Salt & Pepper Nursery School & Kindergarten No. 2 *and* Local 79, Service Employees International Union, AFL–CIO, Petitioner. Case 7–RC–13039

March 8, 1976

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Kenneth C. Hartop on June 13, 1975, at Detroit, Michigan. 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, the case was transferred to the Board for decision.

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

Upon the entire record in this case, the Board finds:

The Employer is a sole proprietorship which owns and operates two day care centers in Detroit, Michigan. During the last fiscal year, school no. 1 had approximately 10 part-time and approximately 63 full-time students, and school no. 2 had approximately 5 part-time and approximately 80 full-time students. The children's ages range from 2-1/2 to 6 years. The schools are geared toward the educational aspects of caring for children. The students are introduced to numbers, the alphabet, and foreign languages. They are given instructions in swimming, ballet, and gymnastics, and are taken on field trips. Although both schools offer kindergarten classes, both appear also to be primarily custodial in nature and geared to the taking care of children of working parents. Thus, the schools are open from 6:30 in the morning until 5:30 in the evening, and they provide lunches and snacks.

Although many of the students are taken to and from the schools by their parents, the Employer owns three vans and provides pickup services for some of the students. All of the students are Michigan residents and come primarily from the Wayne County area, and all pay tuition. Full-time students (those remaining at the school all day) pay $30 per week and part-time students pay approximately $22.50 per week.

The Employer does not receive any government aid or funds, except some tuition payments which are made by the State of Michigan Aid to Dependent Children (ADC) program. Under this program, in those instances where parents of youngsters are receiving public assistance or are in a training program, the Aid to Dependent Children program permits the parents to place the youngsters in school and makes the tuition payments which the parents would otherwise make. There are, however, no government controls or restrictions placed on how the Employer is to use this money.

The Employer's fiscal year is from September 1 through August 31. During the period in question, the Employer's revenue was $90,000 from the operation of school no. 1, and about one-eighth of this amount came from ADC tuition payments. At school no. 2, which was in operation for only part of the year, gross revenue amounted to $50,000, about three-eighths of which came from ADC tuition payments. At the time of the hearing, the Employer stated that it was going ahead with plans to open two new schools by the fall of 1975, each of which would have a capacity of 60 students. Some students would be transferred from schools 1 and 2 to relieve overcrowding, and some new pupils would be accepted. However, it had no way of knowing what the anticipated revenue would be from the new schools. Inasmuch as total enrollment was uncertain, the Employer had no way of estimating its total anticipated revenue for 1975.

The record contains no evidence of purchases directly from suppliers outside the State of Michigan. With regard to in-state purchases, the testimony consisted only of vague approximations. In his closing argument, however, the Employer's counsel appears to have conceded that in-state purchases amounted to at least $13,000 (oil and gas for heating the building, office supplies, toys, etc).

The ownership of the Employer consists of David Woods and his wife, Doris Woods. Mrs. Woods testified that David Woods is the president of both schools. She is the director for both schools and she has a person who assists her in directing both of them. It appears that the parties agree that this trio constitutes the supervision as far as both schools are concerned.

The staff of school no. 2 consists of approximately 4 teachers, 10 teacher aides, a general office person, a cook, and a driver. All staff persons are paid on an hourly basis. Although the record shows that teacher aides start at $2 per hour, neither party presented any evidence as to the salaries drawn by the other categories of employees.

At the hearing, the Employer took the position that the Board does not have jurisdiction because the Employer is not engaged in interstate commerce.

The operations of this Employer appear in many instances similar to those of the employer in *Young World, Inc.*, 216 NLRB No. 97 (1975). In that case the employer operated "developmental day care" centers which combined custodial care and learning

experiences. Each center employed teachers and aides and was open before and after normal school hours in order to accommodate the children of working parents. The employer operated a bus system, unconnected with the public school bus service, to transport children. Each center had a cook, as snacks and lunches were provided, a bus driver, a secretary-receptionist, and a director.

In that case the Board found that the employer's operations were distinguishable from those of an educational institution and the record in that case provided no basis for finding that the Young World operations constituted an adjunct to any local public school system. The same is true in this case. In asserting jurisdiction, the Board stated that it was not, at that time, prepared to establish a jurisdictional standard for day care centers as a class. However, in finding that Young World was engaged in commerce to the extent that a labor dispute in which it was involved would substantially affect interstate commerce, the Board stated that it was satisfied with the commerce data in that case which showed the following:

Young World served approximately 1,500 children, including some from out of State. For the fiscal year, Young World's projected revenues from all sources totaled $1,037,675, and the out-of-state purchases exceeded $50,000. Thus, while disagreeing with the Regional Director's holding that the $1 million standard for educational institutions was applicable to Young World's operations, the Board in asserting jurisdiction stated that Young World met every discretionary standard the Board had applied to that date.

