UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

856 BREWING COMPANY, LLC
and
CRUX FERMENTATION PROJECT, LLC

Employer,

CRUX FRONT OF THE HOUSE EMPLOYEES UNION,

Petitioner.

Case No. 19-RC-294206

CRUX FRONT OF THE HOUSE EMPLOYEES UNION'S CLOSING BRIEF

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I. Introduction: Issues in Dispute.

There are four issues in dispute concerning the petition filed by the Petitioner for recognition of the Crux Front of the House Employees Union ("the Union"): (1) the name of the employer; (2) whether the petitioner is a labor organization under the Act; (3) whether the employees the employer calls "seasonal employees" should be included as a separate category in the bargaining unit and, if so, whether the election should be delayed to allow for additional hiring of so-called "seasonal employees" and; (4) whether the election should be a mail or manual election. See Board Exhibits1, 3 and 4; and summary of stipulated issues (on the record at commencement of hearing).

II. Relevant Facts.

A. Employer's Name.

There is confusion regarding the entity that is the present Employer. When Petitioner John Stewart filed the petition on behalf of the Crux Front of the House Employees Union on or about April 18 2022, the name of the Employer was still 856 Brewing Company, LLC. See Bd. Ex. 1(a); Pet. Ex. 6. Stewart's paystubs reflected that entity as his employer. Pet. Exs. 1 and 2. Until at least April 25, 2022, the liquor licenses still listed 856 Brewing Company, LLC as the holder of the license at the Tasting Room. Test. Stewart.

However, the Employer's representatives testified that the Employer was in the process of creating a new entity, Crux Fermentation Project, LLC, on the advice of counsel. Test. Larry Sidor; Test. Sheryl Bryant. The General Manager, Robert Thompson, indicated that new licenses were applied for and posted in April of 2022. Test. Thompson. It is unclear, based on the testimony and documents, whether the Employer has completed its transition to the new entity, or whether employees are being paid by the new entity. Test. Bryant; Test. Stewart; see also Pet.

Exs. 1-4; Emp. Ex. G. Consequently, the parties were not able to agree to a stipulation regarding the proper name of the employer.

The two entities have the same owners. There is no change in location, employees, or operations. There has been no sale. Test. Sidor. The entity transition has merely been a legal mechanism to insulate the shareholders from possible litigation by third parties. Test. Sidor.

B. Facts supporting that Petitioner is a Labor Organization as that term is understood under the Act.

John Stewart, an organizer for the organization Crux Front of the House Employees Union, filed an RC petition for the bargaining unit and has provided a sufficient number of cards for a showing of interest. Test. Stewart. As both Stewart and Sidor testified, the Employer refuses to voluntarily recognize the labor organization. Test. Stewart; Test. Sidor. The Union is not affiliated with any other national or local labor organization, it is independent. Test. Stewart.

Stewart testified that the employees have raised concerns about scheduling, compensation (the tip pool), sanitary conditions and other health and safety issues to the attention of the management. Test. Stewart. Sidor concurred that those issues had been raised by the employees. Test. Sidor. Those concerns were most recently raised in a meeting between Sidor and the employees, just after the petition was filed. Test. Stewart; Test. Sidor. As a result of that meeting, some of the employees' concerns were finally addressed and resolved by the Employer. Test. Stewart. A plumbing issue that had been a problem for months was finally fixed. *Id*.

The labor organization's purpose is to address working conditions, including engaging in "collective bargaining." Test. Stewart. The employees who will make up the complement of the labor organization are talking with each other about what kind of governance they want to have, what kind of dues are appropriate, how they want elections to work, and what kind of issues they want to address in their first contract, including a tip pooling policy that is fair and agreeable to

all members of the bargaining unit. Test. Stewart. They are particularly concerned with ensuring full participation of all members in the organization's formation and decision-making. *Id*. Stewart testified that the employees who are organizing hope to be able to contact and speak with each member of the proposed bargaining unit so that their input is heard on the creation of bylaws and constitution and how voting will work. *Id*. He does not have the personal contact information of all members, yet, as the employer has not voluntarily recognized the organization. *Id*.

