

**R W Harmon & Sons, Inc and United Food and Commercial Workers, Local Union 576 Petitioner Case 17-RC-9815**

January 29, 1990

**DECISION ON REVIEW AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY**

On April 30, 1986, the Regional Director for Region 17 issued a Decision and Direction of Election in this proceeding, in which he concluded that the Board should assert jurisdiction over the Employer. In reaching his conclusion, the Regional Director found that the Employer retained control "over most terms and conditions of employment" and was therefore capable of engaging in meaningful collective bargaining with the representative of its employees. He further noted that although the Employer had entered into a contract with the Independence, Missouri School District (School District), a governmental entity exempt from the Board's jurisdiction, that appeared to grant the School District control 'of meaningful elements underlying collective bargaining, that control was uncertain because the contract was not then in effect. In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision. On May 30, 1986, the Board granted the Employer's request for review. On June 30, 1986, the Board issued an Order remanding this proceeding to the Regional Director for further consideration in light of the decisions in *Res Care Inc*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), with instructions to reopen the record if necessary, and to issue a Supplemental Decision, if appropriate.

On October 8, 1986 after the record was reopened and a supplemental hearing was held, the Regional Director issued the attached Supplemental Decision and Order in which he dismissed the instant petition. The Regional Director found that paragraph 17 of the contract in effect between the Employer and the School District granted the School District sufficient control, which the School District had exercised, over the Employer's labor relations to make meaningful collective bargaining impossible under the test set forth in *Res-Care*, supra.

Thereafter, the Petitioner filed a timely request for review of the Regional Director's Supplemental Decision, which the Board granted by mailgram order dated January 14, 1987.

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. Contrary to the Regional Director, we find that the Employer retains sufficient control over the employment conditions of its employees to engage in meaningful collective bargaining. Accordingly, we conclude that it will effectuate the purposes and policies of the Act to assert jurisdiction over the Employer.

Briefly, the evidence establishes that the Employer and the School District entered into a contract on February 12, 1986,<sup>1</sup> whereby the Employer would provide transportation services for three successive school years. This agreement followed the School District's acceptance of a bid that the Employer had submitted. Although the Employer had calculated its bid by including, inter alia, the cost of expected driver rates, the bid submitted did not delineate any wage rates. Following acceptance of the bid, the Employer's area general manager did discuss the Employer's wage structure, bonus payments, and safety program with the School District's transportation director. The area general manager testified that the transportation director seemed "pleased." The Employer alone, however, determines the drivers' wages. This determination is usually made in the spring prior to the beginning of the school year. As the Employer makes this determination for only the following school year, the Employer's area general manager also testified that the Employer had not calculated the wage rates for the final 2 years of the 3 year contract (the 1987-1988 and 1988-1989 school years).

Paragraph 17 of the contract between the Employer and the School District states that the Employer "shall not negotiate or enter into any agreement or arrangement with or on behalf of drivers or other personnel without the written approval" of the School District. Pursuant to this paragraph the Employer on August 29 submitted for the School District's approval a list of drivers, copies of the drivers' physical examinations, pay schedules for the 1986-1987 school year, and a copy of the Employer's employee policy handbook. When the Employer began providing school bus transportation services for the School District on September 2, the School District had not yet approved the materials submitted by the Employer. The School District issued its approval on September 16.

In *Res-Care*, supra, and *Long Stretch Youth Home*, supra, the Board reaffirmed the test enunciated in *National Transportation Service*, 240 NLRB

<sup>1</sup> All dates hereafter are in 1986.

565 (1979), for determining when assertion of jurisdiction over an employer providing services for or to an exempt entity is appropriate. The Board explained that the decision whether to assert jurisdiction focuses on the extent of control retained by the employer over essential terms and conditions of employment as well as on the degree of control exercised by the exempt entity over the employer's labor relations. In essence, the Board will assert jurisdiction if the employer has the "final say on the entire package of employee compensation, i.e., wages and fringe benefits." *Res-Care*, 280 NLRB at 674. An employer seeking to avoid the Board's exercise of jurisdiction carries the burden of showing that it is not free to set the wages, fringe benefits, and other terms and conditions of employment for its employees. *Firefighters*, 292 NLRB 1025, 1026 (1989). The Board declined to assert jurisdiction over the employer in *Res-Care* because the exempt entity retained the ultimate discretion over the basic economic terms. Once the exempt entity had contracted with the employer by approving a proposal that specified wage levels and fringe benefits, the employer could not alter those wage levels and benefits without the exempt entity's approval. By contrast, the Board asserted jurisdiction in *Long Stretch* because the exempt entity did not dictate specific limits on expenditures for employee compensation.

