

**McClintock Market, Inc. Employer-Petitioner and  
Retail Food Store Employees Local 322. Case 17-  
RM-634**

August 22, 1979

**DECISION ON REVIEW AND DIRECTION OF  
ELECTION**

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND PENELLO

On May 4, 1979, the Regional Director for Region 17 issued a Decision and Order in this case in which he found that the Union had effectively disclaimed its interest in representing the Employer's employees, and, accordingly, that the Union's current picketing does not evince a present demand for recognition. Concluding that there was no question concerning representation, the Regional Director dismissed the Employer's election petition. Thereafter, the Employer, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, filed a request for review of the Regional Director's decision. On May 31, 1979, the National Labor Relations Board granted the request for review.

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.

For the following reasons we find, contrary to the Regional Director, that the Union's course of conduct is tantamount to a present demand for recognition, and we shall reinstate the petition.

1. The Employer has operated a single retail food store in Neosho, Missouri, for a number of years and since November 1978 has been at its present location.<sup>1</sup> The store employs approximately 35 people.

On March 9, 1979, three union pickets appeared at the Employer's store. They displayed signs which read:

STOP

DON'T SHOP  
THIS STORE DOES NOT  
HAVE A CONTRACT WITH  
RETAIL STORE EMPLOYEES  
UNION #322 AFL-CIO

<sup>1</sup> With the exception of a 1965 election among the Employer's employees, which the Retail Clerks Union lost, there is no history of union activity at the Employer's store prior to the Union's current picketing.

Two pickets reappeared the following day, March 10. Thereafter, two persons picketed the store on March 16, 17, 29, 30; and on April 5, 6, 12, 13, 19, and 20.<sup>2</sup>

On April 10, Tom McClintock, the sole owner of the store, telephoned Jack Gray, a union representative, to inquire about the picketing. Gray suggested that they meet to discuss the situation. During their conversation McClintock inquired, "what would it take to remove the pickets." Gray replied that the Union would remove the pickets once the Employer signed a contract. McClintock then stated that "we would like to have an election." Gray responded that the Union was not interested in an election. Gray and McClintock agree to meet on April 12.

McClintock and one of his sons met with Gray and another union representative on April 12. McClintock again inquired about the purpose of the picketing. Gray replied, "we are informing the public that your employees are not paid standard wages that the union clerks get in this area." McClintock then asked Gray what had to be done to stop the picketing. Gray responded that the Union wanted McClintock "to sign a contract with the Clerks Union 322." McClintock inquired whether the Union was "willing to have an election." Gray answered that the Union was not interested in an election and requested that McClintock send his employees to the Union's office for the purpose of signing authorization cards. Once half of the store's employees signed cards, Gray continued, he would present them to McClintock, and he could then sign a contract. The discussion continued for a short while, touching upon such matters as the composition of the bargaining unit and the payment of union dues. Since this meeting there has been no direct communication between the parties.

On April 18 the Employer filed the instant petition. The next day union representative Gray informed the Hearing Officer, who had telephoned to schedule the representation hearing, that the Union was not interested in representing the Employer's employees and did not intend to attend the hearing. On April 20 the Hearing Officer sent Gray a letter confirming the telephone conversation.

The representation hearing was held on April 25. The Union did not attend. Finding no union conduct since April 19 inconsistent with its disclaimer and relying primarily on the Board's recent decision in *John's Valley Foods*,<sup>3</sup> the Regional Director dismissed the petition. Given the particular circumstances of this case we disagree with the Regional Director's

<sup>2</sup> The Employer alleges in its request for review that the picketing has continued at least until May 9, the date that the request for review was mailed.

<sup>3</sup> 237 NLRB 425 (1978).

conclusion that the Union's object is not immediate recognition.

Prior to the Hearing Officer's April 19 telephone conversation with Union Representative Gray there can be no doubt that the Union was seeking immediate recognition. Strong evidence of the Union's recognition object, at least prior to the April 19 telephone renunciation, are the April 10 and 12 union demands that the Employer sign a contract. That the Union may also have intended to inform the public of the Employer's alleged substandard wages and working conditions does not negate the recognition objective of the Union's activity. Consistent with this view is the Regional Director's implicit finding that the Union's conduct prior to April 19 was of a proscription nature. Moreover, it is significant that there is no evidence that the Union has ever investigated the Employer's wage scale or employment conditions. This consideration undermines the notion that the Union harbors a legitimate area standards objective.<sup>4</sup> Nonetheless, the Regional Director found that the April 19 disclaimer, reinforced by the Union's failure to appear at the hearing,<sup>5</sup> effectively withdrew the Union's demand for recognition.

