Board of Education of Calvert County, Maryland, Petitioner *and* Calvert Association of Educational Support Staff, Inc. Case AO–338

January 13, 1997

ADVISORY OPINION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Pursuant to Section 102.98(b) of the National Labor Relations Board's Rules and Regulations, on August 12, 1996, the Board of Education of Calvert County, Maryland (the Petitioner or County Board), filed a petition for Advisory Opinion as to whether the independent schoolbus contractors (the Contractors) who contract with the County Board to provide student bus transportation are subject to the exclusive jurisdiction of the National Labor Relations Board (NLRB) as employers within the meaning of Section 2(2) of the Act.[1] In pertinent part, the petition alleges that the Calvert Association of Educational Support Staff, Inc. (the Union) is the exclusive representative of a bargaining unit composed of noncertified employees (nonteaching personnel) of the County Board; that, as of July 19, 1996, the Union petitioned the Maryland State Board of Education (State Board) in Case MSDE–BE–34 for a declaratory judgment declaring that the schoolbus drivers employed by the Contractors are County Board employees and, therefore, should be accreted to the Union's existing unit of noncertified employees; that the County Board filed a motion, dated August 9, 1996, with the State Board to dismiss the Union's petition or, in the alternative, to stay the State Board's administrative process pending the NLRB's resolution of the issue of jurisdiction presented by the motion for Advisory Opinion; and that the State Board has granted the County Board's motion to stay further proceedings until the NLRB has completed its consideration of this petition for Advisory Opinion.[2]

The Union filed a memorandum in opposition to the petition for Advisory Opinion, and the County Board filed a reply to the opposition. On November 29, 1996, the Maryland Association of Boards of Education (amicus) filed a memorandum of amicus curiae in support of the County Board.

I. THE RELEVANT FACTS

Although the State Board has not yet made any findings with respect to the jurisdictional facts, the following facts appear undisputed. The County Board has contracted with the various Contractors for a number of years to provide transportation for the students of the Calvert County School System. There are currently 33 Contractors who own the buses and provide transportation, and 117 drivers plus an unstated number of substitutes. Ten of the thirty-three Contractors that own buses also drive one themselves. The annual budget of the superintendent of schools for Calvert County provides for the cost of schoolbus transportation, including a fixed hourly rate based on the drivers' years of experience as well as a payment of $1200 for each driver having health insurance. None of the drivers are paid above this fixed hourly rate. The drivers are paid by the individual Contractors. The "School Bus Contract" between the County Board and the individual Contractors states that the drivers must be employees of the Contractor and that the Contractors will provide and maintain an approved schoolbus to fulfill the requirements of the agreement.

An individual seeking a position as a schoolbus driver first completes an application from the County Board which then conducts a background investigation of the prospective driver and a 24-hour training session. On completion of the training, the driver is taken by the County Board trainer to the Maryland Department of Motor Vehicles for the appropriate licensing test and meets with the County Board supervisor of pupil transportation who signs the certification. The prospective driver may then seek employment with one of the Contractors who provide bus transportation. The individual Contractor decides which drivers it will hire.

The County Board pays for 6 hours of annual safety training for each driver and requires and pays for yearly physicals and for drug testing. The County Board also prepares a yearly bulletin for the drivers, setting forth various safety policies and procedures and conducts an annual meeting of the drivers to discuss these policies. The school board provides each driver with identification, presents an annual awards banquet for the busdrivers, and maintains personnel files for all busdrivers at the County Board offices. The County Board must be notified if a substitute bus or driver is used.

Some drivers have served on County Board-based committees during times when they would normally be working. The driver obtains an approved substitute for that day. When performing work on these committees, the driver is paid by the County Board.[3] Several driv-

[1] Sec. 102.98(b) of the Board's Rules and Regulations provides that any state or territorial agency or court may petition the Board for an Advisory Opinion on whether it would decline to assert jurisdiction over parties then before the agency or court either (1) on the basis of its current standard, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act.

[2] The petition states that no representation or unfair labor practice proceedings involving this labor dispute are presently pending before the Board.

[3] The record does not indicate how many drivers have been so compensated. It does not appear from the facts presented by the parties that this compensation is for the individuals' services as busdrivers. We are unable to determine from the record whether the

ers who have had to wait at the County Board offices between bus assignments have been assigned clerical duties by supervisors at the County Board and have been paid through their respective Contractors for this work.

The County Board evaluates each driver's driving ability and notifies the individual Contractor if one of its drivers is no longer acceptable. The driver will then be terminated. The County Board can also send letters of reprimand to drivers or place drivers on probation after an accident. Assignment of a driver to a particular route must be approved by the County Board. Each Contractor trains, evaluates, disciplines, and terminates its own drivers, and can impose safety standards in addition to those imposed by the County Board. Furthermore, each Contractor determines how overtime assignments are made, adjusts driver grievances, and grants vacation time. Each Contractor may pay wage rates that exceed minimum levels and controls other employee benefits such as disability insurance and pension savings plans.

In the regular course of business, a number of the Contractors annually purchase and receive at their Maryland facilities goods valued in excess of $50,000 that originated outside the State of Maryland. All 33 Contractors belong to the Calvert County School Bus Contractors Association (the Association) and, during any representative annual period, purchased in the aggregate many times the $50,000 worth of goods originating outside the State of Maryland.

