

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

T.G.I. FRIDAY'S, INC. 1/

Employer

and

**Case 26-RC-8271
(formerly 12-RC-8655) 2/**

**HOTEL EMPLOYEES RESTAURANT EMPLOYEES
INTERNATIONAL UNION, LOCAL 355**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as 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: 3/

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

2. The parties stipulated that T.G.I. Friday's, Inc., hereinafter referred to as the Employer, is a New York corporation with an office and place of business located in Port Charlotte, Florida, where it is engaged in the business of providing food and beverage services. During the past 12 months, a representative period, the Employer

derived gross revenues in excess of \$500,000, and purchased and received at its Port Charlotte facility goods valued in excess of \$50,000 from suppliers located within the State of Florida, each of which had received such goods directly from points outside the State of Florida. 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 Petitioner, who I find to be a labor organization within the meaning of Section 2(5) of the Act, seeks 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 Section 9(c)(1) and Section 2(6) and (7) of the Act.

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 full-time and regular part-time cooks, bartenders, hostesses, servers, bussers, stewards, dishwashers, prep cooks, food runners, and people porters employed by the Employer at its Port Charlotte, Florida facility.

Excluded: All other employees, including restaurant accountant/training coordinator, office clerical employees, managers, guards and supervisors, as defined in the Act.

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. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this 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 the 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 replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the Hotel Employees Restaurant Employees International Union, Local 355.

LIST OF VOTERS

In order to ensure that all eligible voters 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 addresses that may be used to communicate with them. **Excelsior Underwear**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an eligibility list containing the *full* names and addresses of all the eligible voters shall be filed by the Employer with the Regional Director of Region 12 within 7 days of the date of this Decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. Region 12 shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, Tampa, Florida, on or before August 17, 2001. No extension of time to file this list will

be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). Any questions should be directed to the Tampa Regional Office.

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, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by August 24, 2001.

DATED at Memphis, Tennessee, this 10th day of August, 2001

/s/

Ronald K. Hooks, Director, Region 26
National Labor Relations Board

- 1/ The Employer's name appears as amended at the hearing.
- 2/ The General Counsel issued an Order Transferring Case from Region 12 to Region 26. Pursuant to said Order, to the extent that further proceedings are appropriate to effectuate this Decision, this case will automatically transfer back to Region 12 and will continue as 12-RC-8655, except that Region 26 will retain jurisdiction only with respect to pre-election issues relating to the substance of this Decision.
- 3/ The Employer filed a timely brief, which has been duly considered. No brief was filed by the Petitioner.
- 4/ The Petitioner seeks to represent a unit of employees at the Port Charlotte facility consisting exclusively of full-time and regular part-time cooks, bartenders, hostesses, servers, bussers, stewards, dish washers, prep cooks, and food runners; excluding all other employees, office clerical employees, managers, supervisors and guards as defined in the Act. Contrary to the Petitioner, however, the Employer contends that the appropriate unit should also include the following classifications: a restaurant accountant/training coordinator and a people porter. The Employer contends that the inclusion of these employees is appropriate because they share a sufficient community of interest with the employees in the petitioned-for unit. The Employer also seeks to exclude bartender Dominick Muzio from the unit on the grounds that he is a supervisor within the meaning of Section 2(11) of the Act.

FACTS

Operational Overview

The record establishes that the Employer has operated a restaurant in Port Charlotte since August 9, 2000. The restaurant consists of a front door area, two non-smoking sections, a bar, a smoking section, an outdoor patio seating area, a kitchen, an office, a back dock area, a store room and bathrooms.¹

To carry out its operations, the Employer employs cooks, bartenders, hostesses, servers, bussers, stewards, dishwashers, prep cooks, a people porter, a general manager, a server manager, a bar manager, a kitchen manager, and a restaurant accountant/training coordinator. The Employer's hostesses are responsible for greeting patrons as they enter the facility and directing them to their dining table. Thereafter, servers take the patrons' food and beverage orders and input orders into a computer. Food and beverage orders are then prepared by the Employer's cooks and bartenders, respectively. Servers then deliver prepared food and beverage orders to patrons, collect payment, and bus tables. The record indicates that dishwashers are responsible for washing dishes.²

The general manager position is occupied by Elizabeth Ludt ("Ludt"), a salaried employee. Rodney DeWitt ("DeWitt"), Pat Gostkowski ("Gostkowski"), and Sherry Batello ("Batello") respectively hold the server manager, bar manager and kitchen manager positions.

