

Frisch's Big Boy Ill-Mar, Inc. and Hotel, Motel, Cafeteria & Restaurant Employees & Bartenders Union, Local No. 58, AFL-CIO, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, Petitioner. Case No. 25-RC-2410. June 19, 1964

DECISION ON REVIEW

On July 17, 1963, the Regional Director for the Twenty-fifth Region issued a Decision and Direction of Election in the above-entitled proceeding, directing an election in a unit of all regular and regular part-time employees at the Employer's restaurant located at 51 North Illinois Street, Indianapolis, Indiana. Thereafter, the Employer, in accordance with Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, filed with the Board a timely request for review of such Decision and Direction of Election. The Petitioner filed a brief in opposition to the request for review. On July 15, 1963, the Board granted the request for review.

The Board has considered the entire record in this case with respect to the Regional Director's determination under review, and makes the following findings:

In its request for review the Employer contends that the single restaurant unit sought by the Petitioner and in which the Regional Director directed an election is not appropriate for bargaining. It asserts that the only appropriate unit should include all 10 of its restaurants which it owns and operates in Indianapolis. We find no merit in this position.

In *Sav-On Drugs, Inc.*, 138 NLRB 1032, the Board reexamined its unit policy in the retail chain industry and decided, for stated reasons, to abandon its prior general policy of making unit determinations in that industry coextensive with the employer's administrative division or the involved geographic area.¹ The Board there affirmatively stated that it would apply to retail chain operations the same unit policy that it applies to multiplant enterprises in general, that is, the Board will determine the appropriateness, or want thereof, of a proposed unit

¹ We do not agree with our colleagues' interpretation of the Board's decision in *Sav-On Drugs, supra*, which they apparently construe as holding that the Board will presume all stores in an administrative division or geographical area to constitute an appropriate unit unless grounds are shown for establishing a smaller appropriate unit. No such presumption exists. Rather, the Board there abandoned the approach that a multistore unit alone could be appropriate and adopted the view that the general unit criteria should apply to retail store units. Under such criteria a single-plant unit is presumptively appropriate unless it is established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity. *Weis Markets, Inc.*, 142 NLRB 708, 710; *Divie Belle Mills, Inc.*, a Wholly-Owned Subsidiary of Bell Industries, Inc., 139 NLRB 629, 631. We find no compelling reasons to override the presumption that the single-store unit sought is appropriate.

confined to one of two or more retail establishments in a chain, not by any rigid yardstick, but in the light of all the relevant circumstances of the particular case.

The Employer's operation includes 10 restaurants in Indianapolis and an 11th in Muncie, which is about 60 miles from Indianapolis. All restaurants are commonly owned, although separately incorporated, and operated under franchises granted by Frisch's Big Boy, Inc., a multistate corporation doing business in the States of Ohio, Kentucky, Indiana, and Florida. The franchise agreement, among other things, permits the Employer to use the name "Frisch's" in its business and requires that menus, uniforms, marked paper goods, and some food items be purchased from a commissary operated by the franchising company. Other food products—meat, bread, and produce—are purchased directly from the supplier by each restaurant manager. The receipts for these purchases are sent to the Employer's general office, where payrolls, accounts, and other records are maintained separately for each restaurant by two clerical employees.

There are 282 employees in the 10 restaurants located in Indianapolis, varying from 12 employees at the smallest restaurant to 48 at the one sought by the Petitioner. Although employees are temporarily transferred or loaned among the restaurants as business needs require, such transfers appear to be minimal. The figures provided by the Employer reflect that the transfers average approximately eight employees a week, thus involving during a weekly period only about 3 percent of the total number. The length of each such transfer is usually less than a day.

Employees may also be permanently transferred at their request to another restaurant, but it is within the discretion of the manager to decide whether the transferred employee will retain his seniority for purposes of layoff, or for computing his vacation and Christmas bonus benefits. If such an employee is not in the "good graces" of the Employer, he will be treated in effect as a newly hired employee.

The Employer's president prescribes the general overall policies for the entire operation, but delegates to four supervisors the responsibility of making periodic rounds of the restaurants. The restaurant managers, however, are responsible for the day-to-day operation of their establishments. And, in addition to purchasing food items, they also have the authority to hire, fire, and discipline employees.

