Rural Fire Protection Company *and* International Association of Fire Fighters, AFL–CIO, CLC, Petitioner. Case 28–RC–2650

February 14, 1975

DECISION AND ORDER

BY ACTING CHAIRMAN FANNING AND MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a petition duly filed under 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Edward N. Grossman of the National Labor Relations Board. Following the close of the hearing, the Employer and the Petitioner filed briefs. On April 22, 1974, the Regional Director for Region 28 transferred this case to the Board for a decision and, thereafter, the Employer and the Petitioner filed supplemental briefs to the Board.

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 proceeding, the Board finds:

The Petitioner seeks to represent certain employees working as firefighters for the Employer in the city of Scottsdale and the adjacent Paradise Valley area of Arizona.[1] The Employer contends that the petition should be dismissed for jurisdictional reasons. We are in agreement with this contention.

The Employer and its wholly owned subsidiaries, all private Arizona corporations, provide fire suppression, fire prevention, fire investigation, security, first-aid, rescue, and ambulance services to municipalities, fire districts, businesses, and individual subscribers in the State of Arizona. In this proceeding, Petitioner seeks a unit of employees who are engaged in providing fire protection and related services to the city of Scottsdale and to residents of the adjacent Paradise Valley area who individually contract with the Employer for such services. Even if the Employer is deemed to be engaged in commerce within the meaning of the Act, there remains the question of whether the Board should assert jurisdiction over its employees who provide firefighting services to a municipality.

The Employer has a contract with the Scottsdale City Council which requires it to provide reasonable and customary fire protection to the city. The contract calls for four fire stations to be operated within the city limits. Of the four in operation, three are owned and maintained by the city. The contract also requires that certain equipment be maintained within the city limits at all times and much of the major equipment in the fire stations is owned and maintained by the city. The Employer must obtain permission from the city manager before removing certain equipment from the city limits except when responding to a call for assistance from another fire department or in response to an emergency of disaster proportions.

The Employer employs a crew of about 30 full-time firefighters in the Scottsdale area. Its contract with the city obligates it to recruit all new employees from the ranks of city residents. It is also required to maintain a reserve force of part-time firefighters who respond when they are needed as well as two companies of "wranglers," who are recruited from the ranks of city employees to function in all respects as firefighters within the city limits and whose entire cost of training and wages is borne by the city. The contract dictates the number of personnel to be utilized and their required duty hours and the number of men and equipment which must respond to certain calls.

The Employer hires, disciplines, discharges, and supervises the employees. It provides its own pension plan and health and life insurance, and contributes toward workmen's compensation for the employees. Its employees do not participate in any of the fringe benefits available to city employees except that they are eligible for membership in the city credit union.

The city of Scottsdale is obligated to pay the Employer certain fixed sums for its services, subject to changes in service levels and manpower increases; such changes may be made by mutual agreement or arbitration. The fee paid the Employer by the city of Scottsdale permits the employees performing the services to enjoy a somewhat higher wage scale than employees employed elsewhere, essentially because the city council recognizes the higher cost of living in the area.[2]

Additional obligations imposed upon the Employer by its contract with the city of Scottsdale are that it submit annual and monthly written reports to the city council; enforce all the city's fire codes and related ordinances, conducting all inspections associ-

[1] The Employer also denies the appropriateness of the unit sought by Petitioner. We find it unnecessary to resolve the issues raised by that claim in that we are declining to assert jurisdiction over the unit sought by Petitioner, and the showing of interest in support thereof is insufficient to support a larger unit such as is claimed to be appropriate by the Employer. Also, as we are dismissing the petition herein on jurisdictional grounds, and need not make any unit determination, we find it unnecessary to pass on the Employer's motion requesting that it be permitted to withdraw from a stipulation entered into at the hearing to exclude "wranglers" from the appropriate bargaining unit and leave to submit newly discovered evidence.

[2] Recognizing that a substantial amount of operating funds is derived from subscription contracts with residents outside of Scottsdale in the Paradise Valley area, the city has agreed to an increase in contract costs if the Employer is unable to maintain its contracts with Paradise Valley residents at a certain specified level.

ated therewith; and aid in arson investigations. In addition, certain of the Employer's officials act as deputy and assistant state fire marshals, and the Employer has the authority to issue burning permits pursuant to the county health code.

Inasmuch as the city of Scottsdale is not an employer under the Act, the jurisdictional issue which has to be resolved is whether to assert jurisdiction over an employer who provides firefighting services to a municipality in the circumstances of this case. For the reasons given below, we believe that the assertion of jurisdiction is not warranted.

