UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE	
Employer	
and	**Case 08-RC-284759**
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)	
Petitioner	

ORDER DENYING EMPLOYER'S MOTION TO DISMISS OR STAY PETITION

On October 18, 2021, the United Electrical, Radio and Machine Workers of America (Union) filed a petition seeking to represent all hourly-paid student employees of Kenyon College (Employer).

On October 21, 2021, the Employer filed two interrelated Motions in this matter. In its first Motion, the Employer argues that the hearing, along with the due date for filing its Statement of Position and its Initial Lists, should be indefinitely postponed (Motion to Postpone). In its second Motion, the Employer argues that the Region should dismiss the petition, or, alternatively, stay the petition (Motion to Dismiss).

On October 29, 2021, I granted the Motion to Postpone insofar as I ordered indefinite postponement of the hearing that had been scheduled to begin on November 9, 2021 as well as the due dates for the Statement of Position and Responsive Statement of Position.[1]

In its Motion to Dismiss, the Employer contends that significant jurisdictional and federal privacy issues compel me to rule in its favor. I have duly considered the Motion to Dismiss, along with the Union's Response to the Motion to Dismiss, the Employer's Reply and the Union's Surreply. For the following reasons, I deny the Employer's Motion to Dismiss.

The underlying basis for the Motion to Dismiss is that the petition raises a jurisdictional issue that the Employer argues I should address and resolve before the processing of the petition can proceed. Specifically, the Employer urges that the National Labor Relations Board (Board) lacks statutory jurisdiction over the individuals in the petitioned-for unit or, alternatively, that the Board should decline to exercise jurisdiction here. If I decline to dismiss the petition, the Employer requests a stay pending the Board's resolution of the jurisdictional question. A stay is necessary, asserts the Employer, to avoid a potentially unnecessary and expensive hearing and possible election coupled with a "head-on collision" between the Board's election rules and the Family Educational Rights and Privacy Act (FERPA). The Employer also argues that, if an election is

[1] The Employer's Motion to Postpone had also requested an indefinite extension to post the Notice of Petition for Election. I declined to grant this aspect of the Employer's Motion to Postpone.

ultimately held, a stay will ensure individuals have full freedom of choice for or against union representation.

The Employer asks me to dismiss the petition on the basis that the undergraduate student workers do not meet the definition of "employee" under Section 2(3) of the National Labor Relations Act (Act). This case is inappropriate for summary disposition on this point because the determination of employee status under Section 2(3) involves a detailed factual analysis that must be undertaken on the basis of an evidentiary record developed by a hearing officer. In this connection, I note in particular that the Employer devotes several pages of its Motion to Dismiss discussing and then *factually* distinguishing the student-workers here from those at issue in *The Trustees of Columbia University*, 364 NLRB No. 90 (2016), who the Board found to be Section 2(3) employees.

The foregoing supports my conclusion that a full evidentiary hearing is required in order for me to render a decision. At the hearing, the Employer, who bears the burden of proof to demonstrate exclusion, must present evidence to substantiate the arguments it makes in its Motion to Dismiss. A hearing will also permit the Union to present its evidence, with the goal being that the record contains the full range of facts relevant to the Section 2(3) inquiry.

Similarly, for me to evaluate the Employer's argument that it would not effectuate the purposes of the Act to exercise jurisdiction here, I require a full factual record. As correctly pointed out by the Employer, the Board declined to exercise jurisdiction in *Northwestern University*, 362 NLRB 1350 (2015), a newsworthy case involving student football players. What the *Northwestern University* Board emphasized, however, was that its determination was "based on the facts in the record," and future changes to those facts could mean a different outcome jurisdictionally-speaking. Id. at 1355. Sworn testimony and other hearing evidence are the best means for me to judge whether there is merit to the Employer's argument that exercising jurisdiction here would not promote stability in labor relations.

The Employer raises several important points of consideration regarding the student-workers, including the nature of their work, work schedules, job tenure, renumeration and their relationship with the Employer. I have simply concluded that these issues call for a full factual record, rather than the pre-hearing dismissal of the petition based on the Employer's arguments that are not supported by record evidence.

