

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1650 BROADWAY ASSOCIATES, INC.  
Employer-Petitioner

and

02-RM-184263

STARDUST FAMILY UNITED,  
a/w INDUSTRIAL WORKERS OF THE WORLD  
Union

ORDER

The Employer's Request for Review of the Regional Director's administrative dismissal of the petition is denied as it raises no substantial issues warranting review.<sup>1</sup>

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., May 17, 2017.

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<sup>1</sup> We agree with the Regional Director that the Union did not demand recognition as a majority representative, and that her dismissal of the Employer's petition for an election on that ground was correct. Sec. 9(c)(1)(B) of the Act allows an employer to file a petition when a union has "presented . . . a claim to be recognized as the representative defined in Section 9(a)," i.e., as the exclusive collective bargaining representative, supported by a majority of employees in an appropriate unit. Although there is no particular wording necessary to find that the union has "presented" such a claim, the claim must clearly assert that the union has majority support at the present time. *New Otani Hotel & Garden*, 331 NLRB 1078, 1079 (2000). Accordingly "[t]he mere fact that the union is engaged in activities which it hopes will enable it *eventually* to obtain recognition by the employer is not evidence of a present demand for recognition. . . ." *Id.* (emphasis in original). The Board will not find that conduct "which falls short of an actual, present demand for recognition" as a Sec. 9(a) representative will support an employer's election petition. *Id.* Although the Union here, as our dissenting colleague emphasizes, expressed interest in meeting with management to "discuss our concerns with you," it did not purport to have the unit's majority support for doing so or request recognition as the majority representative. The Union's communications to the employer can therefore only be read as coming on behalf of those employees who supported the Union at that time.

Chairman Miscimarra, dissenting:

In this case, my colleagues deny the Employer's Request for Review of the Regional Director's administrative dismissal of the RM petition filed by the Employer, and agree with the Regional Director's findings. The Regional Director's dismissal noted that, "The evidence obtained during the investigation of the petition, however, fails to show that the Union's conduct constituted a present demand for recognition or that the Union was seeking recognition as the employees' representative. Therefore, the petition herein fails to raise a question concerning representation." Contrary to my colleagues, I believe the Union did make a present demand for recognition, and would, therefore, grant the Request for Review and reinstate the petition.

Section 8(d) of the Act lays out the obligation to bargain collectively. It states: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

In addition to several emails to the Employer on various dates in August and September 2016, the Union, on September 14, 2016, sent the following email to the Employer:

Ellen and Ken Sturm:

We would like to sit down and discuss our concerns with you. They are straightforward and are in the best interest of the restaurant: new equipment, adequate staffing, the immediate cessation of Unfair Labor Practices and the reinstatement of all employees unlawfully fired on and after August 24<sup>th</sup>.

We are interested in coming to a solution that is agreeable for both sides. We are confident that we can move forward in a positive direction that will benefit both the staff and the company. We are available for meetings this week.

Regards,

Stardust Family Union

In this email, the Union seeks both to meet and confer regarding mandatory subjects of bargaining (i.e., "new equipment" and "adequate staffing"), and to reach an agreement (i.e., "coming to a solution agreeable for both sides"). I believe these statements, in light of Section 8(d) of the Act, are more than sufficient to establish that the Union is, in fact, not only seeking to adjust grievances with the Employer, but also demanding recognition as the representative of the Ellen's Stardust Diner employees and, in that capacity, to negotiate an agreement with the Employer. As a result, I would grant the Employer's request for review and order the petition be reinstated.

PHILIP A. MISCIMARRA, CHAIRMAN