Volusia Jai Alai, Inc.[1] ***and*** **General Sales Drivers & Allied Employees Union, Local No. 198, Petitioner.** Case 12–RC–4851

December 29, 1975

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Robert L. Westheimer of the National Labor Relations Board. 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, and by direction of the Regional Director for Region 12, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer 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, Volusia Jai Alai, Inc., is a public stock Florida corporation and is a subsidiary of Sports Systems Corporation operating out of Buffalo, New York. The Employer owns and operates a jai alai fronton in Daytona Beach, Florida.

The threshhold question is whether the Board should assert jurisdiction over an Employer which operates a jai alai fronton. Before resolving this question, we must first examine the nature of the game involved and then must review the extensive degree of regulation exercised by the State of Florida over the jai alai industry.

Jai alai is a game similar to handball. The object is for the players to catch and throw a latex ball, a pelota, with a basket-like scoop, a cesta, within a three-walled court. The game may be played by one player against another (singles) or by one team of two players against another such team (doubles). The jai alai games are characterized by pari-mutuel wagering. This means that the Employer is a commissioned state agent which receives 12 percent of the money bet. All of the winners share from a pool comprised of 83 percent of the wagers, and the State receives the remaining 5 percent. The bettors observe the games through a fourth wall of wire mesh. They may place their bets on the players to win, place, show, quiniela (picking first and second in either order), perfecta (picking first and second in specific order), Big Q (picking two quinielas in a row), and/or daily double (picking the winners in two consecutive games).

The State's interest in jai alai operations is protected by the Division of Pari-Mutuel Wagering, hereinafter called the Division. This office is responsible for supervising all fronton activities and for ensuring their compliance with the extensive state statutes, rules, and regulations.

The State requires that all employees, including players and concession workers, be licensed prior to working in a fronton. Some managerial employees, in fact, must be approved by the Division for employment before each season. Furthermore, 85 percent of these employees, excluding players and exempt supervisory personnel, must be Florida residents. The State also employs six or seven people on a permanent basis at the fronton in various capacities in order to maintain the integrity of the game and the betting procedures, as well as to guarantee that the game is being played according to the rules. Additionally, the State conducts surprise audits to insure Employer's compliance with the Division's rules. This compliance is further monitored by the submission of numerous reports by the Employer as required by the regulations.

In addition to all the above restrictions on the Employer, the Division has developed a set of rules governing the behavior of the players. These restrictions include, *inter alia,* the time at which they must report prior to a game, a prohibition against smoking in certain areas, and a prohibition against wagering by the players or their wives.

It should also be noted that virtually all of the 48 participants are natives of Spain or Mexico who have been brought to the United States to play jai alai after having been trained in Employer-financed schools in their home countries. The granting of visas to these individuals is dependent upon their having a contract to play in the United States. These contracts appear to run for the period of 1 or 2 years and to be regularly renewed. Two jai alai players working for Employer testified that they had been playing full time for Employer for 3 and 6 years, respectively. Two other jai alai players engaged at another fronton testified that their employment there had been long and continuous, i.e., 5 and 7 years, respectively.

[1] The name of the Employer appears as amended at the hearing

Furthermore, in addition to the fact that all of the players live in Florida, two have become citizens and four are resident aliens.

The player contracts and all state regulations concerning jai alai are printed in English, despite the fact that almost all the jai alai players are Spanish-speaking with little or no knowledge of English. There is, in fact, evidence that there is little or no opportunity for the players to negotiate for better wages and working conditions upon contract renewal. This lack of opportunity is supported by the fact that on at least one occasion half or more of the roster of players signed their contracts during one evening's performance.

Notwithstanding the extensive state regulation of the industry, it is clear that the Division has no interest in the negotiations or in the terms of the contracts entered into between the players and management. In fact its director asserted that it is not the Division's function to provide job or wage protection for the players, and that his office would only get involved in a dispute if a provision of a player's contract violated one of the State's rules.

There is, in addition to the dispute concerning the effectiveness of contract negotiations, disagreement as to the adequacy of the appeal procedure outlined in the regulations. This procedure permits the player to appeal to the Division any decision of the fronton including discharges and suspensions, as well as any fine in excess of $50. The Division investigates, holds a hearing, and renders a decision. Although all decisions are subject to appeal up to the Florida supreme court, it was doubted by the director that an order of the Division could be taken to court for enforcement. Moreover, although a player may, for example, be ordered by the Division eligible for reinstatement or have his fine reduced, this eligibility does not require the Employer to reinstate him.

Furthermore, with regard to the State's participation in jai alai labor relations, there exists a "15 day rule" which requires that 15 days' notice be given of any possible interruption of the fronton's operations. Upon receipt of this notice, the Division attempts to settle the dispute in order to avoid loss of state revenue. Recently, however, the efforts made by the Division to settle a dispute under this rule in the dogracing industry were unsuccessful, requiring the State to obtain an injunction to end the strike. In jai alai, it should be noted, there has never been a dispute which resulted in a cessation of work.

The Petitioner urges the Board to assert jurisdiction herein, contending that the Employer's operations have a substantial impact on interstate commerce, the state laws are inadequate to prevent labor disputes, and the State does not regulate the terms and conditions of employment of the jai alai players. It argues, in addition, that jai alai does not fall within the same category as horseracing and dogracing but is more similar to professional sports. Furthermore, it asserts that it can be effectively regulated by the Board because of its 210-day playing season.[2]

The Employer contends that its operations are local in nature, rendering unwarranted the assertion of jurisdiction. It also maintains that extensive state regulation, substantial state interest, and the established Board policy against asserting jurisdiction in the horseracing and dogracing industries militates against asserting jurisdiction over jai alai frontons.

