STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ILWU, LOCAL 142, AFL-CIO, Petitioner, and HAWAII JOB CORPS/MANAGEMENT AND TRAINING CORPS, Employer.	CASE NO. 92-2(R) ORDER NO. 945 ORDER DIRECTING ELECTION OF COLLECTIVE BARGAINING REPRESENTATIVE

ORDER DIRECTING ELECTION OF
COLLECTIVE BARGAINING REPRESENTATIVE

On July 24, 1992, Petitioner ILWU, Local 142, AFL-CIO (ILWU) filed a Petition for Determination of Collective Bargaining Unit and Election of Collective Bargaining Representative with the Hawaii Labor Relations Board (Board).

On August 19, 1992, pursuant to Chapter 377, Hawaii Revised Statutes (HRS), the Board conducted a pre-election conference. At said conference, Perry N. Confalone, Esq., Hawaii Job Corps/Management and Training Corps' (Employer or Job Corps) counsel raised a jurisdictional challenge.

On August 28, 1992, a hearing was held to determine whether the Board can or should assert jurisdiction over the Employer in this case. At the hearing on the subject issue, the Employer's Director, Kenneth Dugan, was the sole witness. The parties submitted written memoranda, and based upon the arguments therein, and the Board having heard the testimony of Employer's

witness, and being fully advised as to the premises herein, hereby assumes and asserts its jurisdiction in this case pursuant to Chapter 377, HRS, for the reasons stated below.

The memorandum of ILWU's counsel, Herbert R. Takahashi, Esq., indicates that on June 5, 1992, the ILWU filed a petition with the National Labor Relations Board (NLRB), to represent Job Corps instructors employed on the island of Oahu. On July 20, 1992, Robert H. Miller, the Regional Director of NLRB issued a decision and order declining to assert jurisdiction because the "Employer herein lacks the authority to determine primary terms and conditions of employment and thus the ability to engage in meaningful collective bargaining with a labor organization. Therefore, it could not effectuate the purposes and policies of the Act to assert jurisdiction in this case." The decision of Miller is part of the record before this Board, and we take official notice of it particularly as to the factual background of the Hawaii Job Corps program which contracts with the United States Department of Labor (DOL) to train underprivileged youth in both residential and nonresidential settings in Honolulu and on Maui.

After the NLRB decided to decline jurisdiction over the ILWU petition, the ILWU filed an identical petition with this Board on July 24, 1992, seeking to represent for purposes of collective bargaining the following appropriate unit:

> All full time and regular part time salaried instructors of the employer located at its 7600 Kokohead Park Road, Honolulu, Hawaii location, excluding the center director, program director, education senior instructors, guards and/or watch persons and supervisors as defined by the Act.

The Board finds that the Job Corps herein is an "Employer" as defined under Section 377-1(2), HRS. Further, the Board notes that Section 377-1(3), HRS, defines the term "Employee," inter alia, includes:

> . . . any person, other than an independent contractor, working for another for hire in the state, ... or any individual subject to the jurisdiction of the Federal Railway Labor Act or the National Labor Relations Act, as amended from time to time, provided that the term "employee" includes any individual subject to the jurisdiction of the National Labor Relations Act, as amended from time to time, but over whom the National Labor Relations Board has declined to exercise jurisdiction or has indicated by its decisions and policies that it will not assume jurisdiction.

Section 377-2, HRS, mandates this Board to administer the Hawaii Employment Relations Act, Chapter 377, HRS. The Job Corps instructors on the island of Oahu fall within the definition of "employee" in Section 377-1(3), HRS, because the NLRB has declined to exercise its jurisdiction over them.

The Employer contends that this Board is without jurisdiction to act on ILWU's election petition because federal law pre-empts state labor law in this case. The Employer argues that the NLRB did not decline to assert jurisdiction based upon the effect of a labor dispute on commerce. Rather, the NLRB found that the Employer was engaged in commerce within the meaning of the National Labor Relations Act (NLRA). The NLRB declined to assert jurisdiction on the grounds that the Employer lacked authority to bargain meaningfully and therefore it would not effectuate the purposes of federal labor policy to assert jurisdiction. Employer concludes that because NLRB did not decline jurisdiction on

interstate commerce grounds pursuant to 29 U.S.C. §164(c), this Board is without jurisdiction to determine the present election petition.

Employer's argument raises the question as to whether the NLRB acted under §14(c) of the NLRA, 29 U.S.C. §164(c) (§14[c]), in analyzing the case before this Board under the "employer control" doctrine of Res-Care, Inc., 280 NLRB 670 [122 LRRM 1265] (1986).

