

American Recreation Centers, Inc., d/b/a Mel's Bowl and Beverly Freitas, Petitioner, and Hotel & Restaurant Employees and Bartenders International Union, Local 28, AFL-CIO. Case 32-RD-157

July 28, 1980

DECISION ON REVIEW

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

On June 11, 1979, the Regional Director for Region 32 issued a Decision and Direction of Election in the above-entitled proceeding, finding, as requested by the Petitioner, that the Employer's approximately 10 bar employees constitute an appropriate unit. The Union, thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, filed a request for review of the Regional Director's decision, contending that the unit must also include the restaurant employees described below.

By telegraphic order dated July 13, 1979, the Board granted the request for review and stayed the election.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review and makes the following findings:

Prior to 1978, American Recreation Centers, Inc. (ARC), operated a bar and restaurant in conjunction with its bowling alley in Alameda, California. The bar and restaurant employees were covered by a multiemployer restaurant association agreement adopted by ARC on July 7, 1976.

In November 1978, ARC leased its restaurant known as Alameda Joe's to an unrelated lessee, which took over the operation and its employees. Shortly thereafter, the restaurant lessee, now independently incorporated as Alameda Joe's, Inc., signed the same restaurant association agreement to which ARC was already a signatory.

Subsequently, the bar and the restaurant were operated as independent businesses. The record shows that after the restaurant was leased out, ARC relinquished control over hiring, supervising, disciplining, setting working hours and wages,¹ paying salaries, and handling grievances with respect to restaurant employees. Thus, although the

restaurant and bar employees necessarily continued to work closely together to serve food and drinks to the bowling alley patrons, they were less closely related with respect to wages and working conditions after the restaurant operation changed hands.

The Union contends that its separate contract with Alameda Joe's, Inc., should be accorded no weight, since it was merely intended to be "added protection" for the Union. While the industry agreement makes any bar licensee the guarantor of contractual benefits for employees of any food concessionaire,² in our view this provision should not be construed as to render a nullity the separate contract between the Union and the food service operator. When Alameda Joe's, Inc., signed the industry agreement it became directly responsible for the terms and conditions of this agreement with respect to the restaurant employees, regardless of ARC's guarantor obligations as lessor of the food concession.

Moreover, the Union has, to a significant extent, separately administered its contracts with ARC and the restaurant corporation. The record reflects that when contractual health and welfare contributions for restaurant employees were not paid, the union business agent worked out an agreement with the restaurant corporation directly, whereby the latter would be billed for those payments and no restaurant employee would lose benefits or seniority. Similarly, when restaurant employees became delinquent in their dues the union agent wrote to an official of the restaurant corporation. The union agent also testified that, before writing a letter, it was his practice to contact a restaurant supervisor about any delinquent restaurant employee and the ARC head bartender about any delinquent bar employee.

Thus, although the original contractual unit included bar and restaurant employees, we find the unit was effectively severed when ARC leased the restaurant, at arm's length, to a totally separate corporation which independently contracted for the restaurant employees. The Union acquiesced in the *de facto* separation of bar and restaurant employees by entering into a contract with the restaurant lessee and administering it separately from the ARC agreement.³

We conclude that, by reason of the subsequent contract executed by the restaurant lessee, its enforcement, and the relinquishment of virtually all control by ARC over the restaurant, the restaurant

¹ While Alameda Joe's, Inc., is obligated to pay certain minimum wages under its contract with the Union (appendixes A-C), the restaurant corporation sets the specific wage for each of its employees.

² Sec. 28(c) provides: "In an establishment where the bar licensee leases the food concession to any other person, the bar licensee shall be responsible for all of the terms and conditions of this Agreement for employees hired by such other person."

³ See *Clohecy Collision, Inc.*, 176 NLRB 616 (1969).

employees have been severed for representation purposes from the original unit of ARC employees. Thus, we affirm the Regional Director's finding that the bar employees of ARC constitute the recognized unit in this case, and that it is, therefore, appropriate for purposes of a decertification election.⁴

Accordingly, this case is hereby remanded to the Regional Director for Region 32 for the purpose of conducting an election pursuant to his Decision and Direction of Election, except that the payroll period for determining eligibility shall be that ending immediately before the date of issuance of this Decision on Review.⁵

CHAIRMAN FANNING, dissenting:

My colleagues here conclude that the Union acquiesced in a "*de facto*" separation of restaurant employees from a unit of bar and restaurant employees existing at the Employer's premises since 1974. Thus they direct an election pursuant to a petition to decertify a unit of bartenders despite the fact that the unit covered by the industry contract is one of bar and restaurant employees. The "acquiescence" they find turns upon the Union having permitted, or requested, a sublessee of the restaurant to sign an adoption of the industry contract.

Employer American Recreation Centers, Inc., doing business as Mel's Bowl, holds the master lease on the premises, consisting of a bowling alley, bar, and restaurant. The current industry contract covering the bar and restaurant employees is effective from July 7, 1976, through July 6, 1982, with a wage rate and fringe benefit opening in 1981. In November 1978, ARC sublet the restaurant operation to Frank and Anna Albanese, by an instrument titled "commercial property sublease." Before entering into the sublease Mr. Albanese consulted with the union business agent concerning employee wages under the industry contract and the operation as a whole. About that time Albanese apparently signed a short form adoption of the industry contract, in the same form ARC had signed in 1974.⁶ The significance of this signing was, according to the business agent, "added protection to the Union." He also characterized it as "two band-aids being better than one" and testified that he told Al-

⁴ Contrary to the contention of our dissenting colleague, this conclusion does not ignore the provisions of the lease agreement between ARC and the restaurant lessee. It may be that ARC and Alameda Joe's, Inc., have, by virtue of the lease agreement, become joint employers of the employees here involved. This is an issue we need not reach, since in any event we find the restaurant unit to be separately appropriate. Cf. *Dixie Bell Mills, Inc.*, 139 NLRB 629, 630 (1962).

