

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
MADISON INDEPENDENT WORKERS UNION	:	
Involving Certain Employes of	:	Case I
MANDAR INN II	:	No. 19769 E-2904
	:	Decision No. 14250

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Appearances:

Frankel, Langhammer and Pines, Attorneys at Law, by Mr. Lester A. Pines, appearing on behalf of the Petitioner.  
 Melli, Shiels, Walker and Pease., S.C., Attorneys at Law, by Mr. Jack D. Walker, appearing on behalf of the Employer.

DIRECTION OF ELECTION

Madison Independent Workers Union, having on November 5, 1975, filed a petition with the Wisconsin Employment Relations Commission requesting that an election be conducted pursuant to Section 111.05 of the Wisconsin Statutes among certain employes of Mandar Inn II, Madison, Wisconsin; and hearing in the matter having been held on November 24, 1975 at Madison, Wisconsin, Kay Hutchison, Hearing Officer, having been present; and the Commission having reviewed the testimony, evidence and briefs of counsel; and being fully advised in the premises; and being satisfied that a question of representation has arisen for certain employes of Mandar Inn II;

NOW, THEREFORE, it is

DIRECTED

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within sixty (60) days of the date of this Directive within the collective bargaining unit consisting of all regular full-time and regular part-time employes of Mandar Inn II, but excluding supervisory and managerial employes, who were employed on January 15, 1976, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employes desire to be represented for the purpose of collective bargaining by Madison Independent Workers Union.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
 Morris Slavney, Chairman

Howard S. Bellman  
 Howard S. Bellman, Commissioner

Herman Torosian  
 Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION

Pursuant to Section 111.05 of the Wisconsin Employment Peace Act, Madison, Independent Workers Union petitioned the Wisconsin Employment Relations Commission to conduct a representation election among certain employes of Mandar Inn II. Mandar Inn II is a restaurant located in the campus district of Madison, Wisconsin. The restaurant's sole proprietor is Dr. C. K. Liao, who resides in Olympia Fields, Illinois. Mandar Inn II opened for business on October 17, 1975. The restaurant has seating capacity for 175 people.

Prior to the restaurant's opening, Dr. Liao employed Peter Moy as a manager-trainee. For approximately a month, Moy received training in another restaurant owned and operated by Dr. Liao in Chicago, Illinois. The Chicago restaurant, Mandar Inn I, seats 300 customers and employs 25 persons. On or about October 12, 1975, Moy returned to Madison and actively recruited employes for the Mandar Inn II operation.

During the hearing in the instant proceeding conducted on November 24, 1975, Dr. Liao testified that he had instructed Moy that Mrs. Liao had the final authority on hiring employes. Mrs. Liao provided Moy with a list indicating the acceptable range of numbers of employes needed to staff the restaurant during its various hours of operation. In addition, Mrs. Liao indicated that she wanted to speak to the waiters and waitresses before the restaurant opened for business. During the week preceding the commencement of business, Moy hired forty persons to staff the restaurant.

Prior to the opening, Mrs. Liao conducted two training sessions for the waiters and waitresses. Approximately 25 persons were in attendance. Mrs. Liao spoke individually to at least one employe before the opening and requested information regarding the size of uniform worn by the employe. Dr. Liao stated during the hearing that he had been present when Moy hired several employes on an unspecified weekend preceding the opening of the restaurant. However, he did not participate in the interviews. Upon his arrival in Madison for the opening, Dr. Liao discovered that Moy had hired forty persons and that only the services of a Chinese cook had not been secured.

Dr. Liao testified that he subsequently told Moy that the hiring of such a large number of employes for infrequent hours of work was impractical. Dr. Liao cited burdensome bookkeeping and payrolls and indicated that employing numerous people would be detrimental to the employes and restaurant alike in that regular customers would be served by different employes which, in turn, would reduce tips and customer returns. According to Dr. Liao, the seating capacity of Mandar Inn II warrants the employment of twenty employes working more hours rather than forty employes working fewer hours.

Dr. Liao told Moy that he would try out all the employes Moy had hired to determine which ones would be suitable for permanent employment. A two or three month period, according to Dr. Liao, would be needed to permit evaluation and identification of permanent employes and thereby to arrive at a stable employe complement. Dr. Liao testified that in addition to Moy, he told two other employes that staffing would have to be cut back. Moy was further advised by Dr. Liao that Mrs. Liao had experience in managing restaurants which Moy lacked and that Moy would have to follow her guidance until he was qualified to manage the business himself.

Moy made out employe payroll checks for the ten day period during which the forty individuals hired by Moy had worked. Apparently, Moy made errors in the payroll calculations causing Mrs. Liao to take the

checks back to Chicago for recomputing. Mr. Liao, Mrs. Liao and Moy were authorized to sign checks with the provision that two of the three sign each check. The aforementioned payroll checks were cosigned by Moy and either Dr. Liao or Mrs. Liao.