There is no history of bargaining for any of the restaurants and no labor organization is seeking the overall operation.

It may well be that the optimum unit for collective bargaining would be citywide in scope, but this does not preclude the Petitioner from seeking representation in a smaller unit if, as we find here, the

smaller unit, standing alone, is under all the circumstances also appropriate for the purposes of collective bargaining.²

Upon consideration of the entire record, including particularly the substantial degree of autonomy that exists at each restaurant, reflected in the control each manager exercises in the day-to-day operation of his establishment;³ the minimal interchange of employees; the absence of any bargaining history; and the fact that no labor organization is seeking a larger unit, we are satisfied that the requested single-restaurant unit constitutes *an* appropriate unit which will "assure to employees the fullest freedom in exercising the rights guaranteed by the Act." We find nothing in this record to support the evaluation by our dissenting colleagues of the impact upon employees at the other restaurants of contract terms secured by a union selected by employees of a single restaurant. That a striking union might picket any or all locations is of no consequence; such a situation might arise in any multiplant operation. Nor do we find in this record such evidence as convinces us that the employees have sufficient interests in common, let alone the complete identity of interests that our dissenting colleagues infer, to require finding only the broader unit appropriate. Accordingly, we agree with the Regional Director that the unit requested by the Petitioner is appropriate.

In view of the above, the case is hereby remanded to the Regional Director for the Twenty-fifth Region for the purpose of holding an election pursuant to his Decision and Direction of Election, except that the eligibility date shall be the payroll period immediately preceding the date above.

MEMBERS LEEDOM and JENKINS, dissenting:

The Employer operates a chain of 10 restaurants in Indianapolis, Indiana.⁴ Each of these restaurants operates under the name of "Frisch's Big Boy"; they all sell the same food from the same menu and operate in essentially the same manner; and, as described more

² *Ditie Belle Mills, Inc., supra.*

³ Contrary to the implication of the dissenting opinion, the record does not establish such close daily control of all phases of the operations as to indicate total merging of all the Employer's restaurants in the city. Instead, it appears that basic policy is established and general procedures and rules adopted for all stores, but the day-to-day application is left to each manager. Further, the fact that each manager is required to make purchases from a central commissary operated by the franchising company—a condition imposed by the franchising company, not the Employer, and relied on heavily by our dissenting colleagues—does not require that a multistore unit be found appropriate. Rather this requirement, which was a condition of granting the franchise and presumably applies to all franchise holders, would more logically lead to the conclusion that all Frisch's restaurants in the four-State area must be held a single unit for bargaining purposes, regardless of the fact that they have no ownership or control in common.

⁴ The Employer also operates a restaurant in Muncie, Indiana, 60 miles from Indianapolis. However, this restaurant is not directly involved in this proceeding and the Employer agrees that the employees working there may possibly constitute a separate appropriate unit.

fully below, each restaurant manager's authority is limited, and there is a significant amount of interchange among the employees in all the restaurants, and these employees have identical terms and conditions of employment. The Petitioner seeks to represent a unit limited to the employees of one of these restaurants. Unlike the majority, we believe that the single unit is inappropriate, and we would therefore dismiss the petition.

The Board has traditionally held in cases involving retail chain-store operations that, absent unusual circumstances, the appropriate unit should embrace employees working at all stores located within an employer's administrative division or geographical area.⁵ In *Sav-On Drugs, Inc.*,⁶ the Board modified this rule to the extent of finding that "whether a proposed unit which is confined to one of two or more retail establishments making up an employer's retail chain is appropriate will be determined *in the light of all the circumstances of the case.*" [Emphasis supplied.]⁷ In the course of finding in that case that a separate unit of employees of the employer's Edison, New Jersey, store was appropriate, the Board made clear that it was relying particularly on the geographical separation of the Edison store from other stores in the chain, the substantial authority of the store manager, and the minimum interchange of employees between the Edison store and other stores. We believe that those very factors relied on by the Board in *Sav-On* require the conclusion here that the single-restaurant unit is inappropriate.

