

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION2

PROFESSIONAL REFEREE ORGANIZATION,¹
Employer

and

Case No. 02-RC-097432

PROFESSIONAL SOCCER REFEREES ASSOCIATION,
Petitioner

DECISION AND DIRECTION OF ELECTION

Professional Referee Organization (“the Employer”) is a new organization formed by Major League Soccer and U.S. Soccer to hire, develop, and train soccer referees. On January 31, 2013, Professional Soccer Referees Association (“the Petitioner”) filed a petition seeking to represent referees, assistant referees, and fourth officials working for the Employer.

The parties stipulated to the appropriate unit and an election eligibility formula. The Employer, however, argues that the petition should be dismissed because the Petitioner is not a labor organization within the meaning of §2(5) of the National Labor Relations Act, as amended (“the Act”). Alternatively, even if Petitioner is a labor organization, it has a disqualifying conflict of interest with the Employer. Finally, the Employer contends that the Hearing Officer precluded relevant evidence necessary for the Regional Director to make findings of fact and conclusions of law.

To the contrary, the Petitioner maintains that it exceeds the low standard required for meeting the Board’s definition of labor organization. Further, the Petitioner maintains that it is not in competition with the Employer and therefore, has no disabling conflict of interest. Finally, the Petitioner argues that the Hearing Officer made no prejudicial rulings and a direction of election is appropriate.

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

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

Upon the entire record in this proceeding, as well as the briefs filed by the Petitioner and the Employer after the closing of the record, I find that:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed. In that regard, I find that none of the Hearing Officer’s rulings precluded the introduction of material

¹ “LLC” has been deleted from the Employer’s name to reflect the correct name as noted during the hearing.

evidence or otherwise prejudiced the Employer. The Board, in *Mariah, Inc.*, 322 NLRB 586, n. 1 (1996), stated, “[i]t is beyond cavil that the role of the hearing officer is to ensure a record that is both complete and concise.” Testimony and documents concerning the organization or operations of the Petitioner prior to the filing of the petition are not dispositive to a determination of labor organization status. In light of the Employer’s objection that it was precluded from exploring this area, I am not relying on such evidence in reaching the conclusion on Petitioner’s status, as more fully discussed herein. Accordingly, after full consideration of the record, I find that the Hearing Officer’s rulings were appropriate and have not prejudiced the Employer.

2. The parties stipulated, and I find, that the Employer is a limited liability corporation formed under the laws of New York with an office and principal place of business at 420 5th Avenue, New York, NY. The Employer is engaged in the management and operation of a referee program for professional soccer leagues throughout the United States and Canada. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$1,000,000, and provides services valued in excess of \$5,000, to Major League Soccer, which itself is 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 stated above, the labor organization status of the Petitioner is in issue. For the reasons set forth below, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The sole witness presented at this hearing was Steven Taylor, the Vice President of the Petitioner. The Employer called no witnesses and offered no documents to be received as evidence. Accordingly, the record facts summarized below are based on Taylor’s testimony and the documents introduced by the Petitioner.

The Petitioner was established in January 2010. It accepts into membership all professional referees who work professional soccer games in the U.S. and Canada.

The record demonstrates that the Petitioner has not previously sought certification as a bargaining agent from the Board or negotiated collective-bargaining agreements. However, prior to the Employer’s formation, the Petitioner negotiated with Major League Soccer (“MLS”) about certain working conditions of its employees. In this regard, the Petitioner and MLS reached agreement concerning wages and other conditions of employment of the referees which were implemented at the start of the 2010 preseason.

Since the formation of the Employer, Petitioner has contacted it on behalf of members on multiple occasions. As an example, by letter of June 12, 2012, Petitioner requested that the Employer’s General Manager make certain changes regarding physical fitness testing of employees. Thereafter, the requested changes were implemented.

Taylor testified that the Petitioner’s intention going forward is to conduct collective bargaining on behalf of their members with the Employer with respect to unit employees’ employment conditions and wages.

