

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 2

EAST VILLAGE GRAND SICHUAN d/b/a GRAND SICHAUN,¹
Employer

and

Case No. 02-RC-099300

318 RESTAURANT WORKERS UNION,
Petitioner

DECISION AND ORDER DISMISSING PETITION

East Village Grand Sichuan d/b/a Grand Sichuan (“the Employer”) operates a restaurant at 19-23 St. Marks Place in New York City. On February 27, 2013, 318 Restaurant Workers Union (“the Petitioner”) filed a petition seeking to represent all full-time and regular part-time delivery workers and packers employed by the Employer, and excluding all other employees, including waiters, cashiers, kitchen staff, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

The Petitioner maintains that the petitioned-for unit is appropriate because the packers share a community of interest with the delivery staff in that these employees perform highly integrated work related to the delivery service. Notably, the Petitioner states that it will not proceed to an election in any alternate unit.

The Employer argues that the smallest appropriate unit would include all employees except the cashiers. In the alternative, the Employer contends that the smallest appropriate unit must include the delivery workers, the packers, and the kitchen staff because the packers are part of the kitchen.

Upon a petition duly filed under Section 9(c) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board (“the Board”).

¹ The name of the Employer has been corrected to reflect the correct name as stipulated during the hearing.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding, and the brief filed by the Employer after the closing of the record, I find that:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a domestic corporation with an office and place of business at 19-23 St. Marks Place, New York, New York, the sole facility involved herein, and is engaged in the operation of a restaurant serving and delivering food and beverages to individual customers. During the calendar year ending October 18, 2012, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 from sales or performance of services, and purchased and received at its facility goods valued in excess of \$5,000 from other enterprises, including Consolidated Edison Co. of New York, Inc., and Feudal USA Trading, Inc., which themselves are directly engaged in interstate commerce. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
5. In its petition, the Petitioner seeks to represent all full-time and regular part-time delivery workers and packers employed by the Employer at 19-23 St. Marks Place, New York, NY 10003. The issue raised at the hearing was whether the petitioned-for unit is a readily identifiable group or whether the smallest appropriate unit must also include the kitchen staff or some other grouping of employees.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I find that the petitioned-for unit is not appropriate because the Petitioner did not establish that the delivery workers and the pacers share a community of interest that would warrant excluding the rest of the kitchen staff. Rather, it constitutes a fractured unit and is therefore, not an appropriate unit within the meaning of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). Because the Petitioner will not proceed to an election in any alternate unit, I am dismissing the Petition.

FACTS

The Employer operates a restaurant in the East Village neighborhood of New York City. The restaurant is open seven days per week and offers dining room and delivery services; the latter accounts for about 60% of the restaurant's business.

Manager, Tian S. Wong and Chief Chef, Wang Yong Quiang oversee the Employer's operations. Manager Wong supervises the delivery workers and the waiters. Chief Chef Quiang supervises kitchen staff. The evidence regarding the line of supervision for the packers is unclear. In that regard, Manager Wong testified that all of the kitchen staff, including the packers, report to the Chief Chef and that the packers work in the kitchen area. Apart from this conclusory statement, no record evidence was adduced to more fully demonstrate the chef's authority or the structure of the kitchen department. No packers were called to testify by either party. The only other witness, delivery worker Jiang, testified that the packer talks to the manager in the event that orders are not filled and no food is ready to be packed for delivery. To the extent that this anecdote indicates that the packer reports problems to the manager, it does not directly contradict Wong's testimony regarding the supervisory structure.

A total complement of about twenty-three employees work in the restaurant, including seven waiters, four delivery workers, and ten kitchen employees (cooks, food prep/helpers and dishwashers). It appears that two packers, one full-time and one part-time, are also currently employed. The petitioned-for unit consists of six employees – four delivery workers and two packers; whereas, the smallest proposed unit would encompass sixteen employees.

All employees work similar shifts, with slight variations in starting and ending times so that breaks can be taken on a rotating basis. All full-time employees work approximately 40 hours per week. All employees clock in and out and receive the same benefits. All employees are paid an hourly wage; however, the delivery workers and wait staff also receive tips. The kitchen staff and the packers are paid the same hourly rate, starting at \$7.25 per hour. No further evidence was adduced regarding the hourly rates for the tipped employees. The waiters and the kitchen staff wear uniforms; whereas, the packers and the delivery workers do not.

As is customary in the industry, when a customer calls to place an order for delivery, the order is entered into a computer which is then displayed in the kitchen. After the food is prepared, it is put on a shelf adjoining the kitchen. The packer then packages the food for both pick-up and delivery orders. The packer brings the bags to the delivery staff as it is ready by

either putting it on a shelf or handing it directly to them.

The packers do not appear to interact with dining room staff. However, Manager Wong testified that when the packer is out, anyone on the staff may be assigned to fill in. Further, if the packer is busy, such as on weekends, the kitchen staff helps with packing the orders. The record does not reveal the frequency or duration of the temporary assignment.

