The Workshop, Incorporated *and* Local 200, General Service Employees' Union, S.E.I.U., AFL–CIO Petitioner. Case 3–RC–6900

November 4, 1977

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On May 6, 1977, the Regional Director for Region 3 issued a Decision and Order in the above-entitled proceeding in which he dismissed the petition on the ground that the Employer is not an employer within the meaning of Section 2(2) of the Act because it performs services which are intimately connected with the exempted operations of several governmental entities. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review of the Regional Director's decision on the grounds, *inter alia,* that he made erroneous findings of fact and departed from officially reported Board precedent. By telegraphic order dated July 5, 1977, the request for review was granted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and finds that 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 for the following reasons:

The Employer is a not-for-profit corporation engaged in the operation of a sheltered workshop and rehabilitation facility in Menands, New York. At the hearing held on April 20, 1977, the Employer and the Petitioner were in agreement as to the unit placement of employees;[1] the only disagreement was whether the Employer was exempt from Board jurisdiction.[2]

The Employer asserted that it was exempt from Board jurisdiction because it provided services authorized, encouraged, and funded by units of state and local government, including services to children from local school districts. The Regional Director agreed that the Employer was exempt, both because of the performance of functions authorized by state statute and because of its services to handicapped junior and senior high school students, and did not reach the question of whether the State or one of its subdivisions exercised such substantial control over the Employer's labor relations as to require that the Board decline jurisdiction. In its request for review, the Petitioner contended that the record and Board precedent did not support the Regional Director's conclusions. We find merit in the Petitioner's contention.

The Employer provides counseling, education, vocational training, employment, and placement services for its clients, the majority of whom will always require some sort of sheltered environment. An average of 300–325 clients are served daily, of whom approximately 60 percent are mentally retarded, 20 percent have psychiatric disorders as their primary disability, and the remainder have some type of physical impairment. An unspecified number of the Employer's clients are students in junior and senior high schools in the area who spend half of their schoolday in the Employer's workshop program as a supplement to their education. Many clients are wards of the State or receive some form of public assistance. The Employer does not provide housing; clients may live with families, in group homes or halfway houses, or in other institutions. Some clients are participants in a work-release program from a nearby state correctional facility and are bused to and from the Employer's facility daily. In the past, the Employer has also served patients in United States Veterans Administration hospitals, as well as military dependents.

Approximately 60 percent of the Employer's 1976 budget of around $1.2 million came from payments from various governmental entities, including, *inter alia,* the New York State Education Department's Office of Vocational Rehabilitation, the Albany and Rensselaer County Community Mental Health Boards, and the New York State Department of Correction. In the past, the Employer has also received funds from several Federal agencies. Approximately $500,000 came from the Employer's

[1] In its petition, the Petitioner sought a single unit; however, at the hearing the Petitioner and the Employer agreed that certain employees were professional employees and were therefore entitled to a separate vote, and the parties entered into a stipulation concerning the unit placement and exclusion of all employee categories. Clients of the Employer are not included in the units stipulated to be appropriate.

[2] At the hearing, and again in its request for review, the Petitioner objected to the introduction of evidence concerning the alleged connection between the Employer's operations and the functions of various governmental entities, based on the Petitioner's position that such evidence was irrelevant once it had been established that the Employer met the Board's commerce standards. We find that the evidence was properly admitted, as an enterprise which is "engaged in commerce" may nevertheless be exempt from Board jurisdiction by virtue of its relationship with an exempt governmental entity; see, e.g., *MTL, Inc.,* 223 NLRB 1071 (1976). As expressed in fn. 6 of *MTL, Inc.,* Chairman Fanning believes that, in assessing an enterprise's relationship with an exempt institution, the focus should be on whether the enterprise has retained sufficient control over the employment conditions of its employees so that meaningful bargaining can take place.

contracts with various private and governmental customers for whom clients performed services in the sheltered workshop program, and some funds are received from the operation of the cafeteria in the Employer's building and from voluntary contributions to the United Fund which are channeled to the Employer. The Employer is exempt from Federal income taxes as an organization operating exclusively for an educational purpose.

