

All-Work, Inc. and Warehouse and Mail Order Employees Union, Local No. 743, I.B. of T., Petitioner. Case 13-RC-12394

October 26, 1971

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND KENNEDY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Melvin L. Gelade. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred, by direction of the Regional Director for Region 13, to the National Labor Relations Board for decision. Briefs have been filed by the Employer and the Petitioner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.¹

Upon the entire record in this case, including the briefs filed by the parties, the Board finds:

1. The Employer is an Illinois corporation engaged in providing its customers with temporary unskilled workers. The parties stipulated that during the past fiscal or calendar year, a representative period, the Employer had a gross volume of business in excess of \$500,000 and did business in excess of \$50,000 with customers which themselves shipped goods or products directly across state lines, although the Employer itself provides no goods or services directly across state lines. We find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

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

3. The Petitioner seeks to represent a unit of all day laborers employed by the Employer at 149 West Chicago Avenue during the period February 3 through March 1, 1971, excluding all office clerical employees, guards, supervisors, and professional

employees as defined in the Act. The Employer contends that no appropriate unit exists for its employees because of the nature of their employment. It appears to base its contention on two general considerations: (1) because the employees are casual they have no community of interest with each other in terms and conditions of employment and (2) the Employer does not have sufficient control over the employment conditions of its employees to enable the parties to engage effectively in collective bargaining.

The Employer has an office at 149 West Chicago Avenue, Chicago, Illinois, from which it operates a referral system for unskilled labor. Those who wish to be supplied with labor call the Employer's office the night before, or on the morning of, the day that such labor is required. The customer's request is noted on a card which shows the customer's name, location, type of work to be done, and any special requests by the customer. A request that a certain laborer be sent or one that a certain laborer not be sent are examples of such requests.

Men desiring to be referred by the Employer to available jobs appear at the Employer's office at 5:30 a.m., Monday through Friday. The manager of the office calls out the requests and those desiring the work volunteer for employment at the jobs offered. In each instance the manager assigns the work to the first individual who responds. If the person assigned the work finds upon further inquiry that he does not wish to do the work he may refuse to accept it.

When a laborer has agreed to an assignment the Employer's manager makes out a form containing the name and location of the customer, type of work to be done, and the name of the laborer referred. The laborer takes this form to the customer and when the workday is ended the customer fills in the number of hours worked and signs it. The laborer then returns to the Employer's office and gives the signed form to the manager. At this time the laborer receives a \$10 draw against his wages if he has worked a full day. At the end of the week the laborer is then entitled to his entire wages for the week less the draw he has received on a daily basis.

The customer has the right to reject a laborer who has been referred and send him home if his work is not satisfactory. The laborer must, however, be paid a minimum of 4 hours' pay after he has reported for work. The customer directs the laborer in the performance of his job and determines such working conditions as breaks and the lunch hours.

The Employer receives a fee from the customer depending on the number of hours worked by the

¹ The Employer moved that the transcript be corrected in certain respects. The Petitioner opposed the motion as to two of the items contained in the motion. We shall grant the motion with respect to those items on which the parties agree but deny it as to the two items on which

they disagree. However, we do not find that these items have a significant bearing on the decision reached herein. We shall also grant the Petitioner's motion that reference to a March 25, 1971, letter in the Employer's brief be stricken since it was not entered in evidence.

laborer but there is no written agreement between the Employer and the customer. From the fee thus received, the Employer pays the laborer his wages, usually \$1.60 to \$1.70 per hour, and pays time and half for work in excess of 8 hours in a single day. The Employer also withholds Federal income tax and the Social Security tax from the laborer's wages and makes workmen's compensation payments. The record also shows that the Employer sometimes provides transportation to the jobsite. If the site is located in the city of Chicago the Employer pays for transportation. If it is in the suburbs the customer pays for transportation. Also, one or two men are paid a small amount of money each week for transporting fellow workers to a job.

The relationship of the laborer to the Employer herein is not greatly different from the relationship of the stevedore to the stevedoring companies. There, as here, the employees are hired from a general labor pool and on a day-to-day basis. The laborer, as does the stevedore, may also perform their services for other employers. Thus the laborer herein may work for other employers engaged in supplying casual laborers to customers just as the stevedore may work for a number of different stevedoring companies. The Board has, in fact, recognized stevedores as "casual laborers" and has held that the casual nature of their employment does not deprive them of their rights as "employees" under the statute.² We think that the laborers employed by the Employer are, for similar reasons, entitled to the protection of the Act.

Nor do we believe that the fact that the Employer does not exercise control over the entire employment relationship is a sufficient reason for failing to grant the laborers their statutory right to engage in collective bargaining. The Employer herein controls the wage rates, the manner in which they are paid, the assignment of work, and, in many cases, the transportation of the laborers to the jobsites. Although the Employer does not actually supervise the work performed it thus has control over some of the most important aspects of the employer-employee relationship. We therefore find that effective and meaningful

collective bargaining could take place between the Employer and the Petitioner and that the laborers, as employees of the Employer, are entitled to such bargaining if they indicate that they desire it.

There is thus no legal obstacle to the establishment of an appropriate unit. As set forth above the Petitioner has requested a unit which, in substance, includes all laborers employed during the period February 3, 1971, through March 1, 1971. We would agree that a unit of all laborers employed by the Employer is appropriate but we believe that it would be improper to exclude employees on the basis of their date of hire.³ We therefore find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All day laborers employed by the Employer at 149 West Chicago Avenue, excluding all office clerical employees, guards, supervisors and professional employees as defined in the Act.⁴

4. There remains the question of eligibility to vote in the election. The Petitioner suggests that any employee whose name has appeared on six or more different pay periods within a 6-month period be eligible to vote. In the alternative the Petitioner suggests that any employee who has worked 3 or more days in the calendar quarter immediately preceding the Decision and Direction of Election should be eligible to vote. The Employer does not take a position with respect to this question.

The data in evidence indicates that a substantial number of laborers worked 7 or more days in each quarter for which data was submitted. In the circumstances of this case, therefore, we believe that any employee who worked 7 days in the 90-day period preceding the issuance of our Decision and Direction of Election herein, and who has worked at least 1 of those days during the 30-day period immediately preceding this Direction of Election, has a substantial and continuing interest in conditions of employment with this Employer; and that the selection of these figures will insure a representative vote.⁵

[Direction of Election⁶ omitted from publication.]

addresses which may be used to communicate with them *Excelsior Underwear Inc.*, 156 NLRB 1236, *NLRB v Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 13 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

² *Tamphon Trading Company*, 88 NLRB 597

³ *Detective Intelligence Service*, 177 NLRB No. 115

⁴ The Employer, at the hearing, moved to dismiss the petition on the ground that there was no current showing of interest. The showing of interest is an administrative matter not litigable in a representation case *O.D. Jennings & Company*, 68 NLRB 516. Moreover, we are administratively satisfied with the Petitioner's showing of interest. The motion to dismiss is therefore denied.

⁵ *Avis Rent-A-Car System, Inc.*, 173 NLRB 1366, 1367

⁶ In order to assure 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