¹ The record reveals that the kitchen and office are located in the rear of the facility, and are commonly referred to as the "back of the house."

² The record is silent regarding the duties of bussers, stewards and food runners at the facility.

DeWitt, as a server manager, oversees the work of the servers, conducts monthly departmental meetings to discuss policies and procedures, and prepares a work schedule for the servers on a weekly basis. Bar Manager Gostkowski oversees the bar, orders liquor, beer and wine, and conducts monthly department meetings. As kitchen manager, Batello is responsible for food orders, writing a weekly work schedule for the “back of the house,” assigning work, and conducting department meetings. DeWitt, Gostkowski and Batello report directly to Ludt and all four share a small-sized office located in the back of the facility. DeWitt, Gostkowski and Batello are each paid a set salary and their scheduled work hours are determined by Ludt.

People Porter

The Employer employs one people porter. This position is occupied by Dorcas Whaley (“Whaley”), who has held the position since February 2001. In her role as a people porter, Whaley’s duties include cleaning the restaurant floors, bathrooms, windows and awnings, and dusting artifacts. While performing her job duties, Whaley is required to wear what the record describes as a “back of the house uniform,” which consists of a white logo shirt, checked pants, a hat bearing the Employer’s logo, and black shoes. According to the record, Whaley works for the Employer from midnight to 8:00 a.m., 7 days a week and, with the exception of Fridays and Saturdays, works alone at the facility.³ As far as Whaley’s interaction with other bargaining unit employees is concerned, General Manager Ludt testified that she has observed Whaley exchanging greetings and chatting with servers when Whaley arrives at work.

³ The facility closes at midnight on Monday through Thursday. However, on Friday and Saturday, the facility closes at 2:00 a.m. Present at the facility with Whaley until 3:00 a.m. on Friday and Saturday are an unspecified number of bartenders, a closing server, a closing cook, a closing dishwasher and a manager.

As is the case with unit employees, Whaley receives an hourly wage.⁴ Whaley is also eligible for the same medical insurance benefits, dental insurance benefits, vision benefits, 401(k) benefits, and tuition reimbursement benefits as other employees in the petitioned-for unit. As an additional benefit, Whaley receives a free meal on the nights that she works. The Employer also grants this benefit to dishwashers and servers who lead their shift.⁵ Whaley participated in the same orientation as the other bargaining unit employees. Whaley, like other unit employees, filled-out I-9 and W-4 forms, signed the employee handbook, and completed the Responsible Alcohol, Service and Sales test and training.

Restaurant Accountant/Training Coordinator

Danielle Cook (“Cook”) has been employed at the restaurant as a restaurant accountant/training coordinator since June 8, 2000. Under the supervision of General Manager Ludt, Cook works at the restaurant 30 hours per week and earns an hourly wage of \$9.50.⁶

Cook spends 20 of the 30 hours per week performing restaurant accountant tasks in an office that she shares with General Manager Ludt, Server Manager DeWitt, Bar Manager Gostkowski and Kitchen Manager Batello. In her role as restaurant accountant, Cook’s responsibilities are to handle bookkeeping, process payroll, pay invoices, ensure that vendors are properly set up with the Employer’s corporate office in

⁴ The record does not disclose the amount of Whaley’s hourly wage.

⁵ The record reflects that, as a general operating policy, all other employees receive meals at a discounted rate.

⁶ There was no discussion on the record regarding what, if any, benefits Cook receives as a restaurant employee.

New York, input charges into the computer system, examine weekly sales figures, check income estimate sheets for variances, and review tip deficiency reports. Tip deficiency reports identify employees who fail to claim their proper percentage of tips and who fail to clock out. Following her review of tip deficiency reports, Cook confers privately with the offending employee to discuss her findings, and also brings the infractions to the attention of General Manager Ludt. Besides these tasks, Cook also spends time meeting with employees in her office to address their inquiries regarding such matters as benefits and tuition reimbursement.

