

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. 95-5(RD)
)	
WAYNE PERREIRA, CHARLES PEREIRA	)	ORDER NO. 1291
and EMILIANO MACADANGDANG,)	
	)	ORDER GRANTING EMPLOYER'S
Petitioners,	)	MOTION TO SUPPLEMENT THE
	)	RECORD, DENYING EXCLUSIVE
and	)	REPRESENTATIVE'S MOTION TO
	)	DISMISS PETITION AND
ILWU, LOCAL 142,	)	DIRECTING ELECTION OF
	)	COLLECTIVE BARGAINING
Exclusive	)	REPRESENTATIVE
Representative,)	
)	
and)	
)	
COCO PALMS RESORT,)	
)	
Employer.)	

ORDER GRANTING EMPLOYER'S MOTION TO SUPPLEMENT
THE RECORD, DENYING EXCLUSIVE REPRESENTATIVE'S
MOTION TO DISMISS PETITION AND DIRECTING
ELECTION OF COLLECTIVE BARGAINING REPRESENTATIVE

On September 13, 1995, Exclusive Representative INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142 (ILWU or Union), by and through its counsel, filed a motion to dismiss the decertification petition with the Hawaii Labor Relations Board (Board). The ILWU contends that the petition should be dismissed on the grounds that there is an existing collective bargaining agreement which acts to bar the instant petition.

The Board conducted a hearing on the ILWU's motion on November 27, 1995. All parties were represented by counsel and

were given full opportunity to present evidence and argument to the Board.

On November 30, 1995, Employer COCO PALMS RESORT (Employer or COCO PALMS) filed a motion to supplement the record with additional portions of an exhibit, An Outline of Law and Procedure in Representation Cases (Outline), which was introduced at the hearing by the ILWU. At the time that the exhibit was received by the Board, the Board offered to permit the Employer to supplement the record. The Employer thus submits as Employer's Exhibit 2, a portion of the Outline which pertains to the timeliness of petitions and the application of the contract bar doctrine.

Having had no response from the ILWU, the Board hereby grants Employer's motion to supplement the record in this case. The Board shall receive Employer's Exhibit 2 into the record.

Based upon the record in this case and the arguments presented, a Board majority makes the following findings and conclusions and hereby denies the ILWU's motion to dismiss the instant petition.

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

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

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

The ILWU was certified as the exclusive bargaining representative for more than 200 employees on November 19, 1990. On November 14, 1991, the parties agreed to a contract covering the period from October 15, 1991 to August 31, 1995. Section 41 of

the agreement provides that the parties may renew, modify, amend or terminate the agreement by appropriate actions sixty (60) to seventy-five (75) days prior to August 31, 1995.

In the fall of 1992, Hurricane Iniki struck the State of Hawaii and caused widespread damage on the island of Kauai. The COCO PALMS, situated on Kauai, sustained significant property damage. On September 25, 1992, the COCO PALMS was temporarily closed and many of the employees were placed on temporary lay off status. Subsequently, all employees in the bargaining unit except the three petitioners were laid off permanently. The Employer is still in the process of resolving its insurance claims.

During the 60 to 75-day window period prior to the expiration of the agreement, June 22, 1995 to July 2, 1995, neither party submitted any written notice of a desire to modify, amend or terminate the agreement.

Section 41 of the agreement provides as follows:

This Agreement shall become effective as of October 15, 1991, and shall remain in effect to and including August 31, 1995. It shall be renewed from year to year thereafter unless either party hereto shall give written notice to the other party of its desire to modify, amend, or terminate the Agreement at least sixty (60) days prior to the expiration date of the Agreement, but not more than seventy-five (75) days prior to the expiration date. Notices served under this Section shall be in writing to the Hotel and/or Union and shall be accompanied by the proposals of the notifying party.

On June 30, 1995, the Employer filed an RM petition with the National Labor Relations Board (NLRB) questioning the representation by the ILWU of the three remaining bargaining unit employees. The NLRB heard the petition and on August 14, 1995, the

Regional Director dismissed the petition for lack of jurisdiction because the Employer did not generate \$500,000 in gross revenues per annum. On August 28, 1995, Petitioners filed the instant decertification petition with the Board.

The ILWU moved to dismiss this petition on the grounds that it is barred by the current contract. The Union contends that the contract was renewed under the provisions of Section 41 of the agreement since neither party gave notice to modify or terminate the contract. As the contract has been renewed, the ILWU contends that the subject petition is barred and should be dismissed.

