

ARA Services, Inc. and Communications Workers of America, AFL-CIO, Petitioner. Case 16-RC-8811

10 April 1987

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND BABSON

On 12 November 1985 the Regional Director for Region 16 issued a Decision and Order in this proceeding in which he dismissed the instant petition based on his finding that jurisdiction should not be asserted over the Employer under the test set forth in *National Transportation Service*, 240 NLRB 565 (1979). In so doing, the Regional Director found that the relationship between the Employer and the Stephen F. Austin University,¹ a nonprofit educational institution operated by the State of Texas and exempt from the Board's jurisdiction, was such that the Employer did not exercise sufficient control over its employees' wages, hours, and working conditions to enable it to engage in meaningful bargaining with a labor organization.

In accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, and a motion to remand and reopen the record for newly discovered evidence. The Board granted the Petitioner's request for review by unpublished order dated 24 March 1986,² and held in abeyance the Petitioner's motion to remand and reopen.

On 30 June the Board remanded the instant case to the Regional Director for further consideration consistent with its recently issued decisions in *Res-Care, Inc.*³ and *Long Stretch Youth Home*,⁴ including, if necessary, a reopening of the record.⁵ On 22 August, after the parties were afforded an opportunity to submit briefs on the issue, the Acting Regional Director issued a Supplemental Decision and Order reaffirming the findings and conclusions of the 12 November 1985 decision that jurisdiction should not be asserted over the Employer.

Thereafter, on 12 September, the Petitioner filed a timely request for review, contending that the Acting Regional Director erred in concluding that

the control retained by the exempt entity over the essential terms and conditions of the Employer's employees is the type of direct economic control that precludes collective bargaining. By unpublished order dated 28 November, the Board⁶ granted the Petitioner's request for review.

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

The Board has reviewed the entire record in this proceeding with respect to the issues under review and makes the following findings. In December 1984, the University was advised that state appropriations were going to be reduced, and it began looking for ways to increase revenue and reduce costs. It was determined that by contracting out food services formerly provided by the University itself (including the operation of two cafeterias, a catering service, and a banquet hall), a substantial savings would be realized. Bids were solicited and bidders were interviewed by a food service committee consisting of University administrators, faculty, and students.

The choice was narrowed to two companies, including the Employer, and these bidders were informed that certain benefits must be included in the bids as a result of a consent decree entered into between the University and members of a Federal class action suit alleging that the University violated Title VII of the Civil Rights Act of 1964.⁷ Most of the food service workers were included as members of the class. To satisfy the University's obligations under the consent decree, the University required the bidders to agree to offer employment to all the then-current University food service employees at salaries equal to or greater than those they were receiving from the University, to attempt to accomplish any reduction in current staff by attrition rather than layoff, and to offer current employees a benefit package specified by the University. It was explicitly acknowledged, however, that the successful bidder would possess the right to terminate any employee for cause.

The benefit package mandated by the University included the same benefits (holidays, sick leave, and vacation policies) the University had provided, as well as the payment of a fixed percentage of Social Security taxes for all employees working in excess of 20 hours per week, the contribution of up to \$85 per month to each employee's health and life insurance plan (coverage comparable to the University's plan), and the offer of a retirement

¹ Hereinafter referred to as "the University."

² All dates are in 1986 unless otherwise noted.

³ 280 NLRB 670 (1986) (Member Stephens concurring and dissenting).

⁴ 280 NLRB 678 (1986) (Chairman Dotson dissenting, Member Stephens concurring).

⁵ The Petitioner's motion to remand and reopen was referred to the Regional Director in the Board's remand. Both the Petitioner and the Employer subsequently notified the Region that they did not desire a reopening of the hearing, and both filed supplemental briefs which were considered by the Acting Regional Director

⁶ Chairman Dotson and Members Johansen, Babson, and Stephens.

⁷ *Annie M. Carpenter v. Stephen F. Austin State University*, Civil Action No. TY-74-214-CA (E.D. Tex.), consent decree filed 28 April 1984.

program similar to that of the Teachers Retirement System of Texas, with payment of a specified percentage of the cost of such a program for each employee into an independently supervised retirement plan. The University also required that the successful bidder carry workers' compensation insurance and stated amounts of public liability and property damage insurance.

The University and the Employer executed a letter of agreement on 11 July 1985, and the Employer took over the University's food service operations in August 1985. At the time of the hearing in this case (October 1985), a formal contract between the parties was in effect, but had not yet been executed. The University specifies the hours of operation for the cafeterias and requires that certain types and quality of food be served. In addition, it reserves the right to approve or disapprove the Employer's selection of a food service manager, and the record shows that the University took an active role in interviewing applicants for that position, rejecting at least three before Douglas Goade was selected. In addition, the Employer utilizes University offices, telephones, appliances, and kitchen utensils; does not pay rent for any of the facilities; and requires that its employees adhere to the University's general employment rules and personal conduct rules.