This Board is guided by the ruling held by the Massachusetts Supreme Judicial Court in Operation and Maintenance Service, Inc. Westover Job Corps Center v. Labor Relations Commission, 132 LRRM 2634 (1989). In that case, the employer was the Westover Job Corps Center. A representation petition was filed by the union seeking to represent for purposes of collective bargaining certain teachers and guidance counselors employed by the employer at its Job Corps Center. The regional director of the NLRB concluded that because the employer operated its Job Corps Center pursuant to a comprehensive contract with the DOL, the employer "does not possess sufficient control over the employment conditions of its employees to enable it to engage in meaningful collective bargaining." The regional director dismissed the petition after concluding that the NLRB would decline jurisdiction based on the "employer control" doctrine enunciated in Res-Care, Inc., supra.

After the petition was dismissed, the union filed an identical petition with the Massachusetts Labor Relations Commission. The employer moved to dismiss for lack of jurisdiction, asserting that the Labor Commission's jurisdiction is pre-empted by Federal law. The Labor Commission denied the employer's motion,

concluding that the NLRB had declined to assert jurisdiction over the employer and that, pursuant to §14(c)(2) of the NLRA, the Labor Commission concluded that it had jurisdiction to process the petition. The employer then sought injunctive and declaratory relief. A single justice declared that the Labor Commission was precluded from exercising jurisdiction and the Commission appealed from that ruling.

This Board notes that §14(c) of the NLRA was passed by Congress in 1959 in response to the decision in Guss v. Utah Labor Relations Board, 353 U.S. 1 [39 LRRM 2567] (1957), where the United States Supreme Court held that, even if the NLRB declined to exercise jurisdiction in its discretion, State courts and agencies could not exercise jurisdiction over matters placed within the competence of the NLRB. Guss created "a vast no-man's land, subject to regulation by no agency or court." Id. at 10. Section 14(c)(2) provides that federal law should not be deemed to preclude "any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the [NLRB] declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

In Operation and Maintenance Service, Inc., supra, the Massachusetts Supreme Judicial Court stated that if the NLRB acted under §14(c) in declining to exercise jurisdiction over the Union's petition, the Labor Commission has jurisdiction. The Court concluded that in dismissing the petition, the NLRB acted pursuant to §14(c), and therefore, reversed the single justice's ruling. The Court noted that "when the [NLRB] decides whether the exercise

of its jurisdiction is 'warranted', it does far more than just measure the volume of commerce involved. . . . Under Section 14(c)(1), the [NLRB] must make policy decisions about how best to effectuate the purposes of the National Labor laws, decisions informed by its special knowledge and expertise." See, New York Racing Association, Inc. v. National Relations Board, 708 F.2d 46, 54 [113 LRRM 2746] (2d Cir. 1983).

The Massachusetts Court in its ruling relied on the decision held in National Transportation Service Inc., 240 NLRB 565 [100 LRRM 1263] (1979), where the NLRB stated that "[S]ection 14(c)(1) of the [National Labor Relations] Act is the basis of the [NLRB's] discretion to 'decline to assert jurisdiction over any labor dispute'. . .". The NLRB concluded that by using only the employer control test, the NLRB could "better exercise the discretionary jurisdiction allowed us under Section 14 of the [National Labor Relations] Act." Id. at 566. Therefore, the Massachusetts Court in Operation and Maintenance Service, Inc., supra, concluded that the NLRB has determined that it acts pursuant to §14(c)(1) in declining jurisdiction when it analyzes the issues under the employer control test. Accordingly, the Massachusetts Labor Relations Commission is allowed under §14(c)(2) to assert jurisdiction over the dispute.

In its argument before the Massachusetts Court, employer's counsel relying on National Labor Relations Board v. Committee of Interns and Residents, 566 F.2d 810 [96 LRRM 2342] (2d Cir. 1977) cert. denied, 435 U.S. 904 (1978), argued that the Labor Commission lacks jurisdiction over the Union's representation

petition. The Court noted that the NLRB exercised its jurisdiction over the dispute. In the Committee of Interns case, federal law pre-empted State action because the NLRB, having asserted jurisdiction, made a substantive choice as to labor policy--refusal to certify interns and resident because they are more like graduate students rather than "employees".

Employer also contends that NLRB has implicitly repudiated the idea that it is acting under §14(c)(1) by failing to mention that specific statute in Res-Care Inc., supra. The Court in response to that argument ruled that "[i]f the NLRB has done so, it is the employer's burden so to demonstrate. In the absence of any clear indication from the NLRB that it has abandoned its former position, the commission is justified under §14(c)(2) in assuming jurisdiction." Id. at 132 LRRM, p. 2637.

The case before this Board poses the identical issue that was addressed by the Court in Operation and Maintenance Service, Inc., supra. We are in accord with the conclusion that the NLRB was acting pursuant to §14(c)(1) in declining jurisdiction when it analyzed the issues under the employer control test. The record before this Board does not clearly indicate that federal law completely pre-empted State action. The NLRB's decision in this case did not make a substantive choice as to federal labor policy applicable to Job Corps employees.

