

**Tio Pepe, Inc. and Bartenders, Hotel, Restaurant and Cafeteria Employees Union, Local 36, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. Cases 5-CA-10452 and 5-RC-10373<sup>1</sup>**

September 17, 1982

**SUPPLEMENTAL DECISION, ORDER,  
AND DIRECTION OF SECOND  
ELECTION**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On July 20, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Supplemental Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed cross-exceptions to part of the Administrative Law Judge's Supplemental Decision and a brief in support of both the cross-exceptions and part of the Supplemental Decision.

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,<sup>2</sup> and conclusions of the Administrative Law Judge, as modified herein,<sup>3</sup> and to adopt his recommended Order.<sup>4</sup>

<sup>1</sup> For purposes of this proceeding, Cases 5-CA-10452 and 5-RC-10373 are hereby consolidated.

<sup>2</sup> The Board's original Decision and Order is reported at 242 NLRB 636 (1978), enforcement denied 629 F.2d 964 (4th Cir. 1980).

<sup>3</sup> The Charging Party 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 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>4</sup> In adopting the Administrative Law Judge's recommendation to dismiss the complaint, we rely solely on his finding that Respondent's restaurant captains had the sole authority to determine the distribution of tip income and that the captains promised unit waiters and busboys an increased share in such income if the Union won the election held in Case 5-RC-10373. The Fourth Circuit, in denying enforcement of the Board's original Order in Case 5-CA-10452, stated: "If the captains promised to exercise that power to reduce their own share of the tips in favor of the waiters and busboys in order to introduce support for the Union in the representation election . . . that would have represented an offer of financial benefit for Union support and would have significantly impaired the fairness of the election, requiring that it be set aside. *N.L.R.B. v. Savair Mfg. Co.*, (1973) 414 U.S. 270, 278-79, fn. 6 . . . ; *N.L.R.B. v. Aladdin Hotel Corp.*, 584 F.2d 891, 893, (9th Cir. 1978)," 629 F.2d at 966. Accepting the court's holding as the law of the case, we are required to find that the captains, whether they are supervisors within the meaning of the Act or rank-and-file employees, made offers of financial benefit in exchange for union support and so engaged in objectionable conduct requiring that the results of the election be set aside. We find no need to decide the issue of the captains' alleged supervisory status under these

**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.

IT IS FURTHER ORDERED that the election conducted in Case 5-RC-10373 on April 29, 1978, be, and it hereby is, set aside.

IT IS FURTHER ORDERED that the certification issued in Case 5-RC-10373 on October 26, 1978, to Bartenders, Hotel, Restaurant and Cafeteria Employees Union, Local 36, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate, be, and it hereby is, revoked.

IT IS FURTHER ORDERED that Case 5-RC-10373 be, and it hereby is, reopened and remanded to the Regional Director for Region 5 for the purpose of conducting a second election at such time as the Regional Director deems appropriate.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

circumstances and do not rely on the Administrative Law Judge's findings on that issue

**DECISION**

**STATEMENT OF THE CASE**

**BRUCE C. NASDOR, Administrative Law Judge:** This case was heard in Baltimore, Maryland, on April 27, 1981.

On May 30, 1979, the National Labor Relations Board (hereinafter referred to as the Board) issued a Decision and Order in 242 NLRB 636, finding that Respondent herein has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (hereinafter referred to as the Act), and ordering Respondent to cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices.

Thereafter, the Board filed an application for enforcement of its Order with the United States Court of Appeals for the Fourth Circuit. On September 4, 1980, the Fourth Circuit Court of Appeals denied enforcement, and remanded the case to the Board,<sup>1</sup> finding that Respondent was entitled to a hearing on the issues presented in its motion to reopen the record, relating to the supervisory status of room captains, and to Respondent's allegation that the election was invalid because certain of these captains, in their efforts to enlist support for the Union, had promised to revise the manner of distributing

<sup>1</sup> 629 F.2d 964 (4th Cir. 1980).

tips, so as to yield a greater gain to the waiters and busboys.

