

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

PALACE RESORT ST. THOMAS, LLC. d/b/a
GRAND BEACH PALACE RESORT¹

Employer

And

Case 24-RC-8391

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein the Act, a hearing was held on July 1, 2004, before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine an appropriate unit for collective bargaining. 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:²

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹The name of the Employer appears as amended at the hearing.

²The Petitioner submitted a brief which has been carefully considered. On July 20, 2004, the Employer submitted a brief by facsimile transmission; however, it is rejected pursuant to Section 102.114(g) of the Board's Rules and Regulations which preclude the filing of briefs in this manner. Additionally, by motion dated July 15, 2004, the Petitioner requested the re-opening of the record to include additional evidence consisting of two sworn statements. However, as the Petitioner failed to present any reason why this

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 as discussed below.³

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. 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.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of section 9(b) of the Act. ⁴

INCLUDED: All full-time and regular part-time maintenance and service employees employed by the Employer at its resort in St. Thomas, United States Virgin Islands including engineers, painters, groundkeepers, maintenance helpers, housekeepers, floor supervisors, bartenders, dishwashers, waitresses and waiters, cooks and cook helpers, front desk clerks, PBX operators, bellmen and cashiers.

EXCLUDED: All other employees including office clerical employees, confidential employees, managers, guards and supervisors as defined by the Act.

There are approximately 220 employees in the unit.

evidence was not previously available and therefore newly discovered, the same is hereby rejected. In any event, in view of my determination to direct an election, Petitioner's motion is moot.

³The Employer operates a resort hotel and is engaged in hospitality services in St. Thomas, U.S. Virgin Islands. During the past fiscal year, the Employer derived gross revenues in excess of \$500,000.00 and purchased goods and materials valued in excess of \$50,000 from customers located directly outside the USVI.

⁴ The petition was amended at the hearing to exclude the classifications of wine steward and reservation agents. In addition, the Petitioner corrected its petition to designate the classification of "room inspectors" as floor supervisors. By incorporating this correction the Petitioner stated that it is not conceding that these employees are supervisors under Section 2(11) of the Act.

I. The Issues⁵

There are two issues to be decided in this case. First, whether the imminent closing of the hotel precludes the holding of an election as alleged by the Employer, and secondly, whether the five individuals occupying the position of floor supervisors are supervisors within the meaning of Section 2(11) of the Act.

For the reasons set forth below, I conclude that the evidence is insufficient to support the Employer's asserted claim that the hotel will close imminently and therefore an election is directed. I further conclude that the five individuals in the classification of floor supervisors are not supervisors under Section 2(11) of the Act as they do not possess the requisite indicia of independent authority which would warrant their exclusion from the unit.

II. The Imminent Cessation Issue

On November 6, 2003, The Grand Beach Palace, a Mexican owned corporation, purchased the Renaissance Hotel, a 290-room resort in St. Thomas. José Luis Entrala Fabregas, the Employer's general manager, testified that since the hotel began operations it had experienced low occupancy rates, a trend that has continued to date. According to Fabregas, these low occupancy rates and the hotel's alleged physical deterioration have caused financial losses of approximately 1.5 million dollars.⁶ According to Fabregas these factors prompted the Employer to decide to close the facility for a period of up to six months effective August 28, 2004 in order to perform renovations and refurbishing. It is anticipated that the cost of the renovations will be 12 million dollars. However, the general manager testified that despite this investment it is not certain whether the hotel will ever reopen. He asserted that the reopening of the hotel was contingent on factors such as obtaining governmental EDC

⁵ By motion, the Employer challenged the Petitioner's showing of interest in support of the instant petition as tainted. It is well established that the showing of interest requirement is an administrative matter adopted by the Board to determine if further proceedings are warranted. Thus, this issue will be handled administratively and the parties will be informed of the Region's determination in a separate letter. Sheffield Corp., 108 NLRB 349, 350 (1954); See also, Lotus Suites, Inc., 309 NLRB 1313, 1330 (1992).

benefits⁷, achieving substantial occupancy, bringing the property up to standards, and completing the renovations.

