Walter A. Kelley *and* Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Thomas J. Kelly *and* Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

John W. Galbreath *and* Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Oleg T. Dubassoff *and* Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Max Hirsch *and* Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Cases Nos. 2–RM–1121, 5–RM–434, 9–RM–258, 11–RM–79, and 11–RM–80. October 31, 1962*

DECISION AND ORDER

The above-named Employers filed individual petitions on various dates in April 1961, which were thereafter dismissed by the Regional Directors for the Second, Fifth, Ninth, and Eleventh Regions on the ground that it would not effectuate the purposes of the Act to assert jurisdiction therein. Each of the Employers thereupon filed an appeal from the Regional Director's dismissal. In affirming the Regional Director's actions, the Board stated that in view of its advisory opinions in *Meadow Stud, Inc.*, 130 NLRB 1202, and *William H. Dixon*, 130 NLRB 1204, relating to the impact of horseracing on interstate commerce, it would not effectuate the policies of the Act to assert jurisdiction in the instant cases.

The Employer-Petitioners thereupon filed suit for a declaratory judgment in the Federal District Court for the District of Columbia in which they sought an order requiring the Board either to assert jurisdiction or to grant a hearing before determining whether to assert or decline jurisdiction. The district court granted the Board's motion for summary judgment and dismissed the suit.[1] The Employer-Petitioners appealed the dismissal, and the Court of Appeals for the District of Columbia Circuit reversed and remanded the case to the Board for further proceedings.[2] The court noted that our advisory opinions in *Meadow Stud* and *William H. Dixon* were not based on hearings and these opinions, therefore, were not a "rule of decision" within the meaning of Section 14(c)(1) of the Act, under which the Board could decline to assert jurisdiction over a representation dispute involving an entire "class or category of employers." The court therefore held that the Board has not as yet determined in

[1] *Kelley* v. *Frank McCulloch, Chairman*, 303 F. 2d 208 (C A D.C.).
[2] *Max Hirsch, et al.* v. *Frank W. McCulloch*, 303 F. 2d 208 (C.A.D C.).

a proper manner, the question of whether to assert jurisdiction over the activities engaged in by these Employers.

Pursuant to the decision of the court of appeals, the Board on April 18, 1962, reinstated the above petitions, consolidated the cases for hearing, and directed that a hearing be conducted by the Regional Director for the Second Region. A hearing was thereafter held before I. L. Broadwin, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

The Employer-Petitioners are owners and trainers of thoroughbred race horses. They have filed separate representation petitions seeking elections among their grooms, exercise boys, and hot walkers throughout the United States. The Union contends that horseracing is essentially a business of small operators, that it is local in character with little impact on interstate commerce, and that the Board should therefore decline to assert jurisdiction over the operations of the Employer-Petitioners.

Employer-Petitioner Max Hirsch is a public trainer who operates racing stables for himself and various owners of horses. He trains, supervises, and enters horses in races, and occasionally sells them. Mr. Hirsch's operations are the most diversified of those of any of the Employer-Petitioners and may be considered as representative of those of the others. He normally has between 30 and 48 employees. His gross income in 1961 was approximately $300,000, of which about 75 percent was derived from sources outside the State of New York. In the same year, he spent $120,000 for wages, of which more than one-half went to employees working outside the State of New York; $50,000 for feed for his horses, of which three-fifths was spent outside the State of New York; $9,000 for stables supplies; and $50,000 for transportation expenses. In addition, Mr. Hirsch purchased horses for which he paid approximately $70,000.

Mr. Hirsch operates training stables in Texas and South Carolina. Beginning in March and lasting into December, he races his horses at various tracks in New York, New Jersey, Delaware, and Maryland. Grooms and exercise boys move with the horses.

Horseracing is conducted at 124 racetracks in 30 different States. During 1961, these States derived revenue of approximately $200,000,000 from thoroughbred racing, with the amount wagered through State pari-mutuel systems totaling $2,600,000,000. During the same period, the amount paid to owners of horses as purses by State racing associations totaled almost $100,000,000.

