

Marty Levitt and American Federation of Musicians of the United States and Canada and Associated Musicians of Greater New York Local 802. Case 29-RM-157

May 24, 1968

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Bruce H. Berry, Hearing Officer. Following the hearing and pursuant to Section 102.67 of National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 29, this case was transferred to the National Labor Relations Board for decision. Petitioner, the Union, and the Intervenor¹ filed briefs, and the Union also filed a reply brief.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

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

For reasons stated below, we find that it will not effectuate the policies of the Act to assert jurisdiction over the Employer.²

Employer-Petitioner, Marty Levitt, is a bandleader whose orchestra performs musical engagements known as "club dates."³ Petitioner requests that the Board conduct a representation election to determine whether the sidemen⁴ who perform under his direction wish to be represented by the Union.

The Union argues. (A) the Board lacks statutory jurisdiction because Levitt's business operations do not affect commerce within the meaning of Section 2(7) of the Act, and (B) assuming that the Board

does possess statutory jurisdiction, the Board should decline to assert such jurisdiction because Levitt's business operations do not have a substantial impact on interstate commerce.⁵

A. Statutory Jurisdiction

The Union contends that Levitt's business is both economically insignificant and essentially local in nature, and, therefore, that the effects of Levitt's operations do not "affect commerce" within the meaning of Section 2(7) of the Act. We disagree. Both the courts of appeal and the Board have held that a business "affects commerce" within the meaning of the Act if the effect of its operations on commerce is more than *de minimis*. The annual gross volume of Levitt's business is approximately \$15,000, of which about \$1,500 is derived from engagements performed outside New York State. Although Levitt's out-of-state activities can hardly be described as extensive, we are satisfied that \$1,500 is more than the trifle or matter of a few dollars which the courts have characterized as *de minimis*.⁶ Accordingly, we find that Levitt's business operations do "affect commerce" within the meaning of Section 2(7).⁷

B. Discretionary Jurisdiction

The Petitioner and Intervenor concede that Levitt's volume of business is not sufficient to meet prevailing jurisdictional standards. They urge, however, that the Board recognize the unique features of the "club date" field and devise new jurisdictional standards which will be realistic for that segment of the music industry. Specifically, Intervenor proposes that the Board assert jurisdiction over a bandleader if his gross volume of business exceeds \$15,000 yearly, or, in the alternative, that the Board apply existing standards on a multiemployer basis by combining the business of all leaders who are members of an employer association to which

¹ Orchestra Leaders Association of Northern Illinois

² The Union concedes for the purposes of this case only that Levitt is an employer when he and his band perform at social engagements. See *Carroll v American Federation of Musicians*, 295 F 2d 484, 486 (C A 2), *Cutler v American Federation of Musicians*, 316 F 2d 546 (C A 2), cert. denied 375 U S 941

³ Musical engagements are classified either as "single engagements" or "steady engagements." "Single engagements" are engagements usually for 1 day, but always for less than a week. All other engagements are "steady engagements." A "club date" is defined as a single engagement such as a wedding, commencement, bar mitzvah, debutante party, fashion show, or other social event. Other kinds of single engagement, e.g., television shows, recording sessions, etc. are not classified as "club dates."

⁴ The musicians who perform with the leader are called "sidemen."

⁵ Pursuant to Section 14(c) of the Act, the Board, in its discretion, may decline to assert jurisdiction over a labor dispute "where in the opinion of

the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant exercise of its jurisdiction."

⁶ *NLRB v Suburban Lumber Co.*, 121 F 2d 829 (C A 3), cert. denied 314 U S 693 (1941). *Suburban Lumber* was quoted with approval in *NLRB v Aurora City Lines, Inc.*, 299 F 2d 229, 231 (C A 7), which held that purchase of \$2,000 worth of materials from out of State amounted to more than *de minimis*. The court added that "the time has not yet arrived when \$2,000 is but a trifle." 229 F 2d at 231. See also *Lamar Hotel*, 127 NLRB 885, 886 (holding that an annual direct inflow of \$4,900 is more than *de minimis*), and *Somerset Manor, Inc.*, 170 NLRB 1647 (holding that an indirect inflow substantially in excess of \$1,800 is not *de minimis*).

