STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NATIONAL RESTAURANT ASSOCIATION, Petitioner, To Review Under Section 657 of the Labor Law: Order on the Report and Recommendation of the 2015 Fast Food Wage Board, dated September 10, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. WB 15-001 RESOLUTION OF DECISION AND ORDER

APPEARANCES

Gibson, Dunn & Crutcher LLP (Randy M. Mastro of counsel), for petitioner.

Mario J. Musolino, Acting Commissioner of Labor (Pico Ben-Amotz of counsel), for respondent.

Gladstein, Reif & Meginniss, LLP (James Reif of counsel), for Make the Road New York, Alvin Major, Rebecca Cornick and Flavia Cabral, amici curiae.

WHEREAS:

This is an appeal of a minimum wage order issued by respondent on September 10, 2015, which adopted the recommendations of the 2015 fast food wage board to increase the minimum wage for certain fast food workers in the state of New York to $15.00 an hour by 2018 for New York City and by 2021 for the rest of the state. We have jurisdiction over this appeal under Labor Law § 657 (2), which provides that, "[a]ny person in interest, including a labor organization or employer association, in any occupation for which a minimum wage order . . . has been issued under the provisions of [Article 19 of the Labor Law] who is aggrieved by such order . . . may obtain review before the [Industrial Board of Appeals]." Petitioner National Restaurant Association has standing because it is an employer association with members in New York who are affected by the wage order[1]. Our standard of review in this proceeding is limited to determining whether the minimum wage order under review is "contrary to law" (*id.*).

[1] Petitioner has provided the Board with an affirmation swearing that its members include fast food establishments within the state of New York who meet the definition of "fast food establishment" set forth in the wage order.

The wage order provides that the minimum wage rate for fast food employees in fast food establishments shall be increased for New York City to $10.50 an hour on December 31, 2015; $12.00 an hour on December 31, 2016; $13.50 an hour on December 31, 2017; and $15.00 an hour on December 31, 2018. The order provides that the minimum wage for fast food employees in fast food establishments shall be increased for the rest of the state to $9.75 an hour on December 31, 2015; $10.75 an hour on December 31, 2016; $11.75 an hour on December 31, 2017; $12.75 an hour on December 31, 2018; $13.75 an hour on December 31, 2019; $14.50 an hour on December 31, 2020; and $15.00 an hour on July 1, 2021.

The order defines "fast food employee" as "any person employed or permitted to work at or for a fast food establishment by any employer where such person's job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance."

A "fast food establishment" is defined by the order as:

> "any establishment in the state of New York: (a) which has as its primary purpose serving food or drink items; (b) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer's location; (c) which offers limited service; (d) which is part of a chain; and (e) which is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (30) or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a franchise where the franchisor and franchisee(s) of such franchisor owns or operate [sic] thirty (30) or more such establishments in the aggregate nationally. 'Fast food establishment' shall include such establishments located within non-fast food establishments."

The order defines "chain" as "a set of establishments which share a common brand, or which are characterized by standardized options for décor, marketing, packaging, products, and services."

"Franchisee" is defined by the order as "a person or entity to whom a franchise is granted."

The order defines "franchisor" as "a person or entity who grants a franchise to another person or entity."

"Franchise" is defined by the order as having the same definition as set forth in General Business Law § 681.

The order defines "integrated enterprise" as "two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the

entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control."

The petition alleges the wage order is contrary to law because the 2015 fast food wage board was improperly constituted; the order does not adequately analyze the Labor Law's exclusive employee-focused factors for when to raise the minimum wage; the order violates the Labor Law because it improperly focuses on employers affiliated with chains with more than 30 locations, not an occupation or industry; the order is arbitrary and capricious and not supported by the evidence; the order violates separation of powers; and the order is unconstitutional.

Pursuant to Labor Law § 657 (2), respondent filed his answer and a certified transcript of the record of the 2015 fast food wage board on November 3, 2015. The answer denies the claims in the petition and challenges petitioner's standing, an argument we reject as discussed above, and asserts that the wage order is lawful in all respects. We heard oral arguments from the parties in Albany, New York, on November 19, 2015, as required by Labor Law § 657, and thereafter the parties and amici curiae filed legal briefs. Having reviewed the record and considered the arguments, we find for the reasons discussed below that the wage order is not contrary to law.

