

**Hotel Westward Ho and Hotel and Restaurant  
Employees and Bartenders Local Union 631,  
AFL-CIO. Case 28-CA-1850**

August 7, 1969

**DECISION AND ORDER**

**BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING AND BROWN**

Upon a charge filed by Hotel and Restaurant Employees and Bartenders Local Union 631, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint, dated March 14, 1969,<sup>1</sup> against Hotel Westward Ho, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about February 18, the Union was duly certified by the Board<sup>2</sup> as the exclusive bargaining representative of Respondent's employees in the unit found appropriate,<sup>3</sup> and that since on or about March 7, Respondent has refused and is refusing to bargain collectively with the Union as such exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 4, Respondent filed its answer, admitting in part and denying in part the allegations of the complaint.

On April 11, the General Counsel filed with the Regional Director for Region 28 a motion for summary judgment and issuance of Board Decision and Order. By Order, dated April 11, the Acting Regional Director for Region 28 referred the General Counsel's motion to the Board. In his motion, the General Counsel requests that the Board take official notice of the records and documents in Case 28-RC-1699, and alleges that the pleadings have not raised any factual issues not previously determined by the Board in the representation proceeding. The motion further requests that the allegations of the complaint be deemed to be admitted to be true and so found without a hearing being held, and that the Board issue a Decision and Order, containing findings of fact, conclusions of law, and a remedial order. Thereafter, on April 16, the Board issued an order transferring proceeding to the Board and notice to show cause. On May 12, Respondent filed its response to motion for

summary judgment and petition for reconsideration, alleging that recent case precedent, not available at the time of the representation proceeding, demonstrates the inappropriateness of the unit finding herein and raises material and substantial issues of fact which can only be resolved by a hearing. Respondent further requests that the Board reconsider this unit determination, which it contends is based upon extent of organization and is contrary to applicable Board precedent. On May 26, the General Counsel filed a counterstatement to Respondent's response to motion for summary judgment in which he contends that the Board's unit determination is supported by the record and applicable case precedent and urges that his motion for summary judgment be granted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

**RULINGS ON THE MOTION FOR SUMMARY  
JUDGMENT AND RESPONDENT'S PETITION FOR  
RECONSIDERATION**

In its Response to the General Counsel's Motion for Summary Judgment, Respondent contends, *inter alia*, that a hearing is required to resolve material and substantial issues of fact arising out of the conflict between the unit determination, in Case 28-RC-1699, and recent case precedent involving hotel and restaurant employees in the Phoenix area. Respondent has also asked that the Board reconsider its Decision in Case 28-RC-1699, alleging that the Board's unit determination contravenes Section 9(c)(5) of the Act and is also contrary to applicable Board precedent. In our opinion, there is no merit in Respondent's contentions.

The record before us establishes that on September 5, 1967, the Union filed a petition in Case 28-RC-1699, seeking a unit of all kitchen department employees employed at Respondent's Phoenix, Arizona hotel.<sup>4</sup> After a hearing, the Regional Director for Region 28 issued a Decision and Direction of Election on October 26, 1967, in which he found appropriate for bargaining the following unit of employees:

All kitchen department employees, including cooks, cooks' helpers, pantry workers, butchers, bakers, kitchen helpers, dishwashers and kitchen porters; excluding all employees of all other departments, office clerical employees, watchmen, guards, professional employees, the chef, and all other supervisors as defined by the Act.

On or about November 18, 1967, Respondent filed with the Board a Request for Review of the

<sup>1</sup>Unless otherwise noted, all dates are in 1969.

<sup>2</sup>Decision and Order in *Hotel Westward Ho*, Case 28-RC-1699 (unpublished).

<sup>3</sup>171 NLRB No. 173.

<sup>4</sup>The Union described the unit as follows: all cooks, cooks' helpers, pantry workers, butchers, bakers, kitchen helpers, dishwashers, kitchen porters, cafeteria workers; excluding all others, guards, watchmen, office clericals, office supervisors as defined in the Act.

Regional Director's findings. The Board granted the Request for Review and on June 13, 1968, the Board issued its Decision on Review<sup>5</sup> affirming the Regional Director's unit determination. Pursuant thereto, an election by secret ballot was conducted on August 7, 1968, among the employees in the unit, described above, in which 16 votes were cast in favor of the Union, 4 were cast against, and 1 ballot was challenged. Thereafter, Respondent filed timely objections to conduct affecting the results of the election. On September 9, 1968, the Regional Director for Region 28 issued a Supplemental Decision on Objections and Certification of Representative in which he overruled Respondent's objections and issued a certification to the Union. A Request for Review of the Regional Director's Supplemental Decision was filed with the Board by Respondent, and on October 23, 1968, the Board, by telegraphic order, remanded the case to the Regional Director for hearing on one of Respondent's objections.<sup>6</sup> Pursuant thereto, a hearing on Respondent's objection was conducted before a Board Hearing Officer, and on November 25, 1968, the Hearing Officer issued his report on objections to conduct affecting the results of election with findings and recommendations in which he recommended that the objection be overruled. Respondent filed exceptions to the Hearing Officer's report, and on February 18 the Board issued its Decision and Order adopting the findings and recommendations of the Hearing Officer.<sup>7</sup> In its Decision, the Board also determined that the Union's certification was to become effective as of the date of the Decision.

