Martino's Complete Home Furnishings, Employer-Petitioner *and* Retail Store Employees' Union, Local No. 428, Retail Clerks International Association, AFL–CIO. *Case No. 20–RM–510. December 24, 1963*

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act,[1] a hearing was held before Hearing Officer James S. Jenson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

1. The Employer is engaged in commerce within the meaning of the Act.[2]

2. Retail Store Employees' Union, Local No. 428, Retail Clerks International Association, AFL–CIO, is a labor organization within the meaning of the Act.

3. No 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 for the following reasons:

On March 23, 1963, the Employer filed the instant petition alleging that the Union had presented it with a claim for recognition as the representative of eight selling and nonselling employees.[3]

To understand the circumstances which gave rise to this proceeding, it should be noted initially that the relationship between Martino's and the Union dates back to 1957 and has been the subject of two recent Board decisions.[4] In April of 1957, the newly formed Retail Furniture Council of Santa Barbara, a multiemployer association of retail merchants including Martino's, entered into a collective-bargaining contract, through its authorized Representative Moore,

[1] On March 22, 1963, the California Association of Employers, hereinafter referred to as CAE, filed the instant petition On April 5, CAE notified the Board that the petition had been filed "for and on behalf of Martino's Complete Home Furnishings" We find no merit in the Union's motion to dismiss the petition on the ground that it was not filed by a proper party

[2] The Employer, a California corporation hereinafter referred to as Martino's, owns and operates two stores in San Jose, California, engaged in the retail sale of furniture, appliances, and home furnishings. During 1961 the Employer purchased and received $80,000 worth of goods directly from points outside the State of California and received a gross revenue from sales in excess of $500,000 On these facts, the Board recently asserted jurisdiction over the Employer's operations (*Martino's Complete Home Furnishings,* 141 NLRB 503) and we shall again do so herein *Siemons Mailing Service,* 122 NLRB 81.

[3] The two Martino's stores currently employ 13 persons. In addition to the eight aforementioned selling and nonselling employees, there are five other nonselling employees (a driver, driver's helper, driver's helper-drapery man, shipping clerk, and one man who services the appliances sold by the Employer), of these five employees, all but the serviceman are currently covered by a contract with the Teamsters

[4] *Goldeen's, Inc.,* 134 NLRB 770, and *Martino's Complete Home Furnishings, supra* For purposes of this proceeding, we shall take official notice of the records therein.

with the Union. The contract was effective until July 1960, and contained an annual reopening provision.

In summary form, the pertinent events subsequently unfolded as follows: Pursuant to the reopening provision, negotiations were conducted at the Union's behest in 1958, and culminated in a new contract entered into in January 1959, effective until July 30, 1961.[5] The council members, including Martino's, later terminated their authorization to Moore in March 1960. They thereupon joined the California Association of Employers, a large multiemployer organization and authorized CAE, in writing, to represent them for purposes of collective bargaining.[6] On May 26, 1960, the Union notified the CAE of its desire to reopen the contract. Negotiations followed and on July 28, 1960, the parties executed an amendment thereto.

On March 30, 1961, 4 months before the amended contract was to expire, the council members, including Martino's, voted to dissolve their organization and thus to terminate group bargaining. In lieu of their existing arrangement, they requested the CAE to represent them separately on an individual-store basis. The Union was apprised of this latter development by the CAE on May 2; 3 weeks later the Union was also informed by the CAE that its individual employer-members, including Martino's, desired to terminate their contract as of the July 31 expiration date.

The Union thereupon filed an RC petition on May 26, 1961, requesting an election in the multiemployer unit. The Union also wrote two letters to Martino's (in May and June 1961) which evidenced a desire to negotiate a contract on an individual employer basis. In the meantime, some of Martino's employees petitioned the Board on May 19 to decertify the Union as the bargaining representative.[7]

A consolidated hearing was held on all the petitions and the Board, on November 27, 1961, dismissed the Union's representation petition [8] and all the decertification petitions.[9]

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[5] The agreement also contained an annual reopening provision. Pursuant thereto, negotiations were conducted in the summer and fall of 1959 with reference to a health and welfare plan, these negotiations resulted in an amendment to the contract in January 1960

[6] As the Board indicated previously, "Although the Council members . . . joined CAE, it is clear from the record and actions that Council continued to exist as a body within CAE and that CAE was merely substituted for Moore as the bargaining representative of Council." See *Goldeen's, Inc.*, 134 NLRB 770, 773.