Proceedings of the 2015 Fast Food Wage Board

Article 19 of the Labor Law, also known as the "minimum wage act," sets forth the public policy of the state of New York to establish and maintain minimum wage standards to eliminate employment at wages that are insufficient to provide adequate maintenance for employees and their families and that impairs their health, efficiency, and well-being (Labor Law § 650). Consistent with this public policy, the legislature provided respondent a mechanism to appoint wage boards to "inquire into and report and recommend adequate minimum wages" for employees in occupations the respondent believes employ a substantial number of persons who are receiving wages "insufficient to provide adequate maintenance and to protect their health" (Labor Law § 653 [1]). Respondent, having determined that a substantial number of fast food workers in the hospitality industry receive wages insufficient to provide adequate maintenance and to protect their health, appointed the 2015 fast food wage board on May 7, 2015, to inquire into and report and recommend adequate minimum wages and regulations for fast food workers.

The 2015 fast food wage board consists of Byron Brown, Mayor of Buffalo, representing the interests of the public; Michael Fishman, Secretary-Treasurer of Service Employees International Union (SEIU), representing the interests of workers; and Kevin P. Ryan, founder and chairman of Gilt Groupe, and vice president of the Partnership for New York City, representing the interests of employers.

On May 20, 2015, respondent charged the wage board to "inquire into and report and recommend adequate minimum wages and regulations for fast food workers in fast food chains," and to investigate and report back, together with any recommendations, on what the minimum wage should be for fast food workers.

The fast food wage board met a total of eight times, including conducting four public hearings at which testimony was heard, and issued its report to respondent on July 31, 2015, recommending an incremental increase of the minimum wage for certain fast food workers to $15.00 an hour phased in over time. According to its report, the wage board in reaching its

conclusions considered the oral testimony of some 225 people, received more than 2,000 written comments and submissions, and received various governmental, academic, and other studies and reports presenting data and statistics. Respondent accepted the fast food wage board's report and recommendations in all respects.

Appointment of the 2015 Fast Food Wage Board was not contrary to law

Labor Law § 655 provides for the manner in which respondent may appoint a wage board. The statute requires the wage board to be composed of not more than three representatives of employers, an equal number of representatives of employees, and an equal number of persons selected from the general public (Labor Law § 655 [1]). The 2015 fast food wage board consisted of three members, one each representing employers, employees, and the general public. This is the minimum number of members allowed by statute and is not contrary to law. The statute further sets forth the method for appointing the wage board's members. Labor Law § 655 (1) provides that "[t]he commissioner shall appoint the members of the board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations."

Petitioner objects to the appointment of internet entrepreneur Kevin P. Ryan as the employer's representative, because, according to petitioner, he has no background in the fast food industry, and therefore, is not able to represent the interests of fast food employers. Mr. Ryan is founder and chairperson of several internet retail companies, and vice president of the Partnership for New York City, a nonprofit membership organization comprised of nearly 300 CEOs from New York City's top corporate, investment, and entrepreneurial firms. Petitioner also objects to the appointment of Michael Fishman as the employee's representative, because he is an officer of a labor union that petitioner believes does not represent fast food workers. Mr. Fishman is Secretary-Treasurer of SEIU and a former president of its Local 32BJ. Although the certified record filed by respondent contains no evidence of how the members were nominated, respondent asserts that Mr. Ryan was nominated by the Partnership for New York City to serve on the wage board as the employer's representative,[2] and Mr. Fishman was nominated as the employee's representative by three labor organizations — SEIU, 32BJ, and the New York State AFL-CIO.[3]

While we may agree with petitioner that Mr. Ryan seems an unlikely choice as the employer's representative to a fast food wage board, the statute does not require the employer's representative to be an employer in the specific occupation under investigation or in any other occupation. The statute merely requires that if respondent makes appointments to the wage board from nominations, those nominations must be from employers for the employer's representative, and employees, for the employee's representative, in the occupation or occupations in question. Since the Partnership for New York City, which includes individuals who sit on boards of directors of and own substantial stakes in the largest fast food chains operating in New York,[4] nominated Mr. Ryan, we find his appointment complied with Labor Law § 655 (1) and was not contrary to law.