On or about February 20, the Union requested that Respondent commence bargaining on a contract covering employees in the certified unit. By letter dated March 7, Respondent advised the Union that it considered the unit to be inappropriate, and therefore, it was declining the request for bargaining.

Respondent admits in its answer to the complaint that the Union has been certified by the Board as the exclusive bargaining representative of Respondent's employees in a unit found appropriate by the Board and that on or about February 20, and thereafter, the Union, as the certified bargaining representative of Respondent's kitchen department employees, requested that Respondent bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment for such employees. Respondent further admits that in a letter to the Union, dated March 7, it set forth reasons why it considered the certified unit to be inappropriate, and on the basis of these reasons, Respondent refused to bargain with respect to such a unit.

In essence, Respondent's position is that the unit found appropriate by the Board is in conflict with Section 9(c)(5) of the Act and applicable Board precedent. Respondent answers by arguing that its contention is at least in part supported by case precedent which was not in existence at the time of the representation proceeding and that such precedent has raised material and substantial issues of fact which can only be resolved by a hearing.

We find no merit in Respondent's contentions. As indicated, above, the appropriateness of the petitioned for unit was fully litigated in the underlying representation proceeding, and on the basis of a complete record, the Board found in agreement with the Regional Director that Respondent's kitchen department employees possess a separate community of interest sufficient to warrant the conclusion that a unit confined to such a grouping of employees was appropriate. In its Decision,<sup>8</sup> the Board enumerated the unit factors upon which the determination was made, and also expressly pointed out that no reliance was placed upon the extent of the Union's organization in reaching this conclusion. In view of the foregoing, we believe it is abundantly clear that the unit determination herein in no way contravenes Section 9(c)(5) of the Act. It is likewise clear that this unit determination does not conflict with applicable Board precedent. It should be noted that in a representation proceeding the Board's function is to determine whether the petitioned for unit is *an* appropriate grouping of employees. In such circumstances, the Board does not deem it necessary to determine what would constitute the most appropriate unit. Nor does it pass upon whether other groupings of employees might also be found to be appropriate. Since in each case, the scope of the Board's inquiry is limited to the request before it and the determination is based upon the particular record facts, it is not unusual that unit determinations will vary even when involving employees in the same basic industry. However, this is not to say that because different groupings of employees may be found to constitute appropriate units, the Board is not applying uniform standards in making its unit determinations. On the contrary, in each instance the Board considers the request in light of established unit factors and, on the basis of these factors makes a determination as to whether there is a separate community of interest among the employees sought sufficient to warrant a finding of appropriateness. In our judgment, Respondent has failed to recognize this distinction in contending that the unit finding in this proceeding is in conflict with other unit findings involving employees in the hotel and restaurant industry. In effect, Respondent is arguing for the establishment of a rule which would fix the type of units available in a particular industry without regard to the conditions present in the individual case. Such an approach has been

<sup>5</sup>171 NLRB No. 173.

<sup>6</sup>As to the remaining three objections, the Board denied review as to two and deferred ruling on the other.

<sup>7</sup>The Board also determined that the objection upon which it had deferred ruling was properly overruled by the Regional Director.

<sup>8</sup>See fn. 5, *supra*.

expressly rejected by the Board<sup>9</sup> In the cases<sup>10</sup> relied upon by Respondent to establish the alleged inconsistency, the same unit considerations were applied in the same manner as were applied here, and there is no evidence that the unit finding in this proceeding represents a departure from established Board precedent. Therefore, on the basis of the foregoing and the entire record, we find that Respondent has not demonstrated the existence of any newly discovered or previously unavailable evidence raising material and substantial issues of fact. Nor has the Respondent offered to adduce any evidence which would require that the Board reexamine the Decision made in the representation proceeding. Accordingly, Respondent's Petition for Reconsideration of the Decision is hereby denied. Further, inasmuch as Respondent has either fully litigated or had the opportunity to litigate these matters in the representation case, we find that Respondent has not raised any issue which is properly triable in this unfair labor practice proceeding.

All material issues having been either decided by the Board or admitted in the answer to the complaint, there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment and Issuance of Board Decision and Order is granted. On the basis of the record before it, the Board makes the following

## FINDINGS OF FACT

### I THE BUSINESS OF RESPONDENT

Respondent is, and at all times material herein has been, an Arizona corporation having its principal office and place of business in Phoenix, Arizona, where it is engaged in the business of operating a hotel, providing accommodations, restaurant and related services. During the past year, Respondent, in the course and conduct of its operations, sold goods and services the gross value of which exceeded \$500,000 and purchased and had delivered goods and material valued in excess of \$50,000 at its place of business in Phoenix, Arizona, directly from States of the United States other than the State of Arizona. During the same period in excess of 25 percent of Respondent's guests remained less than 1 month.

