

**Alameda Room, Inc., d/b/a Chateau Madrid and
New York Hotel and Motel Trades Council,
AFL-CIO. Case 2-CA-18446**

21 August 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 22 November 1982 Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alameda Room, Inc. d/b/a Chateau Madrid, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(b) and reletter the subsequent paragraphs.
2. Substitute the attached notice for that of the administrative law judge.

¹ At fn. 6 of his decision, the judge discussed the Respondent's claim that its actions were justified on the basis of what the Respondent terms a "most favored nations clause" of its contract with the Charging Party. We disavow any implication that the clause might render lawful the Respondent's repudiation of the collective-bargaining agreement.

² We disavow the judge's speculative comments in the remedy section of his decision concerning the legality, under the Act, of the Respondent's court suits. See *Bill Johnson's Restaurants v. NLRB*, 113 LRRM 2647, 97 LC ¶ 10,130 (1983).

We shall delete par. 2(b) of the judge's recommended Order because the parties agree that the Respondent continued to comply with the terms and conditions of the collective-bargaining agreement despite the Respondent's repudiation of it.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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WE WILL NOT renounce, during its term, any collective-bargaining agreement we have with New York Hotel and Motel Trades Council, AFL-CIO, covering a unit composed of our waiters, busboys, porters, bartenders, captains, kitchen employees, and cashier.

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

WE WILL mail a certified letter to the Trades Council within 5 days of the Board's Order to inform it that we will no longer repudiate, during its term, any agreement we have with the Trades Council, unless we have the Trades Council's consent therefor.

ALAMEDA ROOM, INC. D/B/A CHATEAU MADRID

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. On November 25, 1981,¹ New York Hotel and Motel Trades Council, AFL-CIO (Trades Council) filed an unfair labor practice charge with the regional office of the National Labor Relations Board (the Board). The charge alleged that Alameda Room, Inc., d/b/a Chateau Madrid (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On January 8, 1982, the General Counsel of the Board, by the Regional Director for the Board's New York office, issued the complaint against Respondent in this case which alleged that Respondent violated Section 8(a)(1) and (5) of the Act by having, since June 5, renounced and repudiated the terms of a collective-bargaining agreement then in force between Respondent and the Trades Council. Respondent's answer avers that it lawfully repudiated that agreement. I heard this case on September 28, 1982, in New York City.

On the entire record, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

I. THE PARTIES

The pleadings, as amended at the hearing, establish and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Trades Council is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates a restaurant located on the premises of the Lexington Hotel in New York City. Respond-

¹ All dates hereinafter are for 1981 unless specified otherwise.

ent's waiters, busboys, porters, bartenders, captains, kitchen employees, and its cashier are represented by the Trades Council. The last collective-bargaining agreement with Respondent covering those employees was effective from June 1, 1978, to May 31, 1982. The terms of the contract signed by Respondent and the Trades Council are identical to those in the agreement between the Hotel Association of New York City and the Trades Council. Respondent, however, is not a member of that Association.

As of the date of the hearing in this case, Respondent's employees were on strike for a renewal contract. There is no allegation before me respecting that strike. Rather, the matters involved in the instant case all took place in 1981.

On January 2, Respondent's president wrote the Trades Council concerning discussions then scheduled to take place between the Hotel Association of New York City and the Trades Council. Therein he stated, in substance, that Respondent's employees should not be covered by an industrywide contract, a reference to the one then in effect which, as noted earlier, was identical to the association contract. He noted that the agreement between the Association and the Trades Council refers to many job classifications in which Respondent has no employees. He observed in that letter also that, even though Respondent's restaurant is located inside a hotel, it is merely a tenant and does not earn revenue from room service. In sum, he stated that Respondent could not afford another wage increase for its employees and he referred to its "desperate" efforts to stay in business. He then, in effect, called for the Trades Council to enter into a less costly agreement with it.

The Trades Council did not respond to that letter. Respondent's president wrote on April 10 to ask for a reply. The Trades Council had other ideas.

B. The Alleged Unlawful Conduct by Respondent

During the first half of 1981, the Trades Council was pressing Respondent to pay its employees a cost-of-living adjustment (COLA) which the Trades Council contended was due them under the provisions of the 1978-1982 contract. Toward that end, the Trades Council notified the "Impartial Chairman" under that contract of its claim for a COLA and Respondent was notified by the office of the Impartial Chairman that a hearing would be held on the COLA claim on June 10.