Based on the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Maryland corporation, is engaged in the operation of a restaurant at its Baltimore, Maryland, location. During the preceding 12 months, a representative period, Respondent had gross revenues in excess of \$500,000. During the same period, Respondent purchased and received, in interstate commerce, products valued in excess of \$50,000 from points located outside the State of Maryland. On the basis of the foregoing, the Board concluded in 248 NLRB 636, that Respondent 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 that it would effectuate the policies of the Act to assert jurisdiction.

##### II. THE LABOR ORGANIZATION INVOLVED

Bartenders, Hotel, Restaurant and Cafeteria Employees Union, Local 36, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNIT

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All kitchen and dining room employees employed by the Employer at its Baltimore, Maryland location, excluding all office clerical employees, guards and supervisors as defined in the Act.

##### IV. THE EVIDENCE

For purposes of convenience and as a shorthand means of identification, the witnesses and their counsel referred to the captains who wear red jackets, as red coats, or reds; the waiters who wear blue jackets, as blue coats or blues; and the busboys who wear yellow jackets, as yellow coats, or yellows.

Respondent called five witnesses to testify on its behalf. Counsel for the General Counsel and counsel for the Charging Party did not call any witnesses.

The witnesses called to testify were as follows:

Jesus Perez Goenaga—Co-owner  
 Pedro Sanz—Co-owner and Chef  
 Oscar Galvis—a red coat (he was a blue coat at the time of election)  
 Dick Rosas—a red coat

<sup>2</sup> I have completely familiarized myself with, and taken official notice of, the entire record commencing with the filing of the representation petition in Case 5-RC-10373 and culminating in the court's remand.

Nicolas de Jesus Hernandez—a yellow and blue coat

The following is a composite of the unrefuted testimony elicited from the five witnesses.

The greater portion of the income received by the reds, blues, and yellows comes from the customers' tips. Their tips amount to triple what they earn as salary, which is paid to them by Respondent. During the period of the election,<sup>3</sup> the captains, waiters, and busboys worked in teams. A team comprised a captain, a waiter, and a busboy; the captain was held responsible for directing the members of his team. When customers paid their bills and left a tip, the red coat would immediately collect the tip if in cash, or if a credit card take the charge slip to the cashier, who would immediately give the captain the equivalent amount of cash assigned by the customer as the tip. Thereafter, at the end of the shift that night, or the next day, the captains (red coats) would pool all of their tips and the teams would share equally among the split which was in a 4-2-1 proportion, with each team receiving an equal share. Record testimony reflects that the owners do not have the authority to modify or change the proportion of the split and that any problem concerning the split must be directed to the captains. In footnote 3 of the court's decision, it makes reference to the Board's initial decision wherein the Board discounted the importance of the original determination on the method of distributing the tips. The court states, with reference to the Board, "It said that the original method followed the traditional manner of distribution. Perez did testify that he assumed the method of distribution was the one commonly followed in similar restaurants. In so testifying, he professed a lack of familiarity with the system followed in other restaurants." In this evidentiary hearing, Perez testified that the split is not customary in other restaurants, it is unusual—unique to the Tio Pepe restaurant.<sup>4</sup>

Sometime during the early part of 1979, the blue coats and yellow coats approached Perez and told him that they were ready to quit or go on strike because the red coats had reneged on a promise they had made to them. The blue coats and yellow coats told Perez that, some time before the election, the red coats had promised them that if the Union won the election the red coats would increase the tips of the blue coats and yellow coats. Perez advised the blue coats and yellow coats that he had no authority or control over the proportion or split of the tips but he would talk to the red coats about it.

Thereafter, Perez told the red coats of the threat to quit by the blue coats and yellow coats, and asked the red coats what they could do to resolve this difficulty. In an effort to resolve the problem, a meeting was held on March 3, 1979, attended by the red coats, blue coats, and yellow coats.

<sup>3</sup> The election was held on April 29, 1978.

<sup>4</sup> I am not suggesting that Perez was inconsistent in his testimony, only that perhaps other information came to his attention between that hearing and the present hearing. At any rate he did not falter in his testimony with respect to this point.

