

**Bultman Enterprises, Inc. d/b/a Le Rendezvous Restaurant and Taber Partners I d/b/a Ambassador Plaza Hotel & Casino, A Radisson Plaza Hotel and Union Gastronomica De Puerto Rico, Local 610, HEREIU, AFL-CIO.** Case 24-CA-7129

September 25, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On April 14, 1997, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> which found that Respondent Taber Partners I d/b/a Ambassador Plaza Hotel & Casino, A Radisson Plaza Hotel (the Hotel) violated Section 8(a)(1) of the National Labor Relations Act by threatening its employees with discharge because of their union activities and membership in the Union. The Board ordered the Hotel to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act. The Board also found that Respondent Bultman Enterprises, Inc. d/b/a Le Rendezvous Restaurant (Bultman), a successor to the Hotel, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, by failing to supply the Union with requested information, by unilaterally lowering the restaurant employees' wages, and by otherwise departing from the terms of the Union's collective-bargaining agreement with the Hotel,<sup>2</sup> and violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment and by refusing to hire a substantial portion of the Hotel's restaurant employees because of their affiliation with the Union.

The Board, however, severed for further consideration the issues of the joint employer status of the Hotel and its joint liability for the unfair labor practices engaged in by Bultman. The Board stated that it was severing those issues in light of the oral argument held in the then-pending cases of *Jeffboat Division, American Commercial & Marine Services Co.*, and *T. T. & O Enterprises, Inc.*, 9-UC-405; *M.B. Sturgis, Inc.*, 14-RC-11572; and *Value Recycle, Inc.*, 33-RC-4042.

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

On review of the judge's decision and the record relating to the joint employer issue in light of the Hotel's ex-

ceptions and briefs, we have decided to affirm the judge's finding that the Hotel is a joint employer with Bultman of the restaurant employees.<sup>3</sup>

In its recent decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000), however, the Board declined to reexamine or change extant Board precedent concerning the joint employer standard.<sup>4</sup> Thus, as stated in *Sturgis*, slip op. at p. 4:

Under current Board precedent, to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Riverdale*, 317 NLRB at 882, citing *TLL, Inc.*, 271 NLRB 798 (1984).

Here, we find that the judge correctly applied that precedent to the facts of the present case in concluding that the Hotel and Bultman are joint employers. In sum, the judge based his joint employer finding on the Hotel's active involvement in Bultman's hiring of a nonunion work force to replace the Hotel's existing work force, and the terms of the concession agreement between the Hotel and Bultman. This agreement gave the Hotel the right to require Bultman to (1) ensure that its employees adhere to all rules established by the Hotel for its own employees; (2) demand attendance of Bultman's employees at orientations for the Hotel's employees; (3) discipline and/or discharge any Bultman employees whom the Hotel finds objectionable; and (4) "quit and surrender" the concession area to the Hotel in the event Bultman defaulted in fulfilling any of the covenants of the concession agreement. Indeed, the record shows that the Hotel exercised the authority granted to it by the concession agreement, at least through its involvement in the hiring and disciplinary process.<sup>5</sup> Accordingly, for all these reasons, we agree with the judge that the Hotel is a joint employer with Bultman of the restaurant employees.

On the basis of the joint employer finding, the General Counsel seeks an order requiring the Hotel to make whole the employees affected by Bultman's violations of Section 8(a)(3) and (1) of the Act. The leading Board

<sup>1</sup> 323 NLRB 445.

<sup>2</sup> As noted *infra*, Bultman and the Hotel are joint employers. However, the General Counsel does not seek a finding that the Hotel violated its duty to bargain or a remedial bargaining order that runs to the Hotel as well as Bultman. Thus, the bargaining order runs only to Bultman and is confined to those terms and conditions of employment controlled by Bultman.

<sup>3</sup> In doing so, we find it unnecessary to rely on *Thriftown, Inc.*, 161 NLRB 603 (1966); and *Globe Discount City*, 171 NLRB 830 (1968), discussed by the judge.

<sup>4</sup> See *M.B. Sturgis*, 331 NLRB No. 173, slip op. at 2.

<sup>5</sup> See *Le Rendezvous Restaurant*, 323 NLRB 445, 454 fn. 16 (1997).

case on joint employer liability for discriminatory employment actions is *Capitol-EMI Music*, 311 NLRB 997 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994), which was not cited by the judge.

Although *Capitol-EMI* differs from this case in that the joint employer relationship there involved a situation where one employer supplied employees to a second employer, the test for joint liability applies equally as well to the facts here. Thus, in order to determine whether the Hotel is jointly liable for the remedial obligations of Bultman, we apply the allocation of burdens established in *Capitol-EMI*, 311 NLRB at 1000:

The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, *if* it knew, it took all measures within its power to resist the unlawful action.

Here, the first prong of the test is met because, as stated above, we agree with the judge that the Hotel and Bultman are joint employers of the group of employees that work in Le Rendezvous Restaurant. The second prong of the test is also satisfied because, as found in our previous decision, Bultman discriminatorily refused to consider for employment and refused to hire the Hotel's restaurant employees because of their union affiliation.