Cook spends 9 hours of the workweek engaging in tasks associated with her role as a training coordinator. As a training coordinator, Cook conducts a 3-hour orientation for all newly hired employees, assigns new employees to coaches⁷, provides coaches with a training schedule, confers with coaches regarding the progress of training, reviews paperwork prepared by coaches for accuracy, conducts coaching meetings and otherwise oversees the work coaches perform. Cook carries out her training coordinator tasks at a table in the restaurant outside of her shared office.

Although the record is not entirely clear as to how Cook spends the remaining hour of her workweek, Cook testified that she fills in as a hostess on a daily basis and busses tables at busy times during the restaurant's lunch period.

⁷ The record discloses that coaches are employees who, after participating in a coaching seminar and passing a validation examination, are qualified to train newly hired employees to perform certain job tasks. The Employer currently employs coaches who are bartenders, servers and cooks.

Dominick Muzio

Dominick Muzio (“Muzio”) is employed at the restaurant as a bartender.⁸ In his role as a bartender, Muzio prepares beverage orders and, from his home, drafts a weekly schedule of the days and times he and the Employer’s six other bartenders work. According to the record, Muzio began drafting the weekly work schedule during the first week of January 2001, at the request of Tim O’Neal (“O’Neal”), Muzio’s former bar manager. At the time Muzio assumed this job duty, O’Neal provided him with specific instructions regarding how the schedule was to be prepared. Muzio was advised by O’Neal to place the more qualified bartenders on the busiest shifts and to ensure that the bartenders received an equal number of closings and days off. Since he assumed scheduling duties, Muzio has never deviated from O’Neal’s instructions.

In addition to adhering to O’Neal’s instructions, Muzio accommodates the bartenders’ communicated shift preferences when he creates the work schedule. Muzio and the other bartenders have a permanent schedule that, with a few exceptions, remains the same from week-to-week. Muzio testified, for example, that he has worked the same weekly schedule for the past 6 months.

ANALYSIS

The matter under consideration requires the resolution of the following three issues: (1) whether Dorcas Whaley, a people porter, should be included in the petitioned-for unit; (2) whether Danielle Cook, a restaurant accountant/training coordinator, should be included in the unit; and (3) whether Dominick Muzio, a bartender, is a statutory supervisor.

⁸ According to the record, Muzio began his employment at the restaurant as a waiter on June 26, 2000. However, the record does not disclose when Muzio became a bartender.

When determining an appropriate unit, the Board applies a community of interest analysis that examines a number of factors, such as similarity of duties, job qualifications, wages, benefits and working conditions, extent of interaction and interchange, organizational structure, functional integration of the business, history of collective bargaining and the scope of the petitioned-for unit. **Kalamazoo Paper Box Corp.**, 136 NLRB 134 (1962).

With respect to the first issue, the record discloses that Whaley performs various cleaning tasks at the Employer's restaurant 7 days a week from midnight to 8:00 a.m. Her work schedule places her in contact with unit employees for a 3-hour period on 2 of the 7 nights she works, specifically, Fridays and Saturdays. Whaley has been observed interacting with unit employees on these occasions. On the remaining 5 nights, Whaley works at the restaurant alone. From the record, it does not appear that Whaley has ever performed other unit work or shares common supervision with other employees in the unit. However, Whaley wears the same uniform worn by unit employees who work in the back of the house, earns an hourly wage and receives the same benefits as unit employees, and also participated in the same orientation as other unit employees.

Based on the foregoing, I find that Whaley possesses a sufficient community of interest with the employees in the petitioned-for unit. Moreover, she would be otherwise unrepresented if excluded from the unit. Accordingly, I shall include her in the unit sought by the Petitioner. See **Dadco Fashions, Inc.**, 243 NLRB 1193 (1979).

Regarding the second issue, the record reflects that Cook works at the Employer's restaurant 30 hours per week. Cook invests 20 of those hours performing restaurant accounting tasks consisting of bookkeeping, processing payroll, paying

invoices, and, *inter alia*, examining sale figures. Nine hours of Cook's workweek are spent engaging in training coordinator tasks which essentially involve conducting orientation sessions and overseeing the work performed by coaches. The record indicates that at least part of the remaining hour of Cook's workweek is spent greeting patrons and bussing tables.

