

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Fresno, CA)

WILLIAM M. AND SANDRA L. WAGNER,
d/b/a OLD FRESNO HOFBRAU¹

Employer

and

Case 32-RD-1335

RUSS SISCHO, An Individual

Petitioner

and

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES UNION, LOCAL 19, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

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

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

¹ The name of the Employer appears as corrected at the hearing by stipulation of the parties.

² The brief filed by the Employer has been duly considered. No briefs were filed by the Union or by the Petitioner.

2. 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
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ The Employer, a sole proprietorship owned by William M. Wagner III and Sandra L. Wagner, husband and wife, is engaged in the operation of a hofbrau-style restaurant and bar in Fresno, California. The Wagners took over operation of the facility effective March 10, 1999. Based upon testimony at the hearing, under the prior ownership, the operation enjoyed annual revenues of more than \$800,000 on a year in, year out basis. There have been no changes in the nature of the business since the change in ownership. During the month of April, 1999, the only full month of operation since the change of ownership, the gross revenues for the business were around \$58,000 and revenue for the month of May was running at about the same level as April. Projecting the revenues of the facility for a full year based upon the revenues since the change in ownership would yield annual revenues of around \$700,000. Accordingly, the Employer's operations meet the Board's gross revenue standard for retail enterprises established in *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959) either based upon the business of the predecessor, *Northgate Cinema, Inc.*, 233 NLRB 586 (1977), or on a projected basis, *Carpenter Baking Co.*, 112 NLRB 288 (1955). The other jurisdictional issue is, of course, whether the Employer's operations are within the Board's statutory jurisdiction, i.e. that there is a non *de minimis* effect on interstate commerce. Based upon the record testimony, the Employer purchases approximately \$200 to \$300 per week in beers brewed out of the State of California, such as Coors from Colorado, or foreign brewed beers. On a projected basis, these purchases would amount to over \$10,000 per year in purchases of goods which originate outside the State of California. It is well established that out-of-state purchases in an amount as low as \$2,000 per year are non *de minimis* and sufficient to warrant the exercise of the Board's statutory jurisdiction. *Arlington Ridge Development Co.*, 203 NLRB 787, 789 (1973).

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

INCLUDED: All fulltime and regular part-time employees employed by the Employer at its facility located at 2820 Tulare Street, Fresno, California 93721.

EXCLUDED: All office employees, professional employees, guards, and supervisors⁵ as defined in the Act.

⁴ The unit description is in accord with the bargaining unit historically represented by the Union. At the hearing, there was testimony to the effect that the Employer was in negotiations with the Union for a collective bargaining agreement covering all of the employees who worked at the restaurant. It is well settled that in a decertification proceeding such as this one, the appropriate unit is the unit currently represented by the incumbent union. *Mo's West*, 283 NLRB 130 (1989).

⁵ The Union contends that the Petitioner, Russ Sischo, is a supervisor within the meaning of Section 2(11) of the Act. Such a finding would require the dismissal of the instant petition. The Employer and the Petitioner, on the other hand, take the position that Sischo is not a statutory supervisor and that an election should be directed herein.

The Employer's facility consists of a bar area where the bartenders and cocktailers (cocktail servers) are employed, a kitchen where Sischo and the other cooks work during part of the day, a pantry area where salads are prepared, and a serving line. Customers order and pickup their sandwiches, which are made by the cooks, and other items on the serving line and pay for their order at the cashier's station at the end of the line. There are no wait persons as in a regular restaurant. In addition to the bartenders and cocktailers, the rest of the staff includes cooks, dishwashers, bus persons, pantry employees, and cashiers. Sischo, whose status is in question, is classified as the head cook and works the day shift from 5:30 a.m. to around 2:00 p.m. One of the two managers, Ron Hassert and William Wagner IV, who alternate day and night shifts, opens the facility at 5:30 a.m. Sischo then turns on the ovens and roasts or cooks the meats that are utilized to prepare sandwiches. The restaurant starts serving at 11:00 a.m. at which time Sischo moves to the serving line where he prepares sandwiches to order. Another cook works the night shift from 3:00 p.m. until closing. There is also a third cook who works from 7:00 a.m. to 3:00 p.m. That cook also prepares sandwiches on the serving line. On a daily basis Sischo orders meat products from the supplier designated by the Employer. His authority in this regard is limited to keeping the inventory up to a standard level set by the Employer. All other supplies are ordered by the managers. With regard to supervision of the staff, there is always a manager on duty, either Hassett or Wagner IV, with the owner, Wagner III, often there during the middle of the day. Hassett prepares the schedule for all employees and posts the schedule on a board on the Thursday of the week before. Employees request time off in writing by submitting requests to one of the managers. Employees call in sick to the manager on duty. Any overtime is determined by the manager on

