

A contrary holding would, in our view, subvert the purpose of the premature-extension rule since, by engaging in "premature" multi-plant bargaining for a considerable period, the parties to a single-plant contract could effectively prevent the employees covered by the original contract from making a change in their bargaining representatives at an appropriate time.

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(b) of the Act:

All production and maintenance employees of the Employer at its Silsby Street plant in Houston, Texas, excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined by the Act.

[Text of Direction of Election omitted from publication.]

MEMBERS BROWN and JENKINS took no part in the consideration of the above Decision and Direction of Election.

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**Kenneth Wong, Henry Lim, Harry Lim, Fook Lim, and Robert Lim, Co-partners d/b/a Capitol Market No. 1; Capitol Grocery, Inc. d/b/a Capitol Market No. 2, Petitioner<sup>1</sup> and Retail Clerks Union Local 770, affiliated with Retail Clerks International Association, AFL-CIO. Case No. 21-RM-937. January 31, 1964**

#### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c)(1)(B) of the National Labor Relations Act, a hearing was held before Hearing Officer Floyd E. Folven. 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 and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union is a labor organization within the meaning of the Act.

3. The Employer seeks an election in a unit of food clerks employed at its two retail food stores in Los Angeles, California. The Union contends that the petition should be dismissed because it has disclaimed any present interest in representing the employees who are the subject of the petition, and that, therefore, no question concerning representation exists.

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<sup>1</sup> As amended at the hearing.

On March 18, 1963, the Union requested that the Employer sign a contract covering all food clerks at both stores. The Employer refused. The Union repeated its request on June 11, 1963, and stated that unless the Employer signed a contract, the Union would picket both stores. The Employer again refused, and the Union immediately picketed both stores. The pickets patrolled at all seven entrances, which are used by both employees and customers. The picket signs were in Chinese and English and read: "Don't patronize this Chinese Store" and "Please don't come to this Store."

On June 11, 1963, the Employer filed the present petition.

On June 13, 1963, the Union sent a telegram to the Employer purportedly disclaiming any further interest in obtaining a contract and withdrawing any prior request for recognition. The Union continued the picketing without interruption, however, although the picket signs were changed to read: "This store pays substandard wages and maintains substandard working conditions." The Union also continued to solicit employees to sign authorization cards and to join the Union.

Section 9(c) (1) (B) of the Act provides in substance that the Board shall entertain an election petition filed by an employer only when the employer is presented with a claim for statutory recognition. This refers, obviously, to an immediate recognition claim. Such a claim may or may not be inferred from a union's picketing activities, depending on the particular circumstances. Picketing, without more, will not be found to constitute a present claim for recognition under Section 9(c) (1) (B) where its immediate object is not recognition, even though it may have such ultimate object: for example where the picketing is aimed only at organizing the employees so that ultimately, if organization is successful, the union may present the employer with a claim for recognition.<sup>2</sup> The situation is different, however, where in the context of other related events it appears that an object of the picketing is to press upon the employer a demand for immediate recognition. In the latter situation, there is a basis for finding the statutory predicate for a petition under Section 9(c) (1) (B).

It is quite true that a claim for immediate recognition does not become irrevocable simply because it has once been made. Under certain circumstances a union may effectively withdraw an earlier claim for recognition, and thus remove the statutory basis for the petition.<sup>3</sup> But the fact of withdrawal is not established simply from its declaration. Obviously, the Board is not compelled to find a valid and effective disclaimer just because the union uses the word, and regardless of the other facts in the case. Thus, a purported disclaimer can scarcely be credited if the union at the same time tells the employer that it will continue to picket until the employer recognizes the union or

<sup>2</sup> See *Martino's Complete Home Furnishings*, 145 NLRB 604.

<sup>3</sup> *Andes Candies, Inc.*, 133 NLRB 758; *Muratti's, Inc.*, 132 NLRB 699.

where the union engages in other conduct which in context is clearly at variance with its asserted disclaimer. The question must be decided in each case whether the union has in truth disclaimed, or whether its alleged disclaimer is simply sham and for that reason not to be given force and effect.<sup>4</sup>

In the instant case, the Union's demands of March 18 and June 11 leave no doubt that prior to the purported disclaimer of June 13 the Union was presenting the Employer with a claim for immediate recognition. It is equally clear that the picketing which the Union threatened and then initiated on June 11 was in furtherance of that immediate recognition claim. The sole question here is whether the Union in good faith, and effectively, withdrew that claim when, prompted obviously by the filing of the RM petition of which it had just been apprised, it sent its telegraphic disclaimer, which it reiterated at the hearing and in its brief. On this record we are satisfied that it did not. Notwithstanding the disclaimers, the Union continued without interruption to picket as it had before, save for a slight modification in the picket sign language, to which in the circumstances of this case we attach no special significance. Only 2 days earlier, the Union had told the Employer that its picketing was designed as a pressure device to force capitulation to its recognition demand. In the context of these other closely related events, we are unable to conclude that the Union's purported disclaimer effectively withdrew its prior unequivocal claims for immediate recognition or otherwise altered the basic immediate recognition objective of its continued picketing. Rather, we find that the Union's entire course of conduct is inconsistent with its expressed disclaimer.<sup>5</sup>

Accordingly, we find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

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

All the employees employed by the Employer at 4617 North Huntington Drive and 256 South Atlantic Boulevard, Los Angeles, California, excluding all office clerical employees, technical employees, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

<sup>4</sup> See *Peninsula General Tire Company, Inc.*, 144 NLRB 1459

<sup>5</sup> *Miratti's Inc., Andes Candies, Inc., and Martino's Complete Home Furnishings, supra*, are distinguishable on their facts. In *Miratti's*, unlike here, the union did not commence picketing until a substantial time after the disclaimer, and the picketing was not for present recognition. In *Andes Candies*, also unlike here, the employer had never been presented with a claim to recognize the union. And in *Martino's*, again unlike here, there was no present demand for recognition, although one had been made almost 2 years earlier.

MEMBER LEEDOM, concurring:  
I concur only in the result.<sup>6</sup>

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

<sup>6</sup> See my dissent in *Martino's Complete Home Furnishings*, 145 NLRB 604.

**Red Top Cab & Baggage Co., Yellow Cab Company of Miami, Checker Cab Operators, Inc., B & S Taxi Corp., Yellow Cab System and John A. Kurtz.** *Case No. 12-CA-2380. February 3, 1964*

### DECISION AND ORDER

On August 22, 1963, Trial Examiner A. Norman Somers issued his Intermediate Report in the above-entitled proceeding, finding that Respondents had engaged in and were engaging in unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. The Trial Examiner also found that Respondents had not engaged in other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, Respondents filed exceptions to the Intermediate Report and a supporting brief.<sup>1</sup>

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 Leedom and Jenkins].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,<sup>2</sup> conclusions, and recommendations of the Trial Examiner with the following additions:

We agree with the Trial Examiner that Kurtz's concerted activities in protesting against alleged favoritism in dispatching at the airport, which adversely affected his earnings and those of his fellow cab-drivers, were protected by Section 7 of the Act.

We also agree with the Trial Examiner that Respondent corporations operating as members of the Yellow Cab System were joint em-

<sup>1</sup> Respondents requested oral argument. This request is hereby denied because the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

<sup>2</sup> The Intermediate Report incorrectly states that the upper ramp at the airport is not covered by Respondent Red Top's exclusive franchise and that the airport is in Miami. The record shows that the franchise covers the upper and lower ramps and that the airport is not within Miami city limits but within Dade County. We hereby correct these inadvertent errors.