

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

CHEM RX PHARMACY SERVICES, LLC,

Employer

and

Case Nos. 29-RC-114881
29-RC-115184

CHEMRX EMPLOYEES UNION,

Petitioner

and

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 2013,

Intervenor¹

DECISION AND DIRECTION OF ELECTION

Chem Rx Pharmacy Services, LLC (“the Employer”) is engaged in the distribution of pharmaceuticals. On October 18, 2013,² ChemRx Employees Union (“the Petitioner”) filed petitions under Section 9(c) of the National Labor Relations Act, seeking to represent two units of employees employed by the Employer. In Case No. 29-RC-114881, the petitioned-for unit includes all full-time and regular part-time drivers, maintenance, warehouse, and production employees employed by the Employer at 750 Park Place, Long Beach, New York, and at 4041 Hadley Road, Building M, South Plainfield, New Jersey, but excluding all pharmacy employees, management employees, clerical employees, confidential employees, guards and supervisors as defined by the Act. In Case No. 29-RC-115184, the petitioned-for unit includes all full-time and regular part-time pharmacy employees employed by the Employer at 750 Park Place, Long

¹ I hereby amend the caption to reflect the parties’ full and correct names.

² All dates hereinafter are in 2013 unless otherwise indicated.

Beach, New York, and at 4041 Hadley Road, Building M, South Plainfield, New Jersey, but excluding all drivers, maintenance, warehousemen, production employees, management employees, clerical employees, confidential employees, guards, and supervisors as defined by the Act. These two cases were consolidated for hearing.

United Food and Commercial Workers, Local 2013, intervened on both petitions on the basis of collective bargaining agreements.

The Intervenor asserts that the Petitioner does not meet the definition of a labor organization contained in Section 2(5) of the Act, and therefore its petitions must be dismissed. The Petitioner contends that it is a labor organization as defined in the Act. The Employer did not appear at the hearing.³

A hearing was held before Brent Childerhose, a hearing officer of the National Labor Relations Board.

For the reasons discussed below, I conclude that the Petitioner meets the Act's definition of a labor organization. I will therefore direct an election in the appropriate units below.

FACTS

The Employer distributes pharmaceuticals. Bd. Ex. 2.

The Petitioner was formed in or about August 2013. The Petitioner has three members, all of whom are employees of the Employer, including Samuel Marshall, who testified at the hearing. The other two employees were not identified by name. These three employees hold the positions of President (Marshall), vice president, and treasurer. Tr. at 8-9. These three employees decided who would hold those positions. Tr. at 12, 14. The three members have paid dues to the Petitioner, which are being held in an envelope at the present time. Tr. at 15.

³ The Employer signed a factual stipulation regarding the parties' full and correct names, the appropriate units, the Intervenor's labor organization status and commerce. Bd. Ex. 2.

Marshall testified that the Petitioner has held a “handful” of meetings with employees and has had discussions with employees of the Employer about representation. Tr. at 22. Marshall further testified that the Petitioner has a constitution and bylaws, although the Petitioner did not produce these documents or give any details about those documents at the hearing. Tr. at 10, 12. The Petitioner’s constitution was drafted by Marshall. Tr. at 11. Marshall testified without contradiction that the Petitioner exists, at least in part, for the purpose of dealing with employers concerning conditions of work, statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment. Tr. at 24.⁴

DISCUSSION

Section 2(5) of the Act defines a "labor organization" as:

[A]ny 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.

This statutory definition of a labor organization has been interpreted broadly. See, e.g., Electromation, Inc., 309 NLRB 990, 993-4 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). In order to qualify as a "labor organization," the Act requires that (1) employees participate in the organization; and (2) the organization exists, in whole or in part, for the purpose of "dealing with" employers concerning wages, hours, and other terms and conditions of employment. Alto Plastics Mfg. Corp., 136 NLRB 850, 851-52 (1962).⁵ The Board has stated that the intent of the organization, and not what it actually performs, is critical in ascertaining labor organization

⁴ Cerrone Batchelor, an employee of the Employer, also testified about discussions he had with Marshall about the possibility of being represented by another labor organization. I do not find this testimony relevant to the issue of whether the Petitioner satisfies the definition of a labor organization under the Act. Accordingly, I have not relied on Batchelor’s testimony.

⁵ The term "dealing with" in Section 2(5) of the Act has been interpreted to extend beyond simply "bargaining with" an employer. N.L.R.B. v. Cabot Carbon Company, 360 U.S. 203, 210-212 (1959).

status, regardless of the progress of the organization's development. Edward A. Utlaut Memorial Hospital, 249 NLRB 1153, 1160 (1980); Armco, Inc., 271 NLRB 350 (1984). In addition, structural formalities, such as a constitution and by-laws or filing documents with the Department of Labor, are not required to find labor organization status within the meaning of Section 2(5) of the Act. See e.g., Yale New Haven Hospital Police Benevolent Association, 309 NLRB 363 (1992). For example, in Advance Industrial Security, Inc., 225 NLRB 151 (1976), the purposes of the petitioner had not yet come to fruition, it participated in no representational activities and lacked structural formality. The Board nevertheless found labor organization status inasmuch as the petitioner indicated it intended to perform collective bargaining activities and to become formally structured, if certified, to represent employees in an appropriate unit.⁶ Similarly, in American Automobile Association, Wisconsin Division, 242 NLRB 722 (1979), the Board found that a petitioner, which was newly formed, was a labor organization within the meaning of the Act inasmuch as its members met, elected officers and evidenced an intent to bargain with the employer over their wages, hours and other terms and conditions of employment.

