

White Castle System, Inc and Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO Case 7-CA-12263

June 17, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PENELLO
AND WALTHER

On February 12, 1976, Administrative Law Judge Henry L Jalette issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the exceptions.

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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.* 91 NLRB 544 (1950) enf'd 188 F.2d 362 (CA 3 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge. This proceeding was initiated by a charge filed by the above-captioned Union on August 20, 1975.¹ Pursuant thereto, complaint issued on October 20 alleging that the above-captioned Respondent had violated Section 8(a)(1) and (5) of the Act by polling its employees about their

union sentiments and desires and by withdrawing recognition from and refusing to negotiate and bargain with the Union as the collective-bargaining representative of its employees. On December 10, a hearing was held in Detroit, Michigan.

Upon the entire record, including my observation of the witnesses, and after consideration of the briefs filed by the parties, I hereby issue the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent is engaged in the operation of a chain of fast food restaurants in several States of the United States including Detroit, Michigan, the location of the only facility involved in this proceeding.² Those facilities consist of 10 units or restaurants, plus an office and warehouse. Since at least 1942, Respondent has recognized and has been in contractual relationship with Local 24, the Charging Union herein, or its predecessor.³ The last collective-bargaining agreement between the parties expired on April 30. Negotiations for a new collective-bargaining agreement were held on April 29 and 30, at which it was agreed to extend the expiring agreement for the period of negotiations. Principal negotiator for Respondent was its assistant general counsel, Robert Hays, and principal negotiator for the Union was Dinah Alexander, an employee of the Union in the position of coordinator of administrative activities. Alexander was assisted by another official of the Union. No employee of Respondent was on the Union's bargaining committee.

The record does not indicate how many negotiation meetings were held, but, according to Hays, by the latter part of May they were in agreement on some important points and far apart on issues of benefits, arbitration and grievance, a no-strike clause, and checkoff. Hays did not describe what was included in the term benefits, but, under section 4 of the prior contract, matters such as life insurance, sick leave, savings, and bonus were deemed gratuities and voluntary additions to be granted or withheld at the sole discretion of Respondent. Whether the Union was seeking to restrict such a broad discretion affecting matters of substantial significance to employees is not shown in the record. The prior contract contained a grievance and arbitration provision of sorts, a no-strike clause, and provided for union security and checkoff. The record does not indicate what either party was proposing on these issues.

After the May meeting, the parties adjourned with the understanding that Hays would draft contract language on these issues. Hays testified that by early June he had made three or four submissions by letter to the Union, but he did not receive a proposed contract from the Union reflecting

² Jurisdiction is not in issue. The complaint alleges the answer admits and I find that Respondent meets the Board's standard for the assertion of jurisdiction over retail enterprises.

³ The parties stipulated that Local 24 is a successor of Local 234 International Restaurant Employees and Bartenders International Union.

¹ Unless indicated, all dates hereinafter are in 1975.

his submissions until July 31 Hays neglected to mention, however, that on June 20 Alexander had advised him by letter that his proposed contract revisions were at variance with earlier discussions and agreements and that she was preparing a complete agreement which she believed would accurately reflect such agreements reached

About the third week of July, Hays conferred with officials of Respondent to report expressions of discontent among employees and his doubts of the Union's majority status On July 23, counsel was consulted and it was decided to conduct a poll of employees to determine whether or not they desired to be represented by the Union The poll was conducted between August 18 and 25 At the time of the poll there were approximately 165 employees in the unit The poll was by secret ballot and the results were 65 votes for union representation, 83 against, with 2 invalid ballots Based on these results, Respondent notified the Union it would no longer recognize and bargain with it

B Analysis and Conclusions

General Counsel and Respondent are agreed on the legal principle which governs this case, namely, that an incumbent union enjoys a rebuttable presumption of majority status and that any assertion of a good-faith doubt of such majority status must be supported by objective considerations They are further agreed that a similar rule applies to any poll on which the employer relies for his good-faith doubt, that is, before he may undertake a poll he must have a good-faith doubt based on objective considerations *Montgomery Ward & Co., Incorporated*, 210 NLRB 717 (1974), *Jackson Sportswear Corporation*, 211 NLRB 891 (1974) Whether or not the objective considerations required to justify a poll are qualitatively or quantitatively different from those required to support a withdrawal of recognition is not clear, but it is not necessary to make a distinction here In my judgment, the record indicates sufficient objective considerations to support Respondent's polling of its employees and its withdrawal of recognition

