

1948

Hotel Utah Company v. R. H. Ralrymple, Daniel
Edwards and H. Fred Egan, and Hotel and
Restaurant Employees Alliance, Local No. 815. :
Brief of Petitioner

Utah Supreme Court

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Callister, Callister & Lewis; Attorneys for Petitioner

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IN THE SUPREME COURT of the State of Utah

HOTEL UTAH COMPANY, a corporation,

Petitioner,

vs.

R. H. RALRYMPLE, DANIEL EDWARDS and H. FRED EGAN, constituting the Utah Labor Relations Board, and HOTEL AND RESTAURANT EMPLOYEES ALLIANCE, LOCAL NO. 815,
Defendants.

Case No.
7212

BRIEF OF PETITIONER

CALLISTER, CALLISTER & LEWIS
Attorneys for Petitioner

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UTAH SUPREME COURT

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IN THE SUPREME COURT of the State of Utah

HOTEL UTAH COMPANY, a corporation,

Petitioner,

vs.

Case No.
7212

R. H. DALRYMPLE, DANIEL EDWARDS and H. FRED EGAN, constituting the Utah Labor Relations Board, and HOTEL AND RESTAURANT EMPLOYEES ALLIANCE, LOCAL NO. 815,

Defendants.

BRIEF OF PETITIONER

STATEMENT OF FACTS

The petitioner herein, Hotel Utah Company, a Utah corporation, heretofore filed its Petition with this Honorable Court for a Writ of Certiorari to review the proceedings and order of the Utah Labor Relations Board.

On the 24th day of February, 1948, the Hotel and Restaurant Employees Alliance, Local No. 815, filed its Petition for Investigation and Certification of repre-

sentatives as provided for by Title 49-1-17, Subsection (c), Utah Code Annotated 1943. Said petition set forth that the unit appropriate for the purpose of collective bargaining constituted the service department employees in the following classifications:

Bell boys, porters, elevator operators (male and female), baggage check room attendants, doormen, page boys, valets and lobby porters.

The Utah Labor Relations Board caused a notice to be served upon this petitioner, notifying it that a hearing would be held on the 4th day of March, 1948, at the State Capitol at Salt Lake City, Utah. That on said day a hearing was conducted by the Honorable Daniel Edwards, one of the Commissioners of the defendant, Utah Labor Relations Board.

On the 8th day of March, 1948, the Utah Labor Relations Board made and entered its Election Order, in which it directed that an election be conducted during the week of March 10, 1948 to March 17, 1948, between the hours of seven o'clock a.m. and seven o'clock p.m., among employees of the Hotel Utah Company in the following described unit:

All employees within the following classifications: Bellboys, porters, elevator operators, baggage checkroom attendants, doormen, page boys and valets, excluding front office employees, clerks, housekeeping department employees, culinary and banquet department employees, garage employees and all supervisory employees with authority to hire and fire such as superintendent of service, head porter, etc.

On the 9th day of March, 1948, the Utah Labor Relations Board, by C. E. Cockayne, Investigator, gave notice of an election to be held among the employees designated in said Election Order for the 10th day of March, 1948.

On the 18th day of March, 1948, the Utah Labor Relations Board made and entered its Certification in which it certified the Hotel and Restaurant Employees Alliance, Local No. 815, as the collective bargaining representative with respect to rate of pay, hours of labor and other conditions of employment with respect to the employees in the appropriate unit set forth in the Election Order, *supra*.

On the 23rd day of March, 1948, this petitioner filed its Motion for Clarification, of which the following is a copy:

“Comes now the Hotel Utah, the above named respondent, and moves this Board for clarification of the Certification heretofore filed in the above entitled matter, upon the grounds and for the reason that the same is ambiguous, uncertain and indefinite in that the following cannot be understood by this respondent:

‘. . . . excluding front office employees, clerks, housekeeping department employees, culinary and banquet department employees, garage employees and all supervisory employees with authority to hire and fire such as superintendent of service, head porter, *etc.*’

This respondent cannot understand what this Honorable Board means by ‘*etc.*’

This respondent respectfully requests that this Board clarify its Certification, and if this respondent can be of assistance, we will be happy to be present at the hearing to discuss this Motion further.

