

Puerto Rico Marine Management, Inc. and Union Independiente Empleados Clericales Frente Portuario, Petitioner. Case 24-RC-6187

May 14, 1979

DECISION AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, PENELLO, AND MURPHY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Graciela J. Belaval of the National Labor Relations Board. Following the close of the hearing, the Regional Director for Region 24 transferred this case to the Board for decision. Thereafter, the Employer filed a brief.

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, having duly considered the Hearing Officer's rulings made at the hearing, finds they are free of prejudicial error. They are hereby affirmed. At the hearing, Local 402, Office and Professional Employees International Union, AFL-CIO, requested that it be allowed to intervene in these proceedings because "this petition was filed for the Puerto Rican employees of PRMMI [Puerto Rico Marine Management, Inc.] only, and because the International Union represents all employees of PRMMI, Local 402 is the one that represents the employees in Puerto Rico." Office and Professional Employees International Union, AFL-CIO,¹ opposed the intervention of Local 402 based on its contention that "representation is vested in the International Union in a multi-location contract. . . ." The Hearing Officer referred her ruling to the Regional Director who, subsequent to the hearing, transferred the case to the Board for decision. Based on the evidence in the record, we sustain the objection of Office and Professional Employees International Union, AFL-CIO, and do not permit the intervention of Local 402. The evidence we rely on is the collective-bargaining agreement signed by Puerto Rico Marine Management, Inc., hereinafter PRMMI or the Employer, and the Office and Professional Employees International Union, AFL-CIO, hereinafter OPEIU or the International, effective between November 9, 1975, and November 9, 1978.² Local 402 is not signatory to the agreement, nor is it referred to

¹ Whose status as an intervenor has already been granted and which we affirm.

² Both Local 402 and the International have relied on the collective-bargaining agreement as the basis for their respective intervention in the proceeding herein; and, since neither union has been certified, our decision must be based on a construction of the collective-bargaining agreement, the only relevant evidence in the record.

therein as a party to the agreement.³ Consequently, we are in agreement, based on an examination of the entire document, that the wording of the paragraph preliminary to the collective-bargaining agreement does not make Local 402 a party to the contract so as to allow its intervention based on that document.⁴ Indeed, the unit delineated in the contract is employerwide (multilocation) in scope; and, while it is apparent that Local 402 may administer or police the contract with respect to that segment of the total unit located in Puerto Rico, it does not represent those or any other employees as a separate unit for collective bargaining. Accordingly, and for the reasons set out above, we sustain the International's objection and deny the motion for intervention of Local 402.

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

1. The Employer is a Delaware corporation engaged in providing marine transportation and related services between Puerto Rico and the mainland of the United States and in interstate and foreign commerce. It has its principal office and place of business at Elizabeth, New Jersey, and maintains other places of business and port facilities throughout the United States, including the Commonwealth of Puerto Rico. During the past year PRMMI derived gross revenues in excess of \$500,000 from the handling and transportation of cargo in interstate and foreign commerce in connection with its services as manager and operator of vessels and related facilities owned by Puerto Rico Marine Shipping Authority, hereinafter PRMSA, a public corporation. During the same period PRMMI provided and performed services valued in excess of \$50,000 for companies located outside the Commonwealth of Puerto Rico.

The Petitioner seeks to represent a unit limited to those employees employed as "office and clerical employees" by the Employer at all its locations throughout the Commonwealth of Puerto Rico. Both the Employer and the Intervenor contend that an employerwide, multilocation unit is appropriate. In addition, a question is presented whether PRMMI is an "employer" within the meaning of Section 2(2) of the Act. This issue has previously been considered by us in a series of situations involving National Mari-

³ The closing paragraph of the collective-bargaining agreement states:

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their duly authorized representatives. . . .

The signatures which appear under this paragraph are those of the representatives of PRMMI and the International, only.