Some of the payments which the Employer receives from governmental entities come in the form of grants for specific purposes. For example, the Employer received construction grants for its present facility from the United States Department of Health, Education and Welfare and the New York State Department of Mental Hygiene, and the salaries of some staff members are partially reimbursed by grants for those positions. Other income from governmental sources comes in the form of fees for service, based on the amount and type of services provided by the Employer to each individual client for whom a particular agency is responsible.

Based on the above, we find that the Employer's operations are not so intimately connected with an exempted governmental function as to warrant declining jurisdiction. In reaching his conclusion to the contrary, the Regional Director relied largely on the exemption which was found in *MTL, Inc.*, 223 NLRB 1071 (1976). However, in our view that case is distinguishable in that there the employer was found to be so closely controlled by the city and county of Honolulu as to be an instrumentality of the city. Therefore, while in that case as in the instant case the function performed was authorized by statute, the extensive control on which the Board relied in *MTL, supra,* is simply not present here. Rather, the Employer, while performing certain functions, determines for itself what level of services it will provide (and thereby sets the fees which will be paid to it for its services). The role of the State is limited to periodic inspections and audits to insure that the Employer meets minimum standards for the level of reimbursement which the Employer receives (there are four levels of reimbursement provided by the Office of Vocational Rehabilition for evaluation, training, and placement, depending on the ratio of qualified staff members to clients).

In our opinion, the record also does not indicate such pervasive control over labor relations as to require a finding that the Employer would be exempt from Board jurisdiction due to inability on the Employer's part to engage in meaningful collective bargaining. Salary reimbursements for specifically funded positions are subject to a maximum set by the funding agencies, but the Employer may pay higher salaries out of its other sources of income, and salaries of other employees do not appear to be regulated. Even as to grant employees, agencies are not involved in supervision, evaluation, assignment, discipline, or most other conditions of employment. They are involved in employee transfers only to the extent that they could veto a transfer into a funded position if the employee involved did not have the qualifications for that position. Agencies can suggest that the Employer institute certain employee benefit programs, but with the exception of benefits required of all employers (e.g., workmen's compensation insurance) no governmental agency can require that the Employer institute any particular program. The State has only an indirect influence on the hours of work of the Employer's staff members; the sheltered employment program requires that clients work at least 5 hours per day for at least 40 days over a 3-month period in order for the Employer to receive reimbursement, but the specific hours and days during which this will take place (and therefore during which staff members must be on the job) are set by the Employer.

In light of the foregoing, we conclude that the limited oversight by state and local governmental agencies, designed to assure a minimum quality of service for the Employer's clients, does not deprive the Employer of its effective control over labor relations. The Employer retains virtually complete control over matters affecting conditions of employment and is therefore capable of engaging in meaningful collective bargaining.[3]

In deciding to assert jurisdiction over the Employer, we are not unmindful that it provides services to local junior and senior high school students, which the school systems are apparently required to provide. But, unlike cases involving services to school children in which the Board has found that it lacks jurisdiction,[4] the Employer here provides services to such school children only on a part-time basis, and the children continue to attend their regularly assigned schools during the portion of the day in which they are not at the Employer's facility. Additionally, services to school-age persons constitute only a portion of the services rendered by the Employer. Finally, unlike the basic education provided in the cited cases, the services provided by the Employer are primarily in the vocational training area.

[3] See *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977); *JA-CE Company, Inc.*, 205 NLRB 578 (1973).

[4] See, e.g., *Mitchell School, Incorporated and Main Line Day School, Incorporated,* 224 NLRB 1017 (1976); *Overbrook School for the Blind,* 213 NLRB 511 (1974); and *Pennsylvania School for the Deaf,* 213 NLRB 513 (1974), on which the Regional Director relied. For reasons expressed in fn. 9 of *Austin Developmental Center, Inc.*, 226 NLRB 134 (1976), Chairman Fanning agrees that these cases are inapposite to this area.