Dated this 23rd day of March, 1948.

(s) CALLISTER, CALLISTER,
& LEWIS

Attorneys for Respondent''

This petitioner filed with the Utah Labor Relations Board on the 31st day of March, 1948, a Motion to set aside the certification heretofore entered on the 18th day of March, 1948, by the Utah Labor Relations Board upon the grounds that the Election Order, together with the Certification of the Board, was not predicated upon findings of fact, as to an appropriate unit for the purposes of collective bargaining. That on the 31st day of March, 1948; this petitioner filed with the Board a Petition, in which it requested the Utah Labor Relations Board to continue its investigation of what constituted an appropriate unit for the purposes of collective bargaining. This petitioner alleged, among other things, that there was not sufficient evidence introduced to predicate any finding of fact as to what constituted an appropriate unit for the purposes of collective bargaining. That in substance, said investigation was incomplete.

On the 8th day of April, 1948, the Utah Labor Relations Board made and entered its Clarification of Certification, which provided in part as follows:

“The Board has accepted the Motion and

now issues the following clarification. That there should be excluded from the bargaining unit as set forth in the Certification issued March 18, 1948:

front office employees, clerks, housekeeping department employees, culinary and banquet department employees, garage employees and all supervisory employees with authority to hire and fire such as superintendent of service, head porter, etc.

It is the intent of the Board that "etc." means any other supervisory employees with related authority as is designated to the superintendent of service and the head porter by the above named Respondent."

The Motion to Set Aside and Vacate, and the Petition requesting the Board to continue its investigation were both denied.

On the 12th day of May, 1948, the Hotel and Restaurant Employees Alliance, Local No. 815, filed a charge with the Utah Labor Relations Board, alleging that the said Hotel Utah Company had refused to bargain with the Hotel and Restaurant Employees Alliance, Local No. 815, with respect to the employees in the unit heretofore set forth in the Election Order.

The Board filed its Complaint on the 2nd day of June, 1948, in which it alleged that, among other things, the Hotel Utah Company had refused to bargain collectively, in good faith, with the Hotel and Restaurant Employees Alliance, Local No. 815, and therefore, was in violation of Title 29-1-16, Subsection 1 (d).

It further alleged that Hotel Utah Company is engaged in the Hotel and Restaurant business at Salt Lake City, and as such is engaged in intra-state commerce, and that the unfair labor practices charged in said complaint affect intra-state commerce and the orderly operation of industry, contrary to Title 49, Chapter 1, Utah Code Annotated 1943, as amended.

An Answer to said Complaint was filed on behalf of the Hotel Utah Company, in which the Hotel Utah Company denied that the Hotel and Restaurant Employees Alliance, Local No. 815, was the duly certified bargaining representative.

The Hotel Utah Company further alleged that it was not required under the laws of the State of Utah to bargain, unless and until such time as the Board, by its Order, found an appropriate unit for the purposes of collective bargaining. It further denied that the unfair labor practices set forth in the Complaint on file herein affected intra-state commerce and the orderly operation of business under Title 49, Chapter 1, Utah Code Annotated 1943, as amended (Tr. 147, 148).

On the 17th day of July, 1948, the Trial Examiner filed his Report, in which he set forth his Findings of Fact and Recommendations (Tr. 157, 158, 159). He recommended that petitioner be ordered to cease and desist from refusing to bargain with the Hotel and Restaurant Employees Alliance, Local No. 815. That the Hotel Utah Company be further ordered to begin bargaining,

immediately, with the Union, respecting the wages, hours and conditions of employment for all employees included in the bargaining unit as found by the Board, and that the petitioner be ordered to make periodic reports as to the progress of the negotiations.

Within the time required by law, that is, on the 23rd day of July, 1948, the Hotel Utah Company filed its Objections to the Intermediate Report of the Trial Examiner, Findings of Fact and Recommended Order (Tr. 173, 174). The Hotel Utah Company alleged among other things in its objections, that there was no evidence to support the Board's action in determining that the unit as set forth in its Findings of Fact, paragraph six, constituted and was an appropriate unit for the purposes of collective bargaining. Further, that the unit as determined by the Board did not constitute an appropriate unit for the purposes of collective bargaining as provided for by the Laws of the State of Utah.