⁴ The preliminary paragraph referred to *supra* reads as follows:

AGREEMENT entered into this 9th day of November, 1975 between the OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and affiliated Local Unions of the Office and Professional Employees International Union, AFL-CIO, hereinafter referred to as the "Union," and PUERTO RICO MARINE MANAGEMENT, INC., its successors and assigns, hereinafter referred to as the "Employer."

time Union of America, AFL-CIO, Seafarers International Union, AFL-CIO, and the Employer herein.⁵ The Board considered the Administrative Law Judge's Decision and affirmed it without significant modification, finding, *inter alia*, PRMMI to be an "employer" within the meaning of Section 2(2) of the Act.⁶

Since issuance of our Decision and Order in that case, and prior to the filing of the instant petition, PRMSA acquired on June 30, 1978, the stock of TKM Corporation, a holding company which itself owned 100 percent of the stock of PRMMI.⁷ Upon PRMSA's acquisition of TKM, a special meeting of the stockholders of TKM was held on June 30, 1978, in Newark, New Jersey, at which the resignations of TKM's directors were accepted. The sole stockholder of TKM, PRMSA, then nominated and elected Ruddle E. Irizarry, Miguel A. Rossy, and Jose A. Calderon as the new directors of TKM. These directors thereupon passed a resolution electing themselves president, executive vice president and secretary, and treasurer, respectively, of TKM. TKM, then, as sole stockholder of PRMMI, elected Irizarry, Rossy, and Calderon as president, executive vice president and secretary, respectively, of PRMMI. These three individuals, now filling the top three offices of both TKM and PRMMI, had all been employed by PRMSA, right up to the point in time they had resigned to assume their new positions with TKM and PRMMI.⁸ They did not, however, retain any connection with PRMSA upon the assumption of their duties with TKM and PRMMI. In addition, 15 other PRMSA employees left that entity and took new positions with PRMMI, having formally severed, like Irizarry, Rossy, and Calderon, any and all ties with PRMSA.⁹ Although PRMSA does not intend to

replace all those who left its employ for PRMMI, there was testimony which indicated that PRMSA is currently in the process of consolidating its operations, thus obviating the need for many of its employees who joined PRMMI.

Despite the changeover of personnel, there is no evidence of any significant change in the relationship between PRMSA and PRMMI. PRMMI continues to oversee the day-to-day operations of the ships it manages, and also continues to control all aspects of labor relations with respect to its employees. Although PRMSA has budgetary control over PRMMI, there is no evidence that the nature or extent of that control has changed since the stock acquisition by PRMSA. Indeed, PRMMI continues to remain a separate corporate entity, its relationship to PRMSA defined by the amendment and restatement of the management services contract entered into by PRMSA, PRMMI, Puerto Rico Marine Operating Company, Inc., and TKM Corporation. Moreover, there is no evidence that this amendment and restatement differs in any significant fashion from the management services contract in effect at the time we considered this issue in *Puerto Rico Marine Management, Inc.*, *supra*. Thus, in accordance with our Decision in the earlier case, in which held, *inter alia*, that asserting jurisdiction over PRMMI would effectuate the policies of the Act, and because we believe, based on the evidence herein, that the acquisition of PRMMI's stock by PRMSA through the intermediary corporation, TKM, does not alter those factors on which we relied when we first asserted jurisdiction over PRMMI,¹⁰ we reaffirm our Decision in the earlier case and find PRMMI to be an

⁵ *National Maritime Union of America, AFL-CIO (Puerto Rico Marine Management, Inc.)*, 227 NLRB 20 (1976).

⁶ Member Penello dissented on this issue, refusing to assert jurisdiction over PRMMI.

⁷ PRMSA, an instrumentality of the Commonwealth of Puerto Rico, was created by the legislature for the express purpose of taking responsibility "for the maritime transportation between Puerto Rico and abroad [and] which will provide this essential service wholly or partially, as long as the public interest, health and welfare of its citizens may require." Act of the Puerto Rico Maritime Shipping Authority, Act No. 62 (approved June 10, 1974).

⁸ When employed by PRMSA, Ruddle Irizarry had served as assistant executive director, Miguel Rossy has served as assistant executive director of finance and auditing, and Jose Calderon had occupied the position of assistant executive director of finance.

⁹ The following lists those individuals formerly employed by PRMSA who are now employed by PRMMI, and the positions held by them respectively. (It does not include the three individuals discussed in fn. 8, *supra*.)

Angelo Colon - Asst. Exec. Dir., Operations, Gen. Mgr. Operations, Puerto Rico; Freddie Vasquez - Supervisor, Mgr. Marketing, Puerto Rico; Roberto F. Cruz - Senior Internal Auditor, Dir. Administration, Puerto Rico; Lorenzo Santiago - Head Internal Auditor, Director, Auditing; Ramon Feliciano - Tariff Officer, Documents Manager; Licio Hernandez - Community Relations Officer, Special Projects Officer; Froilan Ansa - Dir. Client Relations, Dir. Marketing, Puerto Rico; Miguel Diaz - Dir. Maritime Operations, Dir. Corporate Maintenance; Luis Colon - Personnel Officer, Director; Justinio Hernandez - Dir.