[7] Numerous other decertification petitions were filed in April and May 1961, by employees of other former employer-members of the council.

[8] The Board found that the individual members of the CAE, including Martino's, had communicated to the Union an unequivocal intent to abandon multiemployer bargaining As such action was timely taken, the Board concluded that the multiemployer unit requested by the petitioning Union was no longer in existence. See *Goldeen's, Inc*, 134 NLRB 770, 775.

[9] Each of the several decertification petitions sought elections in single-employer units The Board dismissed these petitions, since the Union was not then currently "certified" or recognized in single-employer units. See *Goldeen's, Inc.*, 134 NLRB 770, 775–776.

On December 7, 1961, approximately 1 week thereafter, the Union began to picket Martino's two retail stores with signs addressed to the public reading:

Please
Do Not Shop
At
Martino's
x x x x x
Retail Store Employees Union
Local 428, AFL–CIO

Picketing took place in front of the consumer entrances to the stores during the normal hours when they were open to the public. The pickets also distributed leaflets to the public which stated that Martino's had no contract with the Union, Martino's employees did not enjoy union wages and conditions of employment, the public was undermining the position of union members at other stores by shopping at Martino's, and the purpose of the leaflet was not to make demands upon Martino's but rather solely to urge the public to withhold patronage from Martino's.

On January 8, 1962, Martino's filed an unfair labor practice charge alleging that the Union's picketing violated Section 8(b)(7)(C) of the Act.[10] On March 14, 1963, the Board[11] dismissed the complaint on the grounds that the picketing, although in furtherance of recognitional and organizational objects, was conducted for informational purposes, and, therefore, in the absence of any proscribed statutory "effect," fell within the protection of the second proviso to Section 8(b)(7)(C).[12]

Eight days later Martino's filed the instant petition. Shortly thereafter, on March 29, the Union filed a written "Answer to Petition" denying that it represents any of Martino's employees, has any interest in representing them, or has requested recognition or a contract from Martino's within the past 12 months. At the hearing in the instant proceeding on April 22, the Union repeated its denial of any claim to representation. The Union's aforedescribed picketing and leaflet distribution continued as of the date of the hearing in this proceeding.

The sole issue now before the Board is whether the Employer has been presented by the Union with "a claim to be recognized as the representative defined in Section 9(a)" of the Act as prescribed by Section 9(c)(1)(B). As set forth more fully below, we are not

[10] The United States District Court (N.D. Calif.) denied a temporary injunction in this matter. *Roy O. Hoffman, Reg. Dir.* v. *Retail Store Employees Union, Local No. 428 (Martino's Complete Home Furnishings)*, 206 F. Supp. 271.

[11] *Martino's Complete Home Furnishing, supra* (Members Rodgers and Leedom dissenting).

[12] *Id.* at 504. Parenthetically, it should be noted that there is no evidence that the Union's picketing and leaflet activities caused any delivery or work stoppages at Martino's within the past year.

satisfied on the record before us that any *present* claim for recognition exists which would support the Employer's petition for an election herein.

It is undisputed that, as of the date of the hearing, almost 2 years had elapsed since the Union last communicated with the Employer in June 1961. It is likewise undisputed that, throughout this extensive period, the Union did not directly convey to the Employer any claim, written or oral, that it represented his employees or desired recognition or a contract.[13] Rather, as noted previously, the Union continually disclaimed any present recognitional objective in its leaflets to the public and throughout both the instant representation hearing and the earlier complaint case.[14]

