

Aspen Skiing Corporation and Aspen Mountain Employees' Association, Petitioner. Case No. 27-RC-2389. July 22, 1963

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Clinton M. Elges, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

Upon the entire record in this case,¹ the Board finds:

1. The Employer is a Colorado corporation engaged primarily in the operation of skiing facilities on Aspen Mountain and in the Snowmass area near Aspen, Colorado. Its skiing facilities, consisting of seven ski lifts and other mechanical equipment, are open to the general public. During the skiing season which lasts from approximately Thanksgiving to Easter, depending on snow conditions, the Employer operates its Snowmass Touring Service and runs a ski school. It also owns and leases out a restaurant located on top of Aspen Mountain and a ski repair and waxing service. During the summer months the Employer operates two ski lifts for the benefit of tourists.

Although the Employer is not connected with any hotels or motels and all its tickets are sold in Aspen, the record shows that about 65 percent of the users of Aspen facilities are from out of State,² and that about 50 percent of the land over which it operates is leased from the United States Government. These leases require the Employer to operate in compliance with safety regulations of the United States Forest Service and to maintain an adequate and qualified ski patrol hired on a nondiscriminatory basis. The Employer is a member of the Colorado Convention and Tourist Bureau, whose object is to promote Colorado skiing. The Employer supplies advertising literature for distribution by the Colorado Skiing Information Center in Denver, which sends the literature throughout the country. The Employer also does considerable advertising in four nationwide maga-

¹ At the hearing the Employer moved to dismiss the petition on the grounds that its operations are not within the Board's jurisdiction; that the Petitioner is not a labor organization within the meaning of the Act; and that the unit petitioned for is inappropriate. The motion was referred to the Board for a ruling. For the reasons hereinafter set forth, the motion is denied.

² Although there is no record of the percent of out-of-State users for the Employer alone, the record shows that 65 percent of the winter users of the Aspen area ski facilities, which include other than the facilities operated by the Employer, are from out of State. The record does not reveal what percentage of summer tourists are from out of State. However, only a small portion of the Employer's income is derived from its summer business.

zines, three of which are published out of State. It has a telephone answering service in six major out-of-State cities, and advertises such service in the respective cities' local papers. The Employer loans an advertising film to various ski clubs throughout the country. It also furnishes gratuitously its facilities for various national and international ski meets, some of which have been nationally televised.

During the fiscal year ending April 30, 1962, the Employer's gross income totaled \$744,129.57,³ and its out-of-State purchases amounted to \$3,697. During this time the Employer also spent \$16,525 in national advertising and \$3,000 for the above-mentioned advertising film.

It is undisputed that the Employer's operations are retail in character, and that its annual gross revenue satisfies the Board's \$500,000 jurisdictional standard for retail operations.⁴ Moreover, the Employer has spent more than a *de minimis* amount in out-of-State purchases and national advertising.

The Employer contends the Board should not assert jurisdiction for the reason that, as in the case of the horse-racing industry,⁵ it is essentially a sports industry and not an amusement or entertainment business. Moreover, it also asserts that its operations are unique, local, seasonal, and a participant sports business which, at best, only minimally affects commerce.

While it is true that the Board has declined to assert jurisdiction over employers' activities in the horse-racing industry, the Board has done so because such industry was subject to extensive and detailed regulation by State authority.⁶ Whether, however, the business of the Employer herein is to be classified as a sports industry or one more in the nature of amusement or entertainment, we can find no significant reason for declining jurisdiction. In the instant case, contrary to the horse-racing industry, at least 50 percent of the Employer's operations are conducted on Federal property and are subject to extensive Federal regulations through the Forest Service. This endows it with more than a purely local interest. Additionally, 65 percent of the skiers who use the Employer's facilities have traveled to the Employer from out of State, and, as indicated, the Employer spends substantial sums on national advertising and in the purchase of materials originating outside the State of Colorado. In this case we find that the Employer's operations have a close, intimate, and substantial relation to trade, traffic, and commerce among the States, and that the Employer is engaged in commerce within the meaning of the Act. As the Employer's operations satisfy the Board's jurisdictional stand-

³ \$876,000 of such income is derived from the sale of wintertime ski lift tickets.