Upon a remand from the Court of Appeals for the District of Columbia Circuit in *Herbert Harvey, Inc.* v. *N.L.R.B.*[3] requesting clarification of an unexplained alleged inconsistency between the Board's original adjudication of *Harvey* and its disposition of other cases, the Board responded with a detailed analysis of its position in the matter of asserting jurisdiction over the nonexempt provider of services to exempt institutions.[4] Because our dissenting colleague also relies on this response to the court, but views it as supporting his position in the case before us, we think it would be helpful at the outset to quote the relevant language of the Board. Faced with the issue of whether to assert jurisdiction over a contractor who provided maintenance services on the premises occupied by the World Bank, an exempt institution, the Board, after determining that the contract exercised sufficient effective control over the working conditions of its employees to bargain about them with a union, said (at 239–240):

> In response to the Court's observation that the result in the instant case appears to be inconsistent with the Board's prior cases dealing with exempt institutions, it is respectfully submitted that our holding here is in accord with the criteria that the Board has generally utilized in determining whether jurisdiction should be asserted over contractors performing services for such institutions. The Board has, with the possible exception of *Specialized Maintenance Services, Inc.*, . . . [unpublished] uniformly held that the assertion of jurisdiction over a contractor providing services for an institution exempted from the process of the Act is dependent upon the relationship of the services performed to the exempted functions of the institution. Where the services are intimately connected with the exempted operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities. By so doing the Board is enabled to strike a balance between the congressional policy of excluding the noncommercial charitable and educational activities of institutions and the policy of the statute to encourage collective bargaining—one of the fundamental purposes of the Act.

Then, addressing itself directly to the case at hand, the Board (at 241) continued:

> The Respondent's employees are engaged exclusively in the operation and maintenance of the buildings in which the World Bank is located. These housekeeping duties performed by the Respondent's employees have no connection with the functions of the World Bank as an investment institution. They are, in fact, less intimately connected with the operations of the Bank than the maintenance activities of the contractor in the *Bay Ran* case . . . [161 NLRB 820] in which the Board asserted jurisdiction over the maintenance contractor performing services for an exempted hospital.[5] We are therefore constrained to adhere to our initial decision that it would effectuate the purposes of the Act to assert jurisdiction over the maintenance activities of the Respondent in the buildings occupied by the World Bank.

The dissent would read *Harvey* and other Board decisions as standing for the proposition that "Where it has been found that the employer possessed sufficient control over the employment conditions of its employees to enable it to bargain collectively with a union, the Board has asserted jurisdiction and where such control was lacking, the Board declined to assert jurisdiction." However, our reading of *Harvey* and other recent decisions leads us to believe that this is not a complete and wholly accurate statement of existing Board law.

The degree of control exercised by the exempt institution over the operations of the nonexempt employer who provides services may, of course, be a determinative factor in certain situations. Thus, where the exempt employer exercises substantial control over the services and labor relations of the nonexempt contractor, so that the latter is left without sufficient autonomy over working conditions to enable it to bargain efficaciously with the union, that in itself is reason enough for declining jurisdiction,[6] for the contractor is not required "to do the impossible" or to engage in a mere "exercise in

[3] 385 F.2d 684 (1967).

[4] *Herbert Harvey, Inc.*, 171 NLRB 238 (1967).

[5] The Board there pointed out that "Significantly, the cleaning work performed by the Employer has no direct relationship to patient care."

[6] See *Servomation Mathias Pa., Inc.*, 200 NLRB 1063 (1972), and *Current Construction Corporation*, 209 NLRB 718 (1974).

futility," since the purpose of collective bargaining is to produce an agreement covering working conditions.[7] In such a situation, of course, while the Board may do so,[8] there is no need to invoke *Harvey's* "intimate connection" test, there being sufficient other reason for declining jurisdiction.

Where the control exercised over the nonexempt employer is not substantial, so that the employer is capable of bargaining with the union over wages, hours, and other conditions of employment, the focus of necessity is on the nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer and not, as the dissent claims, on the mere absence of control by the one over the other. This, plainly, is the lesson of *Harvey*. For, after accepting the court's view that the nonexempt respondent and the exempt World Bank were joint employers over the employees involved, but finding that the respondent exercised effective control over the working conditions of its employees, the Board proceeded to inquire into the existence of an "intimate connection." And only upon ascertaining that the housekeeping functions performed by respondent's employees had no connection with the World Bank as an investment institution, was jurisdiction asserted.

