

Fahnestock Enterprises, Inc. d/b/a Stox Restaurant and Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders—International Union of Long Beach and Orange County.¹
Case 21-RM-1342

August 8, 1968

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND BROWN

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Robert L. Bernier. Thereafter, the Employer-Petitioner filed a brief.

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

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer-Petitioner is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

Petitioner, herein referred to as the Employer, operates two establishments, known respectively as Stox Restaurant and Stox Pie Shop at Downey, California. The Employer's petition, as amended at the hearing, seeks an election in a unit composed of employees of both establishments. The Employer indicated, however, that it was willing to go to an election in a unit confined to Stox Restaurant employees if the Board determines that the broader unit requested is inappropriate.

¹ As amended at the hearing

² The undisputed evidence establishes that Fahnestock's status as the employer of the Stox Restaurant employees remained substantially the same despite the incorporation of his business. The record further shows that the Petitioner, following incorporation, continued to operate the restaurant in strict conformity with the terms of the contract which Fahnestock, as an individual, executed in July 1963, also that on a number of occasions subsequent to incorporation the Petitioner, by certain actions

The Union moves the dismissal of the petition on the ground that it was untimely filed with reference to the expiration date of a contract dated July 1, 1963, covering the Stox Restaurant employees. Contrary to the Employer, the Union alleges that this contract is in effect and will not expire until January 31, 1971. In the event an election is directed, the Union claims that the appropriate unit should encompass only those employees whom it presently represents at Stox Restaurant.

We consider first the contentions bearing on the contract-bar issue.

The record shows that Stox Restaurant was opened on June 26, 1963, by Harry L. Fahnestock, and that sometime in 1964 the latter transferred ownership of the business to Fahnestock Enterprises, Inc., Petitioner herein, without any change in operation and with the same employee complement. Fahnestock was and is president and chief stockholder of the Petitioner, and his wife is the only other stockholder.

Since on or about July 15, 1963, the Stox Restaurant employees have been continuously covered under a contract signed by Harry L. Fahnestock and the Union. That contract was executed on or about July 1, 1963, shortly after the Stox Restaurant was opened, to become effective on July 15, and to remain effective until February 1, 1968, subject to an automatic renewal clause. On November 30, 1967, the Employer filed the petition in this case.

We reject what appears to be the Petitioner's initial contention that it can in no event be held bound by the July 1, 1963, contract executed by Fahnestock as an individual because it did not as a corporation formally adopt that contract.² But we do find merit in its further contention that the contract cannot serve as a bar because this petition was filed before the operative date of the contract's automatic renewal clause and within the 60 to 90 day period preceding the expiration date of the contract's initial term, as required by our rules. *Deluxe Metal Furniture Company*, 121 NLRB 995, and *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000.

The Union's claim of contract bar is predicated upon its contention that it has a continuing contractual relationship with the Employer governed by a contract which it negotiated in 1966 with the Long

described below, acceded to Union demands based on the 1963 contract provisions. Moreover, Harry Fahnestock admitted at the hearing that the Petitioner was in fact bound to the terms of the July 1963 contract. We find, accordingly, for purposes of this proceeding, that the Petitioner is to be regarded as the *alter ego* of Harry Fahnestock, as the employer party to the July 1, 1963, contract, and that the terms of that contract were binding upon it at all times here relevant. Cf. *Shop Rite Foods, Inc.*, 162 NLRB 1020

Beach and Orange County Restaurant Association³ and which does not expire until January 31, 1971. Although conceding that the Employer is not a member of the Association, and did not sign the 1966 contract, the Union claims nonetheless that the terms of the association contract became "automatically" binding upon the Employer by virtue of certain provisions in the Employer's 1963 contract.

The merits of the Union's contract-bar contentions turn on an interpretation of the following provisions of the Employer's 1963 contract:

This Agreement, made and entered into this first day of July 1963, to become effective on the 15th day of July, 1963, and to remain in full force and effect from the effective date until *February 1, 1968*, and thereafter under the terms hereof. . . . [Emphasis supplied.]

Section 24—Change of Agreement: (a) It is understood and agreed by the parties hereto that during the life of this Agreement, if any more favorable contractual conditions are granted by the Union subsequent to the execution of this Agreement to any other similar establishment, such conditions shall be immediately available to an Employer signatory to this Agreement at his option.