As to the geographical separation, all 10 of the Employer's 11 restaurants are located within a few blocks of one another. These facts are in marked contrast to *Sav-On*, where seven of the stores were located in separate communities in northern New Jersey, two were located in Staten Island, New York, and the various stores were separated by distances ranging from approximately 5 to 65 miles.

As to the authority of the restaurant manager, the Employer's entire operation is under the general supervision of the president who determines overall policy for the restaurant chain, including personnel policies. There is also a supervisor of cleanliness who directs

⁵ See, for example, *Robert Hall Clothes, Inc.*, 118 NLRB 1096. This rule has also been applied to restaurant chains. See *Frank G. Shattuck*, 106 NLRB 838.

⁶ *Sav-On Drugs, Inc.*, 138 NLRB 1032.

⁷ The majority incorrectly reads the Board's decision in *Sav-On Drugs, supra*, as holding that single-store units are presumptively appropriate. In this connection, we point to footnote 4 of that decision in which the Board clearly says that it had "simply added the possibility—as in manufacturing and other multiplant enterprises—that a single location or a grouping other than an administrative division or geographical area may be appropriate." [Emphasis supplied.] Our interpretation is further borne out by the Board's decision in *Weis Markets, Inc.*, *supra*, cited by the majority, where the Board, quoting the above language from *Sav-On Drugs, Inc.*, *supra*, said: "It has long been the policy of the Board to find that the appropriate bargaining unit in retail chain operations should embrace the employees of all stores within an employer's administrative or geographical area. The Employer's contention that the Board's decision in *Sav-On Drugs, Inc.*, *supra*, abandoned that rule is without merit." [Footnotes omitted.]

sanitary activities for all 11 restaurants, and 3 area supervisors, each of whom is responsible for supervising the operations of 3 or 4 restaurants. Each of these area supervisors has the right to hire and discharge employees. While each of the restaurant managers may hire employees, they do so only within the minimum and maximum hiring rates established by the president and any deviation from these rates must be approved by the area supervisors. Further, before an applicant can be hired, the restaurant manager must check his name against the list of "untouchables," that is, those employees who were unsatisfactory at another of the Employer's restaurants. And, although the restaurant manager is authorized to make purchases of certain products, he is required to purchase menus, uniforms, marked paper goods, and some food products from the commissary operated by the franchising company in Cincinnati. Here again, these facts are markedly different from those in *Sav-On*. Thus, the managers in that case had complete hiring authority with respect to part-time employees, hired full-time employees, subject only to the approval of the division manager; made all purchases of merchandise for their own stores from a list of companies approved by the division manager; and generally decided what and how to advertise. Finally, unlike the instant case, there was no central warehouse for the *Sav-On* chain.

As to interchange of employees, the record shows that they are loaned on a temporary basis from one restaurant to another because of employee absenteeism or seasonal business fluctuations; that, in two 1-month periods during the past year, out of a total employee complement of approximately 300 employees, there were 83 loans from one restaurant to another for periods ranging from 4 to 16 hours; and that employees, at their own request, may be permanently transferred to another restaurant. These facts again emphasize the difference between this case and *Sav-On*, where the Board held that transfers between stores were "infrequent, mainly for relief work and emergencies." Indeed, in *Sav-On*, the greatest interchange of employees occurred in 1961, when *during the entire year*, 26 employees were transferred temporarily to assist in the opening of 2 new stores.

The unitary nature of all 10 stores is further demonstrated by the record. Thus, employees at all restaurants are paid according to the same pay levels and receive the same fringe benefits; the two classifications of helpers and waiters exist at all restaurants and, at all but three restaurants, which do not have drive-in service, an additional classification of carhop exists; all employees work in 8-hour shifts for a maximum of 6 days a week; the Employer has a central office in Indianapolis, where the records, books, and payrolls of each restaurant are maintained; the two clericals and a comptroller who are employed at this office perform work relating to all the restaurants; the restaurant managers forward sales receipts directly to the central office and

send invoices there for payment; and a warehouse is located adjacent to the central office, where one maintenance man is employed who makes rounds of the restaurants to maintain equipment or to bring it to the warehouse for repairs.