The Acting Regional Director, after applying *Res-Care* and *Long Stretch*, concluded that "the control of employee wages and other benefits is more closely allied to that present in *Res-Care* than *Long Stretch*." Thus, he affirmed the previous order dismissing the petition. Contrary to the Acting Regional Director, we find that it would effectuate the purposes and policies of the Act to assert jurisdiction over the Employer.

In *Res-Care*, the Board reaffirmed the basic two-fold inquiry enunciated in *National Transportation Service*,⁸ for determining when assertion of jurisdiction over an employer providing services to or for an exempt entity is appropriate. Further, the Board stated that henceforth it would examine not only the control over essential terms and conditions retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer is capable of engaging in meaningful collective bargaining.

The Board concluded in *Res-Care* that it was the exempt entity (the Department of Labor) that, in

every sense, retained the ultimate discretion for setting wage and benefit levels; thus, the exempt entity effectively precluded the employer from engaging in collective bargaining. Although the employer initially set the wage and benefit levels for each job classification in its operating budget, the Board noted that the budget required approval by the exempt entity and, once approved, became the basis for the contract price. In addition, the employer was required to obtain approval from the exempt entity of the wage ranges to be paid to the employer's employees, including a maximum for each classification, and the substantive terms of several employee benefits. The contract specifically provided that any proposed changes in the approved wage ranges or fringe benefit plans had to be submitted to the exempt entity for approval, along with any proposed changes in the staff manning table, labor grade schedule, or salary schedule.

In the instant case, the Acting Regional Director found that the University controls the base wages and benefits of all ex-University employees employed by the Employer, but that it does not exercise similar controls over new hires. However, he found no indication that the Employer will be in a position to hire new employees or to raise wages and fringe benefits of its current employees above the level mandated by the University. Thus, he noted that the food service operations were overstaffed when the Employer initiated its operations, and, therefore, there were no existing plans to hire new employees in the foreseeable future. He also noted that the base wages set by the University were higher than similar industry wages in the geographical area. Accordingly, he concluded that the Employer does not sufficiently control the employment conditions of its employees to enable it to engage in meaningful bargaining.

We disagree with the Acting Regional Director's conclusion. As the record clearly shows, there are no line-by-line budgetary controls imposed upon the Employer by the University, and there are no limitations or controls upon any expenditures by the Employer. Moreover, the circumstances under which the Employer agreed to offer employment to all then-current food service employees (at wages equal to or better than their current wages), as well as the "one-time only" benefit package it agreed to offer them, in no way prevents the Employer from exercising its discretion in these areas in the future, as both the Employer's food service manager and the University's general counsel testified. Thus, the initial wages and all amounts specifically set forth in the benefit package are "minimums," not maximums, and no one disputes that

⁸ In *National Transportation Service*, the Board majority stated that the inquiry is "whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act and, if so . . . whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." 240 NLRB at 565.

the Employer is free to pay more than the minimum wage mandated by the parties' agreement to ex-University employees or to any new employees it may hire, to add additional holidays and other benefits, or to offer other retirement options. Further, we note that although the Acting Regional Director speculated that the Employer most likely will not be in a position to hire any new employees for some time, the record contains testimony indicating that the Employer already may have done so.

In this case, we find that the exempt entity does not exercise such control over the Employer's labor relations policies as would oust the Employer of the final say over decisions affecting the "core group of 'basic bargaining subjects,'" and thereby prohibit meaningful bargaining. *Res-Care*, supra, slip op. at 12. Unlike the situation in *Res-Care*, minimum guidelines mandated by the University in order to comply with the consent decree are merely that—"guidelines." The Employer is free to determine for itself any increases in wages and/or benefits afforded ex-University employees, so long as they satisfy the specified minimums, and may establish and modify wages and benefits paid to its other employees without any limitations whatsoever. It is clear that these initial limitations imposed by the University on the Employer are designed to

ensure that the obligations agreed to by the University in the consent decree are met, even though it has chosen to contract out the food service operation.

Based on the above, we find that the minimum guidelines imposed by the University do not affect the Employer's ultimate discretion over wage and benefit levels. *Long Stretch Youth Home*, supra, slip op. at 11. Indeed, the limitations imposed by the minimum guidelines constitute an even lesser constraint on the Employer's ability to engage in meaningful collective bargaining than was present in *Long Stretch*. We therefore conclude that the Employer retains substantial control over all economic matters which are central to the employer-employee relationship and which enable it to engage in meaningful collective bargaining, and that it will effectuate the purposes of the Act to assert jurisdiction herein. Accordingly, the Acting Regional Director's Supplemental Decision and Order is reversed, and we shall reinstate the petition and remand the proceeding to the Regional Director for further appropriate action.

ORDER

The petition in Case 16-RC-8811 is reinstated and remanded to the Regional Director for appropriate action.