

HEARING OFFICER'S REPORT

Dept. of Industrial Relations  
Conciliation Service  
San Diego

IN THE MATTER OF DISPUTE BETWEEN

I.B.E.W., Local 465, AFL-CIO, Union

and

Julie Ann Parker, Petitioner

and

San Diego Trolley, Employer

C.S.M.C. CASE NO. ~~88-3-537~~ 88-3-537

PETITION FOR DECERTIFICATION

This matter was heard on December 7, 1989, at the offices of the Attorney for the Employer, San Diego Trolley, in San Diego, California.

All the parties to this proceedings were present and were given a full opportunity to present evidence, to call witnesses that were duly sworn and were available for cross-examination, and to offer argument.

This Hearing was conducted pursuant the Southern California Rapid Transit District Law, as amended, July 1983. The undersigned Hearing Officer was appointed by the Director of the Department of Industrial Relations, State of California, as a result of a Petition for Decertification that was filed by an individual, Julie Ann Parker by name. In conformity with the procedures in such matters, a check of the showing of interest was made by the San Diego office of the State Department of Industrial

Relations and its Commissioner, whereupon a finding was made that the  
Petitioner's showing was sufficient for the matter to proceed further.

### ISSUES

The I.B.E.W. raised the issue of the sufficiency of the showing of interest on the part of the Petitioner. The files of the San Diego offices of the Department of Industrial Relations were secured and examined by the Hearing Officer. Those files indicated that, based on the list of employees in the bargaining unit represented by the incumbent Union, the I.B.E.W., furnished by the Employer, the Petitioner did have the required showing of interest of at least 30% of the employees there, listed as having signed a Petition for Decertification of the I.B.E.W. These signatures were dated during the months of March, April and May of 1989.

The Union then argued that the employment roster was a changing one and asked the Hearing Officer to ascertain the accuracy of the Employer's payroll list, and whether it was for an appropriate date insofar as the date and submission of the Decertification Petition's filing date. The Hearing Officer then examined the file presented by the local office of the Department of Industrial Relations and determined that the dating of the list of names submitted by the Employer was appropriate to this proceeding, based on the date of the submission of the Decertification Petition. Here the undersigned's ruling was based on the Rules and Procedures of the National Labor Relations Board, wherein the date of the Employer's nearest ending payroll period to the date of the Agency's receipt of the Petition is the payroll used for purposes of the check of showing of interest by the Petitioner.

The Union contended that the Employer gave illegal assistance to the employee Julie Ann Parker by giving her a list of all employees' names and classifications. To this the Petitioner testified that she found the list of employees on the Bulletin Board in the employee lounge, the "Train Operator's Lounge."

The Union contended that the Employer's representatives and officials gave other illegal assistance to the Petitioner, in that they provided her with the forms for filing her Petition and otherwise gave assistance in the preparation and submission of said forms. The Employer's official who was present, a Mr. Mark Spedding, the Personnel Administrator for the San Diego Trolley, admitted that he called his attorney, Rod Betts (who was present as the Employer's Counsel in these proceedings) and secured copies of the N.L.R.B. Petition forms from him, and then gave those to Ms. Parker for her use in this matter, advising her in their use.

The Union contended that the Petitioner was a personal friend of the Personnel Administrator and that she secured his and other management officials' assistance in securing the signature of the employees and in getting the information on how to proceed in this matter.

Ms. Parker attempted to hide the relationship she had and currently has with one official, Terrence William Mulcahy by name. At the time of this Petition's circulation, she stated he was listed as a Supervisor Controller on the Employer's payroll roster. From the testimony of the Petitioner and from her refusal to answer questions as well, it appears that she enjoys a very close attachment to Mr. Mulcahy and, as of the date of this Hearing, she and Mulcahy are apparently the co-owners and inhabitants of a home in the San Diego area. Ms. Parker acknowledged being a friend of Mark Spedding, as well as of the President of San Diego

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Trolley, Mr. Langley Power; but she asserts that neither one gave her any assistance in this matter.

The Union contended that the Petitioner received special status and assistance in various ways from the Employer in her securing the signatures on the Petition. They point to the fact that, at the State of California meeting in the local State Commissioner's offices held on June 22, 1989, attended by the Petitioner as well as others representing the parties hereto, the Petitioner took time off of work to come to the meeting. While she testified she was unsure of whether or not she was paid as though she were at work, the Employer indicated that she had been paid for that day.

The Union contended that the Petitioner has been seen in the area of the workplace's various operations holding hands with Mr. Mulcahy, that she has been attending social functions with him as her escort, that she has been dating him for some time (for six years by her admission), and that these facts are known to the employees, thereby creating the impression that she is connected to management and has special status with management, thereby tainting her standing to be the moving element in a Decertification proceedings.

