

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

JOLLY'S BAR AND GRILLROOM

Employer/Petitioner

and

Cases 4-RM-1247 and 4-RM-1248

HOTEL EMPLOYEES & RESTAURANT
EMPLOYEES INTERNATIONAL UNION,
LOCAL 274

Union Involved

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union Involved is a labor organization within the meaning of Section 2(5) of the Act.
4. The Employer/Petitioner (herein called the Employer) operates a restaurant in the Latham Hotel in Philadelphia, Pennsylvania (herein called the Restaurant). The Employer filed the petitions in these cases pursuant to Section 9(c)(1)(B) of the Act requesting an election in a unit of bartenders, cooks, waiters, and waitresses employed at the Restaurant.¹ In support of the petitions, the Employer contends that the Union Involved (herein called the Union or Local 274) has demanded recognition as the representative of the petitioned-for unit.² Local 274 maintains

¹ There are about 12 or 13 employees in the requested unit.

² The Employer attached to its post-hearing brief two handwritten statements. Local 274 moved to strike the Employer's entire brief on the ground that these documents were improperly submitted. As the Employer has

that it has not demanded recognition and has disclaimed interest in representing the Employer's employees.

Local 274 represented employees who worked for Michelle's, a restaurant that once occupied the space now occupied by the Restaurant.³ In about late November 2000, Charles Murphy, a business agent of Local 274, telephoned Jolyon Weldon, the Restaurant's owner. According to Weldon, Murphy said that he understood that Weldon was negotiating to lease the restaurant space located at the Latham Hotel, and that he wanted Weldon, "to know now that that is going to be a union shop. If it's not union there's going to be trouble . . . It's always been a union shop." Weldon told Murphy that he had not yet signed a lease. In December 2000, Murphy called Weldon again and told him that Local 274 had caused another restaurant to cease negotiations for space at the Latham. Murphy also indicated that, "there's going to be a union shop and you're going to be union. You should sit down with us and recognize us." Weldon signed the lease on January 15, 2001⁴ and opened the Restaurant to the public on April 12.⁵

In about late March, a Local 274 leaflet and about five to ten authorization cards were found in the Restaurant's kitchen, and the same leaflet and one authorization card had been slipped under Weldon's office door. The leaflet, among other things, urged employees to seek a union contract and provided contact information for Local 274.

The day the Restaurant opened to the public, Weldon found a letter from R. Thurston Hyman, Local 274's President and Business Manager, on the maitre d' stand in the Restaurant. The letter read, in pertinent part:

This correspondence is to inform you that H.E.R.E. Local 274 AFL-CIO is setting up an informational picket line for the purpose of truthfully advising the public that you do not employ members of, or have a contract with, our organization. We will not interfere with pickups or deliveries, or ask other companies to not do business with you. We will, however, request the public to not patronize your establishment. This is not an attempt to organize your employees.⁶

Before the Restaurant opened that day, several Union representatives walked through the Restaurant and distributed leaflets, authorization cards, and pamphlets. From that date through October 2, Union representatives regularly picketed and handbilled on the sidewalk outside the Restaurant. For the first few weeks, the number of pickets varied from four to 20. Picketing

sought to include evidence not in the record by attaching documents to its brief, Local 274's motion is partially granted and the attachments are hereby stricken. The attachments will not be considered in resolving the issues in the subject cases. The motion to strike the entire brief is denied. See *Southern Florida Hotel and Motel Association*, 245 NLRB 561, 570, fn. 6 (1979), *enfd.* in pertinent part, 751 F. 2d 1571 (11th Cir. 1985); Board's Rules and Regulations 102.68.

³ Michelle's closed more than five years ago.

⁴ Unless otherwise specified, all dates are in 2001.

⁵ Murphy did not testify at the hearing.

⁶ The letter also asked the Employer to contact Local 274's attorney with any "questions or difficulties in this matter"

occurred about three to four times a week during the lunch and dinner hours.⁷ Joseph McCarthy, an organizer of Local 274, directed the picket line. Local 274 Organizing Director Kevin Smith and Murphy also picketed at times at the Restaurant. Smith and McCarthy testified that the purpose of the picket line was not organizational, but to inform the public that union members no longer work in that restaurant space. The picketers distributed two similarly worded leaflets asking the public not to patronize the Restaurant. A waiter at the Restaurant testified that Local 274 picketers handed both leaflets to him. One of these leaflets stated:

Please tell Jolly's that they are not treating the workers who worked here at this location for years, fairly, because they refuse to hire them. Jolly's restaurant does not employ members of, or have a contract with, Hotel Employees and Restaurant Employees Local 274, AFL-CIO. Tell Jolly this behavior will not be tolerated in our city!⁸

Picketers also carried a sign that read, "Jolly's does not have a contract with Hotel Employees and Restaurant Employees Local 274 AFL-CIO."

