

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

34th STREET PARTNERSHIP,

Employer

And

CASE NO: 02-RC-090954

**UNITED EMPLOYEES OF SERVICE
WORKERS UNION, LOCAL 365,
Petitioner**

And

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 210,
Intervenor**

DECISION AND DIRECTION OF ELECTION

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

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based on the entire record¹ in this proceeding, I find that:

1. The Hearing Officer’s rulings are free from prejudicial error and are hereby affirmed.²

¹ All parties declined to submit briefs in this matter.

² On October 17, 2012, I denied the Intervenor’s special appeal to the hearing officer’s decision to preclude testimony on matters that are not relevant or material to the only issue in dispute herein.

2. The parties stipulated, and I find, that 34th Street Partnership (herein “the Employer”), a New York not-for-profit organization with an office and place of business located at 1065 6th Avenue, New York, New York, is engaged in providing, among other things, sanitation services to local businesses. Annually, in the course and conduct of its business operations, the Employer provides services valued in excess of \$50,000, to local businesses which are themselves engaged in interstate commerce. Accordingly, I find that 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.

3. As a threshold matter, the Intervenor claims that the Petitioner, United Employees of Service Workers Union, Local 365, is not a labor organization because no documentary evidence was proffered to show that Petitioner has collective-bargaining agreements with other employers. Further, the Intervenor claims that because Petitioner has not offered in evidence its annual financial reports as required under the LMRDA, it is not a labor organization. For the reasons set forth below, I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The sole witness presented at this hearing was Jose Vasquez (herein “Vasquez”), the Secretary/Treasurer of the Petitioner. Accordingly, all of the record facts summarized below are based on his testimony and the documentary evidence admitted in the instant record.

The Petitioner has been in existence for about five years. On September 20, 2008, Petitioner adopted a Constitution and By-laws which sets forth in Article II, that the objects and principles of Petitioner are to aid workers in securing improved wages, hours and working conditions through collective-bargaining. The Constitution provides for the rules and regulations in Petitioner’s operations, including the requirement that regular elections be conducted for Union officers. Petitioner collects dues from its members.

Vasquez testified that Petitioner is party to seven collective-bargaining agreements with various employers, which include terms such as, wages and other benefits. In that regard, he is presently negotiating a collective-bargaining agreement with a company called H. P. Lincoln Urban Renewal Company. On April 6, 2011, Region 22 issued a certification of representative for Petitioner in a unit of all full-time and regular part-time porters, handymen, doormen and maintenance employees employed by H. P. Lincoln Urban Renewal Company. Unit employees participate as members of a negotiating committee during the bargaining process and the agreed upon contract is subject to member ratification.

Similarly, on October 2, 2012, Region 2 issued a certification of representative for Petitioner in a unit of all full-time and regular part-time porters handymen, doormen and maintenance employees employed by 30 River Court East Urban Renewal Company. No further evidence was adduced regarding the status of collective bargaining between these parties.

Section 2(5) of the Act provides the following definition of “labor organization:”

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The statutory definition of a “labor organization” has long been interpreted broadly. *See Electromation, Inc.*, 309 NLRB 990, 993-994 (1992), *enf’d.* 35 F.3d 1148 (7th Cir. 1994). To fall within the definition of a “labor organization,” the Board has held that employees must participate in the organization and it must exist for the purpose, in whole or in part, of dealing with employers on their behalf regarding their wages, hours of employment and other terms and conditions of employment. *See Alto Plastic Mfg. Corp.*, 136 NLRB 850, 851-852 (1962). Under this definition, an incipient union that has not yet actually represented employees may, nevertheless, be accorded Section 2(5) status if it was *formed* for the purpose of representing

employees. See *Coinmach Laundry Corp.*, 337 NLRB No. 193 (2002); *The East Dayton Tool & Die Company*, 194 NLRB 266 (1971); *Butler Manufacturing Company*, 167 NLRB 308 (1967). A finding of labor organization status does not require proof that the entity in question has ever “dealt with” an employer. *Coinmach Laundry, supra*; *Armco, Inc.*, 271 NLRB 350 (1984); *Steiner-Liff Textile Products Co.*, 259 NLRB 1064, 1065 (1982). Rather, it is the intent of the organization that is critical in ascertaining labor organization status, regardless of the progress of the organization’s development and what activities the organization has actually performed. *Edward A Utlaut Memorial Hospital*, 249 NLRB 1153, 1160 (1980). Indeed, even if such an organization becomes inactive without ever having represented employees, it is still deemed to have been a statutory labor organization if its organizational attempts “[c]learly . . . envisaged participation by employees,” and if it existed “for statutory purposes although they never came to fruition.” *Comet Rice Mills*, 195 NLRB 671, 674 (1972). Moreover, “structural formalities are not prerequisites to labor organization status.” *Yale New Haven Hospital*, 309 NLRB 363 (1992) (no constitution, by-laws, meetings, or filings with the Department of Labor); *Butler, supra*, at 308 (no constitution, bylaws, dues, or initiation fees); *East Dayton, supra*, at 266 (no constitution or officers). Thus, the absence of a constitution or bylaws is an irrelevant consideration in analyzing whether a petitioner is a labor organization within the meaning of the Act. *Coinmach Laundry, supra*.

In the instant case, the record established that the Petitioner exists for the purpose of negotiating wages, hours, and working conditions on behalf of employees and that it represents and has bargained for maintenance employees with other employers. Further, the record demonstrates that the Petitioner has previously been certified by both Region 22 and Region 2 in previous elections conducted by the Board. It also appears that employees participate in the

Petitioner's bargaining committee meetings and that all contracts are subject to ratification by the employees. The record also establishes that the Petitioner has a constitution and by laws, which regulate activities such as officer elections. Based on the evidence presented at the hearing, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The parties stipulated, and I find, that the following unit is an appropriate unit within the meaning of Section 9(b)(3) of the Act:

INCLUDED: All full-time and regular part-time cleaners, maintenance employees and porters.

EXCLUDED: All other employees, including managers, clerical employees and guards, and professional employees and supervisors, as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military

services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the **United Employees of Service Workers Union, Local 365**, or the **International Brotherhood of Teamsters, Local 210**, or by **no** labor organization.

NOTICE OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of

voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 2's Office, 26 Federal Plaza, Room 3614, New York, New York 07728, on or before **November 16, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be ground for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington DC 20570. This request must be received by the Board in Washington by **November 23, 2012**.

In the Regional Office's initial correspondence the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may not be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website,

select the **E-Gov**³ tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at New York, New York this 9th day of November 2012.



Karen P. Fernbach
Regional Director
National Labor Relation Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 07728

³ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the “File Documents” button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the “Accept” button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the “Submit Form” button. Guidance for E-filing is contained in the attachment supplied with the Regional Office’s initial correspondence on this matter and is also located under “E-Gov” on the Board’s web site, www.nlr.gov.