

Marjo Food Stores, Inc., Employer-Petitioner, and Amalgamated Food and Allied Workers Union, Local 56, AFL-CIO and United Independent Union, Local 1, NFIU

Marjo Food Stores, Inc., Employer-Petitioner, and Retail Clerks Local 1360, chartered by Retail Clerks International Association, AFL-CIO and United Independent Union, Local 1, NFIU. Cases 4-RM-928 and 4-RM-929

February 2, 1978

DECISION AND DIRECTION

BY MEMBERS JENKINS, PENELLO, AND MURPHY

Pursuant to two separate Stipulations for Certifications Upon Consent Elections approved by the Regional Director on March 22, 1977, elections by secret ballots were conducted on April 22, 1977, under the direction and supervision of said Regional Director. The official tally of ballots served on the parties showed that there were approximately 11 eligible voters in Case 4-RM-928 and that 11 ballots were cast, of which 4 were for the United Independent Union, Local 1, NFIU (herein Local 1); 2 were for the Amalgamated Food and Allied Workers Union, Local 56, AFL-CIO (herein Amalgamated); no votes were cast against the participating labor organizations; and there were 5 challenged ballots. In Case 4-RM-929, the tally of ballots showed that there were approximately 27 eligible voters and that 27 ballots were cast, of which 10 were for the United Independent Union, Local 1, NFIU; 2 were for the Retail Clerks Local 1360, chartered by Retail Clerks International Association, AFL-CIO (herein Retail Clerks); no votes were cast against the participating labor organizations; and there were 12 challenged ballots. The challenged ballots were sufficient in number to affect the results of the elections and, on April 29, 1977, Amalgamated and Retail Clerks filed timely objections to conduct affecting the results of the election in which each participated. In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Acting Regional Director completed an investigation of the objections and challenges and on July 11, 1977, issued and served on the parties his Report and Recommendations on Challenged Ballots and Objections to Elections. In his report, the Acting Regional Director recommended to the Board that the objections by Amalgamated in Case 4-RM-928 be overruled in their entirety, that the challenges to four

ballots be overruled, and that the challenge to one ballot be sustained. The Acting Regional Director also recommended to the Board that the objections by Retail Clerks in Case 4-RM-929 be overruled in their entirety, that the challenges to 10 ballots be overruled, and that the challenge to 2 ballots be sustained.

Thereafter, on July 29, 1977, Amalgamated and Retail Clerks filed timely exceptions to the Acting Regional Director's report with respect to the ballot of Pierre Jacquot and with respect to whether the Employer interfered with the election by reason of Pierre Jacquot's alleged assistance to Local 1 either in a capacity as supervisor or because he was placed in a position by the Employer where employees reasonably believed that he spoke on behalf of management. In addition, Amalgamated and Retail Clerks filed a motion to dismiss further certification proceedings on the ground that the Employer had terminated its business at 50 Warrick Road, Somerdale, New Jersey, and that no store or bargaining unit presently existed.

On September 8, 1977, the Board issued a Notice To Show Cause to all the parties to this proceeding as to why the motion of Amalgamated and Retail Clerks should not be granted and why the petition for certification of representative previously filed should not be dismissed. On September 21, 1977, Amalgamated and Retail Clerks advised the Board that the store had remained closed. On September 30, 1977, affidavits were filed by Local 1 relating to the imminent reopening of the store.

The Board considered the responses by the parties to the Notice To Show Cause and determined that the allegation of Amalgamated and Retail Clerks that the store was permanently closed raised a material issue of fact best resolved by a hearing. The Board also considered the objections, the Acting Regional Director's report, the exceptions of Amalgamated and Retail Clerks with respect to the challenge to the ballot of Pierre Jacquot and with respect to whether the Employer interfered with the election by reason of Pierre Jacquot's alleged assistance to Local 1 either in the capacity as a supervisor or because his actions should be imputed to the Employer on the ground that he was in a position where employees reasonably believed that he spoke on behalf of management, and determined that this portion of the Acting Regional Director's report also raised material issues of fact best resolved by a hearing.¹

Pursuant to the Board's Order Directing Hearing, a hearing was held on November 21, 1977, to resolve

¹ In the absence of exceptions thereto, the Board adopted, *pro forma*, the Acting Regional Director's recommendation that Objections 1 through 4 in Cases 4-RM-923 and 4-RM-929 be overruled. The Board also adopted, *pro*

forma, the Acting Regional Director's recommendations concerning the disposition of each of the challenged ballots, except for the ballot of Pierre Jacquot.

the issues raised with respect to whether the store is permanently closed, with respect to the challenge to the ballot of Pierre Jacquot, and with respect to whether the Employer interfered with the election by reason of Pierre Jacquot's alleged assistance to Local 1 either in the capacity as supervisor or because he was placed in a position by the Employer where employees reasonably believed that he spoke on behalf of management.

At the hearing, Amalgamated and Retail Clerks moved to withdraw their exceptions to the Acting Regional Director's report on both objections and challenges which was issued on July 11, 1977.² They further stated that the Acting Regional Director's report issued on July 11, 1977, is correct and acquiesced to by both of them and that therefore they had no evidence to present on these issues.