In late May, Murphy became Executive Vice-President, the Union's second highest position.⁹ On Friday, August 10, Weldon telephoned Murphy and said that Local 274 had been picketing for approximately four months and asked what Murphy wanted from him. Murphy requested a face-to-face meeting, and they met at a restaurant about 45 minutes later. According to Weldon, he again asked what Murphy wanted, and Murphy replied, "We want you to recognize us. We want you to abide by the terms of the contract that's in force and we would like you to give the four or five people who used to be employed there the opportunity to be rehired." Weldon said he did not know anything about the contract, and Murphy responded that Weldon could get one from the Latham Hotel's general manager.¹⁰ Weldon said that he would think about the matter and get back to Murphy, and Murphy stated that Local 274 was planning a big protest that week.

On Monday, August 13, approximately eight to twelve Local 274 picketers appeared in front of the Restaurant and used drums, bullhorns, and whistles to make noise. They also taped leaflets to the Restaurant. The following day, Weldon received another letter from Hyman, which began:

I am the President and Business Manager of Local 274, and the only person authorized to speak on behalf of the Local in your matter. I am reminding you of my earlier letter that we do not intend to organize your employees at 17th and Walnut.

This letter then repeated the contents of Hyman's April 12 letter.¹¹

⁷ There were two breaks in picketing for about a week each time during this period.

⁸ The leaflet also listed Jolly's telephone number. Both leaflets also indicated in fine print that "Local 274 is not requesting any delivery or mechanical persons to withhold their services, at this time."

⁹ Murphy has subsequently negotiated contracts on behalf of the Union.

¹⁰ The Latham Hotel had a collective-bargaining agreement with Local 274.

¹¹ The Employer did not respond to either of Hyman's letters.

According to Weldon, on about September 4, outside the Restaurant McCarthy said to him “you’re going to be union.” McCarthy denies having said this. On September 17, a customer of the Restaurant asked a picketer what the picketing was about. The picketer replied that, “Jolly didn’t recognize the union and this was always a union restaurant in the past,” and that the Employer was not “hiring union people.”

At the hearing, the Union disclaimed interest in representing employees at the Restaurant. According to Hyman, Local 274’s standard method of requesting recognition is to present to the employer a letter along with authorization cards from a substantial number of employees. Hyman also asserted at hearing that Murphy did not have the authority to demand recognition from the Restaurant, and he sent the August 14 letter after hearing about the conversation between Murphy and Weldon.¹² Hyman denied that Local 274 sought to obtain authorization cards from employees at the Restaurant and asserted that the picket line’s purpose was strictly informational.

The Board has consistently construed Section 9(c)(1)(B) as requiring evidence of a union’s “present demand for recognition” as the majority representative of the employer’s employees before the employer’s petition will be processed. *Rapera, Inc.*, 333 NLRB No. 153, slip op. at 1 (May 2, 2001); *New Otani Hotel & Garden*, 331 NLRB No. 159, slip op. at 1 (2000). A present demand for recognition may be expressed in a variety of ways, including verbal and written communications, picketing and demonstrations. *Rusty Scupper*, 215 NLRB 201 (1974); *Holiday Inn of Providence-Downtown*, 179 NLRB 337 (1969). A demand may also be established if a union informs an employer that its picketing would cease if the employer signs a contract with the union. *Windee’s Metal Industries*, 309 NLRB 1074, 1076 (1992). However, informational picketing, without more, is not sufficient to establish a present demand for recognition. *New Otani Hotel & Garden*, supra, slip op. at 2; *Windee’s Metal Industries*, 309 NLRB at 1075. The Board must analyze the circumstances to determine whether, “in the context of other related events it appears that an object of the picketing is to press upon the employer a demand for immediate recognition.” *Capitol Market No. 1*, 145 NLRB 1430, 1431 (1964).

A union’s valid disclaimer of interest in representing employees may demonstrate that there is no present demand for recognition. *New Otani Hotel & Garden*, supra; *Capitol Market No. 1*, supra (1964). In *Capitol Market*, however, the Board noted that it:

[I]s not compelled to find a valid and effective disclaimer just because the union uses the word, and regardless of the other facts in the case. Thus, a purported disclaimer can scarcely be credited . . . where the union engages in other conduct which in context is clearly at variance with its asserted disclaimer. The question must be decided in each case whether the union has in truth disclaimed, or whether the alleged disclaimer is simply sham

Id. at 1431-32. Thus, the Board will reject self-serving disclaimers where the union acts inconsistently with the disclaimer, and a present demand for recognition may continue to exist

¹² Hyman testified that he has not spoken to Murphy about this conversation.

where the union engages in postdisclaimer picketing. *Windee's Metal Industries*, supra at 1076; *Rusty Scupper*, supra.

