

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. 95-5(RD)
)	
WAYNE PERREIRA, CHARLES PEREIRA,)	ORDER NO. 1370
and EMILIANO MACADANGDANG,)	
)	ORDER DIRECTING ELECTION
Petitioners,)	
)	
and)	
)	
ILWU, LOCAL 142,)	
)	
Exclusive)	
Representative,)	
)	
and)	
)	
COCO PALMS RESORT,)	
)	
Employer.)	

ORDER DIRECTING ELECTION

On August 28, 1995, WAYNE PERREIRA, CHARLES PEREIRA, and EMILIANO MACADANGDANG (Petitioners), employees of COCO PALMS RESORT (Resort or Employer), filed a Petition for Decertification with the Hawaii Labor Relations Board (Board) seeking an election to decertify the INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142 (ILWU or Union) as their collective bargaining representative. On September 13, 1995, the Union filed a Motion to Dismiss Petition on the basis that an existing collective bargaining agreement (CBA) barred an election. After a hearing conducted on November 27, 1995, the Board issued Order No. 1291 dated February 14, 1996, denying the motion and directing an election. By letter dated February 28, 1995, the Union raised various arguments in opposition to an election being held. On

April 10, 1996, the Board held a hearing on the issues raised by the Union. The Employer and Union were represented by counsel and were given full opportunity to present evidence and argument to the Board. The Petitioners did not appear at the hearing. The Employer and the Union submitted post-hearing briefs on April 30, 1996.

Based on the record in this case the Board makes the following findings and conclusions and hereby directs an election.

Petitioners WAYNE PERREIRA, CHARLES PEREIRA and EMILIANO MACADANGDANG are employees as defined in § 377-1, Hawaii Revised Statutes (HRS).

COCO PALMS RESORT is an employer as defined in § 377-1, HRS.

The ILWU is a representative as defined in § 377-1, HRS.

The ILWU was certified by the National Labor Relations Board (NLRB) as the exclusive bargaining representative for employees of the Employer on November 19, 1990. The bargaining unit represented by the ILWU was described as:

All full-time and regular part-time employees, including food and beverage employees, housekeeping employees, front desk employees, sous chef(s), bell captain(s), inspectresses and night auditor(s) employed by the Employer at its Wailua, Kauai, Hawaii location; excluding the general manager, assistant general manager, sales department employees, department head secretaries, reservations manager, director of engineering, assistant director of engineering, administrative assistant, office clerical employees and back office employee(s), front desk manager, director of food and beverage, executive chef, catering manager, executive sous chef(s), banquet manager, executive steward, restaurant manager, Sea Shell manager, executive housekeeper, assistant

executive housekeeper, confidential employees, managerial employees, professional employees, guest services manager, guards and/or watchpersons and supervisors as defined in the Act, as amended.

On November 14, 1991, the Employer and the Union agreed to a contract covering the period from November 19, 1991 to August 31, 1995.

In early September, 1992, Hurricane Iniki struck the island of Kauai. Among the many properties which sustained serious damage from the hurricane was the COCO PALMS RESORT. Prior to the hurricane, the Resort was a 390-room hotel situated on forty-five (45) acres, with nine (9) tennis courts, a restaurant, a lounge, meeting rooms and banquet facilities, and a wedding chapel. The Resort employed approximately 140 employees, approximately 112 of whom were included in the bargaining unit.

As a result of hurricane damage, the Employer closed operations and within a few months after the hurricane struck, the Employer laid off all but three bargaining unit employees; EMILIANO MACADANGDANG and CHARLES PEREIRA, who are groundkeepers, and WAYNE PERREIRA, who is the engineer responsible for building, vehicle, and equipment maintenance. In October 1993, the Employer designated the 1992 layoffs as permanent and, accordingly, provided severance pay to all of the eligible bargaining unit employees. Pursuant to the CBA, by providing the terminated employees severance pay, their seniority and recall rights under the CBA were severed.

Since early 1993, the three Petitioners are the only bargaining unit members that have been employed by the Resort.

