RECANA SOLUTIONS 1163

Albert Eaddy d/b/a Recana Solutions and Service Employees International Union (SEIU) Local 100, Petitioner. Case 16–RC–10754

May 25, 2007

DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On December 15, 2006, the Regional Director for Region 16 issued a Decision and Order finding that Recana Solutions is not "the" employer of the petitioned-for temporary day laborers, and therefore dismissed the petition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review. On January 17, 2006, the Board granted the Petitioner's request for review. Thereafter, the Employer filed a brief on review.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the brief on review, we find, contrary to the Regional Director, that Recana Solutions is "an" employer of the petitioned-for employees. Accordingly, we reinstate the petition and remand this case to the Regional Director for further processing.

Recana Solutions (Recana) is a sole proprietorship. In January 2005, Recana entered into a 3-year, \$6 million contract with the City of Dallas, Texas (the City), to provide temporary day laborers to work in the City's sanitation department. The contract between Recana and the City specifies the qualifications for the sanitation jobs, and states, among other things, that Recana is to provide safety training, drug and alcohol screening and testing, and maintain workmen's compensation and general liability insurance coverage. The contract states that Recana must pay temporary day laborers the Federal minimum wage, but does not preclude Recana from paying them a higher wage. The contract requires that Recana make wage payments directly to the temporary day laborers. Recana is responsible for all withholding, recordkeeping, and reporting of Federal taxes and other Although Recana does not pay payroll deductions. fringe benefits to temporary day laborers, the contract does not preclude it from doing so.² The contract states that Recana "shall exercise independent judgment in performing duties under [the] Contract and is solely responsible for setting working hours, scheduling or prioritizing the work flow and determining how the work is to be performed." Also pursuant to the contract, Recana has the right to control temporary day laborers away from City worksites. It has the right to control which temporary day laborers are assigned and to what locations they are assigned. It may subcontract any aspect of the work.

Recana selects and transports persons seeking work from day laborer sites to City jobsites and gives them a job application to complete. City representatives choose individuals from this pool of laborers to work for the day and assign them to a City sanitation truck, where they work alongside with and share the same supervision as City employees. The City does not provide temporary day laborers with uniforms or equipment as it does for City employees. Recana provides a timesheet for the temporary day laborers on which they record the hours they work.

As contractually permitted, Recana pays another company, Tolman Building Maintenance (Tolman), to provide bookkeeping, payroll, and transportation services. The City provides Tolman with timesheets showing who has been employed as a temporary day laborer and how many hours those individuals have worked. Tolman writes paychecks to the temporary day laborers on checks drawn from Recana's bank account and delivers them to City jobsites for distribution. Tolman also provides a driver who transports work-seeking individuals to City jobsites.

The Regional Director's Decision

The Regional Director found that Recana is not "the" employer of the petitioned-for employees because, in her view, Recana "plays no actual role in the employment relationship with" the temporary day laborers. The Regional Director found that Recana does not determine hiring criteria, does not supervise or discipline temporary day laborers after the City selects them to work, and, in general, does not maintain any employment policies that apply to the temporary day laborers. The Regional Director concluded that the City and Tolman are "primarily engaged in an employment relationship" with the temporary day laborers who Recana provides under its contract with the City. The Regional Director dismissed the petition as "procedurally defective," because it did not name Tolman as the employer and Tolman was not served as a party-in-interest.

¹ Pursuant to the contract, Recana is responsible for work-related injuries. The agenda information sheet from the City Council Hearing on January 26, 2006, about the time that Recana was awarded the contract, states that "Workers remain employees of the temp agency for liability and workers' comp coverage, but receive daily work supervision from City staff."

² The City provides its employees with benefits, such as health insurance and vacation and holiday pay.

³ However, there is testimony, discussed below, that the parties' actual practice in this regard is somewhat different from that specified in the contract.

The Parties' Contentions

The Petitioner contends that the Regional Director erred by disregarding Recana's contractual relationship with the City. The Petitioner asserts that, notwithstanding certain contract provisions, Recana is free to set the pay of its employees, as long as it is at least the minimum wage, and that Recana exercises independent judgment by selecting which individuals it will transport from day laborer sites to City jobsites. It disputes the Regional Director's finding that Tolman is in an "employment" relationship with the temporary day laborers. The Petitioner emphasizes that Tolman's only involvement with the laborers is to provide transportation and to prepare their paychecks and that Recana pays Tolman for these services as it is permitted to do under the contract. The Petitioner also emphasizes that the temporary day laborers are working for Recana's profit, not Tolman's, and that Recana, not Tolman, has assumed all duties, rights, and obligations under the contract.

Recana asserts that the City is the "true employer" of the temporary day laborers because, according to Recana, the City manages and directs every aspect of the temporary day laborers' daily working conditions.⁴ Recana insists that it merely provides payroll and transportation services and assists in recruiting temporary day laborers willing to be hired by the City. Recana also contends that the parties' actual practice in applying the terms of the contract differs from the explicit terms of the contract and supports a finding that the City is the actual employer of the temporary day laborers that Recana supplies.

Analysis

The issue in this case is not whether Recana is "the" employer of the temporary day laborers the Petitioner seeks to represent. Rather, the relevant inquiry is whether Recana, a supplier of temporary labor, is "an" employer, within the meaning of Section 2(2) of the Act, of these employees.⁵ And if Recana is an employer, the Petitioner may seek to represent the day laborers employed by Recana, irrespective of Recana's relationship to other entities that may also employ such individuals.