Moreover, contrary to the contentions of the Employer-Petitioner, we are not persuaded that there is any other evidence upon which to predicate a finding that a present claim for recognition exists. It is true that the Union has been picketing and distributing leaflets at Martino's customer entrances from December 1961, to the present, and that the leaflets made incidental reference to the fact that Martino's does not have a contract with the Union. But it seems clear from the tenor of the Union's message and the manner in which it was transmitted that the main thrust of this appeal was directed at communicating with the public for the legitimate purpose of persuading potential consumers not to shop at Martino's which, in the circumstances, we do not construe as a demand for immediate recognition. That the Union has not contacted Martino's since it began picketing in December 1961, and that its leaflet also expressly declared, "We make no demands of any kind upon Martino's," serves to emphasize this point. Accordingly, in light of all the circumstances, we do not agree with the Employer's contention that the picketing was tantamount to a *present* demand for recognition.[15]

Evidence that a union is engaged in publicity picketing for an ultimate recognitional objective may in certain circumstances bring into play Section 8(b)(7)'s ban on recognitional picketing.[16] But such evidence does not provide a basis for processing a petition under

[13] It also appears that since November 1961, the Union has not contacted Martino's employees for organizational purposes

[14] See footnotes 19 and 20, *infra.*

[15] Cf. *Andes Candies, Inc.*, 133 NLRB 758; *Miratti's, Inc.*, 132 NLRB 699; *Martino's Complete Home Furnishings, supra.*

In so finding, we do not agree with our dissenting colleague's assertion that the second *Crown Cafeteria* decision (135 NLRB 1183) stands for the proposition that all publicity picketing within the meaning of the proviso to 8(b)(7)(C) automatically evinces a *present* recognitional objective. Indeed, in the recent *Bartlett and Company, Grain* case (141 NLRB 974) the Board cited *Crown Cafeteria* for a more limited principle, namely, that proviso language on picket signs "may constitute evidence of an organization or recognition objective."

[16] Picketing for an ultimate recognitional objective could furnish the basis for finding a violation in the circumstances described in subsections (A) and (B) of that section, or in subsection (C) thereof where the picketing produces delivery or service stoppages.

Section 9 that is designed to resolve a *currently* existing question concerning representation. The dissent evidently fails to recognize this vital distinction which is essential in harmonizing the second proviso to Section 8(b) (7) (C) and Section 9. We would open a ready avenue for evading the immunity granted publicity picketing for an ultimate recognitional objective under the second proviso to Section 8(b) (7) (C)[17] were we to hold that such picketing provides a basis for entertaining a representation petition even though no current question concerning representation exists. For this would allow an Employer via the route of a regular RM petition and a subsequent 8(b) (7) (B) charge to accomplish indirectly what could not be accomplished directly under Section 8(b) (7) (C)—namely, put an end to otherwise lawful publicity picketing.

Finally, we do not believe that either a union-sponsored announcement which appeared for only 1 day in a local San Jose newspaper 8 months prior to the filing of the instant petition [18] or the testimony of Union representatives at this hearing [19] and/or the recent 8(b) (7) (C) case involving Martino's [20] evince a present demand for recognition inconsistent with the Union's written disclaimers.

In sum, we are confronted in this case with a situation where the facts clearly show that the Union does not presently claim recognition as bargaining representative of the Employer's employees. Nor

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[17] See *Department & Specialty Store Employees' Union, Local 1265, AFL–CIO (Oakland G R Kinney Company, Inc)*, 136 NLRB 325 (Member Leedom, dissenting) and *Retail Clerks International Association, Local 57, AFL–CIO (Hested Stores Company)*, 138 NLRB 498 (Members Rodgers and Leedom, dissenting).

[18] On July 8, 1962, the Union inserted a two column announcement which generally took issue with Mr Joe Martino's alleged statement that the NLRB had upheld his charges against the Union It further pointed out that Martino was actually referring to an Intermediate Report of a Trial Examiner, and that the Board had not yet ruled on the case The Union expressed the opinion that the Board would follow the district court ruling (see footnote 10, *supra*), which upheld the Union's right to distribute leaflets informing the public that Martino's was nonunion.

The final paragraph of the announcement read as follows.

> Martino's has been one of the most active in a group of furniture stores which has sought to get rid of union contract obligations in recent months Perhaps Joe Martino's failure to "learn" the facts, results from his opposition to the Union agreement Whatever the reasons PLEASE Don't Shop at Martino's.