Murphy, initially as a business agent and later as Executive Vice-President of Local 274,¹³ verbally demanded recognition as the exclusive bargaining representative of the petitioned-for employees. In November and December, Murphy told Weldon that the Union expected recognition from the Restaurant after it opened and threatened “trouble” if the Employer did not comply. After the Union had picketed for several months, on August 10 Murphy unequivocally told Weldon that the Union wanted the Employer to recognize it and to adhere to the terms of Local 274’s contract with the Latham Hotel. Murphy added in the same conversation that the Union was planning a big protest, thus linking the recognition demands to the picketing, and the following Monday, Local 274 engaged in noisy and boisterous picketing in front of the Restaurant. Additionally, in explaining the reasons for the picketing, a picketer told a customer that the Employer did not recognize the Union. See *Avis Rent-A-Car System, Inc.*, 280 NLRB 580 fn. 1 (1986) (union responsible for picketers’ picket line conduct). The Union did not confine its communications to the public but also communicated with employees. Thus, Local 274 authorization cards and pro-Union literature were left in the Restaurant in March before it opened, and the Union distributed cards and literature there on April 12 before it opened. Picketers also handed leaflets to at least one Restaurant employee on more than one occasion. See *Rusty Scupper*, supra. The evidence thus establishes that the Union did far more than engage in informational picketing and that it demanded immediate recognition from the Employer.

Local 274 contends that the Union should not be found to have made a present demand for recognition because it disclaimed interest in representing the Restaurant’s employees in Hyman’s April 12 and August 13 letters to Weldon, as well as in its leaflets and at the hearing. In particular, the Union notes that Hyman’s letters denied that an object of the picketing was representational or that Local 274 wanted to organize the Restaurant’s employees, and in the second letter he indicated that he was the only person authorized to speak on behalf of the Union. The Union’s two highest-ranking officials, however, gave conflicting messages to the Employer. Hyman’s initial “disclaimer” letter, indicating that the Union was not attempting to organize the Restaurant’s employees, was dated the same day as the Local 274 distributed authorization cards to the Restaurant’s employees. Even after President Hyman’s initial “disclaimer,” Executive Vice-President Murphy demanded recognition and threatened a major protest, a threat that the Union soon acted upon. Moreover, Hyman has never expressly disavowed Murphy’s statements to Weldon that Local 274 was seeking recognition, nor has he even spoken to Murphy about his conversations with Weldon. Notwithstanding Hyman’s communications, the Union continued to picket for several months. *Rusty Scupper*, supra. Therefore, I find that despite the purported disclaimers, Local 274 never abandoned its purpose to press a demand for immediate recognition on the Employer. *Rusty Scupper*, supra; *Holiday Inn of Providence-Downtown*, supra; *Capitol Market No. 1*, supra. Cf. *Windee's Metal Industries*, supra; *New Otani Hotel & Garden*, supra.¹⁴

¹³ As business agent and later as Executive Vice-President of Local 274, Murphy possessed at least the apparent authority to act on the Union’s behalf. See *Yellow Freight System of Indiana*, 327 NLRB 996, 1002 (1999); *Bartenders Local 2 (Zim's Restaurants)*, 240 NLRB 757, 759 (1979).

¹⁴ In *Windee's Metal Industries*, the Board found that the union’s picketing did not establish a “present demand for recognition,” but in that case the union never requested or demanded recognition and did not engage in any conduct other than picketing. *New Otani Hotel* is similarly distinguishable because, the Board found that “there

Based on the foregoing, I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. The parties stipulated to the appropriateness of the unit. Accordingly, I shall direct an election in the following unit:

All full-time and regular part-time bartenders, cooks, waiters and waitresses employed by the Employer at Jolly's Restaurant located in the Latham Hotel at 135 South 7th Street, Philadelphia, Pennsylvania, excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,¹⁵ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO, LOCAL 274

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior*

is no evidence to indicate that the Union at any time conveyed to the Employer any claim, written or oral, that it represented its employees or that it was seeking immediate recognition or a contract."

¹⁵ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **November 8, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **November 15, 2001**.

Signed: November 1, 2001

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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