In support of its position, Respondent adduced testimony on a number of factors which it contends meet the objective considerations test General Counsel disagrees and in his brief he has undertaken to analyze most of them My analysis follows

1 There had never been an election in the unit

The Union had been the representative of Respondent's employees for over 20 years and the basis of the initial recognition was not really known, but Respondent believed that there had never been an election I agree with General Counsel that the fact that no election had ever been held is not a valid consideration on which to predicate a doubt of majority status It must be presumed that when recognition was granted Respondent acted lawfully and recognized a majority union *Shamrock Dairy, Inc* 119

NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd 280 F 2d 665 (C A D C, 1960), cert denied 364 U S 892 (1960)

2 There had been no arbitration and only one substantial grievance in 20 years

Hays testified to the foregoing General Counsel does not appear to argue that this would not be a valid objective consideration, rather, he questions the weight of Hays' testimony, contending, insofar as grievances were concerned, that Hays did not really know whether or not grievances had been settled between the Union and lower-level management in accordance with contract provisions I am not persuaded by General Counsel's argument Hays testified that "Any grievance of any consequence that couldn't be resolved between the, say the supervisor and the employees, that would come to the attention of the manager and would involve dealings with union representatives, I'm quite confident the manager would have brought to my attention' I share that confidence There were no stewards or other union representatives with whom lower-level management could resolve grievances Moreover, if Hays' testimony is not the most weighty, it stands nevertheless unchallenged by any evidence from the General Counsel In my judgment, the absence of grievance processing by the Union was a valid factor for consideration in doubting the Union's majority status

3 There were no union stewards

Hays testified that he had never known of any union stewards representing the employees in the unit General Counsel contends such testimony is insufficient to constitute a valid objective consideration for two reasons He contends that it would be rare for a high corporate executive to deal with stewards and, accordingly, his testimony "I've never known of any union stewards" does not constitute proof there were none I disagree Hays' testimony was corroborated by Area Manager Reynolds (for his period of supervision of the unit) and it stands uncontradicted If there were any stewards, it should have been an easy matter for General Counsel to prove it I find there were none

General Counsel contends that the lack of stewards is immaterial to the issue of majority status, that how a union functions, whether by steward or paid staff representative, is not Respondent's concern Whether by steward or paid staff representative may not be of concern, but when it is neither, it is reasonable to ask whether the Union represents anyone On the record before me, there is no showing that anyone acted on behalf of the employees In my judgment, the absence of a union representative to handle any of the day-to-day problems of employees was a valid factor for consideration in questioning the Union's majority status

- 4 None of the Respondent's employees was seated at the Union's side of the table during bargaining
- 5 The union bargaining committee never mentioned to management that it would report back to its membership
- 6 The Union's statement that procuring its standard form contract was a major union goal in bargaining

The three items above were adverted to by Hays as circumstances which created a doubt in his mind concerning the Union's majority status. As noted earlier, the Union was represented in bargaining by two paid union representatives. Hays testified that at the first meeting he had explained to the union representatives that his committee did not have final authority to reach a final agreement, that such authority was vested in a management committee. The union representatives responded by stating that they understood this because they likewise did not have final authority. They said they would have to report to their superiors, but they made no mention of reporting to the employees in the unit. At one point in the negotiations, Hays asked Alexander what the employees wanted and her reply was that she did not know what they wanted and was not interested in what they wanted, that her concern was that the principles of the Local and the International as set forth in their so-called "street contract" were upheld.