During the Board hearing on November 27, 1995, with respect to the Union's Motion to Dismiss, the Union introduced into evidence copies of check stubs and the Employer's Individual Deduction Register demonstrating that Union dues are being deducted from the paychecks of only the three Petitioners. The Employer's casual employees and security guards are not part of the bargaining unit. Nor are the three management employees included within the unit. Finally, the one remaining employee, Patrick Gaughan, who is listed on the payroll as having been a member of the bargaining unit prior to taking a long-term disability leave, quit his employment with the Resort in July 1991.

After the hurricane struck, the Employer was hopeful that the Resort would reopen in three to nine months. In June 1993, the Employer was still hopeful that a settlement would soon be reached with the insurance carrier, Aetna, and that reconstruction would thereafter take twelve (12) to eighteen (18) months. However, due to a dispute with the Employer's insurer the Resort has not been reconstructed. Accordingly, the Resort has never been reopened and there is no current guarantee that it will ever reopen.

In its post-hearing memorandum, the ILWU argues that the Board should not order an election because of the uncertainty as to when the Employer will reopen its hotel operation. It is contended that the three individuals identified by the Employer as eligible to vote do not satisfy the NLRB's test of a "substantial and representative complement" of employees found eligible to vote and that an election would "disenfranchise a substantial number of voters." The ILWU further argues that a decertification petition

involving a list of only three eligible voters is an attempt to sever the historically recognized unit of "Hotel Bargaining Unit Employees" originally set at 200 employees and at the time of Hurricane Iniki to be 112 employees. Therefore, ILWU argues that the petition should be dismissed because the unit in the petition is not co-extensive with the historically recognized unit.

Both the Employer and the Union agree that there is uncertainty as to when the Employer will reopen its hotel operations. Although the ILWU emphasizes that the Employer has presented no evidence that it has abandoned its option to rebuild the Resort and resume operations, the record is clear that there are currently no plans to reopen the Resort in the foreseeable future and whether or not the Employer will ever resume operations remains speculative. It is undisputed that except for the Petitioners, the bargaining unit employees who were laid off after Hurricane Iniki were permanently terminated in October 1993. Under such circumstances, the cases cited by the Union in support of its contention that an election would disenfranchise a substantial number of voters because the Employer does not have a substantial and representative complement of employees are inapplicable. In those cases an expansion or contraction of the bargaining unit was foreseeable or imminent. In this case no expansion in the number of employees is foreseeable and may well never take place. Refusing to direct an election would disenfranchise the current employees in the bargaining unit for an indefinite period of time.

Moreover, contrary to the assertion of the Union, the petitioned for unit is co-extensive with the NLRB certification and

the bargaining history. It is true that a majority of the employee classifications included in the unit are unfilled because the Resort is not functioning as it was prior to Hurricane Iniki. However, all eligible employees in the bargaining unit as described in the NLRB certification and the bargaining history will be afforded an opportunity to vote.

The ILWU also argues that COCO PALMS RESORT does not fall under the definition of "employer" as provided in § 377-1, HRS. The definition of "employer" in that section reads:

- (2) "Employer" means a person who engages the services of an employee, and includes any person acting on behalf of an employer, but shall not include the State or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

The Union's argument is that the Employer no longer provides hotel "services" and the primary services of the Employer operating as a hotel are not being performed by the three employees who allegedly make up the appropriate bargaining unit.

The reliance placed by the Union on the services provided by the Employer is misplaced. The definition of "employer" focuses on whether the Employer engages the services of an employee and not on the nature of services provided by the Employer. Clearly, the Employer engages the services of the employees involved herein and the services currently provided by the Employer, i.e., whether it is currently providing services as a hotel, is irrelevant to its status as an "employer" in § 377-1, HRS.

Finally, the Union contends that the failure of the Petitioners to attend the hearing on the matter precludes a

complete record for the Board to fully confirm a question concerning representation. The Board finds this argument to be without merit. Although the Petitioners did not appear, the case was fully litigated by able counsel from the Union and the Employer who presented evidence and arguments regarding the petition. The Board will not speculate as to the reason the Petitioners did not appear but finds that the record is sufficient for it to make its findings and conclusions.

Based on the foregoing, the Board finds that a question concerning representation exists and directs that an election be conducted in accordance with the terms and conditions set forth below.