The Board has, in fact, consistently declined to assert jurisdiction over the dogracing and horseracing industries. On July 18, 1972, the Board published in the Federal Register a notice of proposed rulemaking concerning these industries. After consideration of the information received, the Board (Member Fanning dissenting) concluded that:

> The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the act involving the horseracing and dogracing industries.[3]

In support of this rule the Board noted, *inter alia,* the extensive state control over these industries. With regard to the unstable work force in these industries, the Board reasoned as follows:

> . . . the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force. This is further evidenced by a pattern of short workhours and sporadic and short periods of active employment with any given employer.

[2] The playing season in each fronton is 105 days long with a substantial majority of the players obligated to play a second season (an additional 105 days) at another jai alai fronton, in the case of the employees herein, one located in Melbourne, Florida, operated by Sports Palace, Inc., like Employer, a subsidiary of Sports Systems Corporation.

[3] National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, Sec 103.3.

Prior to this time the Board had consistently declined to assert jurisdiction in these industries on a case-by-case basis *Los Angeles Turf Club, Inc.,* 90 NLRB 20 (1950) (horseracing track), *Jefferson Downs, Inc,* 125 NLRB 386 (1959) (horseracing track), *Hialeah Race Course, Inc,* 125 NLRB 388 (1959) (horseracing track); *Walter A Kelley,* 139 NLRB 744 (1962) (horse owners / breeders); *Centennial Turf Club, Inc,* 192 NLRB 698 (1971) (horseracing track) (Member Fanning, dissenting), *Yonkers Raceway, Inc.,* 196 NLRB 373 (1972) (horseracing track); *Jacksonville Kennel Club,* Case 12–RC–3815, May 5, 1971 (dogracing track—not reported in NLRB volumes). It had also refused to take jurisdiction over those employers whose operations were intimately related with the racing business. See, e.g, *Pinkerton's National Detective Agency, Inc.,* 114 NLRB 1363 (1955); *Hotel & Restaurant Employees & Bartenders International Union, Local 343, AFL–CIO (Resort Concessions, Inc.),* 148 NLRB 208 (1964).

> Besides minimizing the impact on commerce of the industries, this pattern of short-term employment also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the act within the highly compressed timespan of active employment which is characteristic of the industries.[4]

The Board has, however, taken jurisdiction in the gambling industry. In *El Dorado, Inc.*,[5] the Board asserted jurisdiction over all of the employer's gambling casino employees. It rejected the employer's argument that intervention by the Board would "paralyze" the enforcement of the extensive state regulations by the state commission. The Board stated that the State's long history of collective bargaining with other employees in the gambling industry[6] ". . . in no way indicates that their [the employees] representation under the Act has interfered with the State's imposition and administration of the strict standards required in the industry."[7]

After a careful analysis, we have decided that the assertion of the Board's jurisdiction is warranted in the jai alai industry. In the instant case, unlike in the horseracing and dogracing cases which we have previously considered, the desired unit is characterized by a stable work force with regard to hours, duration of employment, and tenure of employment. Thus, unlike those industries, no difficult administrative problems would be posed by the Board's extension of the Act's coverage to jai alai players.[8] We therefore find, contrary to the Employer's contention, that the horseracing and dogracing cases previously decided by the Board are inapposite. Furthermore, we have determined, as we did in *El Dorado, Inc., supra,* that the administration of the Act would not interfere with the enforcement of state laws in the extensively regulated jai alai industry. Thus, it is our opinion that state regulation in this industry can successfully coexist with the Board's assertion of jurisdiction.

In view of the foregoing factors, especially the presence of a stable work force and the industry's substantial impact on commerce, we find that it will effectuate the policies of the Act to assert jurisdiction herein.

During the 1973 season (1974 figures are not representative due to an extensive fire in the fronton), the handle or the amount wagered at the Employer's facility was $2,400,000. The Employer also received $161,000 from admissions; $21,000 from "breaks";[9] $70,000 from concessions (25 percent of the concessions' sales); $2,000 to $3,000 from parking; $11,000 from program sales; and $220,000 from interest on loans. In addition, it paid an annual fee of $90,000 for the out-of-state lease of a totalizer machine. Based on the foregoing facts, we find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

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 Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. General Sales Drivers & Allied Employees Union, Local No. 198, herein referred to as Petitioner,[10] seeks to represent the unit stipulated to by the parties as being an appropriate unit. This unit includes all jai alai players employed by the Employer at the Volusia Jai Alai fronton who engage in playing jai alai covered under the Florida Division of Pari-Mutuel Wagering, and excludes all other employees, guards, and supervisors as defined in the Act.

In accordance, with that stipulation, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All jai alai players employed by the Employer at the Volusia Jai Alai fronton who are engaged in playing jai alai covered under the Florida Division of Pari-Mutuel Wagering, excluding all other employees, guards, and supervisors as defined in the Act.

[Direction of Election and *Excelsior* fn. omitted from publication.]

[4] See Board's statement of "Declination of Assertion of Jurisdiction" at Sec. 103.3 of the Rules and Regulations

[5] 151 NLRB 579 (1965).

[6] The record indicated that for at least 15 years employees closely associated with gambling casinos, i.e., waiters, bartenders, cocktail waitresses, and casino change girls, had been represented by a union *Id* at 583.

[7] *Id.* at 583

[8] Member Fanning does not believe these alleged distinctions are meaningful. He would assert jurisdiction here and also over the horseracing and dogracing industry for reasons set forth in his dissent in *Centennial Turf Club, Inc.*, 192 NLRB 698 (1971)

[9] "Breaks" is the money remaining after the wager is paid off to the next lowest 10 cents; that is if a bet paid $3.58, the patron would receive $3.50, while the Employer and the State would split the 8 cents "break."

[10] The Petitioner is an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.