

We Transport, Inc. and Town Bus Corp. and Local 1181-1061, Amalgamated Transit Union, AFL-CIO. Case 29-RM-403

December 12, 1974

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Richard Epifanio. 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 29, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer filed a brief.

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, including the brief filed herein, the Board finds:

1. We Transport, Inc. and Town Bus Corp. are New York corporations with their principal place of business at 130 Birchwood Park Drive, Jericho, New York, and branches located at 42 Karl Street, Hicksville, New York, and 1969 Jericho Turnpike, Elwood, New York, and as a single integrated enterprise are engaged in the transportation of school children for public and parochial schools and private contract work, including the transportation of factory employees, summer camp, and school charter work. During the past year they had gross revenues of approximately \$2 million of which \$250,000 was derived from sources other than the school bus operations of this amount, \$100,000 was derived from interstate school charter work, and \$75,000 to \$100,000 was derived from private corporations engaged in commerce within the meaning of the Act. During that same period, the Employer purchased supplies valued in excess of \$50,000 directly from firms located outside the State of New York, including \$300,000 for new buses, \$160,000 for gasoline, \$50,000 for tires, and \$50,000 for replacement of parts and equipment.

The parties agree, and we find, that We and Town together constitute a single employer within the meaning of Section 2(2) of the Act. The parties further agree, and we find, that the Employer is engaged in commerce within the meaning of the Act, and that it will further the purposes of the Act to assert jurisdiction herein.

Member Jenkins and Member Fanning would assert jurisdiction on the ground that, as the Employer is engaged in transit operations other than school bus operations which directly and indirectly affect commerce and produce annual revenues of \$250,000, it is

not an essentially local enterprise but, on the contrary, qualifies, for jurisdictional purposes, under the Board's standard governing transit systems. *Charleston Transit Company*, 123 NLRB 1296 (1959). Compare *Camp Baumann Buses, Inc. and V. S. Buses, Inc.*, 142 NLRB 648 (1963), and *Raybern Bus Service, Inc.*, 128 NLRB 430 (1960).

Chairman Miller finds it unnecessary to determine what portion of the Employer's revenues are derived from school bus operations *vis-a-vis* other types of transit operations. In his view, the Board has never made such a distinction, and has consistently counted revenues from public sources as part of the total revenues of any employer for jurisdictional yardstick application. The only issue, in the Chairman's view, is whether a governmental entity (over which the Board is not authorized to assert jurisdiction) has sufficient control over the private employer's labor relations policies that either (a) the true employer is a governmental authority, so that we are precluded for asserting jurisdiction, or (b) the unit is not one "appropriate for collective bargaining" because no meaningful bargaining could take place without the approval or participation of a governmental authority which is beyond the jurisdictional reach of this Board. No such control by any governmental agency, such as a public school board, having been evidenced by this record, the Chairman would apply our applicable jurisdictional standards. Whether this bus service be regarded as a "transit system" or a nonretail service enterprise, it is plain that the Board's jurisdictional standards have been met, and thus the Chairman joins in asserting jurisdiction. Member Fanning concurs in Chairman Miller's "control of labor relations" analysis as set forth above. See *Ja-Ce Company, Inc.*, 205 NLRB 578; *Current Construction Corp. and Samuel M. Wagner*, 209 NLRB 718 (1974), Member Fanning's dissenting opinion. He therefore sees no reasonable bar to the Board's assertion of jurisdiction over these operations which satisfy standards set forth in *Siemons Mailing Service*, 122 NLRB 81, for nonretail service enterprises, and the standard set forth in *Charleston Transit Company, supra*, for "transit systems."

We disagree with the contention of our dissenting colleague, Member Kennedy, asserted as a ground for declining jurisdiction herein, that because the instant labor dispute is, in his opinion, but a continuation of an earlier dispute before the New York State Labor Board, that board is alone entitled to assert jurisdiction in the instant case. In the earlier proceeding in 1971, the Employer petitioned the NYSLB for an election in the unit hereinafter found appropriate, and thereafter the Employer also petitioned the Board for an election in the same unit, in Case 29-RM-320. The Board, responding to the Union's objection that the Employer was thereby

improperly engaged in forum shopping, dismissed the petition on the ground that by going to a NYSLB election, the employees thereby had an opportunity to express their desires as to a bargaining representative with the previous 12-month period, as prescribed in the Act.¹ In this proceeding, the 12-month statutory period has of course elapsed; the petition on file is a new one. Although the events have not been completely spelled out in the instant record, it does appear that the Union filed a representation petition with the NYSLB prior to the instant petition filed by the Employer, but there has been no ensuing hearing or election. Furthermore, the Union currently joins with the Employer in seeking a resolution of the issues in the instant proceeding, and now urges the Board to assert jurisdiction. In these circumstances, we disagree with our colleague that the instant proceeding is but a continuation of the earlier proceeding before the NYSLB, and we therefore find that the earlier proceeding constitutes no jurisdictional bar.