Terminal Operations, Operations; Nicholas Perez - Officer, Division of Terminals, Operations; Rosa Lopez - Administrative Secretary, Secretarial Staff; Ada Zayas - Administrative Secretary, Secretarial Staff; Nancy Santiago - Administrative Secretary, Secretarial Staff; Elba Vazquez - Secretary, Secretarial Staff.

¹⁰ *Puerto Rico Marine Management, Inc.*, *supra*. Member Murphy, in affirming the assertion of jurisdiction herein, notes that the Board's assertion of jurisdiction in *Puerto Rico Marine Management, Inc.*, *supra*, was based in part upon an application of the "intimate connection" test. She, like her dissenting colleague, would continue to apply that test in determining whether to assert jurisdiction over an employer whose operation is closely connected to a governmental entity. However, contrary to her dissenting colleague, she finds an appropriate application of that test results in the assertion of jurisdiction herein, for, as stated by the Administrative Law Judge in the earlier case, "PRMSA's marine transportation operation constitutes a purely commercial enterprise 'paralleled by employers in the private sector' and not a universally recognized, essential and traditional governmental function." Thus, she adheres to the view that the Board should continue to assert jurisdiction over PRMMI for the reasons summarized by the Administrative Law Judge as follows:

Considering the commercial nature of PRMSA's ocean transportation operation, the great scope and direct impact this operation has on interstate commerce, and the substantial control exercised by PRMMI, as a statutory employer, over its labor relations policies and employment conditions; and balancing the rights and protection the Act makes available to the employees and employers against the jurisdictional exemption the Act provides, I find that the purposes of the Act to eliminate disruptions in commerce would best be accomplished by assuming jurisdiction in this case. [*Puerto Rico Marine Management, Inc.*, 227 NLRB at 33.]

“employer” within the meaning of Section 2(2) of the Act.

2. We find, as stipulated by the parties, that the Petitioner and the Intervenor are labor organizations within the meaning of the Act.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. Both the Employer and the Intervenor agree that only an employerwide unit would be appropriate. The Petitioner seeks a unit limited to office clerical employees located in the Commonwealth of Puerto Rico.

During the course of the hearing the parties stipulated to the history of collective bargaining: that, since 1963, the Employer¹¹ has been bargaining with the Intervenor in the unit as set out in the most recent collective-bargaining agreement.¹²

The Employer and the Intervenor take the position that the unit set out in footnote 12, *supra*, is appropri-

ate. The Petitioner contends that the petitioned-for smaller unit is appropriate herein.¹³

In the absence of any evidence contrary to the stipulated bargaining history and most recent collective-bargaining agreement, we find the employerwide unit to be appropriate.

Therefore, we find that, under the circumstances of this case, the appropriate unit under Section 9(b) of the Act is:¹⁴

All office clerical employees of the Employer employed at its Elizabeth, New Jersey; New York, New York; Baltimore, Maryland; New Orleans, Louisiana; Jacksonville, Florida; Charleston, South Carolina; Pueblo Viejo, Puerto Nuevo, Ponce, Mayaguez, and San Juan, Puerto Rico, locations; excluding managerial employees, secretaries to managerial employees, confidential employees, professional employees, guards and supervisors as defined in the Act.¹⁵

[Direction of Election¹⁶ omitted from publication.]¹⁷

MEMBER PENELLO, dissenting:

I dissent on the jurisdictional issue for the reasons set forth in my dissenting opinion in *National Maritime Union of America, AFL-CIO (Puerto Rico Marine Management, Inc.)*, 227 NLRB 20 (1976),¹⁸ and,

¹³ The collective-bargaining history and the most recent collective-bargaining agreement comprise the sum total of the evidence adduced on the unit question.

¹⁴ We have modified the language as set out in the collective-bargaining agreement so as to conform to the usual idiom of Board certification.

¹⁵ The recognition article in the collective-bargaining agreement referred to “[e]xecutives, secretaries to executives, [and] administrative employees functioning at least at the level of supervisors not performing bargaining unit work” We have used the word “managerial” to refer to “executives,” and have included the “administrative employees” referred to above in our standard supervisory classification.