The Hearing Officer granted the motion of Amalgamated and Retail Clerks to withdraw the exceptions to the report on challenges and objections. The Hearing Officer also found that the Employer has terminated its operations and no longer has possession of the building located at Warwick Road in Somerdale, and no longer employs any employees in the petitioned-for or any other unit. Concluding that there was no likelihood of a resumption of operations, the Hearing Officer recommended that no certification of representative be issued.³ Thereafter, Local 1 filed timely exceptions to the Hearing Officer's report.

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 case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. Amalgamated, Retail Clerks, and Local 1 are labor organizations claiming to represent certain employees of the Employer.

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. The parties stipulated, and we find, that the following employees of the Employer constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full- and regular part-time employees of the meat, delicatessen and/or appetizer departments at the Employer's store located at 501 Warwick Road, Somerdale, New Jersey; excluding all other employees including office clerical employees, guards, and supervisors as defined by the Act. (Case 4-RM-928.)

All full- and regular part-time selling and non-selling employees employed at the Employer's store located at 501 Warwick Road, Somerdale, New Jersey; excluding all other employees including meat, delicatessen and/or appetizer departments, office clericals, guards, and supervisors as defined in the Act. (Case 4-RM-929.)

5. The Board has considered the Hearing Officer's report, Local 1's exceptions and brief, and the entire record in this case, and hereby adopts the Hearing Officer's findings, conclusions, and recommendations only to the extent consistent herewith.

We adopt the Hearing Officer's decision to permit Amalgamated and Retail Clerks to withdraw their exceptions to the Regional Director's report on challenges and objections.⁴ However, we do not agree with the Hearing Officer's recommendation that no certification be issued.

Briefly, the facts show that the Employer has been closed since July 8, 1977, and that nonpayment of rent has led to the loss of its lease. The Employer's application for a second Small Business Administration (herein SBA) loan was turned down by the Camden, New Jersey, SBA Regional Office. The inventory at the store is due to be inspected shortly by the SBA as part of its collateral for an earlier loan. Although the Employer professed to have little hope that the store would reopen, the record reveals that all the possibilities for recapitalization have not as yet been exhausted. The Employer has succeeded in obtaining a bank loan contingent on the second SBA loan. The Employer testified that the SBA loan would be approved if the Employer succeeds in obtaining more equity such as would be possible under a partnership arrangement. The Employer is actively pursuing other avenues whereby the SBA's denial of the loan may be overturned, and admits that it expects some further decision by the SBA to be made. Finally, it should be noted that the Employer had indicated that if the store does reopen then all the former employees will be offered their jobs back if they are willing to return.

² In view of the *pro forma* adoption in fn. 1, *supra*, the withdrawal of the exceptions as to the challenged ballot relates only to that of Pierre Jacquot.

³ The Hearing Officer's reference to a certification of representative is premature. Since there are challenged ballots in these two elections sufficient in number to affect the results of both elections, a certification of representative or a certification of results will issue when revised tallies of ballots are served by the Regional Director as directed by this Decision.

⁴ Absent an overriding reason for doing so, the Board refrains from expending its valuable time and resources when a party, who had originally filed objections or challenges, changes its mind and no longer wishes to dispute the election outcome. *Servomation Corporation*, 226 NLRB 420 (1976).

In our judgment, the Hearing Officer's recommendation that no certification of representative be issued will not effectuate the policies of the Act. The instant case can be readily distinguished from those cases where the Board dismisses an *election petition* when the proposed unit is closed or faced with imminent closing or accretion. In those cases the Board is faced with serious practical difficulties in running the election since the unit may change or many employees may have already relocated. In the present situation, however, the election has already been held and none of the parties questions the validity of the election. Thus, the Board is not being requested to expend its valuable time or resources in an election; rather it has merely been requested to issue a certification in an election which has already taken place.

The Board in such circumstances will issue a certification unless it can be shown that there is no likelihood that the store will reopen. The record reveals that the Employer is still intent on reopening the store and that the crucial second SBA loan remains a possibility despite the initial rejection by the SBA regional office. The Employer has succeeded in obtaining a bank loan contingent on the SBA loan and the Employer further testified that recapitalization via a partnership arrangement could be enough to secure the necessary equity for the loan. Since it has not been conclusively demonstrated that this Employer has exhausted all the possibilities it

has pursued to reopen, it is speculative to conclude that there is no likelihood of reopening.

For the foregoing reasons, we reject the Hearing Officer's recommendation that it be found that there is no likelihood that the store will reopen in the future. However, we have granted the motion of Amalgamated and Retail Clerks to withdraw their exceptions to the Acting Regional Director's report on challenges and objections to the election. Accordingly, in the absence of timely objections and challenges, we shall direct that the challenged ballots in these two separate elections be opened and counted.

DIRECTION

It is hereby directed that the Regional Director for Region 4 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Decision and Direction, open and count the ballots of Christine Anthony, Larry Ciaburri, Eugene Maysky, and Connie Poolos in Case 4-RM-928; and open and count the ballots of Deborah Dunne, Donna Griggs, Robert Gildein, John Haun, Pierre Jacquot, Joanne Kentrus, Joan Lavel, Daniel Olivieri, Michael Redfearn, and Patricia Walsh in Case 4-RM-929; and thereafter prepare and cause to be served on the parties a revised tally of ballots in each case including therein the count of said ballots, upon the basis of which he shall issue the appropriate certification in each case.