(b) It is mutually agreed by the parties hereto that any changes made during the term of this Agreement in the collective-bargaining agreement as amended, effective August 15, 1962, between the Long Beach and Orange County Restaurant Association and the Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders International Union of Long Beach and Orange County as the *same may be amended or extended, shall automatically become a part of this Agreement as of the effective date of said change.* [Emphasis supplied.]

Section 34—Term of Agreement: This Agreement shall remain in full force until *February 1, 1968*, and shall remain in full force in all respects for another year from February 1, 1968, and for continued successive annual periods thereafter until a proper notice in writing of a desired change or termination is given by either party. [Emphasis supplied.]

The relevant portions of the 1962 Restaurant Association contract, which was in effect when the above-described contract was executed, read as follows:

Section 34—Term of Agreement: This Agreement, shall remain in full force and effect and not subject to revision except as hereinafter provided for the period *August 15, 1962, to and including January 31, 1968.*

Provided, however, that on or before sixty (60) days prior to February 1, 1964, and or before sixty (60) days prior to each February 1st thereafter during the term thereof, either party may serve written notice upon the other to Open Section 33 . . . *only* for changes or modifications of the wage rates and hours of work and rate of contribution. . . . [Emphasis supplied.]

The facts relating to the negotiations conducted by the Union and the Restaurant Association pursuant to the above-quoted reopening clause of their 1962 agreement are as follows:

In late 1964 and early 1965, the Union and Restaurant Association conducted negotiations resulting in an agreement which modified the 1962 contract by increasing wages and improving health, insurance, and vacation benefits, the modifications to be effective for the years 1964 and 1965. The Employer did not participate in these negotiations and had no knowledge that they were taking place. After the negotiations were concluded, however, the Union notified the Employer of the modified contract terms and the Employer then applied the improved benefits and increased wage rates.

In the latter part of 1965, the Union again notified the Restaurant Association that it desired to renegotiate the master contract's hour and wage provisions. The ensuing negotiations were scheduled to begin in February. On December 30, 1965, the Restaurant Association held a meeting to discuss collective-bargaining strategy. It invited to the meeting restaurant owners who were not members of the Restaurant Association, but who had executed individual contracts with the Union. The Employer attended this meeting through a representative, Horace Griffin, but it was neither invited to nor did it attend any subsequent Restaurant Association meetings. At this initial meeting, a Restaurant Association spokesman, Charles Savitz, advised those attending that the Union had proposed certain wage increases and additional health and welfare benefits. After Griffin and others voiced objections to some of these proposals, Savitz stated that if the Restaurant Association members wished to defy the Union, they should wait until "the full contract expires, not now

³ Herein called the Restaurant Association. This association is comprised of approximately 100 restaurants. Its primary purpose is to negotiate and administer the areawide master contract with the Union.

when we have 2 more years to go under the contract." In the subsequently conducted negotiations, however, the Restaurant Association agreed not only to increase wages and grant new benefits, but also to extend the term of the agreement for an additional 3 years beyond its initial expiration date, to January 31, 1971, subject only to a right to reopen for wages in 1969.

The Employer received a copy of this last-negotiated Restaurant Association-Union contract shortly after it had been executed by the parties thereto, and it thereafter adjusted its wage rates and other benefits accordingly.

From the foregoing it is clear that the Employer did not participate in the negotiations between the Restaurant Association and the Union which resulted in the extension of the term of their 1962 contract beyond its initial expiration date (January 31, 1968) for an additional 3-year period. It is also clear that although notified in December 1965 that negotiations were to be conducted pursuant to the Restaurant Association's 1962 contract's reopening clause the Employer was told that the negotiations would cover *only* those matters specified in the contract's reopening clause. In these circumstances, we could not find the Restaurant Association's extension of its 1962 agreement with the Union binding upon the Employer unless it appears from other evidence that the Employer had explicitly authorized or consented to be bound by such an extension.

Section 24(b) of the Employer's 1963 agreement, quoted above, provides the only other evidence on which the Union relies in claiming that the Employer had in fact authorized such an extension. However, in light of other relevant provisions contained in both the Employer's 1963 contract and the 1962 Restaurant Association contract, we are unable to read Section 24(b) as manifesting the expression of a clear intent by the Employer to grant the Union a unilateral right to determine the duration of its contractual relationship with the Employer. We note, *inter alia*, that: (a) The Employer's July 1963 contract explicitly grants it the right to terminate the agreement as of February 1, 1968, by service of prior timely notice; (b) the reopening rights afforded to the parties under Section 34 of the 1962 Restaurant Association-Union contract were limited in scope; and (c) the 1962 Restaurant Association-Union contract (as it existed when the Employer's contract incorporated its

provisions by reference) explicitly defined the effective term of all its provisions as expiring on January 31, 1968.