The classification of “secretaries to executives” is referred to by “secretaries to managerial employees.” Although these employees are normally included in this type of unit unless they are shown to possess supervisory or confidential status, we shall, based upon the bargaining history, and upon the apparent agreement of the parties – the Petitioner having also specifically excluded these employees in its petitioned-for unit – exclude them from the unit found appropriate herein.

¹⁶ As we have found appropriate a unit substantially different from that sought by the Petitioner herein, the Petitioner shall be given 10 days from the date of this Decision and Direction of Election to make an additional showing of interest. If the Petitioner fails to make the requisite showing of interest, the Regional Director is directed to dismiss the petition herein. If the Petitioner does not now wish to participate in an election in the unit we find appropriate herein, we shall permit it to withdraw its petition upon written notice to the Regional Director within 10 days from the date of this Decision and Direction of Election.

¹⁷ [*Excelsior* footnote omitted from publication.]

¹⁸ I continue to apply the “intimate connection” test, my position in this area having been most recently discussed in the dissent in *National Transportation Service, Inc.*, 240 NLRB No. 99 (1979).

I take this opportunity to note, in disagreement with the conclusion reached by Member Murphy (see fn. 10, *supra*), that the dissent in *National Transportation Service* speaks directly to the situation under consideration herein. Thus, whether or not PRMSA and/or PRMMI is a “commercial enterprise ‘paralleled by employers in the private sector’” is not the critical

(Continued)

¹¹ PRMMI since 1974, and its predecessor, Sealand Services, Inc.

¹² That unit description as set out in the “Recognition” article of the collective-bargaining agreement is as follows:

The Company recognizes the Union as the sole and exclusive bargaining agent for all office and clerical employees working at the locations identified in Appendix “A” and such operating units for which during the term of this Agreement, it may be certified by the National Labor Relations Board or recognized by the Company as the exclusive bargaining representative, and all such employees are referred to whenever the term “employee” is used in this Agreement. Executives, secretaries to executives, professionals, administrative employees functioning at least at the level of supervisors and not performing bargaining unit work, confidential employees, salesmen and supervisory employees with authority to hire, transfer, suspend, lay off, recall, promote, discharge or discipline other employees, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of merely routine nature, but requires the use of independent judgement [sic], are excluded. The terms in the Recognition Article are used as defined by the NLRB.

Appendix A reads as follows:

This Agreement covers all of the Company’s OPEIU members. The locations are as follows:

Fleet and Bombay Streets Elizabeth, NJ 07207	Shed D Control Building Central Market Area Port Area Puerto Nuevo, PR Municipal Pier Playa Ponce Ponce, PR Ponce Terminal Free Zone Port Area Mayaguez, PR
1 World Trade Center New York City, NY 209 Dunmar Building Dundalk Marine Terminal 2700 Broening Highway Baltimore, MD 21222 2700 France Road New Orleans, LA 70186 30 Maritime and Faragate Streets Blout Island Jacksonville, FL 32203	Isla Grande Terminal Isla Grande Airport San Juan, PR Kilometer 2.5 Kennedy Highway Puerto Nuevo, PR
2 Charlotte Street Charleston, SC 29403 Buchanan Terminal Intersection Road to Catano Pueblo Viejo, PR	

further, because the Employer herein is now wholly owned by Puerto Rico Marine Shipping Authority, hereinafter PRMSA, itself an instrumentality of the Commonwealth of Puerto Rico. Thus, not only is

factor on which the analysis should turn. Rather, our examination must revolve around the fact that the Commonwealth of Puerto Rico has deemed that it take responsibility "for the maritime transportation between Puerto Rico and abroad" and, further, that the Commonwealth of Puerto Rico has specifically provided for the creation of an instrumentality (PRMSA) to "provide this essential service wholly or partially, as long as the public interest, health and welfare of its citizens may require." Act of the Puerto Rico Maritime Shipping Authority, Act No. 62 (approved June 10, 1974). It is

PRMMI intimately connected with the exempt operations of PRMSA, but PRMMI itself is also now directly tied to the Commonwealth of Puerto Rico through the umbilicus of PRMSA.

clear, then, that, whether the services performed by PRMMI are commercial or not, they are in fact directly and solely related to the purposes for which PRMSA was created by the Commonwealth of Puerto Rico. Moreover, and as I have noted *infra*, PRMMI's relationship to PRMSA is no longer that of an independent contractor, for they are now tied, one to the other, through the bond of ownership. I thus have difficulty perceiving the distinction between the facts of this case and those of *National Transportation Service*.