Employees have held informal meetings and conversations but until they are recognized, do not have the mechanics in place to notify all employees of Union meetings. Test. Stewart. They plan to regularly hold meetings and elect officers. *Id*. The employees who will make up the Union have filled out cards and those cards have been collected and provided to the Board. *Id*.

Stewart even contacted a federal agency, he believed may have been the Department of Labor, to learn whether he needed to file any paperwork before receiving recognition from the Employer. Test. Stewart. After that conversation, Stewart decided to proceed with the petition for recognition before filing paperwork with the government, believing that to be the appropriate order to proceed. *Id*. Once the Union is recognized, formal documents will be filed with the government, as required. *Id*.

C. The Employer does not have Seasonal Employees as that term is understood under the NLRA. There is no reason to delay an election.

The Employer operates the Tasting Room on a year-round basis. Test. Sidor. Its inside and outside seating areas are open year-round. *Id*. In the spring and summer, the Employer attempts to hire more employees to replace those who have left and to cover the higher volume of patrons during those months. Test. Thompson. There is a newer building that operates as a pizza kitchen that the Employer is currently trying to hire for. Test. Sidor. The plan is for it to

operate "year round." Test. Sidor. The General Manager, Thompson, stated that the Employer tries to have this additional hiring finished by Memorial Day weekend (the end of May). Test. Thompson. The employees who are hired frequently stay on in part-time or full-time permanent positions throughout the year, after the summer. Test. Stewart; Test. Thompson; Test. Bryant; *see also* Emp. Ex. C (describing initial job titles of employees and current job titles of those employees). The actual percentage of employees does not significantly increase during the spring and summer months. See Emp. Ex. B. There are currently several positions that the Employer hopes to fill. Test. Thompson. However, many of these positions have been open for months or longer. Test. Thompson; Test. Stewart; Test. Sidor. The Employer's representatives testified that hiring has been difficult over the last couple of years. Test. Sidor; Test. Thompson.

Thompson testified that in the years that he has worked at the Tasting Room he has not been aware of any employees who have been recalled to work for the Employer from season to season. Test. Thompson. He testified he is not aware of any list of seasonal employees who are contacted each season. *Id*.

In reviewing the headcount data provided by the Employer in Emp. Ex. B, the headcount adjusts upward slightly, but not significantly over the summer months.[1] Data was provided for April through October during 2019, 2020 and 2021. The percentage increase between April and June or July for each month was not significant. See Emp. Ex. B. Stewart testified that some of the positions that used to exist are no longer being filled (door, carpark). Test. Stewart. Additionally, the Tasting Room runs more efficiently now than it did in 2019, eliminating some

[1] The Employer only provided complete data for 2019, 2020 (mislabeled 2021), and 2021. See Emp. Ex. B. These time periods were all during the COVID pandemic, which clearly affected some of the numbers when there were complete shut downs and layoffs. To the extent those numbers are used to bolster the Employer's position, they should be rejected.

of the redundant staff positions (Counter; Beertender). Test. Stewart. There are only so many Beertender positions that can operate in the facility on a given day. Test. Stewart. They no longer have a separate person collecting payment and pouring beverages, reducing the number of employees needed each day between 2019 and the present. *Id*.

III. Legal Argument.

A. Resolving confusion concerning the employer's name.

As demonstrated by the hearing and outlined in this brief, there is still confusion about the Employer's name. Due to the ongoing confusion the employer should be listed as both 856 Brewing Company, LLC and Crux Fermentation Project, LLC.

The parties can reach agreement at a later date substituting Crux Fermentation Company, LLC for 856 Brewing Company, LLC, once it is clear that entity has fully taken over all aspects of the Employer's duties, including payroll.