Perez and Sanz attended the meeting pursuant to a request by the red coats to ensure the blue coats and yellow coats that, if they accepted an offer by the red coats, they would not at a later point in time ask for more money.

At the meeting which was held in the afternoon at the restaurant prior to the dinner service, Perez addressed the assemblage of employees, explaining the purpose of the meeting. He related to the red coats the complaints by the blue coats and yellow coats, and requested that the red coats work something out. At that point there was a group discussion and the red coats caucused and arrived at an offer. Neither Perez nor Sanz participated in the meeting, but merely stood by, while the employees attempted to work the matter out. The red coats decided that the tip split would be changed so that the yellow coats would receive 15 percent of the tips. Of the remaining 85 percent, the blue coats would get one third plus 5 percent, while the red coats kept the remainder. Initially the blue coats and yellow coats were requesting a split of 3-1/2 to 2-1/2 to 1. After the red coats made their offer, it was accepted by the blue coats and yellow coats.

As set forth *supra*, the employees worked in teams and the tips were split equally among each individual team after being pooled. There had been problems with that method of pooling. One of the problems was that one team did not know how much money the other teams were making in tips. Another problem was that certain teams cleared their dining stations later than other teams, and certain teams worked harder than other teams. As a result, the red coats changed the pooling method by deciding that the tips would no longer be pooled, rather, that each team would keep its own tips and would split them, according to the new proportions determined by the red coats set forth above.

The testimony reveals that Perez and Sanz took no part in the determination to change both the amounts of money received by the yellow coats and blue coats and the method by which the tips would be distributed. Moreover, testimony by management reflects that the money received in tips by the red coats is considered *their* money and solely within their control. For example, the record reflects that the red coats have some flexibility with respect to giving a larger portion of the tips to a blue coat or yellow coat if he feels they deserve something extra for doing a particularly good job. This happens often during the year and particularly during the busy holiday seasons.

#### Conclusion and Analysis

The uncontradicted evidence is that the red coats instituted the initial 4-2-1 tip split, and they have the sole authority, which they exercise, to change that tip split. Moreover, with knowledge that they had this authority, they discharged it without counsel or interference from management. For obvious reasons, it was in Respondent's best interest, i.e., to protect its business, to have the problem resolved. To this end therefore, in an effort to accomplish this resolution, it conveyed the complaints of the waiters and busboys to the captains and urged them to settle their differences. In my opinion management's

benign presence at the meeting is a far cry from effectuation or "orchestration" of any change in the tip split or the pooling system. Moreover the evidence is clear that the red coats customarily give the blue coats and the yellow coats additional money, or what can be characterized as a bonus, out of their own share of the tips for a particularly good job.

Although the red coats cannot hire or fire, their authority and responsibility to direct employees, coupled with their right and authority to determine wage rates (tip splits), in my view leads to the conclusion that they are supervisors within the meaning of Section 2(11) of the Act.

Addressing myself to the second issue, the record stands uncontradicted that the red coats promised to increase the tips of the blue coats and the yellow coats, if the Union won the election. This of course represents the offer of financial benefit for union support, which the Board and the Courts find to be prejudicial. *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), and *Turner's Express, Incorporated v. N.L.R.B.*, 456 F.2d 289 at 292 (1972).

Accordingly, because Respondent has established the facts alleged in its motion to reopen the record, I will recommend dismissal of the complaint herein.

#### CONCLUSIONS OF LAW

1. Tio Pepe, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All kitchen and dining room employees employed by the Employer at its Baltimore, Maryland location, excluding all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Captains, often referred to in this litigation as red coats, are supervisors within the meaning of Section 2(11) of the Act.
5. Certain of the captains promised the waiters and the busboys that, if the Union won the election, they, the captains, would increase the tips of the waiters and busboys.
6. Respondent has not refused to bargain collectively with the above-named labor organization in violation of Section 8(a)(1) and (5) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

#### ORDER<sup>5</sup>

It is recommended that the entire complaint herein be, and it hereby is, dismissed in its entirety.

<sup>5</sup> 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 objections thereto shall be deemed waived for all purposes.