We find that like the employer in *Long Stretch Youth Home*, the Employer here has the "final say" over the terms of compensation for its employees. Unlike the employer in *Res-Care*, the Employer here has not submitted a bid that specifies wage levels and benefits. The contract between the Employer and the School District neither specifies wage levels to be paid by the Employer, nor prohibits the Employer from altering those levels once they have been set. Furthermore, the contractual language does not state that the exempt entity has the right to disapprove the pay schedules established by the Employer. Consequently, we find that the contractual relationship between the Employer and the School District is similar to that between bus company employers and exempt entities in other cases in which we have asserted jurisdiction. See, e.g., *Robinson Bus Service*, 292 NLRB 70 (1988), *Rustman Bus Co.*, 282 NLRB 152 (1986). See also *R W Harmon & Sons v NLRB*, 664 F.2d 248, 251 (10th Cir. 1981) ("Since [the employer] controls wages and benefits—the bread and butter issues of collective bargaining—it can engage in meaningful bargaining.")

Nonetheless, the Regional Director and our dissenting colleague find that the Employer does not retain the authority to set employee compensation

because paragraph 17 of the contract grants the School District the right to approve the Employer's negotiation or entry into any agreement with the drivers. Thus, they conclude that as the Employer has submitted its pay schedules for approval pursuant to this contractual clause, and as the School District has exercised its contractual right of approval, the Employer would be unable to engage in meaningful bargaining with a labor organization over such economic terms. We cannot agree that this clause requires that the Board not assert its jurisdiction over the Employer.

Initially, we observe that Davis, the Employer's general counsel for labor relations, testified that paragraph 17 was included at the insistence of the School District, which wanted the right to approve drivers because of its concern with liability resulting from drivers' negligence. Thus, the approval process is primarily designed to limit the School District's potential liability from lawsuits, and not to determine the level or content of compensation paid to the employees. See *Long Stretch Youth Home*, 280 NLRB at 681. We further note that the Employer did not submit the pay schedules until after the contract was in operation and that the School District did not issue its approval until after the Employer began providing service. Moreover, there is no evidence that the School District's review and approval of the materials was anything other than routine. Accordingly, we find that the approval process engaged in by the School District does not constitute the type of control necessary to establish that the Employer has relinquished the authority to determine its employees' wages and other terms of employment.

We are also not convinced by our dissenting colleague's argument that the Board should decline jurisdiction because paragraph 17 of the contract grants the School District the right of approval over any collective-bargaining agreement entered into by the Employer. Although the clause speaks of a grant of approval for negotiating or entering into an agreement, it does not expressly require approval of every term of the agreement. In light of the School District's reason for including paragraph 17 in the contract, as well as the other factors discussed above indicating that the School District's control does not extend to wages and benefits, we cannot conclude that paragraph 17's language mandates School District approval of all terms of collective-bargaining agreements.<sup>2</sup>

<sup>2</sup> In view of the foregoing, we find unconvincing our dissenting colleague's reliance on *Ohio Inns*, 205 NLRB 528 (1973). In that case the State actually exercised such extensive control over aspects of labor relations that the Board found it to be a joint employer with the employees.

In sum, we find that the Employer has not met its burden of showing that it is not free to set the wages, benefits, and other terms and conditions of employment for its employees. We conclude that the Employer therefore retains sufficient control over the essential terms and conditions of employment of its employees to enable it to engage in meaningful collective bargaining. Accordingly, the Regional Director's Supplemental Decision and Order is reversed and we shall reinstate the petition and remand to the Regional Director for further appropriate action.

### ORDER

The petition in Case 17-RC-9815 is reinstated and remanded to the Regional Director for appropriate action.

