OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

RAYMOND J. McDONOUGH, Jr.,

Petitioner, DECISION NO. B-32-85

-and- DOCKET NO. 724-84

HENRY CHARTIER, ARMOND PALATUCCI
DOMENIC PACIELLO, LOCAL 32E,

Respondents.

- x

In the Matter of

BERNARD SANDELL,

Petitioner, DOCKET NO. 726-84

-and-

HENRY CHARTIER, ARMOND PALATUCCI
DOMENIC PACIELLO,

Respondents.

- x

DECISION AND ORDER

Petitioners Raymond J. McDonough, Jr. ("McDonough") and Bernard Sandell ("Sandell") filed verified improper practice petitions on August 2, 1984 and August 7, 1984, respectively, in which they both charged that respondent Local 32E, Service Employees International Union, AFL-CIO ("Local 32E" or "the Union") and several of its offices and/or agents committed improper practices against them, in violation of Section 1173-4.2 of the New York City Collective Bargaining

Law NYCCBL"}. Local 32E submitted a single answer in response to both petitions on August 27, 1984. The petitioners submitted a written statement, deemed to constitute a reply, on September 26, 1984.

On February 6, 1985, the Trial Examiner wrote to the parties to request that they submit a further statement on the question of the Board's jurisdiction in this matter and the applicability of the NYCCBL to the parties herein. The Union's attorney submitted the requested statement on February 20, 1985. Petitioners submitted short statements and copies of their Internal Revenue Service wage statements (characterized by petitioners as "W2 forms", but appearing on "form 1099") on February 25, 1985.

These proceedings were consolidated for hearing, pursuant to a notice issued by the Trial Examiner on August 20, 1985. A hearing was held on August 29, 1985, at which time both of the petitioners and respondent Armond Patatucci, as representative of Local 32E and the other individual respondents, appeared, gave testimony, and were subject to cross-examination. In the course of the hearing, respondent Patatucci offered several exhibits on behalf of the Union, which were received into evidence without objection.

Background

The petitioners were beneficiaries of a complex relationship which exists between Local 32E, the New York City Off-Track Betting Corporation ("OTB"), and Yonkers Raceway. When the State Legislature authorized the creation of regional off-track betting corporations, there was great concern that the operation of such corporations would have an adverse impact on employment at regional race tracks. To deal with this concern, the Legislature mandated that the plans of operation of regional off-track betting corporations shall include provision for job security for employees of race tracks within each region. The Legislature further contemplated that in order to effectuate this mandate, job security agreements would be entered into by and between regional off-track betting corporations and track employee organizations. Such agreements were required to be submitted to the State Racing and Wagering Board for approval, and, when approved, were to be deemed part of the plan of operation of the regional corporation.[1]

[1]Racing, Pari-Mutuel Wagering and Breeding Law S530 (originally enacted as Unconsolidated Laws §8075, added by 1973 Laws ch. 346, S4, repealed by 1982 Laws ch. 865, §2).

Pursuant to this statutory framework, a series of job security agreements have been entered into by and between OTB and Local 32E, acting for and on behalf of mutuel employees of Yonkers Raceway. Such an agreement was in effect at all times relevant to the proceedings herein. Under this agreement, OTB agreed to:

> " ... provide job security to Union Mutuel Employees-should employment during the respective racing meets at Yonkers not be available due to the impact of operations by OTB....[2]

The agreement further placed a cap of thirty-five on the number of Mutuel employees who would be compensated by OTB on any one racing night.

In accordance with this agreement, Local 32E maintains a list of individuals who are eligible for compensation by OTB. While this list is subject to change from time to time in the Union's discretion, petitioners' names remained on the list for five or six years, until the incident in question on June 20, 1984. It is not disputed that the petitioners regularly were compensated by OTB pursuant to

[2] Union exhibit 3.

the job security agreement during this time period.

In the Spring of 1984, Raymond McDonough, Sr., the father of petitioner McDonough and the uncle of petitioner Sandell, ran for the presidency of Local 32E against the incumbent, respondent Henry Chartier. The petitioners allege that on or about June 20, 1984, they were removed by the Union from the list it maintains of individuals who are eligible for compensation under the job security agreement. The petitioners assert that their removal from the list was at the direction of respondent Chartier and was in retaliation for their father/uncle's candidacy in the internal union election. The petitioners' removal from the Union's list had the immediate effect of terminating their compensation from OTB.

The pleadings and evidence submitted by the parties in this proceeding raise an issue concerning the Board's jurisdiction in this matter. Specifically, the parties dispute whether the petitioners are public employees within the meaning of the NYCCBL and, in fact, whether the petitioners are employees of OTB, Yonkers Raceway, the Union, or any of the above. Accordingly, at the hearing in this matter, the parties were requested to direct their attention to the jurisdictional issue. They were informed by the Trial

Examiner that, in the event the Board determines that it does have jurisdic.tion, the hearing will be reopened to receive additional testimony on the merits of the alleged improper practices.

Positions of the Parties

Petitioners' Position

The petitioners submit that they were employees of OTB, which is a public employer pursuant to 51173-3.0g.(2) of the NYCCBL, and were thus public employees within the meaning of the law. They urge that the fact that their compensation was paid by OTB is dispositive of this issue. Moreover, they note that their compensation is pursuant to an agreement between the Union and OTB, to which Yonkers Raceway is not a party. They produced forms (which they characterized as 'IW2" forms) showing the amount of annual compensation which was paid them by OTB. Finally, they added that their time sheets were provided by OTB.