General Counsel contends that none of the foregoing circumstances constitutes objective considerations on which to predicate good-faith doubt of a union's majority status. Thus, as he points out, the makeup of a union's bargaining team is a union prerogative and Respondent produced no evidence of employee dissatisfaction with the Union's exercise of that prerogative. As to the Union's statement that it also lacked final authority and had to report back to its superiors, General Counsel points out that this did not negate the Union's also reporting bargaining progress to unit members and that there is no evidence the Union was not reporting back to its membership. As to the Union's expression of a desire for the Union's standard contract, General Counsel asserts that Respondent presented no evidence that the employees were dissatisfied with this approach.

In other, perhaps most, circumstances, one might agree that none of the foregoing circumstances could afford any basis for doubting that a union enjoyed majority support. Taken in combination with all of the circumstances of this case, it appears to me that these circumstances are entitled to some weight, because all of them in one way or another were indicative of a union which did not enjoy employee support.

- 7 The Union's request for details of all current Respondent employee benefit plans

According to Hays, the Union's request for information about employee benefit plans betrayed an ignorance of employee benefits which he attributed to a lack of contact between the Union and the employees. In my judgment, the request for information afforded no basis for questioning the Union's majority status. The information in ques-

tion is information which is commonly sought in negotiations. It was of particular importance in this case in view of the fact that theretofore the Union, despite 20 years of bargaining, had relinquished sole discretion to Respondent in the matter of life insurance, sick leave, savings, bonuses, and the like.

- 8 The failure of Union Coordinator of Administrative Services Alexander to have been inside a White Castle since she was 10 years old

In agreement with the General Counsel, I find that the foregoing fact was not a valid consideration for doubting the Union's majority status. Apart from other considerations, Alexander's duties were not such as to require her to enter any of Respondent's restaurants in the bargaining unit.

- 9 The failure of the Union to respond to Hays' early June 1975 contract proposals until late July 1975

Although Hays testified about the delay in the Union's submission of a proposed contract, and appeared to have based his doubt of the Union's majority status in part on such delay, I see nothing in the delay to justify such a doubt.

- 10 The Union's failure to join management in a joint communique to the Respondent's employees to the effect that the Respondent did not own the Union

Area Manager Reynolds testified that in a period preceding the negotiations an employee had asked him whether or not the Company owned the Union. Hays testified that he was concerned about this inquiry and that at a negotiation meeting he suggested to the union representatives that the Company issue a statement on that question to clarify the matter for its employees and to post it on a bulletin board. The Union was opposed to this and Hays proposed a joint statement to like effect to which the Union also objected. I am not persuaded that the Union's objection constituted a valid consideration on which to predicate a doubt of the Union's majority status.

- 11 Detroit Area Manager Reynolds' conversations with employees in respect to the Union

In addition to the foregoing, Respondent asserted that it based its good-faith doubt of the Union's majority status on the statements of employees to supervisors. Thus, Area Manager Reynolds testified that in the period from the first part of 1975 to the middle of 1975, at least 100, maybe 120, employees had made remarks to him such as follows: "Why do we have a union, why do we have to belong to the Union, what does the Union do for us, how can we get rid of the Union, how come we have to pay dues, how come they took out this much, does the Company own the Union."

General Counsel challenges the validity of Reynolds' testimony to support a good-faith doubt on two grounds. First, he questions the credibility of Reynolds because,

while professing to have been approached by about 100 employees and professing to know many by name, he could identify only 13 employees among those speaking to him

While General Counsel's observations are accurate, I deem them insufficient to warrant a rejection of Reynolds' testimony Reynolds appeared to me to be a truthful witness He is not in daily contact with unit employees, he made no notes, and he was describing conversations over a period of several months In the circumstances, it is understandable that he could not name more employees I credit him and find that about 100 to 120 employees had made remarks to him such as described above

General Counsel contends that in any event the testimony of Reynolds is insufficient to establish the objective considerations required by Board decisional law General Counsel contends that supervisors' reports of employee dissatisfaction with the Union do not constitute objective considerations supportive of good-faith doubt In support of this contention, he adverts to the following language in *Massey-Ferguson, Inc.*, 184 NLRB 640, 641 (1970)

[S]upervisory reports of employee discontent do not support the Respondent's assertion, to be of any significance, the evidence of dissatisfaction with a validly recognized incumbent union must come from the employees themselves, and not from the employer on their behalf