[19] The testimony of John Blaiotta, the Union's field representative, indicated, in essence, that the Union does not now claim to represent any of Martino's employees and that the Union would reject a contract if offered to it now

[20] At the hearing in the unfair labor practice case on May 31, 1962, the Union's secretary-treasurer, James McLaughlin, testified on direct examination that the Union did not represent Martino's and consequently the Union would not now sign a contract or bargain with Martino's even if requested to by the Employer On cross-examination McLaughlin was repeatedly asked whether the Union would cease picketing and distributing leaflets if Martino's signed a contract McLaughlin replied that Martino was not going to sign any contract, the employees did not want a contract, and there is not going to be a contract. McLaughlin finally acknowledged that, "if you are presuming that if at some future date, say 10 or 15 years, that we go to the employees, and go to Martino's and ask him to sign an agreement, yes, the agreement would undoubtedly be signed . . " and in that event the picket line would be removed On redirect examination, McLaughlin again testified that the Union would not now sign a contract with Martino's

has the Union engaged in any activity inconsistent with its disclaimer of a present desire to be recognized. In such circumstances, as the Board recently had occasion to point out,

> . . . there is no warrant for the needless expenditure of Board time, energy, personnel, or funds which could be directed elsewhere better to discharge Board responsibilities than in conducting an unnecessary election. Moreover, the mere holding of such an election would operate unfairly to deprive employees of the opportunity of choosing a representative in a Board-conducted election for a period of 12 months thereafter.[21]

Accordingly, in view of all the foregoing, we find that no question concerning representation of the Employer's employees presently exists, and we shall therefore dismiss the instant petition.

[The Board dismissed the petition.]

MEMBER JENKINS took no part in the consideration of the above Decision and Order.

MEMBER LEEDOM, dissenting:

I am at a loss to understand my colleagues' conclusion that the current picketing of Martino's evinces no present demand for recognition inconsistent with the union's disclaimer.

My colleagues and I are in agreement that union conduct inconsistent with a disclaimer destroys the effectiveness of the disclaimer. I thought that they really had no choice but to hold the picketing here inconsistent with the disclaimer, in view of a finding they made in a recent case involving this very picketing.[22] Although my colleagues dismissed the Section 8(b)(7)(C) complaint in that case on the ground that the picketing fell within the exemption of the second proviso to Section 8(b)(7)(C), they were careful to point out that the "Respondent's picketing which commenced on December 7, 1961, at Martino's was in furtherance of *recognitional* and organizational objects." [Emphasis supplied.][23] If the picketing, which has continued without change, had a recognitional object in the 8(b)(7)(C) case, there would appear to be no tenable basis for finding other than a recognitional object in this routine 9(c) representation case. In fact my colleagues have so indicated in the reconsidered *Crown Cafeteria* decision, 135 NLRB 1183. After pointing out in that case

[21] *Franz Food Products of Green Forest, Inc*, 137 NLRB 340, 341 (Chairman McCulloch concurring separately and Members Rodgers and Leedom, dissenting)

[22] *Retail Store Employees' Union, Local No. 428, Retail Clerks International Association, AFL–CIO (Martino's Complete Home Furnishings)*, 141 NLRB 503.

[23] Member Rodgers and I dissented as to the dismissal but joined our colleagues in this finding as to recognitional object.

that a picket sign which proclaims that an employer "[does not] have a contract with" a union "clearly implies a recognition . . . object," they added significantly that:

> We might note in passing, however, that while proviso picketing precludes the holding of an expedited election, nevertheless, if the proviso picketing is for recognition or bargaining, as distinguished from organization, a routine 9(c) representation petition would, if other necessary preconditions were satisfied, be entertained.[24]