With respect to whether Cook should be included in the unit, I find as an initial matter that Cook is a dual-function employee or one who performs at least two functions for the same employer. **Continental Cablevision**, 298 NLRB 973 (1990) (defining dual-function employee). I base this finding on the undisputed fact that she performs multiple functions for the Employer. It is well-settled that the Board may include a dual-function employee in a unit if the employee performs unit work for sufficient periods of time to demonstrate that the employee has a substantial interest in the unit's wages, hours, and working conditions. *Id.*; **Berea Publishing Co.**, 140 NLRB 516 (1963). Here, the overwhelming majority of Cook's time is spent performing accounting and training tasks that bear little or no resemblance to the duties performed by employees in the petitioned-for unit. Only a marginal percentage of Cook's time is devoted to performing unit work.

In its post-hearing brief, the Employer relies on **Exxon Company, U.S.A.**, 221 NLRB 1014 (1975), to support Cook's inclusion in the petitioned-for unit. The Board in **Exxon**, applying traditional community of interest factors, found that bookkeepers were analogous to plant clericals and, as a result, included them in a wall-to-wall bargaining unit over the petitioner's objection. The Employer contends that Cook's accounting duties parallel those performed by the bookkeepers in **Exxon**, and, on that basis, urges

that Cook be included in the bargaining unit here. Contrary to the Employer's contention, Cook's tasks as an accountant are distinct from those performed by the bookkeepers in **Exxon**. While the bookkeepers' responsibilities were closely related to the requested unit's retail marketing process, the same cannot be said of Cook's accounting duties. On the contrary, Cook's duties, to wit, paying invoices, processing payroll, and examining income estimate sheets and sales figures, are akin to those duties performed by office clerical employees and, accordingly, appear to have little relationship to the Employer's day-to-day food service process. I therefore find that Cook is not a plant clerical employee.

Based on the above analysis, I find that Cook's performance of unit duties is insufficient to demonstrate that she has a substantial interest in the unit's wages, hours, and working conditions. Therefore, I shall exclude Cook from the unit. **Continental Cablevision**, 298 NLRB 973 (1990); **Pacific Lincoln-Mercury, Inc.**, 312 NLRB 901 fn. 4 (1993); **Wilson Engraving Company, Inc.**, 252 NLRB 333, 334 (1980) (analysis of employees Greer, Jones, Bullard, Wilpitz and Fagan).

Regarding the status of Muzio, Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to 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 judgement."

To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11). Rather, possession of any one of the indicia is sufficient to confer supervisory status, provided the exercise of authority involves the use of independent judgment. **Chicago Metallic Corp.**, 273 NLRB 1677, 1689 (1985); **Harborside Healthcare, Inc.**, 330 NLRB No. 191 (2000). Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks. **Opelika Foundry**, 281 NLRB 897, 899 (1986). The burden of proving supervisory status rests on the party alleging that such status exists. **Tucson Gas & Electric Co.**, 241 NLRB 181 (1979). The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. **Quadrex Environmental Co.**, 308 NLRB 101, 102 (1992).

In the present matter, the facts militate against a finding that Muzio is a supervisor under the Act. In addition to preparing beverage orders, the uncontroverted evidence establishes that Muzio prepares a fairly fixed work schedule for the bartenders. In this regard, the Employer's reliance on language extracted from **Providence Hospital**, 320 NLRB 717 (1996), is misplaced inasmuch as the record here fails to establish that Muzio uses independent judgment when scheduling bartenders. Under these circumstances, Board case law makes clear that, absent the exercise of independent judgment, the task of creating a work schedule is insufficient to confer supervisory status. See **John Ascuaga's Nugget**, 298 NLRB 524, 529-30 (1990) (refusing to confer supervisory status on employee who scheduled the workdays and hours of waitresses on his shift). Accordingly, it is concluded that Muzio is not a

supervisor within the meaning of Section 2(11) of the Act, and, therefore, I shall include him in the unit sought by the Petitioner.

There are approximately 50 employees in the unit found appropriate herein.

In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a Request for Review is filed, unless the Board expressly directs otherwise.

CLASSIFICATION INDEX

177-8520-4700

440-1780-6050

460-5067-4900