In all the foregoing circumstances, and as it further appears that the Employer's petition filed on November 30, 1967, preceded the operative date of the contract's automatic renewal provisions and otherwise met our requirements of timely filing where, as here, a contract is involved, we find that the petition was not filed in contravention of our contract-bar rules.⁴ We therefore deny the Union's motion to dismiss the petition.

We turn next to the unit issues.

As mentioned above, the Employer, in opposition to the Union, seeks to establish a unit extending in scope to the Stox Restaurant and Stox Pie Shop employees. However, the record shows that the Union has never sought to represent the Stox Pie Shop employees; that the Pie Shop was acquired by Harry Fahnstock in 1956 and has been maintained by him since that date as a distinct and unincorporated enterprise; that although Fahnstock has managed both the Pie Shop and the Restaurant at all times here relevant under a centralized administrative system, the day-to-day operations of the two enterprises are separate; that supervision of each of the two groups of employees is independent of the other; and that there is no interchange between the employees of Stox Restaurant and those of Stox Pie Shop. In these circumstances, and particularly in view of the fact that the Union's representation claim and the history of bargaining have been confined to the Stox Restaurant employees, we find that for purposes of this proceeding, the appropriate unit herein is one composed only of the Stox Restaurant employees in the historical contract unit.⁵

It appears that the July 1963 contract recognized the Union as the collective-bargaining representative for the following employees:

Waiters, waitresses, grill men, butchers and bakers' assistants, cooks' assistants, kitchen employees, bartenders, bus boys, cashiers, and hostesses.

Both parties agree, however, that since 1965 hostesses and cashiers have not been covered by the contract because, at that time, the Employer described them to the Union as "supervisors" and the Union therefore agreed to their withdrawal from the unit.

The Employer now seeks to include these

⁴ Contrary to the Union's contention, the Board's holding in *Montgomery Ward & Co.*, 137 NLRB 346, is inapplicable here. In that case, the duration of the effective term of the contract signed by the Employer was not in issue, and the petition was clearly filed untimely with reference to that contract's expiration date.

⁵ Although the Employer has requested a broader unit, it has also indicated its willingness to go to an election in any unit deemed appropriate by the Board. We shall not, therefore, dismiss the petition here. Cf. *A and M Karagheustan, Inc.*, 100 NLRB 917, and *Underwood Corporation*, 101 NLRB 25.

hostesses and cashiers, alleging that its 1965 designation as "supervisors" did not purport to define their legal status within the meaning of the Act, and that in fact they do not possess or exercise any supervisory authority as defined in Section 2(11) of the Act.⁶ The Union, however, opposes their inclusion, claiming that they are in fact "supervisors," and that, in any event, the Employer is now estopped from claiming otherwise.

Although the record establishes that the hostesses and cashiers perform duties which are not supervisory in nature, we do not agree with the Employer's contention that they should now be placed in the traditional bargaining unit. These employees have been neither covered by the collective-bargaining agreement nor represented by the Union for the last 3 years because of the parties' agree-

⁶ The Employer's president, Harry Fahnstock, testified at the hearing that he wanted to obtain the withdrawal of these employees from the unit on the ground that they were unable to obtain benefits under the Union's health and welfare benefit plan because they did not work the number of hours specified as an eligibility requirement under that plan. Once removed from the bargaining unit, the Employer was able to place these employees in its private health and welfare plan maintained for nonbargaining unit employees.

⁷ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their ad-

ment to exclude them from the collective-bargaining unit. Moreover, the Union has disclaimed any interest in representing them. We do not believe in these circumstances that the inclusion of the hostesses and cashiers in the historical unit is warranted. We shall, therefore, exclude them from the overall unit.

4. We find that the following employees of the Employer's Stox Restaurant constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b):

All waitresses, waiters, grill men, butchers and bakers' assistants, cooks' assistants, kitchen employees, bartenders, and bus boys.

[Direction of Election⁷ omitted from publication.]

resses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 21 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.