

**Goodwill Industries of Tidewater, Inc. and Public Service Employees Local Union 572, Laborers' International Union of North America, AFL-CIO, Petitioner.** Case 5-RC-13462

August 27, 1991

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On September 6, 1990, the Regional Director for Region 5 issued a Decision and Direction of Election in the above-entitled proceeding in which he asserted jurisdiction over the Employer and directed an election be held in the petitioned-for unit.<sup>1</sup> Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision contending, inter alia, that the Regional Director erred by asserting jurisdiction over it and by finding that the Employer's handicapped "clients" were employees within the meaning of the Act. By order dated October 4, 1990, the Board granted the Employer's request for review.<sup>2</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in this case and makes the following findings.

The Employer is a nonprofit, charitable corporation with a principal office and place of business in Norfolk, Virginia. Its purpose is to provide rehabilitation training, work experience, and placement to handicapped individuals. The Employer's primary operation is a sheltered workshop program in which donated clothing and goods are reconditioned or reassembled for sale in its retail store. Its operating income is derived primarily from the sheltered workshop program.

Another part of the Employer's rehabilitation program—and the only part involved in this proceeding involves a contract with the United States Navy to provide janitorial services at the Little Creek Amphibious Base in Norfolk, Virginia. Under this contract, awarded to the Employer in 1988 pursuant to the Wagner-

O'Day Act,<sup>3</sup> the Employer operates a janitorial skills training program and provides janitorial services to the entire base. Although the Employer states that it has lost money on this contract, the record shows that it has derived gross revenues in excess of \$250,000 during the past 12 months and has paid wages to both handicapped and nonhandicapped individuals at Little Creek. In its janitorial skills training program, the Employer employs 7 supervisors, 2 supervisor/trainers and approximately 44 janitorial employees, including 27 handicapped and 17 nonhandicapped individuals.<sup>4</sup>

The Employer contends that the Board should decline to assert jurisdiction because its function is purely one of rehabilitating its clients and preparing them for work in private industry. It further contends that this case is factually similar to *Goodwill Industries of Southern California*, 231 NLRB 536 (1977), and that the impact of an adverse ruling here would be no less severe than in that case on the relationship between its handicapped clients and itself.

We find no merit in the Employer's contention insofar as it relies on *Goodwill Industries of Southern California*. In *Goodwill Industries of Denver*, 304 NLRB 764, issued today, the Board has overruled *Goodwill Industries of Southern California* to the extent that it might be read as indicating that an employer's worthy rehabilitative purpose is a basis for declining jurisdiction, and disavowed any construction of that decision as holding that dismissal of a petition on that ground would be applicable even if the unit sought included nonhandicapped employees. Further, the record shows that the Employer's contract with the Navy grosses over \$250,000 in annual revenues. That fact alone suffices to establish the Board's statutory and discretionary jurisdiction over the Employer on the basis that the Employer's operations at the Little Creek Amphibious Base in Norfolk, Virginia, exert a substantial impact on the national defense. *Ready Mixed Concrete Materials*, 122 NLRB 318 (1958). See also *Castle Instant Maintenance/Mail*, 256 NLRB 130, 131 (1981).

The remaining question is whether the individuals employed by the Employer at Little Creek are employees within the meaning of Section 2(3) of the Act.<sup>5</sup> In

<sup>1</sup> All cleaners, waxers, buffers, trainees and strippers employed by the Employer at its Little Creek Amphibious Base, Norfolk, Virginia location, but excluding office clerical employees, guards and supervisors as defined in the Act.

<sup>2</sup> The Employer's request for stay of the election was denied. An election was held and the ballots were impounded pending this Decision on Review.

By letter dated May 2, 1991, the Laborers' International Union of North America urged the Board to affirm the Regional Director's decision to assert jurisdiction over the Employer, with additional supporting rationale. We have not considered this letter in reaching our decision as it represents an untimely filing by a nonparty.

<sup>3</sup> 41 U.S.C. §§ 46-48 (also known as the Javits Wagner-O'Day Act). Under that Act, Federal Government contracts are awarded to nonprofit organizations through noncompetitive bidding.

<sup>4</sup> Since the inception of this contract, the Employer has employed approximately 300 individuals. Of the current work force, approximately 64 percent are handicapped individuals. The Employer is required to have a minimum of 75 percent handicapped individuals, under the Wagner-O'Day program.

<sup>5</sup> This is really the issue that differentiates our decision in this case and *Goodwill Industries of Denver*, supra, from *Goodwill Industries of Southern California*, supra. In the latter case, the Board did not decide whether the clients were employees under the Act but simply refused to assert jurisdiction over the clients, for fear of the collective-bargaining process intruding on the clients' unique relationship with the employer. Here, and in *Goodwill Industries of Denver*, we rest our determination to include or exclude clients in any unit found appropriate solely on whether they qualify as employees under the Act.

making this determination, the Board looks at the employer's relationship with these individuals. When the relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found. When the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions, the Board has indicated that it will not find statutory employee status. Compare *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1216-1218 (1987), enf. denied 851 F.2d 180 (8th Cir. 1988); and *Cincinnati Assn. for the Blind*, 235 NLRB 1448-1449 (1978), with *Goodwill Industries of Denver*, supra.

In concluding that all the persons employed in the unit are statutory employees, the Regional Director relied on evidence that they all were assigned to the various tasks which the Employer is required to perform at Little Creek and on his finding that no significant differences exist in supervision, hours, and discipline. Thus, he found that all the employees work closely together, share substantially common wages, have the same benefits, have similar working hours, share common supervision, and are subject to the same work rules. Our reversal of the Regional Director rests on our findings, described below, that significant differences do exist in supervision, discipline, production expectations, support, and other areas to an extent that the relationship between the Employer and the clients is primarily rehabilitative and that working conditions for the clients are not typical of the private sector.

