STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, AFL-CIO (ILWU), Complainant, and MURRAYAIR, LIMITED, Respondent.	CASE NO. 94-2(CE) ORDER NO. 1097 ORDER DISMISSING UNFAIR LABOR PRACTICE COMPLAINTS
In the Matter of INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, AFL-CIO (ILWU), Complainant, and MURRAYAIR, LIMITED, Respondent.	CASE NO. 94-3(CE)

ORDER DISMISSING UNFAIR LABOR PRACTICE COMPLAINTS

On February 18, 1994, Complainant INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, AFL-CIO (ILWU), by and through its attorney, filed an unfair labor practice complaint with the Hawaii Labor Relations Board (Board) against Respondent MURRAYAIR, LIMITED (MURRAYAIR) in Case No. 94-2(CE) (the Hilo case).

In the Hilo case, the ILWU alleged that on or about December 16, 1993, the ILWU attempted to initiate negotiations to

amend and modify the collective bargaining agreement between MURRAYAIR and the ILWU that was scheduled to expire on February 28, 1994. The ILWU further alleged that on or about February 4, 1994, MURRAYAIR President William Stearns (Stearns) informed ILWU Hawaii Division Director Fred Galdones that MURRAYAIR would not bargain with the ILWU.

Therefore, in the Hilo case, the ILWU alleged that MURRAYAIR refused to bargain with the ILWU and committed an unfair labor practice by refusing to bargain collectively with the representative of a majority of MURRAYAIR's employees in violation of § 377-6(4), Hawaii Revised Statutes (HRS).

On February 24, 1994, the ILWU filed a second unfair labor practice complaint with the Board against MURRAYAIR in Case No. 94-3(CE) (the Lihue case).

In the Lihue case, the ILWU alleged that on or about December 17, 1993, the ILWU attempted to initiate negotiations to amend and modify the collective bargaining agreement between MURRAYAIR and the ILWU that was scheduled to expire on February 28, 1994. The ILWU further alleged that on or about February 4, 1994, Stearns informed ILWU Kauai Division Director Robert Girald that MURRAYAIR would not bargain with the ILWU.

Therefore, in the Lihue case, the ILWU alleged that MURRAYAIR refused to bargain with the ILWU and committed an unfair labor practice by refusing to bargain collectively with the representative of a majority of MURRAYAIR's employees in violation of § 377-6(4), HRS.

On March 9, 1994, MURRAYAIR, by and through its attorney, filed with the Board simultaneous motions to dismiss both the Hilo and Lihue cases for lack of jurisdiction. MURRAYAIR argued that the Board should dismiss the instant complaints because: (1) the National Labor Relations Board (NLRB) has jurisdiction over MURRAYAIR; and (2) the Hilo and Lihue cases are preempted by provisions of the National Labor Relations Act (NLRA).

Thereafter, on March 14, 1994, the ILWU filed simultaneous motions to consolidate the Hilo and Lihue cases with the Board.

On March 15, 1994, the ILWU filed memoranda in opposition to MURRAYAIR's motions to dismiss.

On March 16, 1994, MURRAYAIR filed statements of no opposition to the ILWU's motions to consolidate. Subsequently, on March 21, 1994, the Board issued an order granting the ILWU's motions to consolidate the Hilo and Lihue cases.

Thereafter, on March 30, 1994, the Board held a hearing on MURRAYAIR's motions to dismiss for lack of jurisdiction.

Based upon a thorough review of the record, the Board makes the following findings.

On October 19, 1960, the NLRB certified the ILWU as the collective bargaining representative of certain employees of MURRAYAIR in Hilo, Hawaii. At that time, there were seven (7) employees in the appropriate bargaining unit (the Hilo bargaining unit).

MURRAYAIR and the ILWU were at all relevant times herein parties to a collective bargaining agreement for the period of

March 1, 1990 through February 28, 1993 covering employees of MURRAYAIR at its Hilo, Hawaii operation (the Hilo contract).

By a Memorandum of Agreement dated March 22, 1993, MURRAYAIR and the ILWU mutually extended the Hilo contract to include the period of March 1, 1993 through February 28, 1994.

By letter dated December 16, 1993, the ILWU informed MURRAYAIR of its desire to amend and modify the Hilo contract and offered to meet and confer with MURRAYAIR over the ILWU's proposed amendments and modifications.

By letter dated February 4, 1994, MURRAYAIR informed the ILWU Hawaii Division that MURRAYAIR would not bargain with the ILWU over the proposed amendments and modifications to the Hilo contract because under the NLRA, a bargaining unit "shall consist of at least two (2) or more employees."

At the time of the March 30, 1994 hearing before the Board, only one (1) employee remained in the Hilo bargaining unit.

On April 16, 1965, the NLRB certified the ILWU as the collective bargaining representative of certain employees of MURRAYAIR in Lihue, Kauai. At that time, there were two (2) employees in the appropriate bargaining unit (the Lihue bargaining unit).

