

American Arbitration Association, Inc. and Retail Clerks International Association, AFL-CIO, Local 1357, Petitioner. Case 4-RC-11998.

June 29, 1976

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MURPHY AND MEMBERS JENKINS
AND WALTHER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Mariann Schick on February 20, 1976, and March 5, 1976. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, this case was transferred to the 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. The rulings 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.
2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.
3. American Arbitration Association, Inc., is a public service nonprofit organization dedicated to the resolution of disputes of all kinds through the use of arbitration, mediation, democratic election, and other voluntary methods. Although actively engaged in research and educational activities seeking to develop and promote expanded use of and improvement in arbitration and other dispute resolution techniques, the Association's principal activity, from which it derives over three-quarters of its income, is the administration of voluntary arbitration tribunals and other dispute resolution procedures. This includes the administration of tribunals in the commercial, accident claims, labor, and international areas. The association, in addition, maintains a community dispute services division for the utilization of arbitration and other techniques to solve conflicts arising in urban areas, and an election department which con-

ducts impartial polls for unions, government agencies, and other organizations.

The American Arbitration Association does not itself act as arbitrator. Rather, its function is to submit to parties selected lists from which disputants choose an acceptable arbitrator and to thereafter impartially administer the arbitration.

The Association is governed by a board of directors elected by members of the Association. The Association's membership roll includes companies, trade associations, law firms, and organizations of all kinds, including Local 1357, the Petitioner herein. The board of directors is likewise composed of a diverse grouping of corporate executives, labor union officials, attorneys, and public-minded individuals.

In order to facilitate the conduct of its business, the Association maintains 21 regional offices throughout the United States which administer arbitration tribunals and perform the other services provided by the Association.

Petitioner seeks to represent all tribunal administrators and clerical employees employed by the Association at its Philadelphia regional office. The Association opposes the petition and makes several independently significant but related arguments in support of its position.

The Association first argues that the disruption of its services would have no measurable impact on interstate commerce and that consequently the Board should decline to assert jurisdiction. It argues that in the event its services were interrupted, these services could be performed by the parties themselves or delegated to another agency.

At the hearing, the parties stipulated, and we find, that the Association has an annual gross revenue in excess of \$500,000, and that annually at least \$50,000 of the Association's gross revenue is received from organizations who meet the Board's jurisdictional standards. In 1975, the Association administered 35,156 arbitrations and elections including 13,251 labor arbitrations and 4,128 commercial arbitrations. Many of the labor and commercial arbitrations were undoubtedly initiated under contract clauses calling for the compulsory arbitration of disputes. Others, of course, were voluntarily submitted to the Association after other settlement efforts failed.

We cannot but presume that the resolution of these many thousands of disputes played a critical role in untangling the knotty controversies that tend to obstruct the free flow of commerce in our economy. Additionally, we must presume that the Association played an integral role in this ameliorative process. As the Association itself admits, it is the largest and perhaps the only private organization devoted primarily to administering the voluntary resolution of disputes. No other private organization maintains

a nationwide network of offices to provide arbitration services. No other private organization, it is claimed, handles anywhere near the volume of cases handled by the Association. In light of these facts, we cannot credit the Association's assertion that it has a negligible impact on commerce.

The Association secondly argues that unionization of its employees would create various conflicts of interest. It points to the fact that both the Petitioner and Retail Clerks International Association, to which Petitioner is affiliated, are members of the Association and as such are eligible to participate on the Association's board of directors. The Association argues that membership in the Association, together with potential participation on the board of directors, makes Petitioner an improper candidate to represent the Association's employees. We do not agree.

Traditionally, the Board has concerned itself only with those conflicts of interest which tend to impair a labor organization's ability to single-mindedly pursue its employees' best interests. Thus, the Board has, from time to time, refused to certify a union as bargaining representative where the union's business or other involvement makes it potentially responsive to interests other than those of the employees whom it represents.¹ An examination of the facts satisfies us that no such conflict of interest is present here.

Petitioner, though a member of the Association, enjoys no financial benefit as a result thereof and has no financial stake in the Association's continued well-being. All prospect of pecuniary entanglement is foreclosed by the Association's bylaws which specifically prohibit the Association from paying dividends or distributing any part of its income or profit to members. Although members are entitled to vote for the Association's board of directors, it is clear that, as a practical matter, membership is undertaken for the purpose of supporting the Association's objectives and has as its principal benefit the receipt of the Association's publications. Membership by itself is thus unlikely to involve Petitioner in any cognizable conflict of loyalties. Nor do we believe that participation on the board of directors, should it come to pass, would necessarily involve Petitioner or its International in an irreconcilable conflict of interest. The board of directors presently has more than 100 members and must, under the Association's bylaws, have at least 40 members. Any interest generated by participation in such a body would be altogether too dilute and remote to divert the Petitioner from its statutorily prescribed duty of representing employees.