In furtherance of its decision to close the hotel, and in order to comply with WARN,⁸ the Employer notified certain employees by letter on June 30, 2004⁹ of its decision to close.¹⁰ The letter stated that due to “circumstances beyond their control,” such as low occupancy and the need to renovate the hotel, the hotel would close on August 28, 2004. The letter also advised employees that the Employer would invest 12 million dollars in renovations and that they would pay “severance pay” to some of the employees. The record reflects that on this same date the Employer also notified the Governor and the Commissioner of the Virgin Islands’ Department of Labor of its intention to indefinitely close the hotel. The letter to the Government officials did not advise that the hotel was closing on a date certain although it did state that the employees would be terminated.

The record reflects that the Employer had initially advised its employees that it would renovate the facility by sections. However, at some time this structured plan purportedly changed to that of a close down for a period of at least six months.¹¹ In support of its plan to close its operations imminently, its general manager explained that he had personally seen many different blue prints of the renovations, including two pictures of what the renovated and

⁶ The Employer presented no documentary evidence regarding the terms of the sale, the losses due to occupancy and the alleged physical deterioration of the hotel premises.

⁷ The Economic Development Council (EDC) is a governmental entity created to assess and recommend the granting of economic benefits to local industries in an effort to promote employment and diversification of the economy. As explained by EDC’s board member and union representative Randolph Allen, the EDC receives applications from local employers, holds public hearings, and makes recommendations to the Governor who then grants the final approval.

⁸ The Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. sec. 2101, et. seq., was passed by Congress in 1988 and requires certain employers to give employees sixty-day advance notice of the closing of operations.

⁹ The instant hearing was held the following day.

¹⁰ The testimonial evidence indicates that only those employees who worked on June 30th, and who entered or left their respective work areas through the employees’ gate, were handed a copy of the letter. The record shows that the Employer planned on giving the letter later to these employees who did not work on the 30th.

refurbished rooms should look like. He also testified that he met with the hotel management staff in order to notify them about the closing,¹² and that on June 30th he sent an electronic notification (email) to its reservation agents officially requesting the cancellation of all booked reservations for the month of September 2004.¹³ Although the hotel has not advised the general public about its imminent closing the general manager indicated that it would notify the public on the day after the hearing.

With respect to the actual renovation of the facility, the general manager testified that as far as he knew no contractor had been hired to perform the renovations the Employer planned to start in September 2004. Additionally, he was unable to say for sure that the renovation work would begin in September 2004.¹⁴ Also, while the general manager testified that as far as he knew the Employer had not made financial arrangements with any bank regarding the projected \$12 million dollar renovation cost, he stated that he believed that the money would come from its home office in Mexico.

With regard to the employees' future employment, the general manager explained that no bargaining unit employees would remain employed after August 28th. It appears from the record that in the event the Employer closes and discharges some or all of the current employees, nevertheless the general plan is to re-open. The general manager also explained that during the renovation period the Employer expected to hire and train new employees. When asked whether the hotel would hire any of the current employees, he stated that he was not certain but then clarified that the hotel would hire current employees only after they received the appropriate training in order to conform to the Employer's operating standards. According to

¹¹ The testimony is unsupported by documentary evidence in this regard and the record is devoid of information setting forth the reasons for the change. It should be noted that the general manager had no recollection as to when these initial plans changed.

¹² The record does not reflect the date on which this alleged meeting took place.

¹³ This testimony is unsupported by documentary evidence.

¹⁴ The record shows that one contractor was hired by the Employer in order to set up a show room. A show room is a fully decorated room displaying the decoration and furnishing trend of the hotel rooms. The Employer, however, was not pleased with the contractor's work product.

Union representative Randolph Allen, in a meeting held at the Union's office on June 30th, the president for the Employer said that all employees were being terminated but nevertheless some would be rehired after the hotel reopens if they pass the training.

Analysis

The evidence fails to support that the Employer has taken concrete measures toward ceasing its operations on August 28, 2004. Rather, its assertions are general, speculative and unsupported by any objective evidence. I note initially that the general manager could not conclusively state that the anticipated renovations would even occur. In this respect, although the general manager acknowledged that the Employer intended to renovate, it could not definitively describe the nature or extent of the renovation.¹⁵ Additionally, as of the day of the hearing no contractor had been hired and no bids have been solicited from contractors to perform the renovation. Also, the fact that the Employer is currently processing permits as required by local law is also unsubstantiated by documentary evidence. Regarding the training program mentioned in the WARN letter, the general manager acknowledged that such training has not been agreed to or finalized with the V.I. Department of Labor.¹⁶