⁴ *Carolina Supplies and Cement Co.*, 122 NLRB 88.

⁵ *Walter A. Kelley, et al.*, 139 NLRB 744.

⁶ See *Ray, Davidson & Ray*, 131 NLRB 433, and *Walter A. Kelley, et al.*, *supra*.

ards for retail industries, we further find that it will effectuate the policies of the Act to assert jurisdiction herein.⁷

2. The labor organization involved claims to represent certain employees of the Employer. The Employer contends that, because the Petitioner defers voting rights for one category of members,⁸ the Petitioner does not admit employees to membership as required by the Act, and therefore it is not a labor organization within the meaning of the Act. It is well established that it is a union's willingness to represent employees, rather than the eligibility of the employees to membership in that union, which is the controlling factor.⁹ Therefore, as the Petitioner represents the employees herein and exists for the purpose of bargaining with the Employer concerning wages, hours, and conditions of employment, we find it is a labor organization within the meaning of Section 2(5) of the Act.¹⁰

3. 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 Petitioner seeks to represent a unit of all ski lift employees, including ticket sellers located at the lifts, and cat skimmers,¹¹ and all ski patrolmen employed by the Employer at its Aspen Mountain and Snowmass, Colorado, locations, excluding all other employees, snowpackers,¹² office clerical employees, ski instructors, guards, and supervisors within the meaning of the Act. The Employer challenges the appropriateness of the unit on the ground that Petitioner seeks to include ski patrolmen who, the Employer alleges, are guards within the meaning of the Act. The Employer also contends that all ticket sellers are clerical employees and should therefore be excluded.¹³ There is no collective-bargaining history for any of the employees here involved.

The ski patrolmen are primarily concerned with the safety and welfare of skiers. This requires them to continuously ski the slopes looking for injured skiers, avalanches, and other skiing hazards.

⁷ *Carolina Supplies and Cement Co., supra.*

⁸ The Petitioner's Articles of Incorporation provide for two categories of members with different voting rights depending, in the main, on length of employment.

⁹ *Hazleton Laboratorie, Inc.*, 136 NLRB 1609, footnote 2.

¹⁰ *Id.* See also *Alto Plastics Manufacturing Corporation*, 136 NLRB 850, 853-854.

¹¹ Employees who operated snowmobiles and bulldozers.

¹² The Petitioner would exclude snowpackers as temporary employees. The Employer takes no position on this question. As the record shows the snowpackers are hired on a temporary basis and are so told at the time they are hired, we exclude them as temporary employees. However, for the reasons hereinafter stated, we shall include snowpacker Tolman in the unit.

¹³ Two or three male lift employees sell tickets at the lift. They do not interchange or have any contact with the separately supervised female office clerical employees who also sell tickets at the Employer's office and at a downtown Aspen location, and whom the Petitioner would exclude from the unit. The ticket sellers in issue are supervised by the lift employee supervisor, interchange with lift employees, and help them in loading and unloading the lifts, and receive the same rate of pay as the other lift employees. As the ticket sellers located at the lifts have duties and interests in common with the other lift employees, we include them in the unit.

Their primary duty is to administer aid to injured skiers. They also take various safety measures to prevent injury to other skiers. These measures consist of avalanche prevention (which includes some snowpacking), removal of unsafe objects from the trail, closing and exclusion of skiers from dangerous trails, and exclusion from the lift and slopes of reckless skiers who might endanger other skiers. Although an excluded skier could be an employee in the unit who might ski on his day off, all lift employees are equally empowered to exclude such a skier from the lifts and slopes. The patrolmen are unarmed and do not wear uniforms. However, for purposes of identification, they wear red parkas marked with a white cross and carry a first aid kit to enable them to aid the injured. Because the duties of the patrolmen are primarily directed toward the preservation of the safety of skiers and administering to the injured, we find they are not guards within the meaning of the Act.¹⁴ Accordingly, we include them in the unit.