The NLRB has "a distinct and profound exercise of discretion." New York Racing Association, supra. This Board has no such discretionary authority. In Armbruster v. Nip, 5 Haw. App. 37, (1984), the Hawaii Appellate Court ruled that the Hawaii Labor

Relations Board's construction of the law was "palpably erroneous" when it determined that it had no jurisdiction over the subject unfair law practice complaints specified under Chapter 377, HRS, after the NLRB indicated that it would not assume jurisdiction over the East-West Center and its employees as defined in Section 377-1, HRS.

This Board is mandated to assert jurisdiction in this case based upon the clear meaning of the statute defining the term "employee" in Section 377-1, HRS, and the decision in the Armbruster case. We also accept the conclusion that NLRB has determined that it acts pursuant to §14(c)(1) when it refrains from exercising jurisdiction under the employer control test. This Board is therefore allowed under §14(c)(2), to assert jurisdiction over the Employer and Job Corps employees in this case. See, the Guss case quoting §14(c)(2) as noted in this Order at p. 5, supra. This Board realizes that collective bargaining in this case might be more difficult to achieve, however, to the extent that the parties are able to achieve a reasonable degree of meaningful bargaining, they are directed to do so.

In view of the foregoing rulings, and pursuant to Administrative Rules Section 12-42-23(c), based upon the requisite finding of a valid showing of interest of thirty percent or more of the employees in the unit and having asserted jurisdiction in this case, the Board hereby directs that an election be conducted according to the terms and conditions set forth below.

DIRECTION OF ELECTION

1. SECRET BALLOT ELECTION. An election by secret ballot shall be conducted by a Board representative among eligible employees to determine whether or not such employees desire to be represented by the Union. The election shall be held at a mutually agreed upon time and place as indicated in the Notice of Election which shall be issued by the Board.

2. BARGAINING UNIT. The Employer and the Union agree that the appropriate bargaining unit shall consist of the following:

INCLUDED: All full-time and regular part-time salaried instructors of the employer located at its 7600 Kokohead Park Road, Honolulu, Hawaii location.

EXCLUDED: The Center director, program director, education senior instructors, guards and/or watch persons and supervisors as defined by the Act.

3. ELIGIBLE VOTERS. The eligible voters shall be those regular employees included within the unit described above who appear on the payroll of the Employer as of June 15, 1993.

Employees who did not work during certain payroll periods because they were ill or on vacation or temporarily laid off and employees in the armed forces of the United States who present themselves in person at the polls are eligible. However, employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of election are ineligible.

A list of eligible voters shall be submitted to the Board by the Employer by July 2, 1993 and approved by the Union. The list will be attached to the Notice of Election as Exhibit "A".

4. NOTICE OF ELECTION. The Board shall prepare and issue a Notice of Election. The Employer, upon the request of, and at a time designated by the Board, shall post copies of said Notice of Election at such places on the premises of the Employer so as to afford all interested persons notice of the pending election.

5. OBSERVERS. The Employer and the Union shall be entitled to station an equal number of authorized observers selected from among the nonsupervisory employees of the Employer in the designated polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. The Board representative may have other duly authorized representatives present at the time of voting to assist in any manner.

6. HANDING OUT BALLOTS. Each voter shall be handed a ballot by the Board representative in the presence of the observers. The representative shall be authorized to explain to any voter making inquiry regarding the method of marking the ballot. The services of an interpreter may be employed if necessary. Any further information requested by any voter shall be given only by the representative and only after agreement of both observers.

7. MARKING OF BALLOTS. Each ballot shall be marked by pencil or pen in only one of the squares shown on the ballot. Ballots not marked or improperly marked or ballots signed shall be rejected.

8. CHALLENGES AND REPORTS THEREON. All challenged ballots shall be counted separately and the reason for the

challenge recorded in a manner prescribed by the Board representative. If challenged ballots are determinative of the election, the Board shall investigate the challenge and make a finding with respect thereto, which finding shall be binding upon all parties.

9. DETERMINATION OF ELECTION. A majority of the valid ballots cast shall determine the question of representation for the employees of the Employer who are included in the bargaining unit hereinbefore described.

Immediately upon the conclusion of the election, the votes shall be counted and tabulated by the Board representative in the presence of the observers, and the representative shall report to the Employer and the Union the results of the election by furnishing a Tally of Ballots.

Thereafter, the Board shall certify the results of the election in accordance with the provisions of the Hawaii Labor Relations Act.

DATED: Honolulu, Hawaii, June 25, 1993.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

GERALD K. MACHIDA, Board Member

RUSSELL T. HIGA, Board Member

ILWU, LOCAL 142, AFL-CIO and HAWAII JOB CORPS/MANAGEMENT AND TRAINING CORPS; CASE NO. 92-2(R)
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