MURRAYAIR and the ILWU were at all relevant times herein parties to a collective bargaining agreement for the period of March 1, 1990 through February 28, 1993 covering employees of MURRAYAIR at its Lihue, Kauai operation (the Lihue contract).

By a Memorandum of Agreement dated March 22, 1993, MURRAYAIR and the ILWU mutually extended the Lihue contract to include the period of March 1, 1993 through February 28, 1994.

By letter dated December 17, 1993, the ILWU informed MURRAYAIR of its desire to amend and modify the Lihue contract and offered to meet and confer with MURRAYAIR over the ILWU's proposed amendments and modifications.

By letter dated February 4, 1994, MURRAYAIR informed the ILWU Kauai Division that MURRAYAIR would not bargain with the ILWU over the proposed amendments and modifications to the Lihue contract because under the NLRA, a bargaining unit "shall consist of at least two (2) or more employees."

At the time of the March 30, 1994 hearing before the Board, only one (1) employee remained in the Lihue bargaining unit. However, on March 15, 1994, the ILWU filed a grievance on behalf of a second Lihue bargaining unit member who had been discharged by MURRAYAIR.

MURRAYAIR's revenues exceed $500,000 per year, and MURRAYAIR regularly receives and ships goods through interstate commerce.

With respect to MURRAYAIR's motions to dismiss, MURRAYAIR contends that the NLRB has jurisdiction over MURRAYAIR and that the instant complaints are preempted by provisions of the NLRA. MURRAYAIR argues that the ILWU's recourse, if any, is to file an unfair labor practice charge with the NLRB.

The ILWU, to the contrary, contends that the NLRB has indicated by its policy that it will not exercise jurisdiction over

one-person bargaining units. In addition, the ILWU contends that the NLRA does not preempt Chapter 377, HRS.

Section 377-1(3), HRS, defines the term "employee" and provides in relevant part:

> "Employee" . . . shall not include . . . any individual subject to the jurisdiction of the Federal Railway Labor Act or the National Labor Relations Act, as amended from time to time; provided that the term "employee" includes any individual subject to the jurisdiction of the National Labor Relations Act, as amended from time to time, but over whom the National Labor Relations Board has declined to exercise jurisdiction or has indicated by its decisions and policies that it will not assume jurisdiction.

Based upon the evidence presented, the Board majority concludes that the Board lacks jurisdiction over the Hilo and Lihue cases and therefore dismisses the instant unfair labor practice complaints.

Notwithstanding the arguments of the parties, the Board majority finds that the Board does not have jurisdiction over cases arising in connection with certifications of representative issued by the NLRB. Here, the evidence indicates that the NLRB assumed jurisdiction over MURRAYAIR and its employees when it certified the ILWU as the collective bargaining representative for employees of MURRAYAIR in Hilo and Lihue. Therefore, until such time as the NLRB declines to exercise jurisdiction over MURRAYAIR and its employees, the Board refrains from asserting jurisdiction over the instant complaints.

Moreover, the Board majority finds that there is insufficient evidence in the record to determine whether the NLRB would decline jurisdiction over the instant complaints. While the

NLRB has recognized that "the principle that collective bargaining presupposes that there is more than one eligible person who desires to bargain," Luckenbach Steamship Co., 2 NLRB 181, 193 (1936), the NLRB has indicated that it will require "proof that the purportedly single-employee unit is a stable one, not merely a temporary occurrence." Oscar David McDaniel d/b/a McDaniel Electric, 313 NLRB No. 11, 2 (1993).

In the instant cases, the parties seemingly agree that one-person bargaining units currently exist. However, based upon the evidence presented, it remains unclear whether the one-person units are stable or temporary in nature. On one hand, representations of the parties indicate that MURRAYAIR's business may be declining due to cutbacks in the sugar industry, suggesting that the one-person bargaining units may be stable. On the other hand, the evidence indicates that, at least in the Lihue case, the existing one-person unit resulted from the discharge of a bargaining unit employee. This evidence suggests that the one-person bargaining unit may be a temporary occurrence.

The Board majority does not believe that the Board is in a position to interpret NLRB policy with regard to one-person units, especially in view of the fact that the NLRB certified the bargaining units involved. Accordingly, the Board defers to the NLRB for a jurisdictional determination in the instant matters.

ORDER

The Board hereby dismisses the instant unfair labor practice complaints.

DATED: Honolulu, Hawaii, August 18, 1994.

HAWAII LABOR RELATIONS BOARD

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

CONCURRING OPINION

I concur with the decision to dismiss the instant unfair labor practice complaints. In my opinion, the Board should dismiss the instant complaints on the basis that there is insufficient evidence in the record to make a proper determination as to whether or not the Hilo and Lihue cases involve stable one-person bargaining units. On this basis, I would dismiss the instant unfair labor practice complaints without prejudice pending a jurisdictional determination by the NLRB in these matters. I do not agree with the Board majority that the issue of certification should be the determinative factor in deciding whether the Board or the NLRB has jurisdiction over a particular case.

BERT M. TOMASU, Chairperson

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