The Hotel Utah Company further alleged there was no evidence to support the Findings of Fact as set forth by the Examiner.

On the 27th day of July, 1948, the Utah Labor Relations Board made and entered its Order (Tr. 175), which is as follows:

“The Utah Labor Relations Board, after consideration of a statement of Objections to Intermediate Report of Trial Examiner, Findings of Fact and Recommended Order filed by the Respondent, concurs with the Trial Examiner's

Report issued July 12, 1948 and hereby orders:

1. That Respondent, Hotel Utah, cease and desist from any further unfair labor practice as set forth in Section 49-1-16 (1), Sub-section (d).

2. That Respondent enter into collective bargaining with the Complainant as it relates to rates of pay, hours of labor and other conditions of employment within fifteen (15) days from this date.

3. That Respondent notify this Board of its compliance with the Board's Order.

Issued this 27th day of July, 1948.

B. A. Fowler,
Secretary.

UTAH LABOR RELATIONS BOARD

Daniel Edwards, Commissioner
H. Fred Egan, Commissioner
R. H. Dalrymple, Chairman''

The Board did not make any Findings of Fact as provided for by Title 49-1-18, Sub-section (c).

ASSIGNMENTS OF ERROR

1. The Order of the Utah Labor Relations Board, dated the 27th day of July, 1948, is void in that it is not supported by any Findings of Fact as provided for, in Title 49-1-18, Sub-section (c), Utah Code Annotated, 1943.

2. The Board erred in failing to make Findings on material issues.

3. The Utah Labor Relation Board did not have

the authority to issue any Order or make any Findings.

ARGUMENT

ASSIGNMENT OF ERROR NO. 1.

THE ORDER OF THE UTAH LABOR RELATIONS BOARD, DATED THE 27TH DAY OF JULY, 1948, IS VOID IN THAT IT IS NOT SUPPORTED BY ANY FINDINGS OF FACT AS PROVIDED FOR, IN TITLE 49-1-18, SUBSECTION C, UTAH CODE ANNOTATED 1943.

Title 49-1-18 provides in part as follows:

“ then the Board shall state its findings of fact and shall issue and cause to be served on such person an order to cease and desist from such unfair labor practice, ”

The statute is clear and mandatory that the Utah Labor Relations Board shall state its findings of fact in each case.

The record in this case discloses the fact that no findings of fact or conclusions of law were made or entered by the Honorable Utah Labor Relations Board, one of the defendants herein.

It is the position of this petitioner that it is mandatory upon the Board to make findings of fact upon all the material issues presented by the pleadings and necessary for a proper disposition of the case.

Title 49-1-18 further provides:

“ The findings of the Board as to the facts, if supported by evidence, shall be conclusive. ”

By reason of the fact that no findings have been made or entered in this cause, this petitioner is not given an opportunity to assail the findings as unsupported by the evidence.

This petitioner contends there were material issues presented by the pleadings in this cause, and that the disposition of the same was necessary for a proper disposition of the case; therefore, findings of fact were necessary with reference to these material issues. The petitioner will hereinafter set forth facts and circumstances in the following assignments of error that justify the statement set forth herein, that there were material issues presented by the pleadings in this cause, and that the disposition of the same was necessary for proper disposition of the case.

ASSIGNMENT OF ERROR NO. 2.

THE BOARD ERRED IN FAILING TO MAKE FINDINGS ON MATERIAL ISSUES.

A. *Failing to make Findings with respect to the unit appropriate for the purposes of collective bargaining, in proceedings under both Sections 49-1-17 and 49-1-18.*

The record in this case discloses the following facts with respect to material issues.

The Petition for Investigation and Certification (Tr. 1) filed on the 24th day of February, 1948, claimed that the following unit constituted a unit appropriate for the purpose of collective bargaining:

Service department employees in the following classifications: Bellboys, porters, elevator operators (male and female), baggage check room attendants, doormen, page boys, valets and lobby porters.