Although generally the Board will not direct an election when there is insufficient time between the selection of a bargaining representative and the cessation of an Employer's operations to allow for effective bargaining, in the instant case the record evidence fails to demonstrate probative evidence to show that the Employer's cessation is certain and imminent. There is no objective evidence to show that the decision to renovate and refurbish the hotel has been methodically carried forward other than letters sent after the petition was filed to employees and representatives of the local government. Significantly, there is no evidence of any agreement to contract out the renovation work or even that it has been put out for bids and

¹⁵ In explaining what changes had occurred to the intended plans, the general manager only made general reference to changes in the blueprints.

no information was provided regarding any entity interested in doing this work. (Compare, Hughes Aircraft Co., 308 NLRB 82 (1992) where the employees were notified early on and informed of transition plans and dates, and contractors were selected and agreements signed.) Clearly there is uncertainty that the Employer will close its operations on August 28, 2004 in order to renovate. Mere speculation as to the uncertainty of future operations is not sufficient to dismiss the petition. Hazard Express, Inc., 324 NLRB 989, 990 (1997); Canterberry of Puerto Rico, Inc., 225 NLRB 309 (1976).

III. The Housekeeping Floor Supervisors

The Employer, contrary to the Petitioner, alleges that five employees classified as floor supervisors in the housekeeping department are statutory supervisors. In this regard, the Employer contends that the housekeeping floor supervisors possess the requisite indicia of independent authority and responsible direction of employees which would warrant their exclusion from the unit as statutory supervisors.

The record reflects that the floor supervisors are supervised by Mary Ann Mathias, Housekeeping Manager, and Mr. Fabregas.¹⁷ The record also reflects that the floor supervisors essentially enforce certain quality control standards set by the hotel. In this respect, the floor supervisors inspect the daily room cleaning performed by housekeeping employees to check that the rooms are cleaned according to Employer guidelines as set forth in a document entitled "room standards list."¹⁸ If the rooms do not conform to the hotel's standards, the floor supervisors are authorized to have housekeeping employees redo the room. The duties of floor

¹⁶ The WARN notice handed to certain employees of the Employer, and mailed to the governor and the Department of Labor, indicates that during the closing the hotel " anticipated providing training programs in cooperation with the Virgin Islands Department of Labor."

¹⁷ The record shows that Mary Ann Mathias conducted daily meetings with the housekeeping employees. Although it is not clear as to whether the floor supervisors are required to attend these meetings, floor supervisor Elizabeth Gumbs testified that she has attended these meetings.

¹⁸ Although the list refers to the role of the supervisor in maintaining the standards for room cleanliness, the record testimony shows that the list was provided to the housekeepers as well. The list details specific standards of cleanliness and sets forth certain required items such as the number and type of ingredients for the preparation of coffee and tea.

supervisors also include the training of housekeepers and assuring that housekeepers have sufficient supplies to perform their work. Occasionally, floor supervisors may also be called on to clean rooms themselves. The record reflects that the floor supervisors do not assign the rooms or sections to be cleaned by the housekeepers. Rather, these assignments are made directly by a manager or the office coordinator.¹⁹

With respect to wages, the record reflects that while the housekeepers earn \$7.85 an hour, the floor supervisors earn \$11.74 per hour. Like the other housekeeping employees, the floor supervisors record their work hours on time cards and receive compensation for overtime. Unlike the admitted supervisors of the floor supervisors who earn a fixed salary, the floor supervisors do not maintain employee time cards nor approve any leave requests. Although Ms. Gumbs claimed generally that she could recommend suspensions, discharges, or transfers, she admitted that she has never exercised such authority. Also, while she additionally testified that she has the authority to recommend that a housekeeper receive a written warning, she was unable to explain the basis for saying that her recommendation would be followed. In this regard, Gumbs admitted that she has never recommended any form of discipline.²⁰ She explained that if a housekeeper is not cleaning properly the floor supervisors could recommend a meeting with the general manager, an initiative that Ms. Gumbs has never exercised. Likewise, Ms. Gumbs has never been involved in the layoff or promotion of housekeepers and does not have the authority to hire or discharge housekeepers. The evidence further reflects that Ms. Gumbs has no authority to approve or recommend wage raises.