Thus, in order to escape liability, the Hotel must show that it did not know, nor should it have known, of the reasons for Bultman's discriminatory actions against the employees, or that it knew but did all it could to prevent the unlawful actions. We find that the Hotel has failed to meet this burden. First, the fact that the Hotel knew that Bultman was seeking to discriminate against union-represented employees is evidenced by the comments of the Hotel's general manager, Ralph Morales, written as a response on a memo from Bultman to him. The memo stated that in order to run the restaurant successfully, all union-represented personnel, except for some 10 to 12 employees, would have to be discharged. In his responsive comments on the memo, Morales urged Bultman not to retain *any* union-represented personnel for fear they might be "contaminated," i.e., hold prounion sympathies. Further evidence of the Hotel's knowledge of Bultman's discriminatory activity is the fact that after the union-represented employees were discharged, interviews for new employees took place at the Hotel, and the chief of

the Hotel's food and beverage department, Noel Garcia, participated in interviewing the job applicants. Despite the fact that many former employees of the Hotel's restaurant had submitted applications, none were interviewed. When employee Juan Colon asked why, Garcia replied that those were the orders from Bultman. Thus, it is clear that the Hotel knew not only that Bultman was seeking to discriminatorily avoid hiring any union-represented employees, but that the Hotel also assisted in the discrimination. Having been a willing participant in the discrimination, the Hotel clearly cannot escape liability by showing that it "took all measures within its power to resist the unlawful action," as required by *Capitol-EMI*.

For the reasons stated above, we find that the Hotel is jointly liable for Bultman's violations of Section 8(a)(3) and (1), and we shall so provide in our remedial Order.

#### ORDER<sup>6</sup>

The National Labor Relations Board orders that the Respondent, Taber Partners I d/b/a Ambassador Plaza Hotel & Casino, a Radisson Plaza Hotel, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing to consider for employment, failing to hire, or otherwise discriminating against its employees because of their union affiliation.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to all the following employees, whose names are set forth below, and all other persons formerly employed in the food and beverage department who were not hired as of December 1, 1994, full reinstatement to the positions denied them or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or privileges previously enjoyed, discharging, if necessary to make room for them, employees hired from sources other than the employees who were formerly employed by the Respondent Ambassador Plaza Hotel & Casino, in the food and beverage department:

Juan Colon Marin	Carmen Silva Rivera
Juanita Vega Laguer	Carmen Gisela del Prado
Lesley Ann Vazquez	Julio Alvarez
Elke Feliciano Torres	Jesus Rivera Molla

<sup>6</sup> Because the record shows that the majority of the Hotel's employees are Spanish-speaking, we order the notices to be posted in both English and Spanish.

Luisa M. Pagan	Gladys Zambrana
Guillermo Guirona Figueroa	Mariano Anderson Hilton
Rafaela Pastrana Ramirez	Carlos Martinez Negron
Maria Lepin Castro	Cesar S. Miranda
Julian Reyes	Margarita Colon Roman
Jorge De Jesus Suarez	Jose N. Tubens Velez
Carmen D. Robles	Francisco Martinez Negron
Damaris Pimentel	Sixto Alicea
Antonio Valentin Mercado	Allan Roberto Gonzalez
Margarita Ortiz Reyes	Herenio De Jesus
Gilda Crescioni Ortiz	Olga Gonzalez

Luis Omar Rosario Perez	Edwin Gonzalez
Evelyn Gonzalez Vazquez	Carmelo Mercado
Rafael Negron Calderon	Juan Montanez Gonzalez
Hilda Martinez	Pablo Negron Diaz
David Negron	Raquel Ortiz Montero
Jeanette Vargas	Angelita Pardo
Miguel A. Martinez	Carmen Lidia Perez
Lazara Fleites	Benito Pena Rodriguez
Isidro Lebron	Jose Luis Ramos
Wilfredo Diaz Torres	Blanca Roman Colon
Jesus Ramon	Milagros Sierra
Lourdes M. Rivera	Wilbert Vazquez

(b) Make the above employees whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusals to consider for employment or to hire the employees named above, and within 3 days thereafter, notify them in writing that this has been done and that the refusals to consider and hire them will not be used against them in any way.

(d) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, written in both English and Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Hotel's authorized representative, shall be posted by the Hotel 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 Hotel to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Hotel has gone out of business or closed the facility involved in these proceedings, the Hotel shall duplicate and mail, at its own expense, a copy of the notice in English and Spanish to all current employees and former employees employed by the Hotel at any time since February 13, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Hotel has taken to comply.

#### 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to consider for employment, failing to hire, or otherwise discriminating against our employees because of their union affiliation.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer to all the following employees, whose names are set forth below, and all other persons formerly employed in the food and beverage department by us who were not hired as of December 1, 1994, full reinstatement to the positions denied them or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or privileges previously enjoyed, discharging, if necessary to make room for them, employees hired from sources other than the employees who were formerly employed by us in our food and beverage department:

<sup>7</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the wording in the notice reading "Posted by an 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."

Juan Colon Marin	Carmen Silva Rivera	Miguel A. Martinez	Carmen Lidia Perez
Juanita Vega Laguer	Carmen Gisela del Prado	Lazara Fleites	Benito Pena Rodriguez
Lesley Ann Vazquez	Julio Alvarez	Isidro Lebron	Jose Luis Ramos
Elke Feliciano Torres	Jesus Rivera Molla	Wilfredo Diaz Torres	Blanca Roman Colon
Luisa M. Pagan	Gladys Zambrana	Jesus Ramon	Milagros Sierra
Guillermo Guirona Figueroa	Mariano Anderson Hilton	Lourdes M. Rivera	Wilbert Vazquez
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Rafael Negron Calderon	Juan Montanez Gonzalez		
Hilda Martinez	Pablo Negron Diaz		
David Negron	Raquel Ortiz Montero		
Jeanette Vargas	Angelita Pardo		

WE WILL make the above employees whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusals to consider for employment or to hire the employees named above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusals to consider and hire them will not be used against them in any way.

TABER PARTNERS I D/B/A AMBASSADOR PLAZA  
HOTEL & CASINO, A RADISSON PLAZA HOTEL