While the Board has long recognized that a claim for immediate recognition is not irrevocable, it has also emphasized that a withdrawal of claim is not effectuated by a simple expedient of its declaration.<sup>6</sup> Thus, when a disclaimer has followed a present demand for recognition by several days and picketing continues without interruption following the disclaimer,<sup>7</sup> However, when a union follows a disclaimer with the cessation of picketing for a significant period of time and engages in no other conduct inconsistent with its disavowal of representative interest, the Board has been more inclined to conclude that the union has abandoned its present recognition objective. This was the situation in *John's Valley Foods, supra*. There the union, whose picketing had been enjoined by a Federal district court, resumed picketing

approximately 1 month after the court's order, using placards and distributing leaflets disclaiming any recognition object and containing verbatim language suggested by the district court. Because the union's conduct conformed with the court's decree, there had been a substantial hiatus following the injunction, and there had been no communication between the parties regarding the union's postinjunctive picketing the Board was unable to conclude that the union's activity was tantamount to a present demand for recognition.

Here, by contrast, there has been no hiatus. The disclaimer followed by only a few days a union demand that the Employer enter into a contract. Further, there is no evidence that the Union has distributed leaflets advising the public of the purpose of the picketing or that the Union has ever investigated the Employer's wage scale and working conditions. Nor has the Union ever unequivocally conveyed to the Employer that it is not interested in immediate recognition.<sup>8</sup> In conclusion, we are persuaded that the Union's objective is immediate recognition. To conclude otherwise we would have to find the Union's naked declaration a valid disclaimer. Instead, the Union's demands for a contract to remove the pickets, in the context of continued picketing and the absence of other evidence that the Union has truthfully renounced its immediate recognition objective, leads us to conclude that the disclaimer does not remove the claim for recognition, and that a question concerning representation exists among the Employer's employees.

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

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. We find that 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 full and part-time employees of the Employer employed at its Neosho, Missouri, retail food store excluding meat department and office clerical employees, the store manager, guards, professional employees and all other supervisors as defined in the Act.<sup>9</sup>

<sup>4</sup> *United Brotherhood of Carpenters and Joiners of America, Local No. 1245, AFL, CIO (New Mexico Properties, Inc.)*, 229 NLRB 236, 240 (1977).

<sup>5</sup> To support this proposition the Regional Director relies on *Josephine Furniture Company, Inc.*, 172 NLRB 404 (1968). There an employer questioned the continuing majority status of a union which had earlier been voluntarily recognized. The Board construed the union's failure to appear at a hearing, in conjunction with its failure to act to effectuate its representative status since its recognition, as either abandonment of its representative status or a disclaimer. We therefore view that case as inapposite. Under the circumstances of this case we attach no significance to the Union's failure to participate in the hearing.

<sup>6</sup> *Kenneth Wong, Henry Lim, Harry Lim, Fook Lim, and Robert Lim, Co-partners d/b/a Capitol Market No. 1, etc.* 145 NLRB 1430 (1964).

<sup>7</sup> *Id.*; *Allen & O'Hara Investments, Inc. d/b/a Holiday Inn of Providence-Downtown*, 179 NLRB 337 (1969).

<sup>8</sup> Cf. *Martino's Complete Home Furnishings*, 145 NLRB 604 (1963).

<sup>9</sup> 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.

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

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The exclusion of the meat department and office clerical employees is consistent with Board precedent. *C & E Stores, Inc., C & E Supervise Division*, 229

NLRB 1250 (1977); *Allen & O'Hara Investments, Inc., supra*. Consistent with the Employer's position, the owner's son Mark is excluded as having interests allied with management. Charles McClintock, another son, is excluded on the basis that he possesses acknowledged supervisory authority. Further, the owner's wife, Mary, is excluded from the unit, and the Employer agreed that Marada McClintock, Charles' wife, should be excluded as an office clerical employee.