#### MEMBER DEVANEY, dissenting

Contrary to my colleagues, I would affirm the Regional Director's Supplemental Decision and Order because I believe that on the basis of the record before us, it will not effectuate the purposes and policies of the Act to assert jurisdiction over this Employer. In *Res-Care, Inc.*, 280 NLRB 670, 674 (1986), the Board stated that "if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible [footnote omitted]." Paragraph 17 of the contract between the Employer and the exempt governmental entity, the School District, states that the Employer "shall not negotiate or enter into any agreement or arrangement with or on behalf of drivers or other personnel without the written approval of" the School District. Pursuant to this contractual provision, the Employer submitted for the School District's approval the drivers' pay schedules for the then forthcoming school year. The School District thereafter issued its written approval.

In my view, an employer's payment of wages to employees in exchange for their services constitutes an agreement with its employees. Thus, paragraph 17 of the contract required the Employer's submission of the pay scales to the School District. Indeed, if the Employer had not complied with this requirement, paragraph 17 further provides that the School District would be authorized to terminate the contract. I also note that the School District exercised its contractual rights by issuing the written approval. In light of this evidence, and in the absence of countervailing evidence establishing that

the School District does not retain the authority to approve the drivers' wages in practice,<sup>1</sup> I agree with the Regional Director that the Employer does not have the final say on the entire package of its employees' compensation. Although my colleagues find that the contractual relationship between the Employer and the School District is similar to that between school bus companies and exempt entities in other cases in which the Board has asserted jurisdiction, those cases did not involve an exempt entity's right to approve the employees' wages. Furthermore, my colleagues' reliance on the *absence* of evidence that the School District's approval was *not* routine does not aid their case. The Employer has met its burden of establishing that it does not retain the ultimate discretion over the payment of wages by showing that the contract required it to submit the pay scales for approval and that the exempt entity exercised that right of approval. The Union could have rebutted this showing by introducing evidence indicating that the approval process was routine or a sham. As noted above, however, no such countervailing evidence was presented.

Furthermore, I find that the above-quoted language of paragraph 17 on its face necessarily requires that any negotiation of or entering into a collective-bargaining agreement by the Employer concerning its drivers be subject to the School District's written approval. When a governmental entity exempt from the Board's jurisdiction has the right of disapproval over a collective-bargaining agreement entered into by an employer, the Board will not assert its jurisdiction over that employer. See *Ohio Inns*, 205 NLRB 528 (1973), *Res-Care, Inc.*, 280 NLRB at 674 fn 22. As the Board stated in *Ohio Inns*, 205 NLRB at 529 fn 3:

When parties are subject to our jurisdiction, certain rights and obligations attach, and we must have the authority to enforce those rights and obligations. For example, when parties negotiate to the point of agreement, we have the authority to require that they reduce their agreement to writing, execute it, and thenceforward implement it. But when, as here, the State of Ohio has the power to disapprove of any collective agreement, any attempt on our part to enforce our law, in the event of such a disapproval, would create an irresolvable confrontation between Federal and state authority.

immediate employer, and the Board relied not only on contract language, but also on evidence at the hearing (not fully described) regarding a requirement that collective-bargaining agreements had to be approved by the State before they could become effective. Id. at 528-529.

<sup>1</sup> I find that the evidence indicating that the School District did not issue its written approval until approximately 2 weeks after the Employer's drivers began transporting the school children is insufficient to establish that the School District does not possess actual authority to disapprove the drivers' wage schedules.

I find that the Board's reasoning in *Ohio Inns* fully applies here. Therefore, as the School District has the power to disapprove of any negotiations or agreement entered into by the Employer with or on behalf of its employees, I conclude that it would not effectuate the purpose and policies of the Act to assert jurisdiction herein. Accordingly, I would affirm the Regional Director's Supplemental Decision and Order and dismiss the petition.

#### SUPPLEMENTAL DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a supplemental hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the [Regional Director for Region 17].

Upon the entire record in this proceeding, the undersigned finds:

1 The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2 The Employer is engaged in commerce within the meaning of the Act.