The Employer's clients primarily come from referrals by the Virginia Department of Rehabilitation Services (DRS).<sup>6</sup> A representative of DRS testified that DRS makes referrals of disabled persons "who need assistance and support" to find a job, and that DRS contracts with the Employer to "provide training for our clients" for eventual placement in competitive employment. The DRS and the Employer negotiate individualized contracts providing for client training in a wide range of janitorial skills. The training period varies depending on the individual client's needs and abilities.

The on-the-job training for clients includes general office cleaning, cleaning of restrooms, supplying soap and bathroom tissue, cleaning windows, and stripping, waxing, and buffing floors. Although this part of the clients' training emphasizes skills used on the particular job being performed under the Employer's contract

<sup>6</sup>Other referrals have been by private insurance companies who have referred persons involved in accidents to prepare them for a return to the work force. Also, other individuals with documented disabilities have been admitted for training.

with the Navy, these skills are readily transferrable to private competitive employment in the area.<sup>7</sup>

The clients work at their own pace and are not subject to production quotas or discipline for insufficient production.<sup>8</sup> Although they are subject to the same work rules as the nonhandicapped employees, the standard for discipline is fundamentally different. Thus, the emphasis is on counseling the clients about work problems and discipline is imposed only in extreme cases. The emphasis on counseling also is reflected in the clients' supervision: in addition to a supervisor, the clients have a trainer who works with them on their training program and monitors their progress. Furthermore, accommodations are made in the clients' working hours for their medication and therapy.

The clients' on-the-job training is supplemented by a work adjustment support program that emphasizes appropriate behavior in the workplace and socialization skills. This program is not provided for nonhandicapped employees and is often administered outside work hours. It includes teaching clients how to catch the bus to get to work on time and how to punch the timeclock, "lots of one-on-one support on the job," and "staffing" sessions at which problems experienced by the clients in the course of their job training are gone over with them, their referring agencies, and their supervisors and trainers, among others, and at which modifications in their training are made. Although this supplemental training is responsive to particular problems arising out of the clients' participation in the Employer's janitorial services program, many aspects of such training have general application beyond the program to the time when the clients become employees of other employers. Thus, it is clear that the training was designed to prepare the clients for entry into the private work sector, rather than for further employment with the Employer.

The record also shows that long-term employment is not contemplated for the clients; rather, the objective is to prepare each client for private competitive jobs.<sup>9</sup> To achieve this objective the Employer employs a full-time job placement counselor to obtain information on,

<sup>7</sup>The record indicates that a training program for janitorial services for the clients was selected because janitorial work is readily available in the resort areas of Norfolk and Virginia Beach.

<sup>8</sup>This lack of emphasis on production is in marked contrast to *Arkansas Lighthouse for the Blind*, supra. There, the clients received 30 days of on-the-job training but were retained after that period only if their production was sufficient. To ensure such production by the clients in that case, the respondent used a variety of techniques including what witnesses described as "pressure to produce." Similarly, there was an emphasis on productivity in *Cincinnati Assn. for the Blind*, supra, and in *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979).

<sup>9</sup>Consistent with this objective, the DRS pays one-half of the clients' wages during the training period; the rest is paid by the Employer. The latter, however, becomes fully responsible for the clients' wages if they stay on after the training is completed.

and make arrangements for, the placement of clients in private employment. Although there is no showing, on the record here, that clients are forced to leave at the end of the training period, there also is no showing that clients are retained to the exclusion of creating new openings for other clients. The absence of any such clear pattern may be explained by the relative newness of the program at the time of the hearing and the need to attain a work force of 75 percent handicapped employees to meet the requirements and purpose of the Wagner-O'Day program. In any event, the high turnover rate (see fn. 4 supra) is at odds with any suggestion of long-term retention of individual clients. Compare *Arkansas Lighthouse for the Blind* at 1217.

In sum, we find the clients' relationship with the Employer is primarily rehabilitative and that the clients' working conditions are not typical of private sector working conditions. We predicate this finding on the record as a whole, but particularly, on the evidence of the significant differences in the nature of supervision, the emphasis on counseling over discipline, the absence of any typical industrial means of ensuring productivity, and the substantial supplemental support for the clients both during and outside of work hours. Accordingly, we find that the clients are not employees within the meaning of Section 2(3) of the Act.

With respect, however, to Goodwill's nonhandicapped naval base employees, the record establishes that they neither receive rehabilitative services nor are subject to the flexible disciplinary and production policies described above.<sup>10</sup> Therefore, the working conditions of these individuals are typical of private sector working conditions and, absent the provision of any rehabilitative services, we find these individuals to be employees within the meaning of Section 2(3) of the Act.

Accordingly, we shall direct an election in the following appropriate unit composed of those individuals we have found to be employees under the Act:<sup>11</sup>

All cleaners, waxers, buffers, and strippers employed by the Employer at its Little Creek Amphibious Base, Norfolk, Virginia location, but excluding office clerical employees, guards and supervisors as defined in the Act.

[Direction of Election omitted from publication.]

<sup>10</sup>The Regional Director found no merit in the Employer's contention that the nonhandicapped workers are "casual employees" who are ineligible to vote in the election. The Employer did not renew this contention in its request for review. We note that the record shows that the nonhandicapped employees, like the handicapped persons, work an average of 18-26 hours per week.

<sup>11</sup>At the hearing, the Petitioner indicated that, if the Regional Director found appropriate a unit different from the petitioned-for unit, it desired to proceed to an election in the unit found to be appropriate.