⁷ See also *Polish Alliance v NLRB*, 322 U S 643, 648, cf. *Carroll v Association of Musicians of Greater New York*, 206 F Supp 462, 474-475 (S D N Y), aff'd 316 F 2d 574 (C A 2) (holding that the "club date" field is an "industry affecting commerce" notwithstanding the fact that a "club date" is a local affair).

full bargaining powers have been delegated.⁸

We do not find merit in the proposal for aggregating the business of leaders who are members of an employer association. Although the Board has asserted jurisdiction by totaling the business volume of an association's members, it has done so only where the members of the multiemployer association participate in or are bound by multiemployer bargaining.⁹ Although the National Association of Orchestra Leaders, an employer association to which Levitt belongs, is authorized to bargain collectively for its members, it has never done so. In fact, the Union has specifically rejected the Association's demand for multiemployer bargaining and stated that it prefers to bargain separately with each leader. Apart from collective-bargaining powers, the Association has no control over its members, all of whom operate independently.¹⁰ Since there is no history of multiemployer bargaining, no prospect for such bargaining in the future, and the Association, apart from bargaining powers, has no control over its members, there is no justification for assertion of jurisdiction on a multiemployer basis.¹¹

Intervenor also argues that assertion of jurisdiction on a multiemployer basis is appropriate, despite the absence of multiemployer bargaining in the traditional sense, because the method of setting wages, hours, and working conditions within the jurisdiction of Local 802 is similar to the method employed in multiemployer bargaining. With rare exceptions, leaders are members of the Union. The Local Union's board of directors prescribes working conditions and wages within its jurisdiction after giving leaders the opportunity to present their views. The leaders are bound by the Local's prescriptions. Thus, Intervenor argues that to the extent bargaining has occurred, it has occurred on a *group* basis and may be equated with multiemployer bargaining. Additionally, it is contended that by imposing uniform conditions throughout the in-

dustry and by treating all leaders identically, the Union has implicitly recognized and consented to a multiemployer unit, even if no collective bargaining in the traditional sense has actually occurred.

These arguments overlook the fact that multiemployer bargaining is predicated upon consent of the parties.¹² We do not believe that the actions of the Union manifested consent to multiemployer bargaining. The mere fact that the Union, through its economic strength, is able to enforce demands uniformly against Levitt and other band leaders does not mean that the Union tacitly recognizes that group as a multiemployer unit appropriate for bargaining. It is common knowledge that some unions are able to secure the same benefits from all or most employers in a given industry, and it has never been held that solely by virtue of that fact the unions are engaging in a kind of group bargaining or consenting to multiemployer bargaining.¹³ Moreover, in this case, the Union has refused to bargain with the National Association of Orchestra Leaders and has stated that it prefers to bargain separately with each leader. In the absence of mutual consent, there is no justification for finding that a multiemployer unit is appropriate.¹⁴

Petitioner and Intervenor also argue that even if jurisdiction is not asserted on a multiemployer basis, assertion of jurisdiction over single employers should be governed by a new jurisdictional standard set sufficiently low to permit assertion of jurisdiction over a significant number of band leaders. They state that a standard based on annual gross revenues of \$15,000 would be necessary. We do not believe, however, that establishment of such a jurisdictional standard for the "club date" field is warranted. Our decision is based on several considerations. First, employment patterns in the "club date" field are highly sporadic and casual. The typical "club date" lasts only several hours. The band leader who hires the sidemen for a particular engagement may never employ the same sidemen

⁸ Petitioner argues that the Board should assert jurisdiction over a leader if his gross volume of business exceeds \$15,000 per year and if he is a member of an employer association to which full bargaining powers have been delegated. Employers who are not members of an employer association would be governed by a \$50,000 gross revenue standard.

⁹ *Simons Mailing Service*, 122 NLRB 81.

¹⁰ Compare *Checker Cab Company and Its Members*, 141 NLRB 583 and 153 NLRB 651, enfd. 367 F.2d 692 (C.A. 6).

¹¹ See *The Evening News Association*, 154 NLRB 1494, holding that a multiemployer unit is inappropriate unless the employers and the union both consent at the inception of the relationship. The cases cited by Intervenor on this issue are not in point. In *Commission House Drivers*, 118 NLRB 130, and *Reilly Cartage Co.*, 110 NLRB 1742, the Board totaled the dollar volume of primary and secondary employers for purposes of jurisdiction in secondary boycott cases. These cases do not support the contention that revenues of association members should be combined for purposes of jurisdiction in representation cases. *Checker Cab Co.*, 141 NLRB 583 and

153 NLRB 651, enfd. 367 F.2d 692 (C.A. 6, 1966), is distinguishable because, in that case, the finding that Checker Cab Co. and its members were joint employers was based on the "substantial degree of control" exercised by Checker over its members and the fact that Checker Cabs was represented to the public as a single enterprise.

¹² *The Evening News Association*, 154 NLRB 1494, *The Evening News Association*, 154 NLRB 1482, affd. 372 F.2d 569 (C.A. 6, 1967), *Hearst Consolidated Publications, Inc.*, 156 NLRB 210.