We therefore find that the following employees of the Employer *may* constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act: [5]

> All regular full-time and regular part-time employees of the Employer, including rehabilitation counselors, social worker, vocational evaluators, placement counselor, business teacher, registered nurse, hourly supervisors, teacher's aide, maintenance aide, warehouse aide, truckdriver, bookkeepers, secretaries, and receptionist; but excluding the sales engineer, general production supervisor, salaried production supervisor, supervisor of food services, warehouse supervisor, maintenance supervisor, executive director, assistant executive director, director of professional services, director of production and training, office manager, assistant office manager, assistant production manager, administrative assistant, administrative secretary, production control supervisors, and all managerial employees, confidential employees, guards, and supervisors as defined in the Act.

The unit set out above includes professional and nonprofessional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, we must ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees.

We shall therefore direct separate elections in the following voting groups:

> *Voting Group A:* All regular full-time and regular part-time professional employees of the Employer, including rehabilitation counselors, social worker, vocational evaluators, placement counselor, business teacher, and registered nurse; but excluding all nonprofessional employees, the sales engineer, general production supervisor, salaried production supervisors, supervisor of food services, warehouse supervisor, maintenance supervisor, executive director, assistant executive director, director of professional services, director of production and training, office manager, assistant office manager, assistant production manager, administrative assistant, administrative secretary, production control supervisors, and all managerial employees, confidential employees, guards, and supervisors as defined in the Act.

> *Voting Group B:* All regular full-time and regular part-time employees of the Employer, including hourly supervisors, teacher's aide, maintenance aide, warehouse aide, truckdriver, bookkeepers, secretaries, and receptionist; but excluding all professional employees, the sales engineer, general production supervisor, salaried production supervisors, supervisor of food services, warehouse supervisor, maintenance supervisor, executive director, assistant executive director, director of professional services, director of production and training, office manager, assistant office manager, assistant production manager, administrative assistant, administrative secretary, production control supervisors, and all managerial employees, confidential employees, guards, and supervisors as defined in the Act.

The employees in Voting Group A will be asked two questions on their ballots:

(1) Do you desire the professional employees to be included in a unit composed of all employees of the Employer for the purposes of collective bargaining?

(2) Do you desire to be represented for the purposes of collective bargaining by Local 200, General Service Employees' Union, S.E.I.U., AFL–CIO?

If a majority of the professional employees in Voting Group A vote "yes" to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional Voting Group B to determine whether or not the employees in the whole unit wish to be represented by the Petitioner. If, on the other hand, a majority of professional employees in Voting Group A vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be separately counted to determine whether or not they wish to be represented by the Petitioner.

The employees in the nonprofessional Voting Group B will be polled to determine whether or not they wish to be represented by the Petitioner.

We now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in the unit with nonprofessional employees, we find that the following will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[5] The units as set forth herein are in accord with the stipulations of the parties as to the status of the persons employed by the Employer.

All regular full-time and regular part-time professional and nonprofessional employees of the Employer in Voting Groups A and B; excluding managerial employees, confidential employees, guards, and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, we find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time professional employees of the Employer in Voting Group A; excluding managerial employees, confidential employees, guards, and supervisors as defined in the Act.

All regular full-time and regular part-time nonprofessional employees of the Employer in Voting Group B; excluding managerial employees, confidential employees, guards, and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

MEMBER MURPHY, dissenting:

In disagreement with my colleagues, I would find that the assertion of jurisdiction over this Employer is unwarranted for the reasons stated in my dissent in *Austin Developmental Center, Inc.*, 226 NLRB 134 (1976). In my opinion, providing state-mandated education to physically and mentally handicapped school children renders the Employer essentially an adjunct to the public school system.

As it appears that the staff which provides the Employer's school-related services is not separate from the remainder of the Employer's staff, it is impossible to separate this portion of the Employer's services from its other operations as the Board did in asserting jurisdiction over nonschool-related charter bus services in *Roesch Lines, Inc.*, 224 NLRB 203 (1976). It is therefore unnecessary to decide whether other factors relied on by the Regional Director would be sufficient to prevent the assertion of Board jurisdiction over the remainder of the Employer's operation.

Accordingly, I would affirm the Regional Director's Decision and Order and dismiss the petition.