Winsett-Simmonds Engineers, Inc. *and* Laborers International Union of North America, AFL–CIO, Local Union No. 1441. Case 26–RC–2822.

May 15, 1967

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer John E. Higgins, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Regional Director for Region 26, this case was transferred to the National Labor Relations Board for decision. Briefs have been filed by the Employer and the Petitioner.

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

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

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. The Petitioner seeks a unit of all laborers in the Company's construction division. Included among these laborers are employees who operate machines and equipment such as trucks, backhole diggers, front-end loaders, and asphalt rollers. The employees in the construction division are engaged exclusively in construction for utility companies. Their number varies between 95 and 125 depending on the Employer's workload. Those employed are divided into gangs, each supervised by a foreman. At the time of hearing, there were 21 gangs, each separately supervised. Thus, the parties are in agreement as to the basic composition of the unit, and to the exclusion of foremen as well as office clerical employees.[1]

The single issue concerns the proper placement of eight so-called work release prisoners. These are individuals who have been incarcerated at the Shelby County Penal Farm by the order of the Memphis Juvenile Court for failure to support dependent wives or children.[2] Upon proper application by such prisoner and with the approval of the Juvenile Court, he is permitted to leave the Penal Farm during specified working hours and undertake gainful employment with any of several companies which have consented to participate in this rehabilitative venture instituted by Shelby County. The Employer herein has, during its 6 months' participation in the program, employed between 18 and 22 of these prisoners.

In order to reach their place of employment, the eight individuals employed by Winsett-Simmonds are transported by penal bus to Memphis, whence they obtain public transportation to the site of the Employer's operations.[3] During their hours of employment, including their lunch hour, when they are apparently left to their own devices, these employees are subject to no control by the penal authorities. They are, as the Employer's president described it, "considered as employees in our organization." They are assigned to the several gangs apparently with no distinction as to their prisoner status, are subject to the same supervision by foremen, are paid the same wages, and are entitled to the same fringe benefits as other employees. Upon the sole recommendation of his foreman, which is usual procedure in granting wage increases, one work-release employee's hourly rate was increased; and all employees after 6 months qualify for health insurance coverage under a plan paid for by the Employer. In addition, the Employer has continued in his employ, upon their release from the penal farm, individuals who had commenced employment as work-release prisoners. The Employer has also rehired others who had at one time been employed under the work-release program. The Employer concedes that "these employees are not treated any differently than the regular employees of Winsett-Simmonds."

At the end of their workday, the work-release employees return by public transportation to a specific location in the city of Memphis where they are picked up by the penal farm bus and returned to the Penal Farm. Overtime work is not prohibited, although when a work-release prisoner is needed to work overtime, the penal farm authorities require the Employer to make such arrangements. Apart from those times when these individuals are employed, they are treated no differently than other inmates at the Shelby County Penal Farm, and entitled to no greater or lesser restrictions or privileges.

In order to remain in the work-release program, each such employee must abide by certain rules of conduct, which require, *inter alia*, that he report promptly for work and return to the Penal Farm if no work is available. In addition, money earned while employed in the program is not paid directly to the

[1] Although the Union's petition sought a classification of leadmen, the Employer denied any such classification and the Petitioner has abandoned the claim.

[2] It appears from the record that the terms of their commitment vary from 30 days to 1 day short of a year

[3] According to the application for work release, the prisoner is afforded the alternative of using his own vehicle for transportation to and from his place of employment

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individuals but, after appropriate payments are made to dependents and a charge of $3.50 per day paid to the county as reimbursement for maintenance, the balance, if any, is held in trust, to be paid to the prisoner upon his release. However, like all other employees, the actual payment of their salaries is by check directly to the employee himself, who is entrusted with its delivery to the prison superintendent.

