

**Developmental Disabilities Services Organization, d/b/a the Alan Short Center and the Short Center and Pro/Art Federation of Teachers, AFT/CFT, AFL-CIO, Local 4252. Case 20-CA-17458**

26 August 1983

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND ZIMMERMAN

Upon a charge filed on 12 October 1982 by Pro/Art Federation of Teachers, AFT/CFT, AFL-CIO, Local 4252, herein called the Union, and duly served on Developmental Disabilities Services Organization, d/b/a The Alan Short Center and The Short Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint on 5 November 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 25 June 1982 following a Board election in Case 20-RC-15496, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about 28 September 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 17 November 1982 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 9 December 1982 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 29 December 1982 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.<sup>1</sup>

<sup>1</sup> By Order and Notice To Show Cause dated 6 July 1983, a copy of which is attached as Appendix B to this Decision and Order, the Board found that certain communications received by the Board from Alan Short and Mary Short were unauthorized communications, within the definition of Sec. 102.126 of the Board's Rules and Regulations. The par-

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

Upon the entire record in this proceeding,<sup>2</sup> the Board makes the following:

### Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits that it has refused to bargain with the Union, but denies the validity of the Board's certification of the Union on the ground that its commerce operations have not been shown to meet the Board's discretionary jurisdictional standards for educational institutions.<sup>3</sup> Counsel for the General Counsel contends that Respondent is raising issues which were considered and resolved in the representation case, and this it may not do. We agree.

ties to the proceeding have been afforded an opportunity to comment upon these communications, which have been placed in the record of this proceeding. A response has been received from the Union dated 20 July 1983, which has been considered by the Board.

Pursuant to the Notice To Show Cause referred to above, responses were received from Alan Short and Mary Short as to the reasons why the should not be found to have made unauthorized communications under Sec. 102.126 of the Board's Rules and Regulations, and should not be subject to the penalties provided for in Sec. 102.133 of those Rules and Regulations. Alan Short alleges that he is not an "interested person" under Sec. 102.126, but otherwise provides no response to the Notice To Show Cause. Alan Short does not explain the basis for this claim. We find that he is a "person" as defined by Sec. 2(1) of the Act, and that his proffer of an unauthorized communication makes him an "interested person" within the meaning of Sec. 102.126. We note that the restrictions of this section are not limited to parties, as defined in Sec. 102.8 of the Board's Rules and Regulations. No issue of fact appearing as to Alan Short's status as an interested person, and he having raised no other issues in response to the Notice To Show Cause, his request for a hearing concerning this matter is denied.

Mary Short submitted a response to the Notice To Show Cause dated 13 July 1983. That response does not contest whether the communications were made, or the applicability of the Board's Rules prohibiting such communications. Rather, it urges that no penalties be imposed upon Mary Short because she was not aware of the distinctions between a representation case under Sec. 9 of the Act and an unfair labor practice proceeding under Sec. 10 of the Act, or the prohibition in the latter such cases against such communications.

In consideration of the submissions of the parties, of Alan Short, and of Mary Short, the Board, pursuant to Sec. 102.133 of its Rules and Regulations, hereby censures Alan Short and Mary Short for engaging in unauthorized communications as prohibited by Sec. 102.126 of the Board's Rules and Regulations. To the extent the Union's submission requests further sanctions for such communications, it is hereby denied.

<sup>2</sup> Official notice is taken of the record in the representation proceeding, Case 20-RC-15496, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>3</sup> Respondent also contends that "special circumstances" warrant reopening the record for reconsideration by the Board, but it appears that Respondent is merely referring thereby to legal or policy arguments raised and considered in the representation proceeding; we find that no special circumstances warranting relitigation or reconsideration are present here. Respondent further contends that issues of fact remain, but it does not specify what those issues are, and none appear.