Approximately ten to fourteen days after Mandar Inn II opened for business, the forty employes hired by Moy struck for recognition and commenced picketing of the Employer's premises. Subsequent to the onset of picketing, Dr. Liao discharged Moy. At the time of the hearing, a cook, waiter and manager were staffing Mandar Inn II.

#### POSITION OF THE PARTIES:

It is the position of the Employer that there is no sufficiently identifiable employe complement in which the Commission may appropriately conduct a representation election. The Employer argues that the instant petition is untimely and should be dismissed without prejudice. Whereas, Moy, the former manager, hired forty employes, the Employer asserts that only twenty persons are needed to staff the restaurant. Therefore, the Employer argues; only twenty persons have an expectation of continued employment. Furthermore, the Employer contends that the commencement of picketing shortly after the business opened precluded the Employer from evaluating the forty initial employes and determining which twenty of those forty are suitable for permanent employment.

The Employer argues that only employes with a continued expectancy of employment have an interest in wages, hours and conditions of employment and thereby a right to participate in a representation election. Furthermore, the Employer asserts that until it has had an opportunity to conduct its business and to select its true employe complement, a suitable group of employes cannot be identified among whom to conduct an election.

The Employer urges the Commission to adopt a policy similar to that of the National Labor Relations Board with regard to election petitions involving contracting units. 1/ The Employer notes that the NLRB has dismissed as untimely and without prejudice election petitions filed within expanding or contracting units. The rationale of the NLRB in such situations has been that the instability of the present employe complement, due to the on-going expansion or contraction of the work force, renders an election, at that point in time, premature and thereby, inappropriate. The Employer cites that in Family Heritage Nursing Home (8265) 11/67 the Commission adopted "the reasoning of the National Labor Relations Board with respect to an expanding unit problem". The Employer argues that the same reasons which led the Commission to adopt the NLRB rule with regard to expanding units should convince the Commission to adopt the NLRB rule with regard to contracting units.

#### DISCUSSION:

Section 111.02(3) of the Wisconsin Employment Peace Act defines "employe" as:

". . . any person . . . working for another for hire in the state of Wisconsin in a nonexecutive or nonsupervisory

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1/ Douglas Motors Corp., 46 LRRM 1292, 128 NLRB No. 31 (1960),  
Plum Creek Lumber Co. 87 LRRM 1587, 214 NLRB No. 72 (1974).

capacity . . . and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute . . ."

The record discloses no evidence that the employment of the forty persons hired by Moy has ceased for any reason other than a current labor dispute. There is no indication that any of the forty employes who commenced employment during the week that Mandar Inn II opened for business, received notice of layoff or termination. Accordingly, the Commission is satisfied that the forty individuals, hired by Peter Moy and who worked during the ten day period Mandar Inn II was in operation, are "employees" within the meaning of Section 111.02(3).

A related issue before the Commission herein concerns the processing of an election petition where the number of employes to be regularly employed has allegedly not been determined. In Family Heritage Nursing Home, supra, the Commission directed an election within a potentially expanding unit on the basis that:

"A substantial number of employes to be ultimately employed by the Employer are now employed. Future employes will be employed in the same job classifications in which present employes are employed."

We are satisfied that the same standards may be applied to the potentially "contracting" unit herein. In the instant proceeding, the Employer asserts that the appropriate number of employes will be twenty or less of the forty individuals hired by Moy. The Employer contends that the only basis for not identifying those employes who may have a continuing interest in employment is that the Employer has not had an opportunity to evaluate the forty initial employes. We conclude that there is no evidence that the ultimate complement of employes (approximately twenty persons) would not constitute a substantial and representative complement of current employes employed in present and future classifications. Whereas the legitimate business concerns of the Employer may warrant a reduction in the work force, such concerns do not preclude the conduct of an election among employes who will be affected by that reduction. The Commission finds no basis upon which to conclude that the ultimate complement of employes will not constitute a substantial and representative complement of the present employes. We have, accordingly, directed an election among the employes of Mandar Inn II and we have further determined that the eligible employes include the forty employes hired by Peter Moy.

During the course of the hearing, the Union entered into evidence a list of employes who Peter Moy identified as having been hired by him. The Employer is hereby directed to submit within seven calendar days, a list of employes in the employ of Mandar Inn II on January 15, 1976, so that the list of eligible employes may be verified.

Dated at Madison, Wisconsin this 15th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Howard S. Bellman  
Howard S. Bellman, Commissioner

Herman Torosian  
Herman Torosian, Commissioner