This critical reliance upon the relationship between the services performed and the purposes of the exempt institution was expressly noted and approved by the court of appeals which, after stating that the Board was faced with the factual issue of deciding whether Harvey had sufficient command of employment conditions to enable efficacious bargaining, observed, "Beyond that, the Board's task in this case was reconciliation of the benefits conferred by the Act with the immunities enjoyed by the World Bank. . . . "It then proceeded to quote precisely the same language from the Board's decision which is set forth above.[9]

A similar approach focusing on the relationship of the services performed to the exempted functions of the institution to whom they were provided is found in *Inter-County Blood Banks, Inc.*[10] There, the employer provided blood bank services to exempt hospitals and the Board declined jurisdiction on the ground that "the Employer's operations are intimately related to the operations of the hospitals to which it supplies blood for treatment of patients, almost all of which . . . are nonprofit hospitals exempt from the Board's jurisdiction." No reference is made to the extent of the hospitals' control over the employer's employees, if any there was.

More recently, in *The Wackenhut Corp.*,[11] the Board declined jurisdiction over an employer who provided guard services to the City College of New York for the reason that such services were intimately related to City College's administration and educational purposes. The Board expressly stated that it was unnecessary to decide whether the degree of control retained by City College concerning such services would constitute a separate basis for asserting jurisdiction.

In *Current Construction Corporation*[12] a majority of the Board chose to rely on both degree of control and intimate connection as reasons for declining jurisdiction over an employer who pruned, cut, and removed trees in New York City under contract with the parks department of the city.

Our examination of precedent[13] leads us to declare again, in the unmistakable language of *Harvey* (at 240), that "Where the services are intimately connected with the exempted operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities." In this case, it plainly appears that the Employer's firefighting services furnished to the city of Scottsdale, utilizing fire stations and major firefighting equipment owned and maintained by the city, are intimately related to Scottsdale's municipal purposes. Indeed, more than being a service which is merely intimately related to Scottsdale's municipal functions within the meaning of the cases, the firefighting service herein is itself an essential municipal function which Scottsdale, instead of performing directly with its own employees, delegated to the Employer to perform on its behalf, making available its facilities and equipment for that purpose. It follows that, with regard to the employees requested by Petitioner who are performing these services for Scottsdale, the Employer shares the city of Scottsdale's exemption

[7] *Herbert Harvey, Inc* v. *N.L.R.B., supra,* fn. 3.

[8] See *Current Construction Corporation, supra,* fn. 6.

[9] Recognition of this as Board policy is found in Judge McGowan's concurrence in the *Harvey* remand (at p. 686), wherein he stated: "It appears that there are certain kinds of employers which the Board, for policy reasons and unaided by any explicit provision in the Act, treats as exempt. . . . This treatment in at least some cases has been extended to include other employers performing services for the exempted institution, not because the servicing employer is not a true employer but because what he is doing is of such a nature that the institution would be exempted if it were doing the same thing through its own employees."

[10] 165 NLRB 252 (1967).

[11] 203 NLRB 86 (1973).

[12] *Supra,* fn. 6.

[13] Acting Chairman Fanning filed a dissent in the *Current Construction Corporation* case and he expresses disagreement with the disposition of *The Wackenhut Corp.* But Mr. Fanning's dissatisfaction with those cases cannot serve to remove them from the stream of precedent which governs this case.

from the Board's jurisdiction.[14] Accordingly, we shall dismiss the petition.

ORDER

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

ACTING CHAIRMAN FANNING, dissenting:

Since I think it clear that, in accord with pertinent Board precedent, the Board can and should assert jurisdiction over this Employer, and since I think the majority has used an incorrect standard in dismissing the instant petition, I dissent from the majority's failure to assert jurisdiction here.[15]

I note that in assessing whether it will assert jurisdiction over an employer, such as the instant employer, who performs services for an entity which is exempt from the Board's jurisdiction under Section 2(2) of the Act, it has been the Board's consistent policy to focus on the amount of control the employer has retained over the employment conditions of its employees and the degree of review or approval rights the exempt entity might possess over the employer's operations.[16] Where it has been found that the employer possessed sufficient control over the employment conditions of its employees to enable it to bargain collectively with a union, the Board has asserted jurisdiction[17] and where such control was lacking, the Board declined to assert jurisdiction.[18]