The Petitioner would include, and the Employer would exclude as supervisors, employees James Fox and Ren Tolman.

Fox is classified as assistant patrol chief and works under Chief Ski Patrolman Hartman, who the parties agree is a supervisor. Unlike Hartman, Fox is hourly paid and is hired only for the winter season. Fox spends about 90 percent of this time working along with and performing the same duties as the other ski patrolmen. The remainder of his time is spent in merely transmitting Hartman's instructions to the patrol and in giving the patrol such routine directions as telling them where to pack snow, or where there are injured skiers or skiers stuck in snowslides and leading the rescue or digging out operation. On the few days during the winter season when Hartman is out of town, Fox is in charge of the patrol. However, even then he spends the great majority of his time working right along with the other patrolmen and does not receive any additional compensation. Fox is without authority to hire, discharge, or discipline other patrolmen or effectively to recommend such action. His direction of other employees is, as indicated, routine in character, furnishing no opportunity for the exercise of independent judgment.

Although Tolman is classified as a snowpacker, his tenure is more than of temporary duration. Tolman has worked throughout the season. Essentially his duties consist of working along with and performing the same packing work as the other snowpackers. Like Fox, Tolman is hourly paid, is supervised by Hartman, transmits Hartman's instruction to and routinely directs the other snowpackers, and is without authority to hire, discharge, or discipline other snowpackers or effectively to recommend such action. In addition, Tol-

¹⁴ See *McDonnell Aircraft Corporation*, 109 NLRB 967, 969.

man is a qualified ski patrolman and spends an average of 1 day a week acting as a patrolman. It also appears that Tolman may be promoted to a full-time patrolman.

We find on the record as a whole that neither Fox nor Tolman are supervisors within the meaning of the Act,¹⁵ and that their duties are more akin to that of leadmen. Accordingly, we shall include them in the unit.¹⁶

We find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All ski lift employees, including ticket sellers located at the lifts and cat skidders, and all full- and part-time ski patrolmen and ski patrol leaders, employed by the Employer at its Aspen Mountain and Snowmass, Colorado, locations, but excluding snowpackers and other temporary employees, office ticket sellers, office clerical employees, ski instructors, guards, all other employees, and supervisors as defined in the Act.

5. During the skiing season the unit found appropriate herein consists of approximately 50 employees, 47 of whom live permanently in or near Aspen, Colorado, the area of the Employer's operations; 14 of the 50 employees were newly hired during the past year, but 20 of them have worked each winter for the Employer for over 5 years.

Although the employees are hired only for the winter season, the Employer testified it always gives rehiring preference to former employees, and as a result many employees have worked for the Employer for several seasons. For its summer operations the Employer maintains a staff of approximately 14 employees, all, or most, of whom are recruited from among the winter season employees.

The hearing was held near the end of the winter season. Thereafter, on May 10, the Petitioner, in its brief, requested that, although peak employment will not arrive until around Thanksgiving, in view of the number of summer employees and the high rate of reemployment, an immediate election be directed. The Employer has not opposed the request. We find merit in the request. We consider the employees who were regularly employed during the winter season as temporarily laid off employees, and therefore eligible to vote. In the circumstances of this case, however, we shall direct the Regional Director to conduct the election directed herein on a date to be selected by him in the reasonable exercise of his discretion.

[Text of Direction of Election omitted from publication.]

¹⁵ *Schott Metal Products Company*, 129 NLRB 1233.

¹⁶ Although the snowpackers are excluded as temporary employees, we include Tolman as he is also a patrolman and his employment appears to be of a permanent nature.