On June 5, Respondent wrote the Trades Council as follows:

Re: Renunciation of existing Collective Bargaining Agreement under the terms thereof.

On January 2, 1981, we wrote to the Trades Council to emphasize that the Hotel Association could not and did not represent or speak for us in reopening the existing Collective Bargaining Agreement, to remind you of our prior talk about a separate agreement, and to express our readiness to negotiate such a separate agreement.

There being no response, we addressed a further letter on April 10, 1981, to both the Trades Council and Local 6, to remind you that we were ready to

enter into bona fide negotiations for a new collective bargaining agreement, and we invited your attention to our right under the existing collective bargaining agreement to withdraw from such agreement when more favorable collective bargaining agreements (favorable to the restaurant, that is) are found to exist between the Trades Council or any affiliate, such as Local 6, and any other restaurant.

You have still not seen fit to respond to our letters or our request for bona fide negotiation, except to brusquely demand that we simply subscribe to the new agreement lately made between the Trades Council and the Hotel Association. And upon our refusal to accede to your demand, you have filed a complaint with the Impartial Chairman, alleging that we have refused to grant a Cost-of-Living Adjustment to all our employees retroactive to January 1, 1981, under your interpretation of the existing collective bargaining agreement.

We have now considered most carefully the foregoing situation, as well as the circumstance that it is now beyond question that Local 6 has in effect collective bargaining agreements with various other restaurants which are much more favorable to such other restaurants than our collective bargaining agreement (which was forced upon us, in any event) is to us.

Upon such careful considerations, we now do hereby renounce the Collective Bargaining Agreement, made October 20, 1978, between the Trades Council and the Hotel Association, and to which we have previously been compelled to become a signatory, and we do declare that we are no longer bound thereby, all as permitted by such Collective Bargaining Agreement; and we do hereby signify our willingness and readiness to sign the existing collective bargaining agreement between Local 6 and the Restaurant League of New York or any such new agreement, or to sign the existing collective bargaining agreement between Local 6 and an appropriate independent restaurant not a party to the Hotel Association agreement or any such agreement, or to sign such separate collective bargaining agreement between Local 6 and ourselves as may eventuate from free and bona fide negotiations.

To allay any fears in such respect which your union members may have, we add that our renunciation of the existing agreement does not mean that we intend to reduce or eliminate any wages or benefits already being paid or provided for our employees by us; we have no such intention at this time.

It seems to us that we are as much entitled as you are, and that it would be in the best long-term interests of all concerned, to have a collective bargaining agreement suitable to our particular situation and that of our employees which has been arrived at fairly and by bona fide negotiations, rather than an agreement imposed unfairly and without the slightest consideration of or concern for our needs and means.

On June 9, Respondent secured from the Supreme Court of New York a stay of the hearing before the Impartial Chairman, which as noted earlier was scheduled to take place on June 10, respecting the COLA claim. The Supreme Court stay is still in effect and that suit by Respondent against the Trades Council is in the discovery stage.²

In July, the Trades Council wrote Respondent that, pursuant to a wage reopener clause of the 1978-1982 contract, it would have a three-member commission appointed to review the wages of the unit employees. It appears that, by this time, an industrywide wage adjustment had been agreed upon between the Trades Council and the Hotel Association. Apparently fearful that a three-member commission would apply that wage adjustment to its employees, Respondent on July 8, wrote the Trades Council as follows:

We have your letter dated July 2, 1981, which reached us yesterday; and we are somewhat puzzled at the purpose of the same, inasmuch as it appears to disregard entirely various events which have already taken place or are now underway.

If your letter has at its main purpose the actual initiation of negotiations for a new collective bargaining agreement with us, we must remind you that we have been asking for such negotiations for more than six months, as can be seen from our letters to you of January 2, 1981, of April 10, 1981, and of June 5, 1981, all seeking such negotiations, and all without any meaningful results until now.

All we have encountered in response until now, have been naked demands that we simply execute the new agreement made between you and the Hotel Association of New York City, Inc., "or else." We do not consider such demands to constitute negotiations in good faith or otherwise; particularly since we had no participation whatsoever in the making of such new agreement between you and the Hotel Association, particularly since such new agreement totally disregards our own needs and financial circumstances (a detailed projection of the wage increases provided by such new agreement between you and the Hotel Association shows that we would be required to pay some Three Hundred Thousand Dollars in increases alone during the three-year term of such agreement, obviously a sheer impossibility !!!), and particularly since such new agreement between you and the Hotel Association would be fatal not only to our own existence but also to the existence of each of the well-paying jobs we now provide for union members.