See Management Training Corp., 317 NLRB 1355 (1995).⁶

In Management Training, the Board dispensed with the "extent of control" test that previously governed cases where a private employer contracts with a Government entity. The Board held in that case that where a Government entity controls most of the petitioned-for employees' terms and conditions of employment, the Board's assertion of jurisdiction over a private company with close ties to that exempt Governmental entity would be based on whether the company itself meets the definition of "employer" under Section 2(2) of the Act, and whether such an employer meets the applicable monetary jurisdictional standards. In other words, "jurisdiction [w]ould no longer be determined on the basis of whether the employer or the Government controls most of the employee's terms and conditions of employment." Id. at 1357. See also, e.g., Jacksonville Urban League, 340 NLRB 1303 (2003).⁸ Instead in determining the jurisdictional question presented, the Board will focus on whether the private employer controls some matters relating to the employment relationship involving the petitioned-for employees, such as to make it an "employer" under the Act.

The Employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act. In our view, it is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under these circumstances. *Management Training*, supra at 1358.

Consequentially, the question presented is whether Recana controls some matters relating to the employment

⁴ Contrary to the Regional Director's finding, Recana does not contend that Tolman is an employer of the temporary day laborers. Recana's position at the hearing was that the Board did not have jurisdiction, as the City was the true employer of the day laborers.

⁵ Sec. 2(2) of the Act states as follows:

The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

⁶ The parties stipulated that Recana satisfies the Board's monetary standards for asserting jurisdiction. Specifically, they stipulated that, during the 12-month period before the hearing, Recana "performed services valued in excess of \$50,000 for the City of Dallas which the City of Dallas purchased and received goods valued in excess of \$50,000 directly from suppliers located outside of the State of Texas."

⁷ The "extent of control" test was articulated in *Res-Care, Inc.*, 280 NLRB 670 (1986).

⁸ All the United States Courts of Appeals that have considered the issue have affirmed the Board's test in *Management Training*. See *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997); *Pikeville United Methodist Hospital of Kentucky v. NLRB*, 109 F.3d 1146 (6th Cir. 1997); and *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999)

Recana argues that should we find that it is an employer of the employees, we should reconsider *Management Training* and return to the standard under *Res-Care, Inc.*, supra. We decline to do so. See *Jacksonville Urban League*, supra.

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relationship involving the temporary day laborers supplied to the City. The Regional Director concluded that "[t]he uncontroverted facts in this matter reflect that Recana plays no actual role in the employment relationship with the petitioned-for bargaining unit." We disagree. We find, to the contrary, that the record establishes that Recana has control of "some matters relating to the employment relationship" and, therefore, is an employer of the petitioned-for employees.

The City contracted to pay Recana \$6 million to provide it temporary day laborers. There is no dispute that these laborers are statutory employees. Further, it is undisputed that Recana has fulfilled the terms of its contract with the City by engaging in the employment functions of supplying these employees to the City. Day laborers fill out a job application with Recana. Recana then selects, transports, and pays the individuals for the work they perform. Significantly, also, while Recana pays the temporary day laborers the Federal minimum wage, its contract with the City does not preclude Recana from paying them a higher amount. 10 Finally, there are various noneconomic terms of employment that may be subject to collective bargaining, such as provisions for uniforms or training. In sum, Recana has some control over important matters in the employment relationship. In light of the foregoing, we find Recana is an "employer" under the Act. Management Training, supra at 1358; Teledyne Economic Development v. NLRB, 108 F.3d 56, 58 (4th Cir. 1997).

That the City controls many aspects of the temporary day laborers' employment including control over them while they perform their sanitation tasks does not nullify Recana's employment relationship with them. Given that *Management Training* has dispensed with the "ex-

tent of control" test, what is relevant is that Recana maintains sufficient control to qualify as a statutory employer.

Moreover, that Recana pays Tolman to perform book-keeping, payroll, and transportation services as a means of fulfilling its contractual obligations does not defeat Recana's status as an employer. Tolman is not named in the contract with the City, Tolman does not provide any temporary day laborers to Recana, and the City does not pay Tolman to perform a service. Further, Recana does not claim that Tolman is the employer of the petitioned-for employees. Tolman's involvement in writing checks and providing transportation, which may make Tolman an agent for Recana, does not negate Recana's status as an employer. Indeed, the job applications, the time-sheets, and the paychecks are all captioned with the name "Recana Solutions." We find this ample evidence of Recana's status as an employer of the day laborers.

Accordingly, we find that Recana is an employer of the petitioned-for employees and meets the *Management Training* test. We shall reinstate the petition and remand the case to the Regional Director for further processing.¹²

ORDER

The Regional Director's dismissal of the petition is reversed. Therefore, we shall reinstate the petition and remand the case to the Regional Director for further appropriate action.

⁹ The Employer gave one instance in which a laborer completed the Recana application at the City's jobsite and submitted it to a City supervisor.

¹⁰ The record reveals that temporary day laborers selected and referred by KFC, the predecessor contract holder with the City, began with the minimum Federal wage and received raises, ranging from 25 to 50 cents, after they had worked for a year or more under similar arrangements with the City.

¹¹ The reference in the employment application to the possibility of temporary day laborers' finding permanent work with Tolman does not mean that Recana is not their employer while they work for the City.

¹² At the hearing, the parties stipulated that the following unit is appropriate under the Act:

All temporary laborers assigned to work under the City of Dallas Sanitation Department under the contract between the City of Dallas and Albert Eaddy, d/b/a Recana Solutions, executed on January 26, 2005, excluding guards, supervisors, clericals and other employees.