⁵ [*Excelsior* footnote omitted from publication.]

⁶ The ARC short form adoption dated 7/16/74 is in evidence. The short form signed by Albanese in 1978 is not. However, there is testimony that the form was that appearing on p. 51 of the booklet containing the text of the industry contract, which booklet is in evidence.

banese the Union considered that ARC remained bound for restaurant workers. Albanese did not testify.

My colleagues attach great importance to this signing as well as to the fact that later, in 1979, the Union contacted the Albanese interests when it discovered that the union fringe benefits had not been paid for restaurant employees, emphasizing that it was the sublessee, not ARC, that the Union contacted. This conclusion ignores the fact that section 28 of the industry contract provides in subsection (a) that the terms of the agreement "shall be equally effective under any subcontract" and in subsection (c) that "in an establishment where the bar licensee leases the food concession to any other person, the bar licensee shall be responsible for all of the terms and conditions of this Agreement for employees hired by such other person." It appears that ARC qualifies as the bar licensee.

My colleagues also rely upon the Union's handling of dues payment delinquencies, implying that such delinquencies were taken up with the sublessee's supervisor, whereas the record shows that the Union merely contacted a restaurant supervisor for permission to post a notice of dues delinquencies on a bulletin board, consistent with its practice of using a bulletin board for that purpose.

The majority's conclusion that the bar and restaurant were operated as "independent businesses" after 1978 is true only in a limited sense. The sublease of the restaurant contained important restrictions. Working hours could not be changed by the sublessee without ARC's consent. Union benefits and personnel provisions gave ARC the option of requiring that "all personnel working on the leased premises will either join or belong to the appropriate union," or that fringe benefits pursuant to ARC's union contracts would be paid if nonunion personnel were utilized.⁷ There is also a provision that the tenant will use its best efforts to correct "problems" in its restaurant "because of the integrated nature" of ARC's and tenant's operations.

In my view the record does not warrant the conclusion of the majority that the established unit of bar and restaurant employees ceased to exist by reason of the execution of the restaurant sublease and what followed thereafter. Bar and restaurant employees continue to work in close proximity. Bar employees continue to serve drinks in the restaurant; restaurant employees continue to serve food in the bar and lounge. So far as the record discloses, the same employees who had worked in the restaurant when operated by ARC continued to

⁷ The provision also included the option of neither choice, for reasons that are not apparent in light of subsection 28(c) of the industry contract quoted above.

do so after the November 1978 sublease, apparently with the same immediate supervisors.

My colleagues cite as Board precedent *Clohecy Collision*, 176 NLRB 616, a completely distinguishable case. There the Board set forth its general rule concerning the appropriate unit decertification elections: a unit coextensive with the unit previously certified or with the unit recognized. In *Clohecy*, however, the parties had ignored the Board certification of a single unit covering two locations. Instead the bargaining of the two employers, who were allied financially and located 4 to 5 miles apart, proceeded on the basis of a separate unit for each location, separately negotiated. The result was two contracts, each individually tailored to one of the two enterprises involved. The Union acquiesced in the separate bargaining. A 3-year contract was agreed upon for one location and, for the other, a 1-year contract. Unit employees took part in bargaining only for the unit at their own work location. Later the Board, noting this fact pattern and the differing substantive terms of the said contracts, directed a decertification election at one location because the unit had been separately recognized by the parties. On such facts, patently, it was appropriate for the Board to conclude that the Union acquiesced in the result. There is no parallel in the facts here before the Board. I am not prepared to amend the Board's rule concerning the appropriate unit for decertification by subscribing to *de facto* recognition when the facts do not justify it.

In a later case, after *Clohecy*, the issue of employer acquiescence arose. Three Unions administered a contract after the certification of one, and a

panel majority of the Board declined to view the overall unit as effectively divided with employer consent. In that case—*Houdaille-Duval-Wright Company, A Division of Houdaille Industries, Inc.*, 183 NLRB 678—I dissented because all three Unions had participated in the day-to-day administration of the first contract, each with respect to employees in its schedule as attached to the contract. I noted that the Employer had been agreeable to attaching to the contract the schedules describing the three groups of employees, that recognition was granted in terms of the three schedules, and that, though the contract was jointly negotiated by the three Unions, it was separately executed by each. Here I see no comparable facts establishing union consent to the disintegration of the unit of bar and restaurant employees.

I cannot conclude on the evidence here that the Union acquiesced in separate units for bar employees and for restaurant employees. The industry contract specifically deals with the possible operation of sublessees in general, as well as sublessees of the restaurant. The intent to continue coverage of unit employees in the event of sublease is clear. Labeling ARC merely a "guarantor" of compliance with the industry contract, incident to inclusion in the sublease of a provision that would enable it to fulfill its commitments to the Union with respect to the bar and restaurant bargaining unit, does not detract from the continued viability of that unit in this case.

Accordingly, I would on this record reverse the Regional Director with respect to the decertification petition and dismiss.