Racing and the operation of tracks are supervised by State agencies in each of the States where tracks are located. All State agencies impose licensing requirements for so-called "backstretch" employees, which includes everyone connected with the care and racing of horses.

Section 14(c) of the Act provides:

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
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> (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . , from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Contrary to the contention of the Employer-Petitioners, the Board did not on August 1, 1959, have a jurisdictional standard applicable to racehorse owners and trainers.[3] It has never considered that the standard set forth in *Siemons Mailing Service*,[4] applied to the racing industry. The Board never intended by promulgating the *Siemons Mailing* standard to overrule such decisions as *Los Angeles Turf Club* [5] and *Pinkerton's National Detective Agency* [6] in which the Board declined to assert jurisdiction over racetracks.[7] Although a racetrack is immovable and trainers and owners are ambulatory, the track, the horse owners, and the trainers are part of the same industry; one could not exist without the other. The reasons for declining to assert jurisdiction over racetracks are therefore fully applicable to horse owners and trainers. Indeed, it would be inconsistent to assert jurisdiction over one and not over the other. As the Board would not have asserted jurisdiction over a labor dispute involving the Employer-Petitioners and the Union under the standards prevailing on August 1, 1959, we find that the proviso to Section 14(c)(1) does not require the Board to assert jurisdiction in the present cases.

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[3] *Meadow Stud, Inc.*, 130 NLRB 1202 Accord: *Hialeah Race Course, Inc.*, 125 NLRB 388. See also *Max Hirsch, et al.* v. *Frank W. McCulloch*, 303 F. 2d 208 (C.A.D.C.).

[4] 122 NLRB 81.

[5] *Los Angeles Turf Club, Inc.*, 90 NLRB 20.

[6] *Pinkerton's National Detective Agency, Inc.*, 114 NLRB 1363.

[7] *Hialeah Race Course, Inc., supra*, footnote 3.

The Board has considered the evidence in the case and the arguments of the Employer-Petitioners and concludes that, although the operations of the racing industry affect commerce, the effect of labor disputes involving these employers "is not sufficiently substantial to warrant the exercise of its jurisdiction." We do so for the following reasons:

Horseracing as it now exists is a State-created monopoly, subject as such to extensive local regulation.[8] Practically every individual working at a track, including grooms and exercise boys, the employees involved in these proceedings, must be licensed by State regulatory authorities. Because of the important revenue derived from racing activities, State governments have a strong interest in insuring uninterrupted operations at racetracks. This interest extends not only to the tracks, but to the owners and trainers of horses without whom tracks could not operate. Consequently, unless the hands of State authorities are tied, no labor dispute in this industry is likely to be permitted to last sufficiently long to interfere seriously with interstate commerce. We believe that, because of the unique nature of the racing industry, the regulation of labor matters governing employees should be left to the States, which under Section 14(c)(2) are in a position to assume jurisdiction if the Board declines to do so. The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry.

The fact that the employees involved move across State lines is not alone sufficient to justify the Board in asserting jurisdiction. It still remains true, in our opinion, that a labor dispute in this industry is not likely to have very serious repercussions on interstate commerce, and it is this latter factor which is determinative of a decision whether to assert jurisdiction. Moreover, the employees involved are already licensed and regulated by every State in which they work. To subject other aspects of their relationship to possible multistate regulation would therefore be merely to follow a pattern which already exists and to which the employers presumably have accommodated themselves. Finally, the Board's declination of jurisdiction is not irrevocable. If the Board's expectations are not realized, it will not hesitate to reconsider its policy in this area.[9]

[The Board dismissed the petitions.]

[8] *Hialeah Race Course, Inc.*, 125 NLRB 388, 380–391; *John W. Galbreath, et al., New York State*, 48 LRRM 1137, 1139.

[9] See *Boyd Leedom, Chairman* v. *Fitch Sanitarium, Inc.*, 294 F. 2d 251, 255 (C.A D.C.).