A hearing was held with respect to said petition, and the following Election Order issued thereon (Tr. 3):

“Pursuant to the facts and evidence presented at the hearing held on March 4, 1948 at 10 a.m. in Room 422, State Capitol at which Respondent was represented by Louis H. Callister, Attorney, and Petitioner was represented by Fullmer H. Latter, President, Utah State Federation of Labor, an election is hereby ordered to be conducted by the Board during the week March 10, 1948 to March 17, 1948 between the hours of 7 a.m. among employees of Respondent in the following described unit:

‘All employees within the following classifications: Bellboys, porters, elevator operators, baggage checkroom attendants, doormen, page boys and valets, excluding front office employees, clerks, housekeeping department employees, culinary and banquet department employees, garage employees and all supervisory employees with authority to hire and fire such as superintendent of service, head porter, etc.’

It is further ordered that the payroll period beginning February 16, 1948 to February 29, 1948, inclusive, shall be used for the purpose of determining eligibility to vote.

Issued this 8th day of March, 1948.

B. A. Fowler,
Secretary.

UTAH LABOR RELATIONS BOARD
Daniel Edwards, Commissioner"

After the election was held, and on the 18th day of March, 1948, the following Certification was issued by the Utah Labor Relations Board (Tr. 56):

"A hearing was held on the above entitled matter March 4, 1948 at 10 a.m. in Room 422, State Capitol. Louis H. Callister, Attorney, appeared for Respondent. Fullmer H. Latter, President, Utah State Federation of Labor, appeared for Petitioner. Pursuant to the Order of the Board, an election was conducted on March 10, 1948 among employees of Respondent in the following described unit:

All employees within the following classifications: Bellboys, porters, elevator operators, baggage checkroom attendants, door-men, page boys and valets, excluding front office employees, clerks, housekeeping department employees, culinary and banquet department employees, garage employees and all supervisory employees with authority to hire and fire such as superintendent of service, head porter, etc.

Results of the election indicate that a majority of the employees in the above described collective bargaining unit have selected and designated Petitioner herein to be their sole collective bargaining representative with respect to rates of pay, hours of labor and other conditions of em-

ployment and the Board so certifies.

Issued this 18th day of March, 1948.

B. A. Fowler,
Secretary.

UTAH LABOR RELATIONS BOARD

Daniel Edwards, Commissioner
H. Fred Egan, Commissioner
R. H. Dalrymple, Chairman"

Upon receiving the Certification, this petitioner filed its Motion for Clarification (Tr. 62), alleging that it could not understand what this Honorable Board meant by the term "etc.", as set forth in the Certification hereinabove set forth.

On the 31st day of March, 1948, this petitioner filed its Motion to Set Aside and Vacate the Certification (Tr. 63) upon the grounds, among other things, that the Board had failed and refused to make a finding as to what constituted the appropriate unit for the purposes of collective bargaining. That on said 31st day of March, 1948, this petitioner also filed its Petition (Tr. 64) with this Honorable Board, in which, among other things, it alleged that at the said hearing and investigation herein referred to, there was not sufficient evidence introduced to substantiate what constituted the unit appropriate for the purposes of collective bargaining.

The Board attempted to clarify its Certification (Tr. 66, 67), in which it stated:

"It is the intent of the Board that "etc." means any other supervisory employees with re-

lated authority as is designated to the superintendent of service and the head porter by the above named Respondent.”

It is the position of this petitioner that said intended clarification did not in fact make clear the ambiguous Certification issued by the Honorable Utah Labor Relations Board.

Both the Motion to Set Aside and Vacate the Board's Election Order (Tr. 68) and petitioner's Motion to continue its investigation on the grounds that the evidence introduced at the hearing in this cause was not sufficient to make a finding as to what constituted an appropriate unit for the purposes of collective bargaining (Tr. 73), were denied.

The Certification as issued by virtue of 49-1-17, is not an appealable order. See *Southeast Furniture Company v. Industrial Commission*, 111 P. 2d. 154.