¹³ *Id.*

¹⁴ *Electrical Contractors of Troy and Vicinity*, 116 NLRB 354, and *Panaderia La Reguladora*, 118 NLRB 1010, both cited by Intervenor, are distinguishable. In *Electrical Contractors*, all employer-members of the unit had, in the past, participated in joint bargaining, as evidenced by the fact that they had all signed the contracts which resulted from these sessions. In *Panaderia*, 10 of the employers had participated in joint bargaining. The remaining four employers were new members of the employer association and were included in the unit because no party objected to their inclusion.

again,¹⁵ or he may, on the following night, be employed by one of the sidemen who worked for him on the previous night.¹⁶ In addition to the casual and sporadic nature of employment in the "club date" field, we are influenced by the fact that there are a great number of such engagements. In December 1961, 1,307 club dates were performed in the jurisdiction of Local 802 alone. Between April 1 and December 31, 1960, there were 41,342 such engagements. Assertion of jurisdiction over a substantial number of these engagements would involve the Board in thousands of economically insignificant disputes. Such an extension of the Board's jurisdictional boundaries would unduly burden the Board's processes under existing budgetary limitations. Moreover, reduction of standards to the level urged by Petitioner would significantly distort existing jurisdictional policies governing retail enterprises. The proposed standard could lead to the anomalous result of the Board asserting jurisdiction over a band with gross revenues of \$16,000 and declining jurisdiction over the hotel at which the band performs many of its engagements, even though the gross revenues of the hotel might exceed \$490,000.¹⁷ There is neither precedent nor justification for the establishment of such disparate standards.

APPLICATION OF EXISTING JURISDICTIONAL STANDARDS

Since the bandleader is selling a service, rather than a commodity, he is not engaging either in a

retail or nonretail enterprise, as those terms are customarily defined. Nonetheless, the sale of music to the father of the bride or debutante does resemble the prototype retail sale in several basic respects. It is a sale to the ultimate consumer, and it is a "sale to a purchaser who desires to satisfy his own personal wants or those of his family or friends."¹⁸ We are convinced, therefore, that the sale of music to the father of the bride or debutante is sufficiently analogous to a retail sale to justify application of the retail standard to bands which perform at such engagements. However, the record, and previously adjudicated cases,¹⁹ indicate that some bands "sell" music to commercial enterprises, many of which are engaged in interstate commerce. Since such sales are not sales to the ultimate consumer, bands which perform such engagements will be governed by the prevailing nonretail standard. Jurisdiction will be asserted over a band which performs at both kinds of engagement if the band meets either the retail or the nonretail standard.²⁰ Since Petitioner does not meet either of these standards, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

¹⁵ Tables introduced into evidence by Petitioner indicate that during a 9-month period in 1960 more than 42 percent of the musicians who worked as leaders on club dates within the jurisdictional area of Local 802 performed only one engagement as leaders during that time. More than 88 percent of those who worked as leaders performed fewer than 10 engagements as leaders during the same period. Results for the first 11 months of 1961 are substantially similar.

¹⁶ The casual and sporadic nature of employment in a particular unit is not usually, in itself, a sufficient reason for declining jurisdiction over the employees in that unit. See, e.g., *Independent Motion Picture Producers Association, Inc.*, 123 NLRB 1942; *Transfilm, Inc.*, 100 NLRB 78; *Society of Independent Motion Picture Producers*, 94 NLRB 110; *R K O Pictures*, 59 NLRB 132. However, the large number of club engagements, see, *infra*, and the fact that, unlike the cited cases where the number of potential employers is both limited and relatively constant, the number and identity of

employers in this industry are constantly shifting, serve to distinguish this case from the cited cases.

¹⁷ The Board does not assert jurisdiction over a hotel unless it received at least \$500,000 in gross revenues per annum. *Florida Hotel of Tampa, Inc.*, 124 NLRB 261.

¹⁸ *J S Latta & Son*, 114 NLRB 1248, 1249, adopting the definition formulated by the Supreme Court in *Roland Electric Co v Walling*, 326 U S 657, 674 (1946).

¹⁹ *Chicago Federation of Musicians, Local 10*, 153 NLRB 68, 76; *Associated Musicians of Greater New York, Local 802, AFM (Ben Cutler)*, 164 NLRB 23; *American Federation of Musicians (Don Glasser, Employer)*, 165 NLRB 798.

²⁰ *Chicago Federation of Musicians, supra*, fn 19 at 74-76; *Appliance Supply Co.*, 127 NLRB 319; *Cemetery Service Corp.*, 149 NLRB 604; *Sammy Oil Co.*, 139 NLRB 25; *Oregon Labor-Management Relations Board (Barbur Boulevard Flying A Truck Stop)*, 148 NLRB 53; *Tinley Park Dairy Co.*, 142 NLRB 683.