Review of the entire record herein, including the record in Case 20-RC-15496, discloses that following a representation hearing, the Regional Director for Region 20 issued a Decision and Direction of Election on 20 May 1982 in which he found that Respondent was a health care institution within the meaning of Section 2(14) of the Act, and met the Board's discretionary jurisdictional standards for such institutions. He further found that a unit of all instructors at Respondent's Sacramento and Stockton, California, locations was an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. By telegraphic order dated 17 June 1982 the Board denied Respondent's request for review. Thereafter, an election was conducted on 17 June 1982 pursuant to the Regional Director's Decision and Direction of Election, which the Union won.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>4</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Developmental Disabilities Services Organization, d/b/a The Alan Short Center and The Short Center, is a California nonprofit corporation with offices and places of business in Sacramento and Stockton, California, where it is engaged in the operation of training and rehabilitation centers for developmentally disabled adults. In the course and conduct of its operations, Respondent annually purchases and receives goods and services valued in excess of \$5,000, which originate from outside the State of California. In addition, Respondent annually derives gross revenues in excess of \$250,000 per

<sup>4</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

year, and thus Respondent's operations meet the Board's jurisdictional standards for health care institutions.<sup>5</sup>

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

##### II. THE LABOR ORGANIZATION INVOLVED

Pro/Art Federation of Teachers, AFT/CFT, AFL-CIO, Local 4252, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All instructors at the Respondent's Sacramento and Stockton, California, locations; excluding all other employees, interns, management and confidential employees, guards and supervisors as defined in the Act.

###### 2. The certification

On 17 June 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 25 June 1982 and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about 29 June 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 28 September 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive repre-

<sup>5</sup> *East Oakland Community Health Alliance*, 218 NLRB 1270 (1975).

sentative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 28 September 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Developmental Disabilities Services Organization, d/b/a The Alan Short Center and The Short Center, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Pro/Art Federation of Teachers, AFT/CFT, AFL-CIO, Local 4252, is a labor organization within the meaning of Section 2(5) of the Act.

3. All instructors at the Respondent's Sacramento and Stockton, California, locations; excluding all other employees, interns, management and confidential employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 25 June 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 28 September 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Developmental Disabilities Services Organization, d/b/a The Alan Short Center and The Short Center, Sacramento and Stockton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Pro/Art Federation of Teachers, AFT/CFT, AFL-CIO, Local 4252, as the exclusive bargaining representative of its employees in the following appropriate unit:

All instructors at the Respondent's Sacramento and Stockton, California, locations; excluding all other employees, interns, management and confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Sacramento and Stockton, California, locations copies of the attached notice marked "Appendix A."<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

CHAIRMAN DOTSON, dissenting:

I would return to the rule explicated in *Ming Quong Children's Center*, 210 NLRB 899 (1974), and *Cornell University*, 183 NLRB 329 (1970), that the Board will not exercise jurisdiction over non-profit charitable institutions except where it finds that a particular class of such institutions has a "massive impact on interstate commerce."<sup>7</sup> The Board's jurisdictional rule announced in *St. Aloysius Home*, 224 NLRB 1344 (1976), was not based on any evidence of the impact on interstate commerce of operations such as the Employer's in this case, and the Board has yet to consider evidence which could establish "massive impact." Therefore, I would exercise the Board's discretion under Sec-

<sup>6</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>7</sup> See also the dissenting opinions of then Chairman Murphy and then Member Penello in *Aloysius Home*, 224 NLRB 1344, 1346 (1976), and of then Member Penello in *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1147 (1979), enforcement denied 653 F.2d 206 (5th Cir. 1981), vacated 679 F.2d 379 (1982), *enfd.* 696 F.2d 399 (1983).

tion 14(c)(1) to decline jurisdiction over this Employer.<sup>8</sup>

<sup>8</sup> In ordinary circumstances, I would not permit issues resolved in representation proceedings to be relitigated in a subsequent unfair labor practice proceeding. However, the issue here is jurisdictional, and the Board may determine at any stage of the proceeding not to exercise its jurisdiction.