[2] Respondent's answer to the petition at ¶ 13.
[3] Respondent's answer to the petition at ¶ 16.
[4] Respondent's supplemental memorandum of law, dated November 25, 2015, at pp. 24-25.

Likewise, Mr. Fishman's appointment to the wage board was not contrary to law. Mr. Fishman was nominated by labor organizations, including SEIU, which have been actively involved in the national campaign for an increase in the minimum wage for fast food workers to $15.00 an hour. The statute's requirement that the nomination for the employees' representative come from fast food employees is satisfied because Mr. Fishman was nominated by labor organizations that advocate on behalf of fast food workers. We do not find that the appointment of the 2015 fast food wage board was improperly constituted or otherwise contrary to law.

The fast food minimum wage order is not contrary to law

Labor Law § 654 states:

> "In establishing minimum wages and regulations for any occupation or occupations pursuant to the provisions of the following sections of this article, the wage board and the commissioner shall consider the amount sufficient to provide adequate maintenance and to protect health and, in addition, the wage board and the commissioner shall consider the value of the work or classification of work performed, and the wages paid in the state for work of like or comparable character."

The wage board's report and recommendations, which was adopted by the commissioner in its entirety, states that all three factors – amount sufficient to provide adequate maintenance and protect health, the value of the work or classification of work performed, and the wages paid in the state for work of like or comparable character – were considered, and our review of the record shows that a great deal of information was available to the wage board and respondent, including, but not limited to, economic reports and data prepared by government agencies and academics, testimony, and written comments. This evidence touched on each of the statutory factors set forth in Labor Law § 654 and included data such as average wage rates of fast food workers in New York, the percentage of fast food workers receiving public assistance, cost of public assistance for fast food workers in New York, educational level of fast food workers, average hours worked per week by fast food workers in New York, percentage of fast food chains in New York that are franchised, percentage of fast food workers in New York who work in franchises, employment growth in the fast food industry, amount of profit of publicly traded fast food chains in New York, types of work done by fast food workers, and a comparison of wages earned by fast food workers in chain restaurants to those who do not work in chains and those who work in the broader restaurant industry. The record also consists of testimony from fast food workers describing their work and standard of living.

The wage board and respondent found based on the evidence before it that the minimum wage for fast food workers employed in New York in chains with 30 or more locations nationally should be raised to $15.00 an hour. The wage board and respondent in reaching this decision considered that current wages paid to fast food workers in New York are not sufficient to meet their cost of living, that the value of fast food work is reflected in the difficulty of the tasks performed and the profit the work creates for the industry, and that fast food establishments in New York pay the lowest annual wages within the broader food services sector. These findings are final, and not subject to our review except to the extent that we find a sufficient

basis for them in the record no matter our opinion of the conclusions reached (*see* Labor Law § 657 [1] ["The findings of the commissioner as to the facts shall be conclusive."]).

Petitioner alleges the wage order is contrary to law because the wage board and respondent did not adequately analyze the statutory factors for when to raise the minimum wage, and urges us to review the conclusions reached by the wage board and respondent to determine that they acted unreasonably or made policy choices that are arbitrary and capricious. Petitioner, however, greatly misjudges our authority to review the minimum wage order's substance. Our review is limited to determining whether the respondent complied with the statute, not to question policy decisions reached by the wage board or to second guess whether information before the wage board and acting commissioner was considered or properly weighed (*Matter of Wells Plaza Corp. v Industrial Commissioner*, 10 AD2d 209, 215-216 [3d Dept 1960], *affd by Application of Wells Plaza Corp.*, 8 NY2d 975 [1960]).