The petitioners' position on the jurisdictional question perhaps was best summarized by petitioner Sandell's statement at the hearing that:

> "To me, if your check says OTB,
> you work for OTB ......

Union's Position

Initially, the Union contended that the petitioners were not employed by OTB, Yonkers Raceway, or the Union. However, at the hearing herein, the Union modified its position by alleging that the petitioners were employed by Yonkers Raceway. In support of this position, the Union asserts that the petitioners, in order to gain employment, were required to file an application with Yonkers Raceway, obtain approval from Yonkers, submit to fingerprinting by the Bureau of Identification maintained by Yonkers Raceway, and obtain a photo identification card issued by the Raceway. Futhermore, Local 32E argues that the job security agreement entered into between the Union and OTB was designed to comply with the statutory intent to reimburse duly qualified track employees who do not receive a work assignment as a consequence of the operations of OTB. Thus, employment by a track is a prerequisite to eligibility for compensation under the job security agreement. Additionally, the Union observes that the applicable job security agreement, by its own terms, provides that employees receiving compensation thereunder,

> it ... shall not be deemed to be employees of OTB...." [3]

[3] Union exhibit 3, at page 3.

Finally, the Union emphasizes, neither the petitioners nor anyone else similarly situated are or were employees of Local 32E.

Discussion

In this improper practice proceeding, we are required to determine the threshold issue of whether the petitioners are public employees employed by a public employer within the meaning of the NYCCBL. Oddly, neither of the two possible employers - OTB and Yonkers Raceway - have been made parties to this case. [4] Thus, we are placed in the unusual position of attempting to determine the existence of an employment relationship without benefit of any information from the alleged employer(s).

Our consideration of this issue is further complicated by reason of the unique relationship existing between Local 32E, OTB, and Yonkers Raceway as a result of the statutory policy expressed in S530 of the State Racing, Pari-Mutuel Wagering and Breeding Law and the job security agreements entered into incidental thereto. Nevertheless, we are satisfied that the jurisdictional issue has been argued

[4] It is not seriously contended by any party herein that Local 32E is the employer of the petitioners.

by both sides with clarity sufficient to enable the Board to make an informed determination of this matter.

Ordinarily, in determining the employer of an employee or group of employees, we would inquire as to such indicia of employer status as the power to hire and fire workers, the exercise of supervision and direction of the work performed, control over the terms and conditions of the workers' employment, and control over the budget of the agency.[5] However, in this case, these standards may not be entirely appropriate, given the peculiar job security agreement involved herein. In any case, applying the spirit of these standards, if not their precise terms, we are convinced that OTB is not the petitioners' employer, and therefore the petitioners are not public employees.

The record is clear that the petitioners, and all others seeking a place on the Union's eligibility list for purposes of the job security agreement, must apply for such "employment" through Yonkers Raceway, and are subject

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[5] See, e.g., opinion of Counsel, 17 PERB ¶5003 (1984); Auburn Industrial Development Authority v. Teamsters Local 506, 15 PERB -14048 (1982); Niagara Frontier Transportation Authority v. Niagara Frontier Transportation Authority Peace Officers' Benevolent Association; 13 PERB 13003 (1980).

to fingerprinting, investigation, and approval by the Raceway. They must carry Yonkers Raceway identification in order to obtain admission to the track. The job security agreement sets their rate of compensation at an amount equal to the wage rate set forth in the collective bargaining agreement in effect between Yonkers Raceway and the Union for the job classification in question. None of these matters are within the control of OTB.

Significantly, the job security agreement under which the petitioners obtained compensation provides:

> "The Mutuel Employees compensated pursuant to-this Agreement shall not be deemed to be employees of OTB...."

This seems consistent with the statutory intent, underlying the enactment of S530 of the Racing, Pari-Mutuel Wagering and Breeding Law, that job security in the form of compensation be provided for employees of regional racetracks whose employment was adversely affected by the operation of regional off-track betting corporations.[6] There is no

[6]See, Western Regional Off-Track Betting Cone. v. S.E.I.U. Local 235_,91 A.D. 2d 297, 458 N.Y.S. 2d 782 (4th Dept. 1983).

indication of any intention to create a new class of employment by the regional off-track betting corporations, themselves.

We also observe that the compensation rendered by OTB was reported to the Internal Revenue Service on form 1099, entitled "Miscellaneous Income", rather than on form W2, which is used for wages and earnings. While we do not place great weight on the labels used on forms provided unilaterally by the employer, we do find that these forms do not justify the reliance placed in them by petitioners in support of their claim that OTB was their employer. These forms do show that the petitioners received compensation from OTB; they do not establish the basis for which that compensation was received.

All of the other evidence submitted tends to show that the petitioners never performed any services for OTB and were not subject to OTB's supervision and control, except to the extent of OTB's maintenance of a sign-in sheet. The conclusion is unmistakeable that petitioners were not employed by OTB. Consequently, petitioners were not public employees within the meaning of the NYCCBL.

Our dismissal of the petitions herein is without prejudice to any rights the petitioners may possess in any other forum.

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petitions filed by peti~ioners Raymond J. McDonough, Jr., and Bernard Sandell be, and the same hereby is, dismissed.

Dated: New York N.Y.
October 1, 1985

ARVID ANDERSON
CHAIRMAN

MILTON-FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERTCK
MEMBER

EDWARD F. GRAY
MEMBER

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MEMBER