However that may be, we are ready at any time, as we have been right along, to enter into real negotiations for a new collective bargaining agreement. (There is some question as to whether such negotiations and any such new collective bargaining agreement should properly be with you or rather

with your constituent local union, Local 6; but this can be considered more fully as part of the negotiations).

As to your reference, however, to convening a three-man commission under the collective bargaining agreement of October 20, 1978, we call your attention to the fact that, by our letter of June 5, 1981, hand delivered to you on June 9, 1981, we renounced such collective bargaining agreement of October 20, 1978, under the terms thereof, on the specified ground that Local 6 has in effect collective bargaining agreements with various other restaurants which are more favorable to such other restaurants than such collective bargaining agreement was to us. (That we are no longer bound by such collective bargaining agreement of October 20, 1978, is one of the principal grounds for our currently pending application to the New York State Supreme Court, New York County, to permanently stay arbitration under such collective bargaining agreement).

In the event that you actually do seek to convene such a three-man commission, we shall have no alternative but to make a further application to the New York Supreme Court to permanently enjoin any such commission, on the same ground, i.e., that we are no longer bound by the collective bargaining of October 20, 1978, providing for such commission.

Nonetheless, if there now exists a real intention and desire on your part to enter into bona fide negotiations for a new collective bargaining agreement, such attempt to convene a three-man commission and such further application to the New York Supreme Court should be entirely unnecessary.

On October 14, the Trades Council filed a complaint with the Impartial Chairman in order to arbitrate the wage reopener dispute. Respondent has obtained a court stay of that proceeding too.³

On December 11, Respondent gave notice to the Trades Council, to the Federal Mediation and Conciliation Service, and to the New York State Mediation Board that it reaffirmed its position that it had lawfully renounced the 1978-1982 contract and that, if that action was not effective, it would "become finally and fully effective 60 days thereafter."

It does not appear that FMCS or the NYSMB took any action thereon.

There is one remaining factual matter to be set out. Respondent relies on the following "most favored nations" clause in the 1978-1982 contract as a basis upon which it could lawfully renounce that agreement. That clause reads:

In consideration of your execution of the agreement (hereinafter referred to as the Hotel Association contract) between Hotel Association of New

² The General Counsel has observed that in the course of that lawsuit Respondent restated its alleged unlawful renunciation of the 1978-1982 agreement.

³ Its suit was removed to the Federal court which has pended the matter until the state court action involving the COLA dispute, discussed above, is resolved.

York City, Inc., New York Hotel and Motel Trades Council and various members of the Hotel Association, it is understood and agreed that if New York Hotel and Motel Trades Council and/or any of its affiliates shall make an agreement or other arrangement with another hotel association and/or with an individual hotel owner in the City of New York which does not include the union shop and/or check-off or which contains provisions and terms which you may consider more favorable than the terms of the Hotel Association contract, whether or not such terms and provisions would be construed by the Impartial Chairman as benefits or aids within the meaning of Paragraph 18 of said contract, then, in such event, you shall have the right to be released from the Hotel Association contract upon signing such other agreement.

Respondent asserts that one of the Trades Council's constituent locals, Local 6, has a more favorable contract with the Restaurant League of New York.

C. Analysis

The General Counsel and the Trades Council assert that the evidence is unequivocal that Respondent repudiated a valid collective-bargaining agreement in direct violation of the requirements of good-faith bargaining set out in Section 8(d) of the Act.

Respondent first asserts that the Board cannot, through the procedures under the Act, assert jurisdiction to review the actions of the Supreme Court of New York on the COLA claim or of the U.S. District Court on the wage-reopener matter. I view that statement as a contention that the Board must defer to whatever determinations those courts may make as to the merits of Respondent's assertion that it lawfully renounced the 1978-1982 contract. That contention lacks merit as it is now clear that the Board has primary jurisdiction in deciding alleged unfair labor practices under the Act.⁴

Alternatively, Respondent asserts that it lawfully terminated the contract by reason of its December 11 letter to FMCS and the NYSMB. I reject that assertion because Section 8(d) makes clear that a party cannot, in midterm, unilaterally rescind a collective-bargaining agreement.⁵

As a further alternative, Respondent contends that it was entitled by reason of the "most favored nations" clause in the 1978-1982 contract to renounce that agreement. There is no evidence however that there exists a more favorable agreement with another hotel association or hotel owner or that Respondent has signed any allegedly more favorable contract.⁶

⁴ *Kaiser Steel Corp. v. Mullins*, 102 S.Ct. 851 (1982).