Respondent admits, and we find, that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the

purposes of the Act to assert jurisdiction herein

### II THE LABOR ORGANIZATION INVOLVED

Hotel and Restaurant Employees and Bartenders Local Union 631, AFL-CIO, is a labor organization within the meaning of Section 2(6) and (7) of the Act.

### III THE UNFAIR LABOR PRACTICES

#### A *The Representation Proceeding*

##### 1 The unit

The following employees at Respondent's Phoenix, Arizona, hotel, constitute a unit appropriate for collective bargaining within the meaning of the Act:

All kitchen department employees, including cooks, cooks' helpers, pantry workers, butchers, bakers, kitchen helpers, dishwashers and kitchen porters, excluding all employees of all other departments, office clerical employees, watchmen, guards, professional employees, the chef, and all other supervisors as defined by the Act.

##### 2 The certification

On August 7, 1968, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28, designated the Union as their representative for purposes of collective bargaining with Respondent, the Board certified the Union as the collective-bargaining representative of the employees in said unit, and the Union has continued to be the certified bargaining representative at and since the refusal to bargain set forth below.

#### B *The Request to Bargain and Respondent's Refusal*

Commencing on or about February 20, 1969, and continuing to date, the Union has requested that Respondent bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 7, 1969, and continuing to date, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Union was duly certified as the collective bargaining representative of the employees of Respondent in the appropriate unit described above, and that the Union at all relevant times has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of

<sup>9</sup>John Hammonds and Roy Winezardner Partners d/b/a 77 Operating Company d/b/a Holiday Inn Restaurant 160 NLRB 927

<sup>10</sup>Contrary to Respondent's contention and for the reasons heretofore stated, recent Decisions by the Regional Director for Region 28 have not established a pattern of bargaining for hotel and restaurant employees in the Phoenix area which can be construed as having an overriding effect upon the validity of the original unit finding herein.

the Act We further find that Respondent has, since March 7, 1969, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act

#### IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The Acts of Respondent set forth in section III, above, occurring in connection with its operations as described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and embody in a signed agreement any understanding reached

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial year of certification as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit See *Mar-Jac Poultry Company Inc* 136 NLRB 785, *Commerce Company d/b/a Lamar Hotel* 140 NLRB 226, 229, enf'd 328 F 2d 600 (C A 5), cert denied 379 U S 817, *Burnett Construction Company* 149 NLRB 1419, 1421, enf'd 350 F 2d 57 (C A 10)

#### CONCLUSIONS OF LAW

1 Hotel Westward Ho is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

2 Hotel and Restaurant Employees and Bartenders Local Union 631, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act

3 All kitchen department employees employed at Respondent's Phoenix, Arizona, hotel, including cooks, cooks' helpers, pantry workers, butchers, bakers, kitchen helpers, dishwashers, and kitchen porters, excluding all other employees of all other departments, office clerical employees, watchmen, guards, professional employees, the chef, and all other supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective

bargaining within the meaning of Section 9(b) of the Act

4 On February 18, 1969, and at all times thereafter, the above-named labor organization has been and is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act

5 By refusing on or about March 7, 1969, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act

6 By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act

7 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Hotel Westward Ho, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with Hotel and Restaurant Employees and Bartenders Local Union 631, AFL-CIO, as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit

All kitchen department employees employed at Respondent's Phoenix, Arizona, hotel, including cooks, cooks' helpers, pantry workers, butchers, bakers, kitchen helpers, dishwashers, and kitchen porters, excluding all other employees of all other departments, office clerical employees, watchmen, guards, professional employees, the chef, and all other supervisors as defined by the Act

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act

2 Take the following affirmative action which the Board finds will effectuate the policies of the Act

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an

understanding is reached, embody such understanding is a signed agreement

(b) Post at its Phoenix, Arizona, hotel, copies of the attached notice marked "Appendix" <sup>11</sup> Copies of said Notice, on forms provided by the Regional Director for Region 28, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material

(c) Notify said Regional Director for Region 28, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith

<sup>11</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals there shall be substituted for the words a Decision and Order the words a Decree of the United States Court of Appeals Enforcing an Order

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that

WE WILL NOT refuse to bargain collectively with Hotel and Restaurant Employees and Bartenders Local Union 631, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement

The bargaining unit is

All kitchen department employees employed at our Phoenix, Arizona, hotel, including cooks, cooks' helpers, pantry workers, butchers, bakers, kitchen helpers, dishwashers, and kitchen porters, excluding all other employees of all other departments, office clerical employees, watchmen, guards, professional employees, the chef, and all other supervisors as defined by the Act

HOTEL WESTWARD HO  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 7011 Federal Building & U S Courthouse, 500 Gold Avenue SW, Albuquerque, New Mexico 87101, P O Box 2146, Telephone 505-843-2508