Strangely, however, my colleagues seem to have now evolved two rules of law, one for 8(b)(7) cases and another for 9(c) cases, that is, in the former, all "no contract" picketing is for recognition, while in the latter all "no contract" picketing is not necessarily for recognition. This inconsistency defies explanation. It profits my colleagues very little to seek to rationalize their position by asserting that the Union does not seek *present* recognition. For, in the second *Crown Cafeteria* case, the majority recognized that proviso picketing of the "no contract" type, as here, embraced a *present* object of recognition.[25] There, they rejected a view, attributed to the dissenters, that the "publicity" proviso immunizes picketing only "where the sole object is dissemination of information divorced from a *present object of recognition.*" [Emphasis supplied.] My colleagues said:

> This narrow interpretation made the proviso a contradiction in terms, for the express words of the proviso make it clear that the proviso applies where organization, recognition, or bargaining is an object. *Thus, "does not employ members of" clearly imports a present object of organization, and "[does not] have a contract with" just as clearly implies a recognition and bargaining object.* [Emphasis supplied.]

As the pickets continue, as formerly, to distribute leaflets stating that Martino's has no contract and that Martino's employees do not enjoy union wages and conditions of employment, the picketing is clearly recognitional picketing [26] and is inconsistent with the Union's

[24] In the instant case, the Union concedes that it had not sought to recruit any members at Martino's. Neither the picket signs nor the accompanying leaflets address any appeal to Martino's employees as such. Thus, the picketing here did not have organization as an object.

[25] My colleagues rely on *Bartlett* to support the proposition that publicity picketing does not necessarily evince a present recognitional object. As I did not agree with the rationale of Chairman McCulloch and Member Fanning in that case, I joined Member Rodgers in a concurring opinion. Moreover, there is no indication therein that it was the intent of the Chairman and Member Fanning in *Bartlett* to limit the applicability of the second *Crown Cafeteria* decision.

[26] See the dissenting opinion in *Houston Building and Construction Trades Council (Claude Everett Construction Company)*, 136 NLRB 321.

disclaimer of a desire to represent the employees of Martino's.[27] I would find that a question concerning their representation exists and would entertain the Employer's petition for an election.[28]

[27] Contrary to my colleagues, further evidence that the picketing had a recognitional object appears (1) in the admission of the Union's secretary-treasurer that the pickets would be removed upon Martino's execution of a contract, and (2) in the Union's newspaper advertisement calling attention to Martino's efforts "to get rid of union contract obligations" and its "opposition to the Union agreement."

[28] Since, in my view, there exists a question concerning representation, there is no room for the Employer to achieve indirectly what could not be accomplished directly, as my colleagues suggest. Indeed, an election here would be consistent with the congressional purpose to resolve representation disputes by the holding of an election and thereby to eliminate picketing as an industrial irritant whenever possible. To refuse to hold an election, as my colleagues do, is to allow the already prolonged picketing to continue indefinitely on the present basis.

Cockatoo, Inc.,[1] Employer-Petitioner *and* Culinary Workers & Bartenders Union, Local 814, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, Union

The Cockatoo Hotel,[2] Employer-Petitioner *and* Culinary Workers & Bartenders Union, Local 814, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, Union. *Cases Nos. 21–RM–832 and 21–RM–873. December 24, 1963*

DECISION AND ORDER

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Carl Abrams. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

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

1. Cockatoo, Inc., which operates the Restaurant, is a corporation wholly owned by Andrew Lococo and his wife. The adjacent Hotel is also owned by Lococo and his wife in joint tenancy. Lococo testified that during its last fiscal year the Restaurant grossed in excess of $1,000,000 and that it purchased goods exceeding $100,000 in value from distributors who received these commodities directly from outside the State. He further testified that during its current fiscal year the Hotel will gross $310,000 to $330,000 and that for its previous fiscal year it grossed less than $500,000. The Hotel's indirect annual purchases from outside the State exceed $50,000 in value.

[1] Hereinafter referred to as "Restaurant."

[2] Hereinafter referred to as "Hotel."

[3] The Union subpenaed the records of both Restaurant and Hotel. A request to quash that subpena was granted by the Hearing Officer and the Union's motion to strike testimony by Lococo, president of both Hotel and Restaurant, as to commerce facts, was denied. Due to the nature of our decision herein, we find it unnecessary to rule on the Union's exceptions to these rulings.