Worcester Polytechnic Institute, Employer-Petitioner *and* Building Service Employees' International Union Local 254, AFL–CIO. Case 1–UC–125

December 20, 1973

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, KENNEDY, AND PENELLO

Upon a petition for clarification of unit duly filed by Worcester Polytechnic Institute on June 13, 1973, a hearing was held on July 3, 1973, before Hearing Officer G. Rosalyn Johnson of the National Labor Relations Board. On July 11, 1973, the Acting Regional Director for Region 1 issued an order transferring the case to the Board for decision.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

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

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The Employer, Worcester Polytechnic Institute, is a private, nonprofit educational institution which operates in Worcester, Massachusetts. Gross annual revenue for use with no restrictions exceeds $1 million. Annually it receives material valued in excess of $50,000 directly from points outside of Massachusetts.

2. The labor organization involved represents certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of such employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

This case presents the issue of whether the National Labor Relations Board has jurisdiction to clarify the existing, recognized unit of university employees, containing guards and nonguards, where the unit was certified by the Massachusetts Labor Relations Commission at a time when the National Labor Relations Board would not have asserted jurisdiction over the Employer.

The Employer contends that Section 9(b)(3) of the Act proscribes the Union from representing both nonguard employees and guard employees in the same unit.

The Union does not contest the allegation of the petition that the unit includes both nonguards and guards within the meaning of the Act. Rather, it argues only that the National Labor Relations Board does not have the right to "vitiate" a legal action of the Massachusetts Labor Relations Commission which acted upon the "rights and rules then existing between the Massachusetts Commission and the National Labor Relations Board."

For reasons discussed below, we will clarify the unit to exclude the guards.

On September 26, 1969, the Commonwealth of Massachusetts ordered an election by secret ballot, among certain of the Employer's employees, to be held on October 9. The appropriate unit stipulated by the parties and approved by the Massachusetts Labor Relations Commission was a universitywide nonprofessional unit excluding supervisors, professional employees, temporary employees, part-time employees, and students.

The election was held by secret ballot on October 9. Seventy-two employees were eligible to vote and 69 ballots were cast. Of the ballots cast 38 were for, and 31 against, the Union. As a result of the election, the Massachusetts Labor Relations Commission certified the Union for bargaining purposes on October 31, 1969.

The parties negotiated and on January 4, 1970, signed a collective-bargaining agreement which remained in full force and effect until June 30, 1971. On November 15, 1971, another contract was reached to continue in full force and effect through June 30, 1973. The parties are presently negotiating for a new contract but have not yet reached final agreement.

On June 13, 1973, the Employer filed the present unit clarification petition with the National Labor Relations Board, seeking to clarify the unit by excluding guards. The petition states that the proposed clarification would reduce the size of the unit from 71 to 60.

The only differences between the employees to be excluded under the instant petition and the employees who were excluded under the Massachusetts certification are the two categories, "patrolmen" and "sergeant."

The Massachusetts Labor Relations Commission's assertion of jurisdiction over the Employer in 1969 was valid. Section 14(c) of the Act gives the States authority to assert jurisdiction over cases where the National Labor Relations Board declines jurisdiction. While at that time we declined to take jurisdiction over private, nonprofit colleges and universities,[1] we reversed our policy in late 1970 and began to assert jurisdiction over such employers.[2] Since the Massachusetts Labor Relations Commission took jurisdiction over the unit of the Employer involved in the instant case in the fall of 1969 at a time when we would have declined to take jurisdiction over the Employer, the Massachusetts Labor

[1] *The Trustees of Columbia University in the City of New York*, 97 NLRB 424.

[2] *Cornell University*, 183 NLRB 329.

Relations Commission's assertion of jurisdiction was valid.

We have in other cases clarified an established unit so as to exclude guards. In *Libbey-Owens-Ford Glass Company,* 169 NLRB 126, as an incident to ordering a self-determination election at two plants to see whether the employees wished to join a multiplant unit of eight other plants, we noted in passing that the multiplant unit and one of the voting units contained guards and nonguards and we clarified the units so as to exclude guards. In *Sonotone Corporation,* 100 NLRB 1127, we likewise clarified the established unit so as to exclude guards.

It is clear that we have the power to clarify an existing unit represented by a recognized bargaining representative. National Labor Relations Board Rules and Regulations, Series 8, as amended, Section 102.60(b). *Manitowoc Shipbuilding, Inc., and The Manitowoc Company, Inc.,* 191 NLRB 786; *Brotherhood of Locomotive Firemen and Enginemen,* 145 NLRB 1521. The record shows the Union in the instant case, in effect, is a currently recognized collective-bargaining representative for the purposes of the National Labor Relations Act. The Employer and the Union have successfully executed and operated under two successive collective-bargaining agreements and are presently negotiating for a third contract. Since we have authority to clarify a unit represented by a recognized bargaining representative under the authority cited *supra,* we shall do so in the instant case.

ORDER

It is hereby ordered that the existing, recognized unit of guard and nonguard employees employed by Worcester Polytechnic Institute, Worcester, Massachusetts, and represented by Building Service Employees' International Union, Local 254, AFL–CIO, be, and it hereby is, clarified to exclude the job classifications patrolmen, sergeant, and guards as defined in the Act.

MEMBER KENNEDY, dissenting:

Because the state certification and the Employer's subsequent recognition and bargaining with the Union resulted from an election in which guards and nonguard employees were permitted to vote and the votes of those guards may have established the Union's majority status in the election, I would not issue an order of this Board to clarify this statutorily inappropriate unit.

It is clear that, if the Board had asserted its jurisdiction over this Employer in 1969, we would not have permitted guards and nonguard employees to vote in the same election, and we could not have found such a unit to be appropriate under the Act. We would also have been prohibited by Section 9(b)(3) from issuing a certification to the Union in a bargaining unit of guards where that Union admits employees other than guards to membership. In these circumstances, I do not think that the Board should give weight to the Union's recognition by the Employer in an inappropriate bargaining unit following an election in which the votes of guards may have determined the outcome of the election.

In my view, the Board's unit clarification procedures are not the proper method for resolving this matter. The parties should utilize the Board's representation procedures.

Accordingly, I would dismiss the petition.