This case presents us with what is, in fact, a single establishment. All 10 restaurants are located in Indianapolis and are elements of the Employer's single administrative operation. All 10 restaurants operate under the same name, sell the same foods from the same menu, and interchange employees among themselves. All employees come from the Indianapolis area labor market. Every managerial decision must be taken with the greatest regard for the peculiarities of that locality's economic situation. A uniform policy for all restaurants is essential to the employer's pricing and competitive considerations. For this Employer, these individual units in the chain constitute but a single economic unit. Indeed, to the patrons of the chain and to the entire community, one store is much like another since they all operate under the same name, in the same manner, and perform the same functions. In sum, therefore, the cluster of stores in one geographic area is most comparable to the single-plant unit and should, by the same token, be presumptively appropriate.

The same is true for the employees involved. Their wages, hours, and working conditions are identical now and collective bargaining by a small portion of them cannot but affect the others. As a result of today's decision, the latter group is denied the choice of an agent through which they may discuss and agree upon solutions and grievances which they find important.

Although the majority agrees that the "optimum" unit for collective bargaining would, in this case, be citywide in scope, it finds the single-restaurant unit appropriate essentially on the ground that the Petitioner seeks to represent only the employees in the smaller unit. But since, as we have shown, no other factors support the appropriateness of the single restaurant, this determination rests solely on the Petitioner's extent of organization, a result which is specifically forbidden by Section 9(c) (5) of the Act.⁸ In this connection, it should be emphasized that this case is unlike such cases as *P. Ballantine & Sons*, 141 NLRB 1103,⁹ where the Board found the smaller unit appropriate on the ground that to require employees to organize only in the employer's "vast multistate operations" would effectively deny them the statutory rights of self-organization and bargaining. Here, however, all of

⁸ Section 9(c) (5) provides: "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." See *Metropolitan Life Insurance Co. v. N.L.R.B.*, 327 F. 2d 906 (C.A. 1), and *Singer Sewing Machine Company v. N.L.R.B.*, 329 F. 2d 200 (C.A. 4).

⁹ See also *Joseph E. Seagram & Sons, Inc.*, 101 NLRB 101.

the Employer's stores are within a single city. It obviously would not be unreasonable to require the Union to undertake representation of the employees in the more comprehensive unit.

The majority argues that the result it reaches will "assure to employees the fullest freedom in exercising the rights guaranteed by the Act." We believe that the majority decision will have precisely the opposite effect. As noted, the president sets the wages and makes all personnel decisions for all employees in the chain and they all have identical terms and conditions of employment. It is apparent, therefore, that for the purposes of collective bargaining, there is a complete identity of interest among the employees in all the restaurants. In consequence, the contract terms with the union selected by the employees in the single-restaurant unit will undoubtedly have a potent impact on the terms and conditions of employment of all other employees in the chain.¹⁰ Further, under the Board's decision in *Alexander Warehouse & Sales Company*, 128 NLRB 916, if the employees in the single-restaurant unit have a dispute with the Employer and go on strike, they may lawfully picket any of the restaurants in the chain, even though the union does not represent employees in such other unit. In other words, under the majority decision, although the employees in the single-restaurant unit alone are entitled to vote as to whether the Petitioner should represent them, this vote will be an effective determinant in the labor relations pattern for other employees in the chain who have had no voice in deciding whether or not they wished to be represented by the Petitioner.

Today a majority of the Board, under the rubric of providing employees with the "fullest freedom" in exercising the rights guaranteed by the Act, in fact prevents an overwhelming majority of employees from exercising the rights which Congress has bestowed upon them. In this decision the Board withholds what it professes to give. The principle of "fullest freedom" for all employees is not well translated when the desires of a small minority are permitted to control the interests of the affected majority.

We are persuaded that the only basis for granting the unit sought is the extent of Petitioner's organization. Accordingly, we would dismiss the petition herein.

¹⁰ The majority states that there is no record testimony supporting this conclusion. But we think it apparent on the basis of economic realities that wage rates of employees of one restaurant will have an "impact" on those of employees working in other restaurants in the same chain and located in the same city. Nor can we understand the majority's singular lack of concern with the fact that picketing by the Union of any restaurant in the chain would serve to further disrupt the business activity of the Employer, cause economic hardship to employees whom it does not represent, and interfere with the right of the public to patronize these other restaurants. Nor does the fact that the same situation may arise in a multiplant context serve to lessen our concern here.