In this case, the evidence demonstrates that the Petitioner is a labor organization within the meaning of the Act. The record reveals that employees participate in the Petitioner's organization. Specifically, Petitioner's members have met and have spoken to other employees of the Employer about representation. Although Marshall testified that the Petitioner's members held only a "handful" of meetings, regularly scheduled meetings are not required to find labor

⁶ The Board cited Comet Rice Mills Division Early California Industries, 195 NLRB 671, 674 (1972) (where an employee became the president of an organization which envisioned participation of employees and existed for statutory purposes, the organization was found to be a labor organization within the meaning of Section 2(5) although its purposes never came to fruition) and Butler Manufacturing Co., 167 NLRB 308 (1967) (where a newly formed union, which was not yet representing employees but admitted employees to membership and was formed for the purpose of representing the employees, was found by the Board to be a labor organization within the meaning of Section 2(5) of the Act).

organization status under the Act. See Local Union No. 3, IBEW, AFL-CIO (Genmar Electrical Contracting, Inc.), 332 NLRB 1288 (2000). In addition, the members selected officers for the organization and have paid dues. The Intervenor challenged Marshall's testimony that the Petitioner has a constitution and bylaws on the basis that Marshall failed to produce these documents at the hearing. Such documents, however, are not required for a finding of labor organization status. See Yale New Haven Hospital Police Benevolent Association, 309 NLRB 363, supra.

The record further shows that the Petitioner 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. As stated above, the fact that the Petitioner's purpose has not yet been realized does not bar a finding that the Petitioner is a labor organization within the meaning of the Act. See Advance Industrial Security, Inc., 225 NLRB 151, supra. Accordingly, I find that the Petitioner satisfies the definition of labor organization under Section 2(5) of the Act.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. I find that the rulings made by the Hearing Officer at the hearing are free from prejudicial error and hereby are affirmed.
2. The record indicates that Chem Rx Pharmacy Services, LLC is a domestic corporation, which has been engaged in the distribution of pharmaceuticals, with locations at 750 Park Avenue,⁷ Long Beach, New York and 4041 Hadley Road, Building M, South Plainfield,

⁷ The address in the parties commerce stipulation, which lists the Employer's address as 790 Park Avenue, appears to be incorrect. I hereby correct the Employer's address.

New Jersey. During the past year, which period represents its annual operations generally, the Employer purchased and received at its Long Beach, New York and South Plainfield, New Jersey locations good and materials valued in excess of \$50,000.00 directly from suppliers located outside the States of New York and New Jersey. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I hereby find, that United Food and Commercial Workers, Local 2013, is labor organization as defined in Section 2(5) of the Act. As stated above, I further find that the Petitioner is a labor organization as defined in Section 2(5) of the Act. The Petitioner and Intervenor claim to represent certain employees of the Employer.

4. A 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.

5. The parties stipulated, and I find, that the following employees constitute units appropriate for the purposes of collective bargaining:

All full-time and regular part-time drivers, maintenance, warehouse and production employees employed by the Employer at 750 Park Place, Long Beach, New York, and at 4041 Hadley Road, Building M, South Plainfield, New Jersey, but excluding all pharmacy employees, management employees, clerical employees, confidential employees, guards, and supervisors as defined by the Act

and

All full-time and regular part-time pharmacy employees employed by the Employer at 750 Park Place, Long Beach, New York, and at 4041 Hadley Road, Building M, South Plainfield, New Jersey, but excluding all drivers, maintenance, warehousemen, production employees, management employees, clerical employees,

confidential employees, guards and supervisor as defined by the Act

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by ChemRx Employees Union, United Food and Commercial Workers, Local 2013, or neither. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the units who were employed during the payroll period ending immediately before 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 a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States who are employed in the units may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may 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 hereby directed that within seven days of the date of this Decision, the Employer must submit to the Regional Office election eligibility lists, one for each unit, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). The lists may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the lists available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **November 25, 2013**. No extension of time to file the lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the lists. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted to the Regional Office by electronic filing through the Agency's

website, www.nlr.gov, by mail, or by facsimile transmission at (718) 330-7579. To file the eligibility lists electronically, go to the Agency's website at www.nlr.gov, select "File Case Documents," enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the lists will continue to be on the sending party.

Since the lists will be made available to all parties to the election, please furnish a total of **two** copies of each list, unless the lists are submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

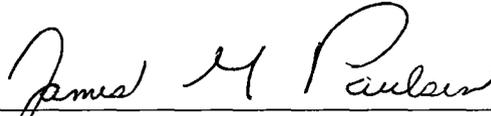
According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least three (3) working days prior to 12:01 a.m. of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 2, 2013**. The

request may be filed electronically through the Agency's website, www.nlr.gov,⁸ but may **not** be filed by facsimile.

Dated at Brooklyn, New York, on this 18th day of November, 2013.

A handwritten signature in cursive script, reading "James G. Paulsen", written over a horizontal line.

James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

⁸ To file the request for review electronically, go to www.nlr.gov, select "File Case Documents," click on the NLRB Case Number, and follow the detailed instructions.