3 The labor organization involved claims to represent certain employees of the Employer.

4 No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

On April 30, 1986, a Decision and Direction of Election issued in the above-captioned case, following a hearing held on April 3, 1986. The issue in that hearing was whether the Board should assert jurisdiction over the instant Employer when considering the then pending contract between the Employer and the School District of the City of Independence, Missouri, a political subdivision of the State of Missouri exempt from the Board's jurisdiction. While recognizing that this pending contract appeared to grant the School District "control of meaningful elements underlying collective bargaining," the Regional Director concluded that the Employer currently controlled most terms and conditions of employment and that any exercise of control by the School District was "a matter of speculation." Accordingly, the Regional Director found that the Board should assert jurisdiction over the Employer and directed an election.

On May 30, 1986, the Board granted the Employer's Request for Review of the Regional Director's Decision and Direction of Election. On June 30, 1986, the Board remanded the case for further consideration of jurisdictional issue consistent with *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986), and *Res-Care, Inc.*, 280 NLRB 670 (1986). On July 24, 1986, the Regional Director issued an Order to Show Cause why the record in the case should be reopened and/or why the Regional Director should not issue a Supplemental Decision in due course. Thereafter, the record reopened and a hearing was held on September 22, 1986.

On February 12, 1986, the Employer contracted with the School District to provide school bus transportation

services for three successive school years, beginning with the 1986-1987 school year. This contract is now in operation. Pursuant to paragraph 17 of this contract, the Employer submitted to the School District by a letter dated August 29, 1986, a list of drivers, copies of physical examinations of these drivers, pay schedules for the 1986-1987 school year and a copy of the Employer's employee policy handbook for approval by the School District. The School District issued its approval on September 16, 1986. The Employer began providing school bus transportation services to the School District on September 2, 1986. The School District is requiring the Employer to update the list of drivers with supporting information on a monthly basis. The record discloses that the School District did not reject any drivers submitted for approval, did not request further information on any drivers, and did not seek to change any pay rates or personnel policies for the drivers. There was discussion between the Employer and the School District concerning pay rates and personnel policies prior to the time the Employer submitted them for approval.

The amount of compensation for the Employer's drivers is included in a base bid amount which reflects type of bus and route. Wages are not delineated in this bid and the bid computation includes such things as route mileage, expected driver rates, number of hours per day the driver and bus are out, and the age of the equipment required. The School District awarded its contract for the current school year as well as the school years 1987-1988 and 1988-1989 based on bid amounts of each year. The Employer has not yet calculated its wages for the final two years of the contract. The Employer normally announces its wages for the upcoming school year in the spring of the year, specifically the last school month of the current year. The Employer considers the actual operating costs of the buses including miles traveled, hours out per day, drivers' wages, maintenance costs and accident rates. There is evidence the Employer discussed with the School District the plans of the Employer to change certain wage structures and institute a bonus plan.

In *Res-Care, Inc.*, supra, and *Long Stretch Youth Home, Inc.*, supra, the Board reaffirmed the basic test for determining whether to assert jurisdiction over an employer providing services to or for an exempt entity as set forth in *National Transportation Service*, 240 NLRB 565 (1979). Thus, the Board seeks to determine whether the employer has retained sufficient control over the employment conditions of its employees to engage in effective or meaningful bargaining with a labor organization. In *Res-Care*, the Board explained that the determination of as to whether effective or meaningful bargaining with a labor organization can take place should be based on an analysis of the degree of control exercised by the exempt entity over the employer's labor relations, as well as the control retained by the employer. Thus, if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible. *Res-Care*, supra at 674. Here, article 17 of the contract between the Employer and the School District specifically provides that

the Employer "shall not negotiate or enter into any agreement or arrange with or on behalf of the drivers . . . without written approval" of the School District. This article further provides for the right of approval by the School District of "the employment of any driver" together with the right "to direct the removal of any driver." Pursuant to this article, the Employer sought and received from the School District approval of its drivers, its wage schedule for the upcoming year, and its

personnel policies. In these circumstances, the School District has retained, as well as exercised, sufficient control over the Employer's labor relations to make meaningful bargaining not possible under the *Res-Care* test. Accordingly, the instant petition is hereby dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.