Legislative history and case law underscore this narrow scope of review. Our scope of review of minimum wage orders was originally to determine whether they were "invalid or unreasonable," which remains our standard of review for petitions for review of compliance orders issued by respondent finding employers have violated specific provisions of the Labor Law, and in which proceedings we hold evidentiary hearings and make findings of fact (*see* Labor Law § 101; *compare* Labor Law § 101 [review of compliance orders] to Labor Law § 657 [review of minimum wage orders]). With respect to minimum wage orders, in 1960, the legislature narrowed our review from "invalid or unreasonable" to "contrary to law" (L. 1960, c. 619, §§ 1-2). Based on the legislature's intent to prevent us from passing on the reasonableness of minimum wage orders we are constrained from reviewing the record of the proceedings of the fast food wage board to determine whether the members made rational decisions based on the available evidence, nor may we substitute our judgment for that of the wage board or acting commissioner by questioning the choices they made and the decisions reached based on their review of the evidence before them. As the Third Department explained in *Wells Plaza*, 10 AD2d at 216, we must presume that the documentary and other evidentiary data relevant to the statutory factors for raising the minimum wage were considered by the wage board and given appropriate weight, and not second guess policy choices made by the wage board and respondent. Moreover, *Wells Plaza* was decided before the legislature acted to further constrain our review (*see Wells Plaza*, 10 AD2d at 211 [citing the "invalid and unreasonable" standard]). The evidence before the fast food wage board amply demonstrates that sufficient information on all the statutory factors under Labor Law § 654 was available, and the wage board's report and recommendations demonstrate that the factors were considered in compliance with the statute.

It is for the same reason that we reject petitioner's argument that we must set aside the wage order for impermissibly defining the covered occupations as fast food chains in New York with 30 or more locations nationally. We find nothing in the statute to prohibit the respondent from issuing a minimum wage order that classifies employees based on the number of locations their employers are affiliated with or that such a definition exceeds respondent's authority. The Labor Law defines "occupation" as "an industry, trade or class of work in which employees are gainfully employed" (Labor Law § 651 [4]), and respondent has the power to investigate the wages paid to persons in any occupation or occupations and to appoint wage boards to inquire into and report and recommend adequate minimum wages and regulations for employees in any occupation or occupations where he believes wages are insufficient (Labor Law § 653 [1]). We note that respondent's determination regarding the adequacy of wages only mentions fast food

workers and that is all we review to determine compliance with Labor Law § 653 (1). Respondent's focus on fast food chains is stated in respondent's charge to the wage board and the definition used that includes a threshold of 30 or more locations nationally, was only present in the wage board report and recommendations ultimately accepted by respondent. A wage board, once appointed, may "classify employments in any occupation according to the nature of the work rendered and recommend minimum wages in accordance with such classification" (Labor Law § 655 [5]). This broad language provides for distinctions within industries and allows respondent to carve out a "sliver of a slice of a subset of a segment of an industry," as petitioner argues, so long as the record establishes a factual basis for doing so.

The 2015 fast food wage board explained in its report that it recommended an increase in the minimum wage only for workers employed by fast food chains with 30 or more locations nationally because, among other reasons, they are "better equipped to absorb a wage increase due to greater operational and financial resources, and brand recognition." Since this finding is final (Labor Law § 657) and reflected in the record evidence, and the definition of "fast food establishment" covered by the order is consistent with the statute's broad language allowing respondent to make distinctions within occupations, we confirm the order.

We find that petitioner's other objections to the minimum wage order — that it violates separation of powers and is unconstitutional — are without merit or not properly before us. The minimum wage order does not violate separation of powers, because the statutory framework for respondent to investigate the adequacy of wages in occupations and appoint wage boards to make recommendations to respondent on whether to raise the minimum wage in those occupations demonstrates the legislature's intent to delegate the authority to raise the minimum wage to respondent so long as the guidance provided by the legislature by the applicable statutes is followed. As discussed above, we find respondent followed the prescribed statutory process and did not act contrary to law. With respect to petitioner's constitutional challenges to the wage order, they are not properly before us. While the parties agree that in certain circumstances administrative agencies have jurisdiction to decide whether application of a rule or regulation is constitutional, such is not the case here, where there is no procedure available to us by which to make our own findings of fact on the constitutional issues raised, and where the minimum wage order, in any event, will not be effective within the time period by which we are statutorily bound to issue our decision (*see* Labor Law § 657 [2] [providing that our decision affirming, amending or setting aside the wage order must be issued within 45 days of the expiration of statute of limitations to file an appeal]).

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NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The order on the report and recommendation of the 2015 fast food wage board, dated September 10, 2015, is confirmed; and

2. The petition for review be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 9, 2015.