DIRECTION OF ELECTION

1. SECRET BALLOT ELECTION. An election by secret ballot shall be conducted by a Board representative among eligible employees to determine whether or not the employees desire to be represented by the ILWU. The election shall be held at a mutually agreed upon time and place as indicated in the Notice of Election which shall be issued by the Board.

2. BARGAINING UNIT. The appropriate bargaining unit shall consist of the following:

INCLUDED: All full time employees, including food and beverage employees, front desk, maintenance, groundkeepers, chef(s), bell captains, inspectresses and night auditor(s) employed by Coco Palms Resort, Kapaa, HI.

EXCLUDED: General Manager, Assistant General Manager, front desk employees, sales department employees, department head secretaries, reservations manager, director of engineering, assistant director of engineering, administrative assistant, office

clerical employees and back office employees, front desk manager, director of food and beverage, executive chef, catering manager, executive sous chef(s), banquet manager, executive steward, restaurant manager, Sea Shell manager, executive housekeeper, assistant executive housekeeper, confidential employees, managerial employees, professional employees, guest services manager, guards and/or watchperson and supervisor as defined in the National Labor Relations Act as amended.

3. ELIGIBLE VOTERS. The eligible voters shall be those regular employees included within the unit described above who appear on the payroll of COCO PALMS RESORT as of September 30, 1996.

Employees who did not work during certain payroll periods because they were ill or on vacation or temporarily laid off and employees in the armed forces of the United States who present themselves in person at the polls are eligible. However, employees who have since resigned or been discharged for cause and have not been rehired or reinstated prior to the date of election are ineligible.

A list of eligible voters shall be submitted to the Board by the Employer by October 8, 1996 and approved by the ILWU. The list will be attached to the Notice of Election as Exhibit "A".

4. NOTICE OF ELECTION. The Board shall prepare and issue a Notice of Election. The Employer shall post copies of the Notice of Election at designated times and at such places on the premises of the COCO PALMS RESORT so as to afford all interested persons notice of the pending election.

5. OBSERVERS. COCO PALMS and the ILWU shall be entitled to station an equal number of authorized observers selected from

among the nonsupervisory employees of COCO PALMS in the designated polling place during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. The Board representative may have other duly authorized representatives present at the time of voting to assist in any manner.

6. HANDING OUT BALLOTS. Each voter shall be handed a ballot by the Board representative in the presence of the observers. The representative shall be authorized to explain to any voter making inquiry regarding the method of marking the ballot. The services of an interpreter may be employed if necessary. Any further information requested by any voter shall be given only by the representative and only after agreement of both observers.

7. MARKING OF BALLOTS. Each ballot shall be marked by pencil or pen in only one of the squares shown on the ballot. Ballots not marked or improperly marked or ballots signed shall be rejected.

8. CHALLENGES AND REPORTS THEREON. All challenged ballots shall be counted separately and the reason for the challenge recorded in a manner prescribed by the Board representative. If challenged ballots are determinative of the election, the Board shall investigate the challenge and make a finding with respect thereto, which finding shall be binding upon all parties.

9. DETERMINATION OF ELECTION. A majority of the valid ballots cast shall determine the question of representation for the

employees of the COCO PALMS who are included in the bargaining unit hereinbefore described.

Immediately upon the conclusion of the election, the votes shall be counted and tabulated by the Board representative in the presence of the observers, and the representative shall report to the COCO PALMS and the ILWU the results of the election by furnishing a Tally of Ballots.

Thereafter, the Board shall certify the results of the election in accordance with the provisions of Chapter 377, HRS.

DATED: Honolulu, Hawaii, October 2, 1996.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

DISSENTING OPINION

I would not order an election for a bargaining unit which currently has only three employees and which in the past had between 100 to 200 employees. There is no evidence that the Employer has abandoned its efforts to resume full operation as a hotel in the future. Absent such evidence and given the past statements made by the Employer that it plans to rebuild and resume operations after its insurance claims are settled, I do not believe that the present complement of employees is substantial and representative of the Employer's projected future work force.

Directing an election at this time would allow a minuscule percentage of employees to determine the representation of the bargaining unit.

Sandra H. Ebesu

SANDRA H. EBESU, Board Member

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