B. The petitioner easily meets the requirements of being a labor organization.

As the hearing demonstrated, the Crux Front of the House Employees Union is ready, willing and capable of representing the employees in the proposed bargaining unit. While it has not, yet, finished preparing Bylaws or taken formal steps to file paperwork with the government, it has collected cards, advocated for employees, and plans to continue doing so once it is certified as a labor union. Such formalities are not yet necessary and judging whether the labor organization at this stage in the formation process has met certain filing or structural requirements is premature. The NLRA provides a low bar for labor organizations to meet at the petition stage and this Union has met it.

Section 9(c)(1)(A) provides that employees may be represented "by any employee or group of employees or any individual or labor organization." A proposed bargaining

representative must meet this standard to obtain an election and/or certification. The statutory definition defines "labor organization" as follows: The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. *See Roytype, Division of Litton*, 199 NLRB 354 (1972), and *Machinists*, 159 NLRB 137 (1966), for Board findings of a "labor organization." All discussed in *An Outline of Law and Procedure in Representation Cases*, NLRB.

The fact that a union is in its early stages of development and has not yet won representation rights does not disqualify it as a labor organization. Thus, the Board has found that the petitioner existed for the statutory purposes, although those purposes had not yet come to fruition, because employees had participated in its organization and subsequent activities even though the latter were limited by the organization's lack of representation rights. *Roytype, Division of Litton*, 199 NLRB 354 (1972); *Michigan Bell Telephone Co*., 182 NLRB 632 (1970); *see also Comet Rice Mills*, 195 NLRB 671, 674 (1972).

Similarly, a lack of structural formality—for instance, the absence of a constitution or bylaws, or a failure to collect dues or initiation fees—does not disqualify a union as a labor organization, provided it was established for the purpose of representing its membership, and intends to do so if certified. *Butler Mfg. Co.,* 167 NLRB 308 (1967); *see also Yale University*, 184 NLRB 860 (1970); *Stewart-Warner Corp*., 123 NLRB 447 (1959); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

The Board rejects certain types of arguments against labor organization status as premature. For example, in *Butler Mfg. Co*., 167 NLRB 308 (1967), the Board stated it was

premature to consider an intervenor's argument that the petitioner was not a labor organization because it did not intend to fulfill its bargaining obligation if certified, but to affiliate with another labor organization immediately after certification. Rather, the Board held that after certification it could, pursuant to its authority to police its certifications, examine the propriety of a post certification affiliation if an appropriate motion were filed. *See also Guardian Container Co*., 174 NLRB 34 (1969). The Board applied the same reasoning to dismiss an employer's contention that the petitioner was not a labor organization because it had "bound itself by contract, custom, and practice" with the employer's competitors "not to bargain or negotiate any other or different terms of employment from those embodied in Petitioner's national contract." *Margaret-Peerless Coal Co*., 173 NLRB 72, 72 fn. 2 (1968); *see also Gino Morena Enterprises*, 181 NLRB 808 (1970), in which there was a premature contention that the petitioner did not fulfill the statutory requirement of employee participation.

When confronted with a dispute over whether a union meets the statutory definition of labor organization, the Board may require affirmative evidence that the asserted labor organization exists for the purposes set forth in the statute, and in the absence of credible evidence the Board will find that the statutory definition has not been met. *See Harrah's Marina Hotel*, 267 NLRB 1007 (1983). The petitioner in *Harrah's Marina Hotel* had asserted that the petitioner was not a labor organization due to the criminal activities of its officers. If a union otherwise qualifies as a "labor organization" within the meaning of the Act, the fact that the petitioner's organizers were members of a former independent union before its affiliation with an intervening union and the fact that the petitioner adopted a name similar to the former union does not preclude the petitioner from filing a petition. *East Dayton Tool Co*., 194 NLRB 266 (1972).

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C. The Employer does not have "Seasonal Employees" as that term is understood under the NLRA.

The job category "Seasonal Employees" need not be included in the proposed unit. There is no reason to create an artificial, separate classification for such employees. The term "Seasonal Employees" has a specific meaning under the Act and the employees who work for this Employer do not meet that definition. There is no reason to delay the election to wait for "full employment" of Seasonal Employees.