duty. All hiring is done by the managers and Sischo is not involved in any way. After the new cook was on the job for a few days Sischo was asked by a manager what he thought of her work. He responded that he thought she was doing fine. While Sischo “trained” the new cook by showing her how to cut meat for sandwiches, the record establishes that all new hires are trained on the job by an employee who currently does the type of work for which the employee was hired. After the new owners took over, one of the dishwashers was promoted to night cook. Sischo was not involved in the promotion in any way. The promotion was determined solely by the managers on the basis of their observation of the individual’s work. All discipline and terminations since the new owners took over have been done by the managers based upon their own observation of the employees. Sischo has not been involved in any such actions. Sischo is not involved in directing the work of the other employees in the kitchen or on the line. According to the record, the operation of the restaurant is very routine and everyone knows what his or her job is. As orders come in from the cocktailers (cocktail servers) for appetizers for the bar patrons, whoever is free prepares the appetizer, from cashier through manager. Sischo is not involved in making any specific assignments of work duties. As to such matters as when to throw out items which may or may not be spoiled, Sischo testified without contradiction that all employees follow a common sense approach, i.e. if you would not eat it yourself, you throw it out. Sischo became head cook shortly after the new owners took over. As head cook he is paid \$10.00 per hour compared to \$7.50 an hour for the night cook. The third cook makes less than that amount. When the new owners took over Sischo was making \$7.50 per hour as the night cook. He was transferred to the day shift to replace the head cook who quit. Sischo testified that he insisted upon a raise to \$10.00 due to the increased responsibility of the day job and because he preferred to stay as night cook. The previous head cook received \$11.78 per hour. There was no evidence presented showing that the previous head cook was a statutory supervisor. Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” While it is clear that the possession of any of the authorities listed in Section 2(11) of the Act, makes that individual a supervisor, *Queen Mary*, 317 NLRB 1303 (1995), it is also clear that Sischo does not possess any of the authorities enumerated in Section 2(11) of the Act. The restaurant is managed on a daily basis by two managers and one of the owners, all of whom exercise supervisory authority. Simply put, Sischo’s job is to prepare the roast meats and other hot foods sold by the Employer and then to prepare sliced meat sandwiches or dinners for the Employer’s customers. His job does not involve oversight over employees who work during his shift. In deciding whether Sischo is an employee or a statutory supervisor, I note first of all that the burden in establishing his supervisory status is on the party

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁶ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently

LIST OF VOTERS

In order to ensure 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 in

asserting such status, i.e. the Union in this proceeding. *Dickinson Iron*, 283 NLRB 1029, 1034 (1987). The Union failed to meet this burden since as noted previously there is absolutely no evidence showing that Sischo possesses any of the authorities set forth in Section 2(11) of the Act which would make him a statutory supervisor. Secondly, and most importantly in a proceeding where a finding of supervisory status would lead to the dismissal of the RD petition, in making determinations regarding supervisory status, "the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Westinghouse Electric Corporation v. NLRB*, 424 F.2d 11541, 1158 (7th Cir. 1970), cert. denied, 400 U.S. 831 (1970).

Based upon the above and the record as a whole, I conclude that Sischo is not a supervisor within the meaning of Section 2(11) of the Act and I shall include him in the unit found appropriate herein. See, generally, *Tree-Free Fiber Co.*, 328 NLRB No. 51 (1999), and *Millard Refrigerated Services, Inc.*, 326 NLRB No. 156 (1998). Further, since Sischo, the Petitioner, is not a statutory supervisor, I shall direct an election herein.

There are approximately 20 employees in the unit.

⁶ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care 359 Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before, June 14, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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 June 21, 1999.

Dated at Oakland, California this 7th day of June, 1999.

/s/ James S. Scott

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

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177-8520-0800
177-8580-5899
220-501
260-3340-0100
260-3340-5000
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