The Union was admitted as a full intervenor in this proceedings based upon their contractual relationship with the Employer.

Neither side requested the opportunity to file briefs at the close of the Hearing.

The Hearing Officer called the parties' attention to the fact that, pursuant to the Code of the State of California in this matter, 15875.1, "In resolving questions of representation the Director shall apply the relevant

federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended."

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### Analysis and Findings

The Petitioner did have a sufficient showing of interest to permit this matter to go forward to the present level of consideration. The question is raised by the Union with regard to the direct assistance of the Personnel Administrator in getting the petition forms to the Petitioner and then advising her regarding the filing of the forms after he consulted with his Counsel. This conduct clearly gives the appearance of aid to the decertification process that may be thought of as beyond the scope of permitted activity by an Employer. But the decisions of the National Labor Relations Board, in such limited areas, considered only by themselves, are not acts that may subject a Decertification petition to a dismissal. *Plastic Molding Corp.*, 112 NLRB 179 (1955); *El Rancho Market*, 235 NLRB 468 (1978); *Brown and Connolly, Inc.*, 237 NLRB 271 (1978); *Moore Drop Forging Co.*, 108 NLRB 32 (1954); and *Southeast Ohio Egg Producers*, 116 NLRB 1076 (1956).

The contention of the Union, and its presentation of a witness supporting the position, that the Employer must have given the Petitioner a copy of the employment roster, does appear to be a valid one. The testimony of the Union's credible witness in this regard was that he had visited the scene of the employee's lounge at least once every month for the past two years and never observed any such employee lists or rosters on the Bulletin Boards. Further, this witness credibly testified, and was not rebutted, that he has repeatedly requested a list of the employees from the Employer and has never received one. He also testified that he

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has asked employees to secure a list for him and they have been unable to do so. Therefore he assumes that, had a list of names ever been posted, he would have gotten a copy.

This witness, the Union's Business Manager, David Moore, was a credible witness in regard to the foregoing testimony, and I believe that his experience covering the last two years at the employee's lounge and his personal requests for a list that were not honored cast a very substantial doubt on the testimony of the Petitioner. Therefore, I must find that Ms. Parker was given a form of assistance that does not meet the test of what is permitted conduct by an Employer and a Decertification Petitioner.

This is especially true in this situation because of the fact that the Union, which is the bargaining agent and has a contractual relationship with the Employer, was unable to secure a list of the names of the employees. Yet here we have an employee who manages to find such a list hanging from the Company Bulletin Board, where none has ever been seen (tr. pages 79, 80, 81). Accordingly, I have concluded that the furnishing of an employee list or roster to the Petitioner, when one was consistently refused to the Union, places the instant Petition for a Decertification election in substantial jeopardy.

The payment for time spent at the State Conference or meeting on this matter, held on June 22, 1989 (tr. pages 63 and 64), reflect that the Petitioner asked for and got the time off, with pay, to attend the June meeting. In her testimony, when she realized that this was so important an issue, the employee reversed her testimony and avers she did not get paid. This sequence of testimony is further very revealing in the light of the testimony she offers shortly thereafter, covering the arrangements to

come to this Hearing and the various contracts and calls that were needed to get approval. The totality of the testimony offered by the Petitioner in this regard causes me to conclude that the Employer gave the employee assistance that exceeds the bounds. Accordingly, I find that the Petitioner was paid and that such payment for her time to attend the June 22, 1989, meeting cited above is a course of conduct by the Employer that interfered with the rights of the employees and of the Union in this matter, giving additional cause for finding that this Decertification Petition should be dismissed.

The relationship of the Petitioner to the Company official Terrence Mulcahy is of some significance, especially in the light of the unrebutted testimony presented by the Union to the apparent fact that both the Petitioner and Mulcahy, who is clearly one of the ranking supervisors of the Employer (listed in the Company Exhibit "A" as the Supervisor over Training and Safety, as of May 2, 1989) are living together in a home of which they are joint owners.

The Union, by following up on telephone numbers, testified to calling Mr. Terrence Mulcahy's phone, as listed in the San Diego phone book bearing on its face page the date March 1989-90 (Union Exhibit "5"); and they were referred to the phone number that was the same as one to which they were referred when they called the last given phone number of the Petitioner.

The Petitioner has the right to refuse to answer questions she thinks are too personal and an invasion of her privacy. But under the circumstances present here, the Petitioner, by raising the issue of personal privacy, avoided answering questions that cast serious doubt on her being, in fact, just an employee and not the other half of a twosome, which in

turn begs the question: If there is nothing wrong in such a relationship as far as the case at hand goes, why then not admit the fact of its existence?