Of like tenor is the following statement from *Terrell Machine Company*, 173 NLRB 1480, 1482 (1969)

To be of any significance, the evidence of dissatisfaction with a validly recognized incumbent Union must come from the employees themselves, not from the employer on their behalf

If I understand General Counsel correctly, he is contending, in effect, that where the evidence of employee dissatisfaction consists of oral expression by the employees only the employees can attest thereto I do not believe that the language cited above stands for such a proposition While it is not entirely clear from a reading of *Massey Ferguson* and *Terrell Machine Company* in what form those employers sought to adduce evidence of employee dissatisfaction, I am persuaded that it was not in the form of Reynolds' testimony, rather, it appears that it was in the form of supervisor A testifying he entertained good-faith doubts because supervisor B told him employees were dissatisfied There is an element of that form of proof here in the case of Hays' testimony about what Reynolds told him I am not relying on that testimony, but on Reynolds' testimony of statements made to him In my judgment, this was evidence of dissatisfaction which came from the employees themselves

It is true, as General Counsel points out, that there was not "the slightest indication of any dissident group, or of any move, however limited, to unseat the exclusive bargaining representatives" *United Aircraft Corporation (Pratt & Whitney Division)*, 168 NLRB 480, 486 (1968) I am persuaded, however, that the explanation for the absence of dissident activity beyond the oral expressions of discontent described by Reynolds is attributable to the ignorance of

the employees of their rights under Sections 7 and 9 of the Act There is no doubt in my mind that the employees whose rights are here in question had no idea that they could file a decertification petition or even submit a signed petition to Respondent They are scattered about 10 facilities and have been under contract for 20 years or more with no one to inform them of their rights When they questioned Respondent it remained silent and did not explain to them their rights under the Act (perhaps for fear of being charged with encouraging employees to cease supporting the Union) To hold that there were no objective considerations to support Respondent's asserted good-faith doubt would be to impose on these employees for yet another year to two or more a union whose only visible contribution to their welfare in over 20 years had been to negotiate a contract with the lowest wages in Respondent's chain of operations while requiring them to join the Union and pay dues I do not believe *Celanese*⁴ and its progeny ever intended such a result

In summary, I conclude, contrary to General Counsel, that of several factors adverted to by Respondent in support of its asserted good-faith doubt the following constitute valid objective considerations only one grievance in 10 years, no union stewards, no employees on the bargaining committee, statements of union representatives in bargaining supportive of an inference that the Union lacked majority support (included under this item, and not previously adverted to, was the Union's failure to reply to Hays' question as to whether they actually represented a majority of the employees), and expressions of employee dissatisfaction with the Union, communicated to Respondent by a majority of the employees In addition, there is the uncontradicted testimony of Reynolds not discussed by General Counsel, that to his knowledge there had been no union meetings of Respondent's employees in the period he was area manager

In his brief, General Counsel has isolated the various factors relied upon by Respondent in support of its conduct and pointed to their insufficiency While I disagree with his conclusions, I recognize the weakness of certain of the factors relied upon by Respondent But "[w]hile each of the factors relied upon by the Respondent standing alone may have weaknesses as a basis for supporting a good-faith doubt of the Union's majority status Respondent does not rely on any one reason alone, but rather on all as a whole" *Taft Broadcasting*, 201 NLRB 801, 803 (1973)

For all the foregoing reasons, I find that there existed valid objective considerations to justify Respondent's polling of employees and its subsequent withdrawal of recognition Accordingly, I conclude the complaint should be dismissed in its entirety

CONCLUSIONS OF LAW

1 White Castle System, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

⁴ *Celanese Corporation of America* 95 NLRB 664 (1951)

2 Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act

3 Respondent did not violate Section 8(a)(1) and (5) of the Act by polling its employees about their desires for union representation and by withdrawing recognition from and refusing to bargain with the Union

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended

ORDER ⁵

The complaint is dismissed in its entirety

⁵ In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board the findings conclusions and recommended Order herein shall as provided in Sec 102.48 of the Rules and Regulations be adopted by the Board and become its findings conclusions and Order and all objectives thereto shall be deemed waived for all purposes