

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. 98-1(CE)
ALAN R. MACKENZIE,)	ORDER NO. 1667
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS COMPLAINT
JOHN KIMURA, President, JK)	
Electric, Inc.,)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On March 23, 1998, Complainant ALAN R. MACKENZIE (MACKENZIE) filed an unfair labor practice complaint against JOHN KIMURA, President, JK Electric, Inc. (Employer) with the Hawaii Labor Relations Board (Board). Complainant alleges that the Employer violated § 377-6, Hawaii Revised Statutes (HRS) by terminating his employment on September 19, 1997 and refusing Complainant's referrals for employment.

On April 6, 1998, Respondent Employer, by and through his counsel, filed a motion to dismiss the complaint with the Board. Respondent contends that the instant complaint should be dismissed because Complainant is an employee covered by the master collective bargaining agreement between the International Brotherhood of Electrical Workers, Local 1186 (IBEW) and several electrical contractors, including JK Electric. As such, Complainant is subject to the jurisdiction of the National Labor Relations Act and in fact, on March 19, 1998, Complainant filed an unfair labor

practice charge with the National Labor Relations Board (NLRB) in Case No. 37-CA-4956 alleging that on or about September 19, 1997, the Employer terminated Complainant because of his union activity. In addition, Complainant alleged that within the past six months and continuing, the Employer refused to accept the union's referrals of Complainant for employment. Thus, pursuant to § 377-1(3), HRS, Respondent contends that the Board lacks jurisdiction over the instant complaint and that the complaint should be dismissed.

On April 20, 1998, Complainant filed a response to Respondent's motion to dismiss complaint with the Board. Thereafter, both parties submitted numerous arguments to the Board regarding the Board's jurisdiction to hear this matter.

The Board conducted a hearing on the instant motion on July 24, 1998. The parties were present and had full opportunity to present evidence and argument to the Board.

Based upon a thorough review of the facts in this case, the Board, on its own motion, dismisses the instant complaint for unlawful termination because the matter is barred by the statute of limitations. The facts in the record indicate that Complainant was terminated by the Employer on or about September 29, 1997. The instant complaint was filed with the Board on March 23, 1998, well beyond the 90-day statute of limitations provided by § 377-9(1), HRS.

With respect to Complainant's remaining claims, i.e., the Employer's refusal to accept Complainant's referrals for employment, Complainant alleges, without specifying any dates in his complaint, that this is a continuing violation. Respondent

contends that these matters are beyond the Board's jurisdiction because Complainant filed similar charges with the NLRB and the NLRB has asserted jurisdiction over these matters. On or about April 3, 1998, NLRB Regional Director Robert Miller indicated to the parties that the NLRB was deferring the charge to arbitration under Collyer Insulated Wire, 192 NLRB 837 (1971) (Collyer). Complainant appealed the decision to defer to the NLRB.

Respondent contends that although the NLRB deferred the matter to arbitration, it has retained jurisdiction over the case throughout and after the arbitration process and therefore the Board lacks jurisdiction over this case.

Complainant contends that the Board has jurisdiction over this case because the NLRB has declined the exercise of its administration jurisdiction over the case.

Previously, in Case No. 93-2(CE), Spangler K. Lewis, the complainant filed an unfair labor practice complaint with the Board alleging that he was improperly suspended and discharged by his employer, BHP Petroleum Americas (Hawaii), Inc. (BHP). A grievance was filed by the union and the matter was processed to arbitration. In addition, Lewis filed unfair labor practice complaints against BHP with the NLRB and the Board challenging his termination. The NLRB deferred the charge to arbitration pursuant to Collyer. The Board considered the definition of "employee" under § 377-1(3), HRS, which provides, in part:

"Employee" includes any person, . . . working for another for hire in the State, . . . but shall not include any individual . . . subject to the jurisdiction of . . . 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.

In Order No. 977 dated October 15, 1993, the Board dismissed the complaint for lack of jurisdiction because the NLRB had asserted jurisdiction over Lewis and his unfair labor practice complaint. Although the NLRB had deferred the charge to arbitration in accordance with the Collyer doctrine, it was clear that the NLRB retained jurisdiction over the matter pending the outcome of arbitration. Thus, the Board found that Lewis did not fall within the definition of "employee" in Chapter 377, HRS, and the Board lacked jurisdiction over the case.

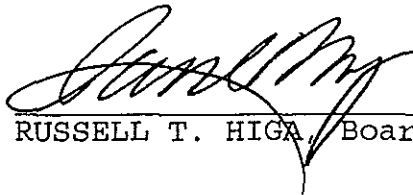
In the instant case, Complainant filed charges with the NLRB which has asserted jurisdiction over the complaint. Notwithstanding the NLRB's application of the Collyer doctrine and consequent deferral of the charge to arbitration, the NLRB has nevertheless exercised its jurisdiction over Complainant's case. Thus, MACKENZIE is similarly not an "employee" under Chapter 377, HRS, and accordingly, the Board hereby dismisses the instant complaint for lack of jurisdiction.

DATED: Honolulu, Hawaii, September 8, 1998.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

ALAN R. MACKENZIE and JOHN KIMURA, President, JK Electric, Inc.;
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CHESTER C. KUNITAKE, Board Member

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