The Association argues that union representation

will create a conflict of interest among the Association's employees in those arbitrations which involve the Petitioner or other locals affiliated with the International. The Association suggests that union membership may create in the Association's employees a divided loyalty which will cause them to breach their duty of fairly and impartially administering arbitrations.

This argument has been considered by the Board before and has been rejected. In *Dun & Bradstreet, Incorporated*,² the employer argued that loyalty to the union might cause the employee credit reporters to violate their employer's rules regarding the confidentiality of credit reports. The Board there said,

The law has clearly rejected the notion that membership in a labor organization is in itself incompatible with the obligations of fidelity owed to an employer by its employees. To the contrary, employees placed in positions of trust by employers engaged in a wide variety of financial activities have exercised their fundamental rights guaranteed by the Act without raising the spectre of divided loyalty or comprised trust. [Footnotes omitted.]³

We are likewise unwilling to presume that union representation will in any way interfere with the Association employees' strict adherence to the highest principles of confidentiality and trust.

Buttressing our conclusion in this regard is the nature of the work performed by the Association's employees. As the record amply demonstrates, the Association's employees do not themselves act as arbitrators. The Association's tribunal administrators, who are principally responsible for administering the arbitrations, have as their primary task the preparation of a list of arbitrators from which the parties select their arbitrator. After the arbitrator is selected, the tribunal administrators schedule the arbitration hearing and generally attend to the administrative details surrounding the arbitration.

The tribunal administrators enjoy very little discretion in the performance of their duties. The lists of arbitrators they prepare are drawn up in accordance with certain prescribed criteria and are subject to supervisory approval. Similarly, scheduling conflicts and other administrative problems that crop up during the course of the arbitration are resolved by the arbitrator after the parties' respective positions have been communicated to the arbitrator by the tribunal administrator.⁴ The tribunal administrators never

² 194 NLRB 9 (1971)

³ 194 NLRB at 9-10

⁴ Michael F. Hoellering, vice president of case administration, testified that the tribunal administrators exercise some slight discretion with regard to scheduling of the arbitration hearing and with regard to the designation

¹ See *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954), *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1957), *Welfare and Pension Funds*, 178 NLRB 14 (1969)

counsel arbitrators on the merits of the dispute and have no apparent opportunity to influence the substantive results of the arbitration. In short, tribunal administrators have little occasion to exercise disloyalty, even if they were so inclined.

The Association makes the related argument that unionization might cause the public to perceive the Association as not being impartial. Such appearance of partiality, though unjustified, would nevertheless, it argues, discourage employers and unions from utilizing the Association's services. A similar argument was made by the employer and rejected by the Board in *Dun & Bradstreet, supra*. We are unwilling now as then to engage in pure conjecture and accordingly adhere to our approach in that case.

Finally, for the reasons articulated above, we reject the Association's alternative request that we restrict the Association employees' choice of bargaining representative to an unaffiliated labor organization, mindful as we are that to so restrict the employees' choice may well be to deny them representation.

Accordingly, we find that a question of representation affecting commerce exists within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. Petitioner seeks to represent a unit consisting of all tribunal administrators and clerical employees employed by the Employer at its Philadelphia regional office, excluding all other employees, guards, supervisors, confidential employees, and professionals as defined by the Act. The Employer agrees to the appropriateness of the aforesaid unit. However, it ar-

gues that Elaine Dodson, secretary, is a confidential employee and should be excluded from the unit. The record shows that Elaine Dodson is primarily employed as secretary to the three tribunal administrators in the Philadelphia office. Occasionally she types material for Arthur Mehr, the Philadelphia regional director who is responsible for labor relations in the Philadelphia office.

However, Mehr himself testified that most correspondence concerning labor relations and employee matters is handled by him over the phone. Only rarely is confidential information concerning labor matters incorporated into a memorandum or letter. Elaine Dodson testified that she could remember typing only two items touching upon employee relations. One was a letter sent to the New York office advising them of the resignation of an employee. The other was a memorandum outlining a proposed grievance procedure.

We find that such occasional typing, incidental as it is to her regular work, is insufficient to make Elaine Dodson a confidential employee. Accordingly, we shall include her in the unit.

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 tribunal administrators and clerical employees employed by the Employer at its Philadelphia Regional Office, excluding all other employees, guards, supervisors, confidential employees and professionals as defined by the Act.

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

of arbitrator As to both things, his testimony conflicted with that of Earl Helfand, a tribunal administrator in the Philadelphia office