The record also demonstrates that professional soccer referees, assistant referees, and

fourth officials, employed by the Employer, have paid dues to the Petitioner and voted in elections for Petitioner's Executive Board. The employees attend Petitioner's bi-annual general membership meetings, in part, to discuss employment-related issues. Throughout the year, employees also directly contact Petitioner's Executive Board members concerning their working conditions as employees of the Employer. During his one year serving as Vice President, Taylor has communicated with Petitioner's membership on a daily basis by phone, email, text messaging, and in-person meetings.

The Petitioner's most recent Constitution and Bylaws, dated January 29, 2013, provides that the Petitioner's first objective is:

To establish a labor organization that will represent the employees of [the Employer] in collective bargaining with respect to salaries, wages, hours of work and other terms and conditions of employment, and which advocates for the improvement of terms and conditions of employment of PRO independent contractors performing officiating duties. (Article III 3.1(a))

On January 30, 2013, the Petitioner filed a Labor Organization Information Report (LM-1) form with the Department of Labor. The Petitioner's seven Executive Board members hold weekly meetings at which they discuss matters pertaining to employees' employment conditions with the Employer, including wages, working conditions, and game assignments.

In analyzing these facts, I note that Section 2(5) of the Act provides the following definition of "labor organization" is:

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), *enfd.* 35 F.3d 1148 (7th Cir. 1994). For a union to fall within the definition of a "labor organization," the Board has held that employees must participate in the union 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 it 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 representing employees in collective bargaining with respect to salaries, wages, hours of work and other terms and conditions of employment, and that the employees variously participate in the organization. Based on this evidence alone, the limited requirements of Section 2(5) of the Act have been met. The record, however, further demonstrates that the Petitioner has a Constitution and Bylaws, which regulate its activities and that it filed an LM-1 form with the Department of Labor. In addition, some record evidence demonstrates that the Petitioner has, in fact, represented and bargained for employees in the petitioned-for unit with the Employer and with its predecessor. *Butler Mfg. Co., supra*, at 308 n. 2 (evidence of prior bargaining can support a finding of labor organization status). In light of the Employers procedural objections, however, I am emphasizing that I am not relying on Petitioner's current Constitution and Bylaws, the LM-1 Form filing, or any conduct prior to the filing of the instant petition. Instead, I am finding that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act based on its stated intent to represent employees and that employees participate in the organization.

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.

As stated above, the Employer contends that even if the Petitioner is a labor organization, it is disqualified from representing these employees because it has a conflict of interest with the Employer, as both entities seek to train and educate referees. Primarily, the Employer relies on the following objective, which is listed in the Petitioner's Constitution and Bylaws, to argue that a conflict of interest exists:

Designing, organizing, staffing, and promoting educational and development programs for the training, testing, cultivation and advancement of referees for the game of soccer. (Article III 3.1.(d))

It appears that the Employer designs educational and development programs for training, testing, cultivation and advancement of referees. Taylor testified that the Petitioner's intent with respect to the above-quoted objective is to support the Employer's initiatives to improve the quality of refereeing. He explained that while the Petitioner could potentially also develop programs of its own that would help newer referees improve their skills, such projects are "in their infancy." The anticipated programs would broadly deal with fitness test preparation and overall referee education and development. He envisioned the future programs as supplemental to the

Employer's programs, and not intended to replace anything that the Employer does along the same lines. The Petitioner's programs would, he testified, have more of a "mentoring" quality.

Currently, Petitioner's Executive Board members promote the Employer's training programs to its members, by working with the Employer's General Manager and/or its Manager of Referees. Specifically, members of Petitioner's Board of Directors have reached out to the Manager of Referees Michael Kennedy and General Manager Peter Walton on various topics related to training, testing, cultivating and advancing referees. As an example, by letter dated June 12, 2012, the Petitioner's President asked the Employer's General Manager to make changes in physical fitness testing procedures. The requested changes were implemented after the Employer received the letter.