First, as testimony and evidence demonstrated, the designation of "seasonal employees" by the Employer is virtually meaningless. The business is more cyclical than seasonal; it is open year-round and many of the employees that they hire during their "busy" season are retained through the rest of the year. Further, there is no "recall" of seasonal employees from year to year nor is there a list of such employees maintained by the employer. Finally, if additional employees are hired in the spring or summer, they are hired to fill the positions currently designated in the proposed bargaining unit. During the summer, the permanent staff who are typically held to part-time hours, are finally given full-time hours to address the increase in patronage by customers. There are also additional part- or full- time staff who are hired. The number of additional staff the employer hires each summer varies depending on the year and the number of hours the permanent, existing staff are able to work during the summer in addition to their part-time hours. At the end of the summer, these newer hires are frequently offered permanent part-time positions. Consequently, such hires should not be viewed as "seasonal" or a separate category of staff. *See* "An Outline of Law and Procedure in Representation Cases," NLRB, at 283 ("***Temporary, extra, or casual seasonal employees are excluded***." *L & B Cooling, Inc.*, 267 NLRB 1 (1983); *Post Houses, Inc*., 161 NLRB 1159, 1172–1173 (1966); *Root*

Dry Goods Co., 126 NLRB 953, 955 fn. 10 (1960); *F. W. Woolworth Co*., 119 NLRB 480, 484 (1957).” (emphasis added).

In deciding whether seasonal employees are eligible to vote, the Board assesses whether they share sufficient interests in employment conditions with other employees. *See Kelly Brothers Nurseries*, 140 NLRB 82, 85–86 (1962). That determination depends on whether seasonal employees have a reasonable expectation of reemployment in the foreseeable future; if so, they are included in the bargaining unit. *See Winkie Mfg. Co. v. NLRB*, 348 F.3d 254, 257 (7th Cir. 2003), affg. 338 NLRB 787 (2003); *L & B Cooling, Inc*., 267 NLRB 1 (1983); *Knapp-Sherrill Co.*, 196 NLRB 1072, 1072 fn. 2 (1972); *Baumer Foods, Inc*., 190 NLRB 690 (1971); *California Vegetable Concentrates, Inc*., 137 NLRB 1779 (1962); *P. G. Gray*, 128 NLRB 1026, 1028 (1960); *Musgrave Mfg. Co*., 124 NLRB 258, 260–261 (1959); *see also Flat Rate Movers*, Ltd., 357 NLRB 1321 (2011). Temporary, extra, or casual seasonal employees are excluded. *L & B Cooling, Inc*., 267 NLRB 1 (1983); *Post Houses, Inc*., 161 NLRB 1159, 1172–1173 (1966); *Root Dry Goods Co*., 126 NLRB 953, 955 fn. 10 (1960); *F. W. Woolworth Co*., 119 NLRB 480, 484 (1957). In considering whether seasonal employees have a reasonable expectation of future reemployment, the Board regularly considers factors such as the size of the area labor force, the stability of the employer’s labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the employer’s recall or preference policy regarding the seasonal employees. *See, e.g., Macy’s East*, 327 NLRB 73 (1998); *Maine Apple Growers*, 254 NLRB 501, 502 (1981).

If record evidence consists only of a single season’s employment for the seasonal employees at issue, “there is no pattern of seasonal employment from which” to extrapolate the employer’s labor requirements and the Board “cannot conclude” this factor favors inclusion. *L &*