II. POSITIONS OF THE PARTIES

The County Board contends that the Contractors are employers within the meaning of Section 2(2) of the Act because they maintain substantial, day-to-day control over employee compensation and other significant aspects of the employment relationship and exercise the authority to hire, fire, discipline, assign work, and overtime. The County Board contends that the Contractors, not the County Board, decide which drivers will be hired, which drivers will be retained or assigned as a substitute, assign vehicles and routes to their drivers, and determine compensation for extracurricular and nonschool assignments, discipline and terminate busdrivers, impose work standards stricter than the County Board's, evaluate driver performance more than the minimum required, assign nondriving duties, decide overtime assignments, adjust grievances, grant vacation time, have the authority to pay drivers above minimum levels, select medical insurance for their drivers, and control other fringe benefits. The County Board further argues that although under Maryland law it is required to train, certify, and evaluate drivers, this does not detract from the Contractors' status as statutory employers. Accordingly, the County Board argues that because the Contractors collectively, as members of the Association, and several Contractors individually, meet the Board's $50,000 direct inflow standard,[4] under *Management Training Corp.*, 317 NLRB 1355 (1995), the Contractors are within the jurisdiction of the NLRB.

The Union argues that the Contractors have so little control over wages, hours, and working conditions that they are not truly "employers" within the meaning of Section 2(2) of the Act, but are merely conduits of orders from the County Board. The Union asserts that there is no aspect of the employment relationship between a Contractor and the busdrivers which is not controlled by the County Board, and that because the authority which the County Board exerts over the operations of the Contractors is so complete, it is virtually impossible for the Contractors to bargain over any aspect of wages, hours, and working conditions without obtaining the permission of the County Board. In essence, the Union argues that the Contractors are not "independent contractors," and that the busdrivers are truly employees of the County Board rather than their individual Contractor. The Union contends that in these circumstances, it is ludicrous to require that the Contractors bargain with a collective-bargaining agent when the true employer is the County Board, citing *Associated Charter Bus Co.*, 261 NLRB 448 (1982). Finally, the Union notes that at least 10 of the 33 Contractors drive buses themselves and are subject to the same rules, regulations, and policies of the school board as the other drivers.[5] Accordingly, the Union argues that the Board should decline to assert jurisdiction over any of the Contractors.

The amicus adopts the County Board's statement of facts and urges the NLRB to find that the drivers are employed by the individual Contractors and that the Contractors are employers within the meaning of Section 2(2) of the Act on the basis that the Contractors collectively meet the Board's $50,000 direct inflow standard.

III. FINDINGS AND CONCLUSIONS

Having duly considered the matter,[6] we are unable, on the basis of the record before us, to determine whether we would assert jurisdiction over the Contractors. Initially, we note that under the analysis set forth

County Board employs individuals for committee work unrelated to bus transportation.

[4] The County Board relies on *Siemons Mailing Service*, 122 NLRB 81, 84 (1958); and *Carpenters Local 35 (Construction Employers Assn.)*, 317 NLRB 18 (1995), in arguing that the Board should assert jurisdiction over all members of the Association based on the aggregate of the commerce activity of the Association members.

[5] It is not clear whether these are individuals who own a single schoolbus and contract directly with the school board for transportation services.

[6] The Board has delegated its authority in this proceeding to a three-member panel.

in *Management Training Corp.*, supra, in deciding whether to assert jurisdiction over an employer that does business with a government agency such as the County Board, the Board will consider only whether the employer meets the definition of "employer" under Section 2(2) of the Act[7] and whether such employer meets the applicable monetary jurisdictional standard. Furthermore, contrary to *Associated Charter Bus Co.*, supra, 261 NLRB 448 (1982), cited by the Union, in which the Board found it was precluded from asserting jurisdiction over a schoolbus transportation company on the ground that the bus company and the school district, an exempt employer within the meaning of Section 2(2) of the Act, were joint employers, the Board will no longer employ a joint-employer analysis to determine jurisdiction. *Management Training Corp.*, supra at 1358 fn. 16. Thus, while the County Board establishes and enforces a variety of standards for the provision for bus transportation and requirements for the drivers, whether the County Board and any of the Contractors are joint employers is irrelevant. Further, although the Union asserts that the Contractors are not employers within the meaning of the Act, but mere "conduits" of orders from the County Board, the undisputed facts indicate that the Contractors hire and pay the busdrivers and engage in a variety of other activities that indicate an employer-employee relationship.[8]

The only issue, therefore, is whether the Contractors meet the applicable commerce standard. The County Board allges that in the regular course of business, a number of the Contractors purchase and receive at their Maryland facilities goods valued in excess of $50,000 annually that originate outside the State of Maryland. The County Board further alleges that all 33 bus Contractors belong to the Calvert County School Bus Contractors Association and, during any representative period, purchase in the aggregate more than $50,000 worth of goods that originated outside the State of Maryland. Although the Board will assert jurisdiction over all members of a multiemployer group who participate in, or are bound by, multiemployer bargaining negotiations if the jurisdictional standards are satisfied by one member of the group or by an aggregation of the individual members, there is no evidence that the Calvert County School Bus Contractors Association is such a multiemployer group. Thus, unlike in *Carpenters Local 35 (Construction Employers Assn.)*, 317 NLRB 18 (1995), cited by the County Board, the Board cannot assert jurisdiction on that basis. Furthermore, the individual Contractors who do meet the $50,000 direct inflow standard and over whom the NLRB would ordinarily assert jurisdiction are not identified.

Accordingly, as the Board is unable to determine whether it would assert jurisdiction over the Contractors, the petition is denied.

[7] Sec. 2(2) excludes from the term "employer" both Federal and state governmental entities as well as "political subdivisions thereof." There is no evidence or allegation that any of the Contractors is exempt from the Board's jurisdiction on this basis.

[8] We are unable to determine, on the basis of the record, whether or not any of the 10 Contractors who are also busdrivers (and who are not identified) are employees of the County Board.