The Board has long held that a labor organization is not a proper bargaining representative of employees if it is also a business rival of those employees' employer. *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). The Board, in *Bausch & Lomb*, found that because the labor organization operated its own optical business which competed with the employer's, it could direct bargaining efforts for the benefit of its business interests, rather than for the betterment of unit employees' working conditions. Thus, because of the "unique" circumstances of that case, where the union was a direct immediate business competitor of the employer, the Board found that the union could not perform its statutory function as bargaining agent. *supra*, at 1562.

Here, no record evidence establishes that the Petitioner or any of its agents is engaged in any enterprise competitive with the Employer's operations. Rather, the Petitioner has merely begun to formulate the parameters of training programs, which would be complementary to the training offered by the Employer and would aspire to enhance the quality of the Employer's "product." The Board, in *North American Soccer League*, 236 NLRB 1317, (1978), found that summer soccer camps and clinics sponsored by a union do not place it in a disqualifying position vis-à-vis an employer that also operates camps and clinics where these programs are merely incidental to the primary purposes of the parties.

In order to establish that a union has a disabling conflict of interest, the employer must show a "clear and present" danger that the conflict will prevent the union from vigorously representing the employees in the bargaining process. *Garrison Nursing Home*, 293 NLRB 122 (1989), quoting *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), *enfd.* 783 F.2d 1444 (9th Cir. 1986). Thus, even if the future programs envisioned by Petitioner's statement of objectives can be shown to have the *potential* to compete directly with the Employer's business, these contemplated programs are not currently a "clear and present" threat of the sort the Board finds problematic. A labor organization is not disqualified from representing employees merely based on plans for a competitive business when those plans have not materialized. *IFS Virgin Island Food Svc., Inc.* 215 NLRB 174 (1974) (labor organization was not disqualified as a potential competitor because of initial steps it had taken to set up competitive businesses; the Board found that if circumstances changed the employer could raise the issue in the future); *Alanis Airport Svc.*, 316 NLRB 1233 (1995) (employer and union both expressed interest in baggage-handling work at an airport, but neither party had obtained needed permits for the work and might never obtain them; possibility of competition was too speculative to disqualify the union from representing employees).

The cases cited by the Employer are distinguishable from the instant case in that they involve scenarios of direct competition between a union and employer. The Board, in *Visiting*

Nurses Association, Inc., 254 NLRB 49 (1981), found that the petitioning union was disqualified because it was in competition with the employer through a registry the union operated which placed home-care nurses. The employer in that case also acted as a placement agency for the same workforce. Similarly, the Board, in *Pony Express Courier Corp.*, 297 NLRB 171 (1989), revoked certifications of a union based on a finding that the union's business agent had a conflict of interest preventing him from performing his representation duties. The business agent was a consultant to both a competitor of the employer's and customers of the employer. The Board found that the business agent's consultant work could cause him to make bargaining demands in the service of his personal business interests which could conflict with the interests of the union's members. His business interests thus directly conflicted with his role as union business agent.

Based on the record in the instant case, I cannot conclude that the Petitioner should be disqualified. Accordingly, allowing the election to be conducted is appropriate and consistent with Board law and I, therefore, direct that an election be conducted in the stipulated unit set forth below.

5. In the instant proceeding, 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 referees, assistant referees and fourth officials working Major league Soccer Games.*

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

*Those eligible to vote in the election are employees in the above unit who were invited by the Employer to attend PRO pre-season training camp conducted on January 10, 11, and 12, 2013.

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 employees in the unit described above, who were invited by the Employer to attend PRO pre-season training camp conducted on January 10, 11 and 12, 2013.

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 **Professional Soccer Referees Association** 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 **March 22, 2013**. 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 **March 29, 2013**.

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.nlr.gov. On the home page of the website, select the E-

Gov² 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 15th day of March, 2013.



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

² 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.