Although the Employer argues that the eight work-release prisoners do not share a sufficient community of interest with other employees to be included in the unit, we find all the evidence to the contrary.[4] The test as to whether an employee shares a community of interest with his fellows so as to be included in a unit with them depends on his status while in the employment relationship and not what ultimate control he may be subjected to at other times. Thus, we have held that individuals, though subject to the absolute and ultimate control of the Armed Forces, may nevertheless be included as part of an appropriate bargaining unit if the usual criteria are satisfied.[5] More recently, we have held that regular part-time employees also on full-time active duty with the United States Air Force, should be included in the bargaining unit.[6] The contentions, all rejected, made in that case that the Air Force employees did not share a sufficient community of interest, included: (1) that there was little likelihood that they would stay with their civilian employer upon completion of military duty; (2) that their presence on the job was subject to government regulation and the will of their commanding officer; (3) that an emergency might remove them from the labor area momentarily; (4) that they were subject to relocation; and (5) that they were beneficiaries of government grants, including room and board and adequate health, welfare, and insurance coverage. And somewhat earlier, in including regular part-time employees on full-time active duty with the United States Navy, we held: "It is true that the Navy personnel require the permission of their commanding officer before going to work for the Employer. But once hired, the part-time employees stand in substantially the same employment relationship with the Employer as do the full-time employees, and share many of the same interests through their common employment."[7] We find such situations analogous to the facts here and strongly persuasive.

The Employer also argues that the rehabilitative aspect of the concededly salutary work-release program will be undermined unless the anonymity of the participants is maintained, citing as support for this contention our requirement that the names and addresses of all eligible voters be made available to the parties in interest.[8] While the contention of the Employer may appear to have a surface element of merit, we are satisfied that the failure to include such employees within a unit in which ordinarily they would be placed would surely destroy the anonymity which the Employer contends should be preserved. In addition, although the superintendent of the Shelby County Penal Farm testified that he would prefer that the names of the work-release prisoners not be revealed, he did not foresee any substantial impediment to the continuation of the program or to the welfare of the individuals involved in the event that their identities were made known.[9]

Other contentions of the Employer have been considered and found lacking in merit. Thus, the facts that work-release employees might not be able to picket in the event of a strike or might not be able to attend union meetings which occur in the evening do not in our opinion outweigh the other factors establishing their community of interest with the unit employees. Nor can we perceive how their status would impede the proper utilization of such grievance-arbitration machinery as may be negotiated by their statutory bargaining representative. Finally, we do not perceive how the inclusion of the work-release employees in the unit will affect the Employer's ability to bid on or negotiate contracts subject to the Walsh-Healey Public Contracts Act, inasmuch as the relevant provisions of that Act relate to the employment of "convict labor" and not to the unit placement of the labor employed.

On the basis of the foregoing and upon the entire record, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All laborers, including truckdrivers and operators of machines and equipment in the Employer's construction division, excluding office clerical and professional employees, supervisors, foremen, guards, and watchmen as defined in the Act.

[Text of Direction of Election[10] omitted from publication.]

[4] Cf *National Welders Supply Co., Inc*, 145 NLRB 948, there convict employees were excluded from the unit because, *inter alia*, they were transported to and from their place of employment via prison van, could not receive wage increases, were precluded from working on certain jobs, and could not accept overtime employment

[5] *Terri Lee, Inc*, 103 NLRB 995, *Lone Star Boat Mfg Co*, 94 NLRB 19

[6] *Hale's Tire Center*, 20-RC-5948 (decided September 30, 1964, not published in NLRB volumes)

[7] *Southeastern Storage and Processing, Inc*, 5-RC-3115 (decided July 7, 1960, not published in NLRB volumes)

[8] *Excelsior Underwear Inc.*, 156 NLRB 1236

[9] The record itself is silent as to whether the employees themselves reveal to their coworkers the commitment to which they have been subjected

[10] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 26 within 7 days after the date of this Decision and Direction of Election The Regional Director shall make the list available to all parties to the election No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed *Excelsior Underwear Inc*, 156 NLRB 1236