¹⁹ The record reflects that the room cleaning assignments are made by either the office coordinator or the manager. The record is devoid of the names of either one, however, the record does reflect that this is not a duty of the floor supervisors.

²⁰ Although Gumbs testified that an employee can be terminated after three written warnings, the Employer did not provide any evidence to support Gumbs' assertion. The Employer did submit a list setting forth the duties and responsibilities of the floor supervisors, which included among other duties, "administering discipline as needed." The signature of floor supervisor Salome Roberts appears on this document. It is noted that the Employer did not submit any evidence to support that this authority was ever exercised by a floor supervisor. Furthermore, Salome Roberts testified that she has never exercised such authority.

Analysis

Section 2(11) of the Act defines the term "supervisor" as:

".... any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment..."

The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. Somerset Welding & Steel, 291 NLRB 913 (1988). Designation of an individual as a supervisor by title in a job description is insufficient to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825, 826 (1979). The mere issuance of a directive or a job description setting forth supervisory authority is also not determinative of supervisory status. Bakersfield California, 316 NLRB 1211 (1995); Connecticut Light & Power Co., 121 NLRB 768, 770 (1958). Rather, the question is whether there is evidence that the individual actually possesses any of the powers enumerated in Section 2(11). Western Union Telegraph Company supra at 826; North Miami Convalescent Home, 224 NLRB 1271, 1271 (1976).

In Kentucky River Community Care, Inc., 121 S.Ct. 1861 (2001), the Supreme Court agreed with the Board that the burden of proving supervisory status rests on the party asserting that status. Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. Quadrex Environmental Co., 308 NLRB 101 (1992); Sears Roebuck & Co., 304 NLRB 193 (1991). Whenever evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established. Phelps Medical Center, 295 NLRB 486, 490-91 (1989).

The Employer argues that the Housekeeping Department floor supervisors are supervisors within the meaning of Section 2(11) because they exercise independent judgment

and responsibly direct the work of others when assigning tasks. The Employer also asserts that their job duties include implementing as well as effectively recommending discipline.

The evidence fails to establish the Employer's contentions. Regarding the responsible direction of housekeepers, the Employer relies on the fact that floor supervisors can ask a housekeeper to redo a room. However, this alone does not establish responsible direction as the standards that the floor supervisor is applying consist of written instructions. In applying these work requirements, the floor supervisors are not exercising independent judgment or exercising responsible direction over the work of the housekeepers. They are instead applying a pre-determined plan of action that is routine in nature. The Board has held that independent judgment is not required when requesting an employee to perform a specific task if the employee's responsibility for performing the task has been predetermined. Western Union Telegraph Company, supra. The record evidence reveals that the tasks performed by the floor supervisors are done in accordance with the Employer's set practice and protocols and thus, do not require the exercise of independent judgment. Kentucky River, supra at 1867.

There is no evidence that the floor supervisors make verbal recommendations to the general manager regarding the work performance of housekeeping employees or that they make any recommendations which impact on the wages or other working conditions of these employees.

There is no evidence in the record to support the Employer's assertion that floor supervisors have authority to impose discipline. Although the job description of the floor supervisors includes "administering discipline as needed," the evidence failed to show that any floor supervisor has ever effectively recommended or disciplined an employee.²¹ Thus, the Employer has not met its burden of establishing that the floor supervisors exercise or possess

²¹This is corroborated by the testimonies of both current floor supervisor Gumbs and Salome Roberts, a previous floor supervisor of the Employer.

supervisory indicia in the discipline of employees. Children's Farm Home, 324 NLRB 61, 66 (1997).

IV. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **United Steelworkers of America, AFL-CIO, CLC**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before 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 the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure 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

Underwear, Inc., 156 NLRB 1236 (1966); North Macon Health Care Facility, 315 NLRB, 359, 361 (1994); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, such list must be received in the NLRB Region 24 Regional Office, La Torre de Plaza Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico 00918-1002, on or before **August 5, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (787) 766-5478. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notices of Election

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to the Election provided by the Board in areas conspicuous to potential voters for a minimum of **three** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least **five** full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so stops the employers from filing objections based on nonposting of the election notice.

V. 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, 1099 14th Street, NW, Washington, D.C. 20570. The Board in Washington must receive this request by **August 12, 2004**.

Dated at San Juan, Puerto Rico, this 29th day of July 2004.



/s/

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