B Cooling, Inc., 267 NLRB 1, 3 (1983). If an employer rehires a "substantial portion" of seasonal employees, this supports finding the seasonal employees have a reasonable expectation of future reemployment. *See Kelly Brothers Nurseries*, 140 NLRB 82, 85 (1962). The Board has never laid a particular percentage requirement on this factor, but it has noted that it "has included seasonals whose return rate is in the 30-percent range." *Saltwater, Inc*., 324 NLRB 343, 343 (1997). Compare Seneca Foods Corp., 248 NLRB 1119 (1980) (reemployment rate less than 4 percent does not favor reasonable expectation of future employment); *United Telecontrol Electronics*, 239 NLRB 1057, 1057–1058 (1978) (total of 17.26 percent of seasonal employees returning over three-year period was "insubstantial number"); *Freeman Loader Corp*., 127 NLRB 514 (1960) (although employer was willing to rehire seasonal employees, only "occasionally" had any returned); *Root Dry Goods Co*., 126 NLRB 953, 955 fn. 10 (1960) (holiday "extras" who generally did not return each year excluded). If there is no evidence concerning actual season-to-season reemployment because an employers has existed only for a short time, this lack of evidence "undercuts any finding that the . . . seasonal employees ha[ve] a reasonable expectation of reemployment." *L & B Cooling, Inc*., 267 NLRB 1, 3 (1983); *see also Maine Sugar Industries*, 169 NLRB 186 (1968) (where there was no evidence as to what percentage of seasonal employees were returning, Board could not find "a sufficiently large number of temporary seasonal employees has a demonstrable expectation of being rehired").

Board policy is to direct elections involving seasonal employees at or near the peak of the season in order to provide as many voters as possible with the opportunity to cast their ballots. *Libby, McNeill & Libby*, 90 NLRB 279, 281 (1950); *Brooksville Citrus Growers Assn*., 112 NLRB 707, 710 (1955); *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974). That said, circumstances may be such that the highest peak is not required. *Elsa Canning Co*., 154 NLRB

1810, 1812–1813 (1965); *Saltwater, Inc*., 324 NLRB 343, 344 (1997). If the employer, despite hiring some employees seasonally, is engaged in virtually year-round production operations, and the number of employees in the year-round complement is relatively substantial, the employer's operation may be deemed "cyclical" and an immediate election directed. *Baugh Chemical Co*., 150 NLRB 1034, 1035–1036 (1965). *Cf. Aspen Skiing Corp*., 143 NLRB 707, 711 (1963) (directing immediate election in view of unopposed request, number of summer employees and high rate of reemployment). The delay in conducting the election will not require a new showing of interest. *Bogus Basin Recreation Assn*., 212 NLRB 833 (1974).

D. The election should be a mail election.

While there are many efforts to pretend that the COVID-19 pandemic is "over," it is not yet over. It is safer and less costly for a mail election and will ensure full participation of all employees in the election. While the Employer's representative claimed that a manual election could be held in accordance with the General Counsel's guidance on COVID protocols, those protocols are intensive and would require not only knowing the COVID counts at the time of the election (which are not being tracked closely in many areas) but also testing and reporting requirements at the Employer's facility. As cases surge across the nation and in Oregon, continuing with a mail election remains the most appropriate choice.

The Employer has also proposed that the election occur manually and that it be held for one hour on one day. Such an election is unacceptable because it would prejudice the Union and employees who want to participate in voting.

The Employer has three different shifts and testimony demonstrates that most of the employees work only part-time for the Employer. This means that there will be few employees who would be naturally working on a specific day and hour. All other employees would have to

travel to the Employer's facility and cast their vote during that time. In Oregon, we preference mail voting and allow a long period of time between receipt of ballot and voting. There is no reason that this socially established and culturally accepted practice should be altered so significantly. The Employer's proposed manual election, and particularly its time constraints, is a radical rejection of the voting norms in Oregon and must be rejected.

IV. Conclusion.

For the reasons described in this brief, and as evidenced at the hearing, the Union is a proper labor organization, the bargaining unit need not include as a separate designation "Seasonal Employees," and due to the confusion before and at the hearing, the employer should be listed as both 856 Brewing Company, LLC and Crux Fermentation Project, LLC.

The election should be a mail election and should proceed as quickly as possible. There is no reason to postpone the election until a later date for any reason. Those employees who are in the proposed bargaining unit classifications at the time of the election should participate. Delaying the election to wait for more new hires who may or may not be around in a few weeks or months but certainly will not be rehired from season to season would not be consistent with the Act.

Dated this 19th of May, 2022.

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