The Employer contends that during the hearing before the NLRB, the Employer and the Union agreed that a question concerning representation exists. The Employer also contends that the petition was filed after the third anniversary of the agreement and therefore the contract bar rules applied by the NLRB do not bar an election because the contract is of an unreasonable duration. Further, the Employer contends that there has been a drastic change in the nature of the Employer's operations. Thus, the Employer requests that the Union's motion be denied and that an election be directed.

The threshold question to be decided is whether or not the contract bar principles fashioned by the NLRB should be applied by the Board in deciding this case. Neither the Board nor the NLRB is required by statute to apply contract bar rules. However, the NLRB formulated the rules to balance the competing policies of preserving stability in collective bargaining and the need to protect the right of employees to change or eliminate their

bargaining representative. A Board majority finds that the NLRB contract bar rules strike a reasonable balance between the two policies and should be applied in deciding the instant case.

The ILWU contends that under NLRB contract bar rules which allow representation petitions to be filed during an "open period" starting 90 days prior to the expiration date of a collective bargaining agreement and ending 60 days prior to the expiration date, the instant petition was untimely filed. According to the ILWU, the contract termination date of August 31, 1995 allowed an open period from June 2, 1995 to July 2, 1995. The petition was filed on August 28, 1995.

The ILWU also contends that the 60 day "insulated period" immediately preceding the expiration date of the contract together with the automatic renewal provision in Section 41 of the contract combine to bar the petition filed herein. The Union argues that the petition was filed during the insulated period and, therefore, should be dismissed because under Section 41, the contract was automatically renewed and bars an election.

The problem with the arguments advanced by the ILWU is that the Union ignores the fact that the contract covering the period from October 15, 1991 to August 31, 1995 was one of "unreasonable duration" and only barred a petition during the first 3 years of the contract. General Cable Corp., 139 NLRB 1123, 51 LRRM 1444 (1962). Although the petition herein was not filed during the open period prior to the third anniversary of the contract, it was filed after the period of reasonable duration and prior to the expiration and automatic renewal of the contract.

In Union Carbide Corp., 190 NLRB 191, 72 LRRM 1145 (1971), the NLRB held that a contract between an employer and a union in excess of three years was of unreasonable duration. The petition in that case was not filed during the open period preceding the third anniversary of the contract but rather, was filed after the anniversary date but before the expiration date of the contract. Because there had been a premature extension of the contract prior to the filing of the petition and the petition had not been filed during the open period prior to the third anniversary of the contract, the NLRB found the new contract acted as a bar. However, the NLRB noted in its decision that if there had been no premature extension of the original contract, a petition filed after the third anniversary of the original agreement would not have been barred.

As in Union Carbide, the petition herein was filed after the third anniversary of the original contract which was of unreasonable duration. However, at the time the petition was filed there was no extension of the agreement in effect as in Union Carbide and the automatic renewal provision had not yet taken effect. Therefore, the petition was timely filed and the contract does not bar an election.

In view of the foregoing conclusion, the Board finds it unnecessary to consider the Employer's other arguments as to why there is no contract bar.

A Board majority hereby denies the ILWU's motion to dismiss the instant decertification petition and, finding that a question of representation exists, 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 3 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 January 31, 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 quit 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 February 21, 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.

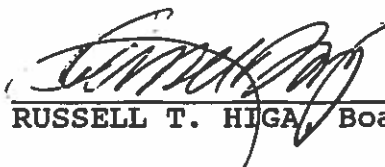
Thereafter, the Board shall certify the results of the election in accordance with the provisions of Chapter 377, HRS.

DATED: Honolulu, Hawaii, February 14, 1996.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

DISSENTING OPINION

I agree with the argument of the ILWU that the current contract bars the election in this matter. The facts in the record establish that the Employer had the opportunity to terminate or modify the contract with the ILWU but allowed the contract to be automatically extended. A decertification petition could have been brought during the open period immediately preceding the expiration of the contract. The Employer instead pursued an RM petition in an inappropriate forum. While it appears that this petition is being brought by the bargaining unit employees involved, it seems clear that the instant petition is being pursued before this Board by the Employer. As the current contract expires on August 31, 1996, the employees could properly bring a petition before the Board in the applicable open period prior to the expiration of the contract.



SANDRA H. EBESU, Board Member

Copies sent to:

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