However, despite this Board precedent, the majority has based its decision to dismiss solely on the "intimate connection" it has found between the Employer's services and the city of Scottsdale's exempted operations. While it is true that, in the past, in determining whether it would assert jurisdiction over an employer like the instant one, the Board has considered the relationship between the employer's work and the exempt institution's operations, it has done so in a context totally different from that which the majority has here constructed. For, when the Board spoke of the relationship, it noted that it depended " *in large part upon the degree of control exercised* by [the exempt institution] over [the employer]."[19] Here, evidence of the degree of control possessed by the city of Scottsdale over the Employer's labor relations has nowhere played a part in the majority's decision to dismiss. Such a decision is therefore clearly at odds with the weight of Board precedent[20] and I dissent from the majority's failure to follow that precedent.[21]

Having noted that a key factor in determining if jurisdiction should be asserted here is whether,

[14] Therefore, whether the city of Scottsdale's control over such services was such as would constitute a separate basis for declining jurisdiction herein is a matter we need not consider.

[15] The question whether to assert jurisdiction over an employer like the instant one who performs firefighting services for a municipality or a governmental body is not a new one. Over 25 years ago, on the particular facts of each case, the Board asserted jurisdiction over two employers who performed firefighting services for the United States Government at its Oak Ridge, Tennessee, townsite and military reservation. *Roane-Anderson Company,* 71 NLRB 266 (1946), and *Monsanto Chemical Company,* 76 NLRB 767 (1948). Years later, the Board again asserted jurisdiction over employers who performed fire protection services for the United States Department of Agriculture's forestry service and the State of California's division of forestry. *Sis-Q Flying Service, Inc.,* 197 NLRB 195 (1972).

[16] *Herbert Harvey, Inc.,* 171 NLRB 238, 239 (1967), enfd 424 F 2d 770 (C.A.D.C., 1969).

[17] See, e.g., *We Transport, Inc. and Town Bus Corp,* 215 NLRB No 91 (1974). *Ja-Ce Company, Inc.,* 205 NLRB 578 (1973); *Barry Industries, Incorporated,* 181 NLRB 1003 (1970); *Yosemite Park and Curry Co.,* 172 NLRB 1740 (1968).

[18] See, e.g., *Slater Corporation,* 197 NLRB 1282 (1972); *Crotty Brothers, N.Y., Inc.,* 146 NLRB 755 (1964).

[19] *Servomation Mathias Pa., Inc,* 200 NLRB 1063 (emphasis supplied). See also *Ja-Ce Company, Inc, supra* at fn. 17

[20] An exception to the consistent Board precedent that the degree of control is a key factor in the consideration of whether to assert jurisdiction is a panel decision in *The Wackenhut Corp.,* 203 NLRB 86. There, a petition for a unit of employees performing guard and security services at the City College of New York was dismissed solely since it was found the employer's services were related to the college's exempted operations and therefore that the employer shared the college's exemption. No consideration was given to the degree of control the college retained over the employer's operations. I did not participate in the *Wackenhut* decision and I do not consider it good law. Rather, I think it a deviation from the Board's consistent policy of looking to the degree of control the exempt institution possesses over the employer's operations and therefore I do not follow it.

[21] I disagree with the majority's assertion that the above exposition is not a "complete and wholly accurate statement of existing Board law." Although the majority claims that certain language in the Board's Supplemental Decision in *Herbert Harvey* supports its total reliance here on the "intimate connection" it finds between the Employer's operations and those of the city, I note that in each of the three published cases cited in *Herbert Harvey,* where jurisdiction was declined based on an "intimate connection" found to exist between the nonexempt employer's services and the exempt institution's functions, that the degree of control asserted by the exempt institution over the nonexempt employer's operations was an important factor in establishing this "intimate connection." The majority here does not look to this factor of control at all in dismissing this petition, in derogation of the teaching of *Herbert Harvey,* the case it professes to follow. Any doubt that it is not existing Board law to look, as the majority does, solely to the service the employer provides to the exempt institution is resolved by a comparison of the Board's decisions in *Crotty Brothers, N Y, Inc, supra, The Prophet Co.,* 150 NLRB 1559 (1965); and *Ja-Ce Company, Inc., supra* at fn. 17. In *Crotty Brothers* and *The Prophet,* the Board declined jurisdiction over employers who provided food services to educational institutions In *Ja-Ce,* the Board asserted jurisdiction over an employer who operated cafeteria programs for 19 school districts within the State of New Jersey. If the Board had looked *solely* to the services the employer in each case performed, as the majority does here, it would be reasonable to assume that the result in *Ja-Ce* would have been the same as that in the two earlier cases since the service in all three cases, i.e., the supplying of food services to educational entities, was the same. Of course, the result in the three cases was not the same and, in *Ja-Ce,* the Board asserted jurisdiction since it found the degree of control exercised by the various school districts over the labor relations policies of the employer was insufficient to warrant declining jurisdiction.

