

IFS Virgin Island Food Service, Inc. and SIU of the Virgin Islands, affiliated with Seafarers International Union of North America, AFL-CIO, Petitioner. Case 24-RC-5342

November 27, 1974

DECISION ON REVIEW

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On May 16, 1974, the Regional Director for Region 24 issued a Decision and Direction of Election in the above-entitled proceeding in which he directed an election in an appropriate unit. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision, together with a supporting brief, on the ground, *inter alia*, that the Regional Director erred in failing to find that Petitioner was disqualified from representing the Employer's employees because Petitioner intended to engage in direct, open market competition with the Employer.

By telegraphic order dated June 19, 1974, the National Labor Relations Board granted the Employer's request for review and stayed the election pending decision on review.

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 entire record in this proceeding, including the Employer's brief on review, with respect to the issues on review and hereby affirms the Regional Director's decision for the following reasons:

The Regional Director denied the Employer's motion to dismiss the petition which alleged that Petitioner intends to engage in a competing business with the Employer and therefore would be an inappropriate bargaining representative under the rule established in *Bausch & Lomb Optical Company*.¹ Citing *Lord & Taylor, a Division of Associated Dry Goods Corporation*,² the Regional Director concluded that there was no "compelling evidence that Petitioner will engage in open market competition with the Employer, rather than operate a non-profit cooperative meat market restricted to its members." We agree.

In support of its assertion that the Petitioner intends to engage in competition with it, the Employer points to the evidence regarding Petitioner's purposes and ob-

jectives as stated in its Provisional Constitution and By-Laws as follows:

. . . To bring to the working men and women of the Virgin Islands the benefits of their own medical and dental clinic, their own legal services, their own pharmacy, their own meat market, their own occupational training and placement offices, their own recreational rooms and facilities, and their own pension and welfare plans, all to be operated by and for Virgin Islanders, not for profit, but for the working men and women of the Virgin Islands.

The record further discloses that, in response to the question whether Petitioner was "actively now engaged in pursuing all those objectives," Petitioner's General Vice President Peters replied, "Not all, not at the same time . . . of course we do not attempt to do everything at one time." Peters testified that the Petitioner has examined building sites in St. Croix for the medical clinic and has applied for a license to operate the recreational facilities. As to the meat market, Peters stated that a resident who imports meat offered to provide S.I.U. with meat to sell at a reduced price. While Peters reported that "nothing has been done about this as of this moment," he acknowledged that establishing a meat market was still one of S.I.U.'s objectives. In fact, Peters welcomed the Employer's business, stating, "I'd be happy to have the I.F.S. be one of our patrons . . ." In further clarification of his testimony, Peters affirmed the Union's intention to open a low-cost meat market.

While it is clear that an objective of Petitioner, among others, is to provide a meat market "for the working men and women of the Virgin Islands" and that certain preliminary steps have been taken toward that objective, we are of the view, in accord with the Regional Director, that the record evidence is insufficient to conclude that the Petitioner intends to engage in direct, open market competition with the Employer so as to render it inappropriate as a bargaining representative of the employees herein.³ It is readily apparent that the Petitioner's plans for a meat market have not yet materialized and it is questionable at this juncture whether such a market, if established, will compete with the business of the Employer. We note that the Employer is primarily engaged in the wholesale distribution of food products, including meat items, and the extent to which Petitioner's proposed market will affect the Employer's operations, if any, is unclear. Thus, we find there is insufficient basis at this time to conclude that the Petitioner is a potential com-

¹ 108 NLRB 1555 fn 4 (1954)

² 150 NLRB 812 (1965)

³ We also agree with the Regional Director's conclusion that the Petitioner is a labor organization and with his rulings with respect thereto

petitor of the Employer.⁴ In answer to our dissenting colleague we note that, if circumstances change requiring further consideration, the Employer may raise this issue at such time through the appropriate procedures available under the Act.

Accordingly, the case is hereby remanded to the Regional Director for the purpose of conducting an election pursuant to his Decision and Direction of Election, as affirmed herein, except that the payroll period for determining eligibility shall be that immediately preceding the date of issuance of this Decision.⁵

MEMBER KENNEDY, dissenting:

I dissent from my colleagues' conclusion that there is insufficient basis at this time for finding that Petitioner is a potential competitor of the Employer. I would not direct an election herein.

In my view, the evidence firmly establishes that the Petitioner is a potential competitor. Indeed, the testimony of Petitioner's own vice president prohibits any other conclusion, establishing that Petitioner has taken positive action toward setting up its own meat market by beginning negotiations with a meat distributor and, further, that such meat market will not be for members only as in *Lord & Taylor*, relied on by my colleagues. Rather, the market, according to Petitioner's constitution, will be open to all "working men and women of the Virgin Islands," and, according to Petitioner's vice president, to the Employer as well.

⁴ Employer's motion requesting oral argument or to remand the case for further hearing with respect to Petitioner's qualifications to represent the employees is hereby denied as there is no affirmative showing that there is newly discovered evidence warranting such action

⁵ [Excelsior footnote omitted from publication]

⁶ *Bausch & Lomb Optical Company*, 108 NLRB 1555, 1562 (1954), *Bambury Fashions, Inc., et al.*, 179 NLRB 447 (1969)

⁷ *N.L.R.B. v David Buttrick Company*, 361 F.2d 300, 304-305 (1966), *R & M Kaufmann, A Division of Russ Togs, Inc., v N.L.R.B.*, 471 F.2d 301, 304 (1972)

In light of Petitioner's announced and unqualified intention to establish a meat market and in light of the record evidence that such market will be open to all "working men and women" on the island and to private employers as well, I find inescapable the conclusion that Petitioner intends to engage in direct, open market competition with the Employer.

As the Board has held, "in a situation such as is involved here, which possesses latent dangers," the Board need not refrain from finding such a bargaining relationship inappropriate "merely because the hazards which can be anticipated have not yet been realized."⁶ Similarly, the Court of Appeals for the First Circuit, quoted with approval by the Seventh Circuit, held:

The principles attaching to the concept of conflicts of interest . . . in the field of collective bargaining, look to the prevention and forestalling of conditions which are likely to divide loyalties.⁷

By planning and taking steps to implement its own meat market, Petitioner has created "a situation which [will] drastically change the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest to one in which, at best, intensified distrust of the Union's motives [will] be engendered."⁸ This danger will poison the collective-bargaining relations between the Employer and the Petitioner by subjecting every issue to the questioning of ulterior motives and to the suspicion that the Petitioner is motivated by purposes other than its loyalty to the employees it represents.

Accordingly, I would find that Petitioner intends to engage in open market competition with the Employer and, therefore, I would dismiss the petition herein.

⁸ *Bausch & Lomb, supra*, 1561