ANALYSIS

It is well-settled that the Act does not require that a petitioned-for unit be the only appropriate unit, the most appropriate unit, or what could become the ultimate unit; it requires only that the unit be “appropriate.” *See, e.g., Overnight Transportation Co.*, 322 NLRB 723 (1996); *Dezcon, Inc.*, 295 NLRB 109 (1989); *Capital Bakers*, 168 NLRB 904 (1968). A petitioner’s desire with respect to unit composition and scope is relevant, but is in no way dispositive -- the Board may not establish a bargaining unit based solely on the extent of union organization. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441 (1965) (The extent of organization may be considered as one factor, but not the controlling factor, in unit determinations. *Id.* at 441).

In evaluating whether a proposed unit is appropriate the Board focuses on whether the employees share a “community of interest.” As the Board recently re-iterated in *Specialty Healthcare*, 357 NLRB No. 83, *slip op.* at 9 (2011), the Board examines,

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Specialty Healthcare*, *slip op.* at 9 (2011), citing *United Operations, Inc.*, 338 NLRB 123 (2002).

Where, as here, the employer argues that the smallest appropriate unit is larger than that which the Petitioner seeks, the Board inquires as to whether the petitioned-for group would arbitrarily divide or “fracture” the unit. “A petitioner cannot fracture a unit, seeking representation in an arbitrary segment of what would be an appropriate unit.” *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, *slip op.* at 13. *Pratt &*

Whitney, 327 NLRB 1213, 1217 (1999); *Seaboard Marine*, 327 NLRB 556, 556 (1999) (“[T]he Board does not approve fractured units, i.e. combinations of employees that are too narrow in scope or that have no rational basis.”).

Applying traditional community of interest factors, I find that the petitioned-for unit is not an appropriate unit for collective bargaining. The kitchen staff share a community of interest with the packers at least to the same degree that the delivery workers do, and possibly to a greater degree. In that regard, the packers and the kitchen staff work side-by-side in, inside the restaurant, their wages start at the same hourly rate, and the kitchen staff sometimes assists the packers when the restaurant is busy.

The Employer contends that a grouping of just the packers with the delivery workers would result in the type of fractured unit held to be inappropriate by the Board. I agree. The petitioned-for unit of delivery workers and packers does not have a separate community of interest distinguishable from that of the rest of the Employer’s non-supervisory employees, and in particular cannot be rationally separated from the kitchen staff.

In *Odwalla, Inc.*, 357 NLRB No. 132, *slip op* (2011) , the Board, applying the framework outlined in *Specialty Healthcare*, found that the unit recommended by the hearing officer was not appropriate because there was no rational basis for excluding a single classification – merchandisers -- where no traditional bases for drawing boundaries between employees supported the exclusion. The Board explained that the merchandisers in *Odwalla* shared a community of interest with included classifications to the same or greater degree than that the included classifications shared with each other. Specifically, the Board found that the unit recommended by the hearing officer did not track any lines drawn by the employer with respect to employee functions, supervision, methods of compensation, or work location. *Id.*, at 6-7. As such, the petitioned-for unit was fractured and therefore inappropriate.

Examination of the workforce of the Employer through the lens of the *Odwalla* decision reveals likewise, that the petitioned-for unit herein cannot be readily identified by reference to any lines drawn by the Employer. The record indicates that the packers report to the Chief Chef and no direct evidence was adduced to contradict this claim. The packers interact with the kitchen staff and with the delivery workers for every order that they pack. The packers are paid the same hourly wages as the kitchen staff, and are not tipped like the delivery workers. The kitchen and the wait staff wear uniforms, unlike the packers and the delivery workers. The

packers primarily work at a table next to the kitchen staff, while delivery workers perform their delivery work outside of the restaurant. Based on this record, I can only conclude that the petitioned-for unit is not appropriate because the Petitioner failed to present evidence that would track these two classifications by functions, supervision, pay or work location. Rather, the record demonstrates that the petitioned-for unit is an arbitrary grouping that would unnecessarily fracture the kitchen staff. They are not a readily identifiable group and there is no rational basis for excluding the other kitchen employees who, in my view, share an overwhelming community of interest with the petitioned-for unit. Having found that the petitioned-for unit is inappropriate, and given the Petitioner's stated unwillingness to proceed in any alternate unit, the petition is hereby dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington DC 20570. This request must be received by the Board in Washington by **April 26 2013**.

In the Regional Office's initial correspondence the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may not be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the E-Gov² tab and click on E-Filing. Then select the NLRB office for which you wish to

² To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E- Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.

E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at New York, New York this 12th day of April 2013.

A handwritten signature in black ink, reading "Karen P. Fernbach". The signature is written in a cursive style with a horizontal line underneath the name.

Karen P. Fernbach
Regional Director
National Labor Relation Board
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