But this was not the position taken by the Petitioner. Instead, she vehemently opposed answering any question in that area of the Union's concern, nor did she attempt in any way to rebut any of the facts presented or testimony offered by the Union in this vital subject area. This leaves me with the only option left and that is deciding that Ms. Parker did and does have a close relationship with a Company official, Mr. Mulcahy. This record shows that this relationship is one that is known at the workplace and reveals that the relationship of this employee to management was a special one.

This conclusion, then, means that Parker's activity in setting up and going about the business of securing signatures of employees for the Decertification Petition was not the innocent conduct of an employee, acting only on her desire to rid herself of a bargaining agent, but must also be viewed as the combined effort of the employee, her Company official boy friend, her other Company official friends who assisted in securing the forms for her, and individuals in the ranks of the Employer who gave Parker a list of the employees' names, to further assist her in her efforts.

As I examined this record and my notes, it became clear that Parker was aware of a previously failed attempt to secure a Decertification Election several months before. At that time an employee who was a Supervisor with the Company secured signatures and submitted a Petition, as has Parker here, for a Decertification Election. That Petition was dismissed because the status of the Petitioner was that of a supervisory employee, and therefore his activity was considered that of an agent of management.



In the instant matter, while the Petitioner is not a supervisor, she certainly has the standing of being in a special relationship to a Company official, T. W. Mulcahy, such that they share one domicile and apparently are co-owners of said property. This fact, plus the Petitioner's refusal to answer any questions regarding her open exhibitions of a very close friendship with the official at Company social events and on the Company premises, while supporting her desire for privacy, does also open up her testimony and position in this proceedings to the consideration that she is engaged in the conduct she is described as having engaged in. Therefore, her very close personal relationship does alter her status for considerations of her conduct as that conduct affects the facts in this proceedings. It gives additional weight to her status as an agent of the Employer.

Ms. Parker may be only sharing housing quarters with Mr. Mulcahy. If so, one must ask: why the extreme anger and antagonism, and absolute refusal to answer questions in these areas?

Accordingly, from the evidence presented, from the Petitioner's own answer and her refusal to answer questions as well; I must conclude that Parker does have a special relationship to the Employer and that this relationship in effect makes her, for the purposes of this proceedings, an agent of the Employer and, therefore, ineligible to enter a Petition such as this one.

"Report No. 8," in the Labor Relations and Public Policy Series of the University of Pennsylvania's Wharton School, entitled NLRB Regulations of Election Conduct, discusses the question of Agency, pages 218, 219, 220 and 221. That monograph states, in part: "To implement its intent (as to agency) Congress defined the term "agent" in its broadest sense.

Subsequent interpretation of the agency provisions has resulted in the Board's position that it will construe agency status by implication from the surrounding circumstances, irrespective of proof of employer authorization or ratification. . . ." The citations included and referenced on these points include decisions of the N.L.R.B., of the U.S. Courts of Appeals and of the U.S. Supreme Court. The lead cases are: General Metal Products Co., 410 F.2d 473, 475, 70 LRRM 3327, 3328 (6th Cir. 1969); I.A.M. Lodge No. 35 v. N.L.R.B., 311 U.S. 72, 7 LRRM 282 (1940), and H.I. Siegel Inc., 165 N.L.R.B. 493, 494 (1967).

It is clear from this record that, when all of the circumstances present in this matter are carefully examined, such as the assistance given the Petitioner at the very outset of her activities by one of the top officials of the Company, its Personnel Administrator, the Petitioner's being able to secure an employee roster when it was not available even to the Union's officers and representatives, the pay for employee attendance at the proceedings involved herein by the Company, and the very close relationship between a Company high ranking supervisor and the Petitioner such that it was visible at Company social events as well as on the job, certainly permits the conclusion that Parker was an agent of the Employer in this matter, as the cases and writings cited above conclude. Therefore, this petition for Decertification is hereby recommended be dismissed.

#### CONCLUSION AND RECOMMENDATION

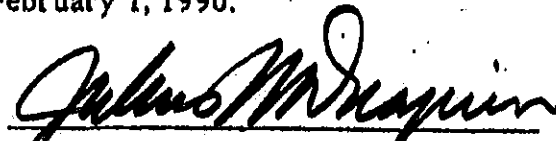
It is the considered conclusion and recommendation of the Hearing Officer that this Decertification Petition be dismissed, based on the totality of all the facts and all of the circumstances present in this matter. The undersigned must, from the record, decide that the Petitioner has been and

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is, for all intents and purposes, an agent of the Employer. Accordingly, pursuant to the precedent of the N.L.R.B., as enforced by the Courts, the instant Decertification Petition cannot be acted upon further and should be dismissed.

Dated: February 1, 1990.

Signed:

  
Julius N. Draznin, Hearing Officer

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