## APPENDIX A

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Pro/Art Federation of Teachers, AFT/CFT, AFL-CIO, Local 4252, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All instructors at the Employer's Sacramento and Stockton, California, locations; excluding all other employees, interns, management and confidential employees, guards and supervisors as defined in the Act.

DEVELOPMENTAL DISABILITIES  
SERVICES ORGANIZATION, D/B/A  
ALAN SHORT CENTER AND THE  
SHORT CENTER

## APPENDIX B

### ORDER AND NOTICE TO SHOW CAUSE

On 20 December 1982 Counsel for the General Counsel filed a Motion for Summary Judgment in the above-captioned case. On 29 December 1982 the Board issued an Order Transferring Proceeding to the Board and Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On 10 January 1983, Respondent filed Opposition to General Counsel's Summary Judgment Motion and Memorandum in Support thereof.

On 3 May 1983 Alan Short, founder of Respondent, sent a letter to NLRB Chairman Donald L. Dotson in which he recounts the circumstances which led to Respondent's founding, challenges the Regional Director's decision in the underlying representation case (20-RC-15496), and requests the Chairman to "review this decision that puts our students in the health care classifications." Mr. Short's letter also asked that the Chairman read attached letters from various organizations "that strongly opposes this unfortunate regional decision." By letter dated 10 May, Mary Short, Respondent's President and Executive Director, wrote to Chairman Dotson and the other Board Members requesting that they "read the attached letter" from David B. Swoap, Secretary, Health and Welfare Agency of the State of California. Swoap's letter, which was in response to an earlier letter from Mary Short, disputes the Regional Director's decision to classify Respondent as a health care institution and expresses Swoap's hope that the "NLRB reconsiders its initial decision and classifies your centers appropriately." As noted above, Mary Short's letter was sent to all the Board Members. However, neither Alan Short's nor Mary Short's letter was served on the other parties to this proceeding.

Section 102.126 of the Board's Rules and Regulations, which deal with "unauthorized communications," provides that "no interested person outside this agency shall, in an on-the-record proceeding of the types defined in Section 102.128, make . . . any prohibited *ex parte* communication . . . relevant to the merits of the proceeding."<sup>1</sup> Section 102.132 of the Rules and Regulations,

<sup>1</sup> Section 102.128(e) extends the prohibition of Section 102.126 to "an unfair labor practice proceeding" and to communications to "members of the Board."

which deals with reporting of prohibited communications and penalties, provides that copies of any prohibited communication shall be "placed on the public record of the proceeding" and that the Executive Secretary, if the proceeding is pending before the Board, shall serve copies of all such materials "on all other parties to the proceeding and on the attorneys of record for the parties."<sup>2</sup>

Having duly considered the matter, the Board is of the opinion that the letters from Alan Short and Mary Short are prohibited *ex parte* communications within the meaning of Section 102.126 of the Board's Rules and Regulations. Accordingly,

IT IS HEREBY ORDERED that copies of said letters be served herewith on the other parties and that they be placed on the public record of this proceeding.<sup>3</sup>

NOTICE IS HEREBY GIVEN that Respondent, Alan Short and Mary Short, show cause, in writing, filed with the Board on or before 18 July 1983, (with affidavit of service on the parties to this proceeding), why the Board should not invoke the penalties provided under Section 102.133 of the Rules and Regulations.<sup>4</sup>

By direction the Board: Joseph E. Moore Associate Executive Secretary.

<sup>2</sup> Thereafter, within ten days after the mailing of such copies, any party may file with the Executive Secretary (with service on the other parties) a "statement setting forth facts or contentions to reflect those contained in the prohibited communication."

<sup>3</sup> Responses, if any, to the letters from Alan Short and Mary Short are due in Washington on or before 18 July 1983.

<sup>4</sup> Section 102.133 provides that, upon notice and hearing, the Board may "censure, suspend, or revoke the privilege of practice before the agency of any person who knowingly or willfully makes . . . a prohibited *ex parte* communication."