However, when an order made pursuant to Section 49-1-18 is properly taken before a court of review (which is being done in the present case), that court then may review the regularity of the Board's action under 49-1-17. See *Southeast Furniture Company*, supra.

Orders issued by the Utah Labor Relations Board under 49-1-17 are preliminary in nature. They merely designate the proper bargaining agent. No action involving an unfair labor practice is involved. However, orders under 49-1-18 are predicated upon a complaint, hearing and findings of fact. (We again call the atten-

tion of the court that in this case findings of fact were not stated by the Board). They are orders to "cease" and "desist." These are "final orders" which may by either party be taken to the courts for enforcement or review. Courts in reviewing such "final order" may also review at that time the regularity of the Board's action under Section 49-1-17. See Southeast Furniture Company, *supra*.

Section 49-1-17, Sub-section (b), Utah Code Annotated 1943, provides as follows:

"(b) The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

This section is identical with Title 29, Section 159, United States Code Annotated, Sub-section (b), commonly known as the Wagner Act. This section, however, has been amended recently by the Labor Management Act of 1947 (Taft-Hartley Law). The National Labor Relations Board in interpreting this section has said as follows:

"Such a determination is required in two types of cases: (1) cases involving petitions for certification of representatives, pursuant to section 9 (c) of the act, and (2) cases involving charges that an employer has refused to bargain

collectively with the representatives of his employees, in violation of section 8 (5) of the act (Utah reference Section 49-1-18).''

The Board further stated in each instance:

“A finding as to the appropriate unit is indispensable to the ultimate decision.”

See Fourth Annual Report, National Labor Relations Board; Volume 5, Labor Relations Reference Manual, Page 30.

The National Board has further held, in interpreting the Wagner Act, which is identical to that of the Utah Labor Relations Act, that in determining the appropriate unit, the Board examines the unit or units proposed by the union or unions in the light of the following factors: (1) the history, extent, and type of organization of the employees in the plant; (2) the history of their collective bargaining, including any contracts with their employer; (3) the history, extent, and type of organization, and the collective bargaining, of employees in other plants of the same employer, or of other employers in the same industry; (4) the skill, wages, work and working conditions of the employees; (5) the desires of the employees; (6) the eligibility of the employees for membership in the union or unions involved in the proceeding and in other labor organizations; and (7) the relationship between the unit or units proposed and the employer's organization, management and operation of the plant.

It is the position of this petitioner that not only did the Board fail to find on a material issue, but that evi-

dence was not introduced to substantiate any finding, if one had been made by the Board. There is no evidence in the record to support a finding that a unit should be found as proposed by the union.

It is the further position of this petitioner that in determining what constitutes an appropriate unit, the Board must examine such proposed unit in the light of the factors enumerated above.

The petitioner contends that the Board may not delegate the selection of the bargaining unit to the employees. That is, it cannot find an appropriate unit on the sole testimony of the union's representative.

Title 49-1-19, Utah Code Annotated 1943, as amended by Chapter 66, Laws of Utah 1947, provides in part as follows:

“It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the State to protect and promote each of these interests with due regard to the situation and to the rights of the others.”

The Legislature of the State of Utah, in clear and concise language, has taken the position that there are three major interests involved with respect to labor disputes and the application of the Utah Labor Relations Act, namely, the public, the employee and the employer.

In view of the foregoing, it is mandatory upon the Board to follow the intent and purpose of this declaration of policy in the interpretation and application of the Utah Labor Relations Act. In determining what constitutes an appropriate unit for the purposes of collective bargaining, the Board must determine what is best for the three involved, the public, the employee and the employer, and not just the desires of one of the three parties.