I note with particular interest also that in *Sis-Q Flying Service, Inc, supra* at fn. 15, where the Board asserted jurisdiction over employers performing the same type of work as the Employer here, the Board specifically noted that there was a close connection between the employers' activities of supplying fire protection services and the purposes and operations of the exempt Government agencies Still, the Board asserted jurisdiction because the employers maintained a considerable area of effective control over their own labor relations.

Clearly then a reliance on the degree of control asserted by the exempt institution over the labor relations of the nonexempt employer is not at variance with Board law but rather is in conformity with it.

notwithstanding the possibility that certain of the Employer's conditions of employment might be in some respects subject to the review and approval of the city of Scottsdale, the Employer retains the ability to exercise such control over the working conditions of its employees that it has the capability of bargaining effectively with a labor organization over conditions of employment, I note the following in consideration of that issue:

The contract under which the Employer supplies its services[22] provides that the Employer's operations are entirely within the Employer's own direction and discretion subject only to the understandable requirement that the operations not conflict with the terms and conditions of the contract. Thus, the Employer establishes the requirements for hiring, and does hire, its firefighting personnel and it maintains supervision, including discipline and discharge authority, over its employees. Any firefighter may be transferred by the Employer to the Scottsdale operation to fill a vacancy or new position or the position may be filled with Scottsdale residents, who meet the Employer's personnel requirements, as the Employer chooses.

The Employer furnishes certain equipment on its own to perform its contractual obligation. All firefighting equipment, whether owned by the Employer or the city, is under the operational control of the Employer and the Employer has the discretion to replace, alter, modify, or eliminate from service any equipment it owns so long as the city's insurance credits are unaffected by this action.

The Employer provides its own pension plan and health and life insurance to its employees, and contributes toward workmen's compensation for its employees. Its employees do not participate in any of the fringe benefits available to city employees except that they are eligible for membership in the city credit union.

From the foregoing, including the Employer's power to hire, fire, supervise, and discipline its employees, its ability to transfer them, and its ability to grant them their own fringe benefits, it is clear that the Employer possesses the capability of exercising effective control over the working conditions of its employees and therefore, under controlling Board precedent,[23] I would assert jurisdiction[24] over this Employer.[25]

In declining to assert jurisdiction, the majority, in effect, is holding that, if it is shown that an employer performs a service for a municipality which is usually associated with a governmental function, then, without more being shown and regardless of the control the employer has over his own operations, that employer is exempt from the Act and its employees are not covered by it. I believe, however, that a municipality's decision to contract out some of its functions to the private sector should not deprive the private sector employees of benefits under the Act, nor deprive the employer and the municipality of the protection provided by the Act. This country is seeing a striking increase in public sector recognition strikes with a sad lack of effective machinery to settle those disputes without great disruption to the public services or great injury to employees' rights of association. For this Board to refuse to assert its jurisdiction over labor disputes involving such services which fall within our jurisdiction simply makes a bad situation worse. Moreover, it precludes the possibility that experience under the Act relative to disputes of this type may suggest a useful model to legislatures which are, or should be, working to establish dispute settlement procedures for public employees. Inasmuch as we clearly have jurisdiction here and as the Employer retains effective control over matters affecting wages, hours of employment, and working conditions so that collective bargaining can function, I would assert jurisdiction.

[22] I have considered the new contract the Employer and the city of Scottsdale entered into from August 1, 1974, to July 31, 1979

[23] *Roane-Anderson Company; Monsanto Chemical Company, Sis-Q Flying Service* (all cited at fn 15, *supra*), *Ja-Ce Company, Barry Industries, Yosemite Park and Curry Co* (all cited at fn 17, *supra*)

[24] The Employer during the last fiscal year purchased goods directly from outside the State of Arizona totaling approximately $16,000 During the same time period, it purchased goods in the amount of $130,000 from suppliers located within Arizona, who obtained the goods from outside the State The Employer does more than $500,000 worth of business with cities and private corporations which in the last year purchased in excess of $500,000 of supplies in interstate commerce, and the Employer clearly meets the Board's jurisdictional standards

[25] I note with interest that while the Employer argued that the city of Scottsdale has ultimate control over its wage rates and similar items with respect to the services it furnishes Scottsdale, it also argued that, if the Board asserted jurisdiction over it, the appropriate unit was statewide (thus apparently including employees under contract to private sector corporations) because its labor relations were centralized and determined on a companywide basis