⁵ *Teamsters Local 574*, 259 NLRB 344 (1981); *C & S Industries*, 158 NLRB 454, 457 (1966).

⁶ Respondent has asserted that it was willing to sign the contract that Local 6 (one of the Trades Council's members) has with the Respondent League of New York. It thus contends that the "most favored nations" clause of the 1978-1982 contract in this case exonerated its repudiation of that very contract. At best, that is an argument it might make in an arbitration proceeding to defeat the Trades Council's COLA claim or its efforts to reopen the wage portion of the contract. I find that Respondent's willingness to be covered by the Restaurant League contract does not

Respondent's letter of June 5 to the Trades Council and its subsequent efforts to frustrate the arbitration provisions of the 1978-1982 contract by seeking to void that very contract strike at the statutory rights of its employees' bargaining representative and constitute an unlawful repudiation of that contract.⁷

CONCLUSIONS OF LAW

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

2. The Trades Council is a labor organization as defined in Section 2(5) of the Act.

3. Respondent has, since June 5, 1981, failed and refused to bargain collectively with the Trades Council as the exclusive representative of the employees in the unit described in paragraph 4 below in that Respondent, on and since that date, unilaterally renounced the 1978-1982 agreement then in force between it and the Trades Council which covered those employees and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

4. The following employees comprise an appropriate bargaining unit:

All waiters, busboys, porters, bartenders, captains, kitchen employees and the cashier employed by Respondent at its restaurant in the Hotel Lexington in New York City excluding all other employees and all supervisors as defined in the Act.

REMEDY

In his posthearing brief, counsel for the General Counsel stated that the General Counsel does not seek an order requiring Respondent to withdraw its suits in the state court, one of which has been removed to a Federal court. I must infer from that statement that there is no reasonable prospect that those suits will adversely affect the Board's order although it appears obvious that, were Respondent to continue to press those actions, it would thereby be continuing to repudiate the obligations of the 1978-1982 contract in contravention of the remedial order provided below. I will defer to General Counsel's position. As noted above, the employees of Respondent were on strike, as of the date of the hearing, for a renewal contract. As it is questionable whether the Trades Council is desirous of having Respondent continue in force the terms of the contract it renounced on June 5, 1981, I shall provide that Respondent shall be required to do so only upon request therefor by the Trades Council.

Respondent asserts in its brief that no remedial order would be warranted as the 1978-1982 contract has expired. I reject that contention as a remedial order vindi-

give it the right to unilaterally repudiate the 1978-1982 contract as there is no evidence before me that the Trades Council had ever agreed that Respondent had such a right. The Board does not readily infer the waiver of contractual rights.

⁷ See *Hiney Printing Co.*, 262 NLRB 157 (1982), where the Board adopted a finding that a refusal to pay a COLA increase amounted to a renunciation of the principles of collective bargaining. That rationale clearly applies to Respondent's refusal to even arbitrate the COLA claim.

cates the public interest and is aimed at preventing a recurrence of the unlawful conduct.⁸

Lastly, I shall not provide a make-whole remedy as it is not clear if the unit employees were entitled to a COLA increase and as the amount of any such increases has not yet been determined. For the same reasons, I shall not order Respondent to make the unit employees whole for increases sought by the Trades Council under the wage-reopener clause.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Alameda Room Inc., d/b/a Chateau Madrid, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Renouncing, during its term, any collective-bargaining agreement it has with New York Hotel and Motel Trades Council, AFL-CIO covering its employees in the unit described in Conclusions of Law.

(b) In any like or related manner interfering with, restraining, or coercing its employees as to their rights to be represented by a union of their own choice or as to any other rights they have under Section 7 of the Act.

⁸ *Boyer Ford Trucks*, 254 NLRB 1389, 1394 (1981).

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action.

(a) Mail a certified letter to the Trades Council within 5 days of this Order to inform it that Respondent will no longer repudiate, during the terms of any agreement it has with the Trades Council, that agreement unless it has the Trades Council consent therefor.

(b) Upon request of the Trades Council, reinstate and comply with the provision of the contract it unlawfully renounced on June 5, 1981.

(c) Post at its restaurant in the Hotel Lexington (and, if its employees are still on strike, mail to them at their home address via certified mail) copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

¹⁰ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."