Although we have not set a jurisdictional standard for day care centers as a class, we shall for the present assert jurisdiction over such operations if they have a gross annual income of $250,000 or more. The day care industry is expanding markedly and undergoing substantial and rapid change. Concerning the HEW figures alluded to by our dissenting colleague, they are somewhat tentative and subject to revision or reinterpretation as a result of a much more exhaustive examination of this industry currently being done by HEW with an expected completion date about 9 months hence. It is for these reasons we have stated that the $250,000 standard is being established "for the present"; we do this in the light of our present knowledge of this and similar industries, and with full recognition that additional knowledge could require a different standard in the future. We shall of course reexamine that figure as more data relative to the operation of day care centers becomes available. Accordingly, inasmuch as the gross revenues of the Employer covered by this petition amount to only $140,000, we shall dismiss the instant petition.

ORDER

It is hereby ordered that the petition in Case 7-RC-13039, filed by Local 79, Service Employees International Union, AFL-CIO, be, and it hereby is, dismissed.

MEMBER FANNING, dissenting:

My colleagues dismiss this petition seeking to represent the employees of an employer operating two day care centers with a gross annual revenue of at least $140,000.[1] In so doing, they announce a "tentative" jurisdiction standard of $250,000 for day care centers as a class. I consider this dollar amount far too high to be meaningful in this industry. Why my colleagues adopt it, even tentatively, does not appear. They make no attempt to describe the basis for selecting this new standard. Obviously the selection is enough to dismiss this case.

Informal statistics assembled by the Department of Health, Education and Welfare with respect to the number and size of such centers have recently been made available to this Board. Originally covering 50 metropolitan areas of the United States, the data coverage was ultimately reduced by HEW to approximately 600 day care centers in 14 cities—cities located from coast to coast and from Washington State to Florida.[2] On that data base, a jursidictional standard of $100,000—which in my view is an appropriate figure—would include 25 to 35 percent of these 600 representative day care centers. My colleagues, by using $250,000, apparently wish to assert jurisdiction over as small a part of the industry as possible—apparently less than two percent.

At an average cost of $100 per month per child, which is considered by HEW to be a "rough" average estimate of cost, day care centers in the study group caring for at least 80 children would probably qualify for assertion of jurisdiction under a $100,000 gross annual revenue standard. At $250,000, the number of children involved would be more than 200 per employer.[3]

Basically my reason for urging the selection of a

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[1] The gross revenue for one of the schools was derived from less than a year's operation. Two additional schools are planned by the Employer

[2] The study actually involved 603 day care centers, comprising approximately 25 percent of such centers in the 14 cities Atlanta, Chicago, Detroit, Los Angeles, New Orleans, Seattle, Dallas, Washington, D C., Houston, Jacksonville, Memphis, Minneapolis, New York, and Philadelphia The number of day care centers in the country as a whole is currently estimated as 25,000. Such centers are to be distinguished from the more than 60,000 "family day care homes" which individually handle a maximum of 6 children

[3] The number of children cared for by this Detroit employer is, according to the record, 143 staying the full day and 15 staying part of the day. The full-day rate is $30 per week.

$100,000 standard has to do with that figure being the approved standard for nursing homes.[4] The two industries—day care centers and nursing homes—have some comparability, providing as they do custodial care necessitated by age and the unavailability of family attention for the recipient of the care. Another consideration of importance is the reliance of working mothers on the availability of child care centers, with consequent impact on the functioning of interstate commerce. The full Board, in reaching the $100,000 figure for nursing homes, rejected the $250,000 minimum because the latter amount would reach "a segment so small as to have little constructive impact on the labor relations of the industry as a whole." Also in the *University Nursing Home* case, the Board specifically noted that a $100,000 standard would provide "effective coverage over a significant portion of the nursing home industry to a substantially like extent" with that of the $250,000 standard then being announced for the proprietary hospital industry.[5]

In my view this Board, when extending jurisdiction, should continue to do so based upon realistic standards, meaningfully stated.

I would assert jurisdiction over this Employer as a day care center having annual gross income of at least $100,000, a standard which, based upon information currently available, may be expected to have a constructive impact on the labor relations of the day care center industry as a whole. To set the standard too high based on available knowledge, and wait for additional knowledge, belies the apparent intent of my colleagues to extend the benefits of bargaining to employees in this industry. My colleagues have placed the cart before the horse.

[4] *University Nursing Homes, Inc*, 168 NLRB 263 (1967).

[5] *Butte Medical Properties, d/b/a Medical Center Hospital*, 168 NLRB 266 (1967).