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. The parties agree, and 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 regular full-time and regular part-time bus drivers and mechanics employed by the Employer at its Jericho, Long Island, New York, establishment, excluding clerical employees, guards, all other employees, and supervisors as defined in the Act.

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

MEMBER KENNEDY, dissenting:

Considerations of precedent, comity, and discouragement of forum shopping dictate that this Board decline to assert jurisdiction over this Employer and I therefore dissent.

We Transport, Inc., and Town Bus Corp. are New York corporations which are a single integrated enterprise and constitute a joint employer. Their principal place of business is located at Jericho, New York, and branches are located at Hicksville and Elwood, New

York. They are engaged primarily in the transportation of schoolchildren for public schools.²

During the past year, the Employer had gross revenues of approximately \$2 million. Of this figure, only \$250,000 was derived from sources other than school-bus work. One hundred thousand dollars of the \$250,000, was derived from interstate school charter work.

Public schools are exempt from coverage of this Act by virtue of Section 2(2). This Board has repeatedly declined to assert jurisdiction over bus transportation companies which are essentially local in character and which operate primarily in aid of local communities and of the State in the field of education. *S. L. Lines, Inc., d/b/a Pacific-Scenic-Lines*, 164 NLRB 1178 (1967); *Community Interprises, Inc., d/b/a Community Charter Bus System*, 164 NLRB 1186 (1967); *Brothers Coach Corp.*, 158 NLRB 931 (1966); *Camp Baumann Buses, Inc. and V. S. Buses, Inc.*, 142 NLRB 648 (1963); *Raybern Bus Service, Inc.*, 128 NLRB 430 (1960).

We Transport, Inc., and Town Bus Corp. primarily bus schoolchildren for public schools and therefore operate fundamentally in aid of local communities and the State in the field of education. Precedent requires that this Board decline to take jurisdiction over this Employer.

Moreover, this labor dispute is simply a continuation of an earlier dispute which this Board declined to take jurisdiction over in favor of the New York State Labor Relations Board, and therefore jurisdiction should continue to be with that board. The Employer petitioned this Board in 1971 to direct an election to determine whether its employees desired to be represented for collective-bargaining purposes by Local 1181, Amalgamated Transit Union, AFL-CIO. This Board declined to take jurisdiction over the matter since the New York State Labor Relations Board had already done so. *We Transport, Inc.*, 198 NLRB 949 (1972). The instant labor dispute is a continuation of this earlier matter. Policy considerations of comity and discouraging forum shopping still apply, and I would decline to assert jurisdiction over the instant dispute for these reasons.

Once again this Board expands its jurisdiction notwithstanding the ever increasing caseload we experience under our present jurisdictional standards. I take this opportunity to reiterate my position that it is unwise to broaden the jurisdictional scope of this Board in light of our caseload problems.³

¹ *We Transport, Inc.*, 198 NLRB 949 (1972) Sec 9(c)(3) of the Act provides in part as follows "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." See *Bluefield Produce & Provision Company*, 117 NLRB 1660 (1957), *The West Indian Co., Ltd.*, 129 NLRB 1203 (1961), *Olin Mathieson Chemical Corporation, Calabarna Plant*, 115 NLRB 1501 (1956), *T-H Products Company*, 113 NLRB 1246 (1955).

² The majority opinion correctly states they also transport children to parochial schools and to summer camp. They also transport children under school charter agreements. Finally, they enter into contracts for the transportation of factory employees to work.

³ See my dissents in *Van Camp Sea Food Company*, 212 NLRB 537 (1974), and *Allen & O'Hara Developments, Incorporated d/b/a Illini Tower*, 210 NLRB 169 (1974).

Since I would not assert jurisdiction over this Employer, it follows that, contrary to the majority decision, I would not direct an election.

MEMBER PENELLO, dissenting:

Although I agree with my colleagues on the majority that the *Charleston Transit* standard is applicable herein, contrary to them I find that the Employer does

not meet that standard. For in my view the Employer's income from school charter work must properly be considered as income from schoolbus operations, and the remaining income from sources other than schoolbus operations is, therefore, insufficient to satisfy the \$250,000 *Charleston Transit* standard. Accordingly, I would dismiss the petition.