Employer's legal counsel. By letter dated May 17, the business manager for the Union advised the Employer that the Union intended to picket and handbill the Employer's restaurant for the purpose of advising the public that the Employer did not have a labor agreeement with the Union. On May 21, the picketing commenced. The signs carried by the pickets, none of whom was an employee of the Employer, contained the following language: "To the Public—Please—Do Not Patronize—Ogden's—Ogden's Does Not Have a Labor Agreement With Hotel, Motel & Restaurant Employees and Bartender's Union, Local 471, AFL-CIO." The handbills being distributed contained language identical to that of the picket signs and, in addition, the following paragraph: "This Leaflet Is Directed To the Consuming Public Only. Local 471 Is Not Requesting Any Person To Stop Work Or Refuse To Pickup Or Make Deliveries At Ogden's."

On June 25, McCormick arranged, through an intermediary, to meet with Belanger on June 29. During the 3 days preceding the meeting there were no pickets at the establishment.[4] On June 29, after the meeting, the pickets returned. Although there is a dispute as to the extent to which the June 29 meeting concerned a contract between the Employer and the Union, there is no dispute that the question of a contract did arise in the context of McCormick's asking whether the picketing would end if the Employer and the Union negotiated a contract and Belanger indicated that it would.

On July 12, the Employer filed the instant petition. By a letter to the Regional Director for Region 3, dated July 13, the Union disclaimed any interest in representing the employees of the Employer; however, the Union informed neither the Employer nor the public of its purported disclaimer.[5]

The picketing and handbilling has continued, the language unchanged, from May 21 to date with the only hiatuses being attributable to bad weather or the unavailability of pickets. The picketing and handbilling has been limited to the public entrance of the restaurant and has taken place at various times during normal business hours. The number of pickets has varied, but there have been as many as seven.

The Union contends that the picketing herein is, and at all times has been, informational in character and that, as such, it is sanctioned and allowable under Section 8(b)(7)(C) of the Act. The Union further contends that it has disclaimed any interest in representing the employees of the Employer, that is has not engaged in conduct inconsistent

[1] The petition, filed July 12, 1979, was dismissed by the Regional Director for Region 3 on July 26, 1979. Thereafter, the Employer filed a request for review and supporting brief. By direction of the Board, Deputy Executive Secretary Robert Volger issued a ruling, dated September 19, 1979, reinstating the petition and remanding the case to the Regional Director for Region 3 for further appropriate action.

[2] Alfred E. McCormick, president of the Employer, testified without contradiction that the Employer is a New York corporation engaged in the operation of a restaurant and bar in Albany, New York, and during the past 12-month period its gross revenues from retail sales exceeded $500,000 and during that same period it purchased in excess of $50,000 worth of goods which were received indirectly from outside the State of New York.

[3] All dates herein shall refer to the calendar year 1979 unless otherwise specified.

[4] Belanger testified that there were no pickets available for these dates.

[5] McCormick's undisputed testimony was that the Employer never received any notice from the Union that they had disclaimed interest in representing the employees of the Employer. Belanger testified that the Union made no effort to notify the public that it had disclaimed interest in representing the employees of the Employer.

with its disclaimer, and that, consequently, there is no question concerning representation within the meaning of Section 9(c)(1) of the Act.

The Employer contends that the picketing herein is, and always has been, tantamount to a present demand for immediate recognition. In support of its position, the Employer alleges that the Union made a demand for immediate recognition at the June 29 meeting, that the picketing continued unchanged following the Union's purported disclaimer, and that the Union's conduct, taken as a whole, indicates a present demand for immediate recognition.

The issue as to the validity of a disclaimer in the circumstances such as presented here is one that the Board is frequently called upon to resolve. In our recent decision in *McClintock Market, Inc.*,[6] the issue was presented in a factual context which closely parallels the situation here. There the Board found that, prior to the purported disclaimer, the union had made a demand for immediate recognition and had picketed in support of that demand. In finding the union's continued picketing inconsistent with its disclaimer and concluding, therefore, that the union's objective was still immediate recognition, the Board relied upon the unchanged nature of the picketing, the union's failure to inform the public of the purpose of its picketing, and the union's failure to inform the employer that it was not seeking immediate recognition. The very same conclusions could be drawn here, but there is one important distinction between the two cases. Here, the Employer's testimony that the Union demanded immediate recognition at the June 29 meeting is denied by the Union. In *McClintock Market, Inc.*, however, the union did not appear at the hearing and, therefore, the employer's testimony was uncontradicted. Thus, the determinative issue in the instant case is whether the Union's activity *prior to its disclaimer* was tantamount to a present demand for recognition.

In the instant case the *only* message contained in the signs and leaflets was the fact that the Employer did not have a contract with the Union. In his testimony at the hearing, Belanger indicated that the Union's purpose in picketing the Employer was to persuade the public to patronize restaurants which had agreements with the Union. This purpose is belied, however, by the fact that the Union neither picketed all nonunion restaurants in the downtown area nor did it attempt to inform the public which downtown restaurants did have agreements with the Union. Additionally, the Union made no attempt to inform either the public or the Employer that it was not seeking recognition. One fact which supports the inference of recognitional objective arising from the language of the signs and leaflets is that it was the Union's chief organizer, *not* the business manager, who initially contacted and later met with the Employer for the purpose of discussing the picketing. The fact that as many as seven pickets patrolled the single entrance to the Employer's restaurant also supports the inference of recognitional objective.

On the basis of the above, we conclude that one of the Union's objectives *prior to its disclaimer* was immediate recognition and that it picketed the Employer in furtherance of that objective. This being so, this case falls squarely within the rule of *McClintock Market, Inc., supra*, and, accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(c)(1) of the Act:

> All waiters, waitresses, busboys, bartenders, barmaids, head bartenders, head waiters, maitre d', host, hostess, cooks, pantrymen, chefs, salad man and dishwashers excluding all office clerical employees, manager, assistant manager, and supervisors.[7]

[Direction of Election and *Excelsior* footnote omitted from publication.]

[6] 244 NLRB No. 85 (1979).

[7] This unit description is essentially as described in the petition and in accord with the position taken by the Employer at the hearing. The Union has expressed no opinion regarding the composition of the appropriate unit.