It is fundamental that before resolving a question concerning representation, the Board should first determine the unit or units appropriate for the purposes of collective bargaining. The particular facts in each case are determinative of that issue. The Board should be guided by the basic concept that only employees having a substantial mutuality of interests in wages, hours and working conditions as revealed by the type of work they perform should be appropriately grouped in a single unit. The National Labor Relations Board in its Eleventh Annual Report again reiterated those principles which we have enumerated, and further in its Fourth Annual Report. In its Eleventh Annual Report it says in substance, the following: In the application of this concept, the Board should consider various factors, some of the more important of which are: The extent and type of organization and history of collective bargaining among the employees at the place involved and at other places of employers in the same industry; the duties, skill, wages and working conditions of the employees;

the desires of the employees; the eligibility of the employees for membership in the union involved; and the relationships between the proposed unit and the administration and organization of the employer's business. See Eleventh Annual Report of the National Labor Relations Board, and it may be further found at pages 72 and 73, Labor Relations Reference Manual, Volume 19.

It is evident from the reading of the record that the Board (1) did not make any findings whatsoever, (2) nor did it make any findings with respect to what constituted an appropriate unit for the purposes of collective bargaining, one of the material issues, (3) that if such finding had been made, that it is not supported by any evidence.

B. *The Board failed to make Findings with respect to the material issue of whether this petitioner was engaged in intra-state commerce and, therefore, the unfair labor practices charged in such Complaint affected intra-state commerce and the orderly operation of industry, contrary to and in violation of Title 49, Chapter 1, Utah Code Annotated 1943, as amended.*

The Board in its complaint (Tr. 138, 139), paragraph 5, provided as follows:

“That Respondent is engaged in the hotel and restaurant business in Salt Lake City, Utah and as such is engaged in intra-state commerce and the unfair labor practices herein charged and complained of are affecting intra-state commerce and the orderly operation of industry contrary

to and in violation of Title 49, Chapter 1, Utah Code Annotated 1943, as amended.”

The Examiner’s findings of fact (Tr. 157), paragraph 3, provide as follows:

“That Respondent is engaged in the hotel and restaurant business in Salt Lake City, Utah, and that such hotel and restaurant business constitutes “commerce” within the meaning of Title 49-1-10, sub-section 6.”

There is no evidence whatsoever in the record that the hotel and restaurant business of the Hotel Utah Company constituted commerce within the meaning of Title 49-1-10, Sub-section 6. As a matter of fact, there is no evidence whatsoever in the record introduced by either the Board, the union or this petitioner pertaining to the activities of this petitioner as to whether its activities constituted commerce within the meaning of Title 49-1-10, Sub-section 6.

The petitioner takes the position that the findings of fact of the Trial Examiner are not the findings of fact of the Board. That the Board must state its own findings as provided by the Laws of Utah, 49-1-18, and that the findings of fact as reported by the Trial Examiner are not the findings of fact of the Board. There is no evidence in the record whatever to support any finding that this petitioner is engaged in intra-state commerce as defined by the Utah Act, and that the unfair labor practices charged in the complaint (Tr. 138, 139) are affecting intra-state commerce and the orderly opera-

tion of industry, contrary to and in violation of Title 49, Chapter 1, Utah Code Annotated 1943.

ASSIGNMENT OF ERROR NO. 3.

**THE UTAH LABOR RELATIONS BOARD
DID NOT HAVE THE AUTHORITY TO IS-
SUE ANY ORDER OR MAKE ANY FINDING.**

It is incumbent upon the Board to prove that it has jurisdiction of any controversy by the introduction of evidence to show that a person involved is engaging in an unfair labor practice affecting intra-state commerce or the orderly operation of industry. This allegation of the Board's complaint must be substantiated by evidence the same as any other allegation. Until such time as the Board proves that it has jurisdiction as set forth in Title 49-1-18, Sub-section (a), it has no jurisdiction or authority to issue any order or make any finding.

CONCLUSION

The Order issued by the Utah Labor Relations Board is void because of the failure of the Utah Board to make findings on material issues presented by the pleadings in this cause. As a matter of fact, the Board failed to make any findings whatsoever.

The record discloses the further fact that if the Board made findings, they would be unsupported by evidence as provided and required by Title 49-1-18.

The Utah Board, in issuing any order, must first comply with the statute that gave it power to act.

The Order of the Utah Board is void and, therefore, cannot be enforced by an order of this Honorable Court.

Respectfully submitted,
CALLISTER, CALLISTER & LEWIS,
Attorneys for Petitioner.