The Employer alternatively motions for a stay of further proceedings in the matter, citing three reasons. I address each in turn.

At the outset, I note that the Employer's request for a stay is made pursuant to § 102.67(j) of the Board's Rules and Regulations (Rules). However, §102.67(j) addresses party requests for extraordinary relief *before the Board*, not before a Regional Director. The statute also requires the Region to proceed with the processing of a petition unless a stay is "specifically ordered by the Board." 29 U.S.C. § 153(b). Notwithstanding the foregoing, I will rule on the Employer's request for a stay and do so under the standard provided for in § 102.67(j)(2), namely, "[r]elief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case."

Echoing its assertions regarding the Section 2(3) status of the petitioned-for workers, the Employer argues that I should stay the processing of the petition to allow the Board to decide the jurisdictional question. Proceeding in this manner, according to the Motion to Dismiss, could obviate the need for a lengthy and expensive hearing were the Board to determine either that the student-workers are not employees under the Act or that it would not effectuate the purposes of the Act to exercise jurisdiction here.

I am not persuaded that what the Employer urges is the best course of action. As discussed above, the determination of both Section 2(3) status and whether to decline jurisdiction are fact-intensive and case-specific endeavors. Without a fully developed hearing record, the Board will have no way to analyze and weigh the facts in order to decide the jurisdictional question the Employer is raising. Even in those situations when a hearing has occurred, the Board has shown that it requires a complete record to make its determination.[2] Therefore, rather than potentially eliminating the need for a hearing, granting the Employer's motion for a stay would simply delay the hearing.

Pratt Institute, 339 NLRB 971 (2003), relied on by Employer for a stay, is factually distinguishable. There, the Board had granted requests for review in two cases[3] that were similar to *Pratt*, both of which had fully developed factual records. The *Pratt* Board reasoned that a stay of the hearing was warranted because the Board's decision in the other cases may moot the need for a hearing and election in *Pratt*. To the contrary here, I am not aware of any petitions pending before the Board on what the Employer describes as the novel issue of exclusively undergraduate, student bargaining units. Furthermore, the *Pratt* Board granted a stay based in part on the guidance that *Brown* and *Columbia* would provide to the *Pratt* parties. The instant matter will not benefit from similar guidance because no such cases currently exist. The Board also granted a stay in *Pratt* at a time before § 102.67(j)(2) required a moving party to make a "clear showing" that extraordinary relief was "necessary under the particular circumstances of the case."

For the reasons stated above, I do not find that the Employer has made a clear showing that a stay is necessary. If anything, a stay will only cause further delay in the processing of the petition.

Next, citing concerns about worker free choice, the Employer maintains that a stay is necessary here because of the rapid turnover of student workers. The Employer predicts a scenario whereby ballots could be impounded pending a final ruling on the jurisdictional issue by the Board, risking an election outcome that reflects the views of individuals who no longer work for the Employer.

While perhaps an initially appealing argument, if a Regional Director granted a stay in every case where there was even the slightest risk that ballots may have to be impounded, stays would be the rule as opposed to the extraordinary remedy described in §102.67(j). In advancing its arguments, the Employer also ignores the rights of the workers who are currently employed and

---

[2] See, *Black Hills/Colorado Electric Utility Company, LP*, 27-UC-229 (August 26, 2011) (remanding case to the Regional Director to reopen the record to take evidence on "whether and when the remaining employees were hired, what duties they actually perform, and any other evidence relevant to the merits of the unit clarification issue"). See also, *Austin Maintenance & Construction, Inc.*, 28-RC-266671 (May 28, 2021) (ordering the Regional Director to reopen the record because even though "the [e]mployer was precluded from litigating the propriety of the petitioned-for unit, the Regional Director was still obligated to find the unit appropriate based on some record evidence").

[3] *Brown University*, Case 1-RC-21368 and *Trustees of Columbia University*, Case 2-RC-22358.

want a say in whether or not to be represented by a union. Furthermore, I do not find the cases cited by the Employer in support of its argument to be persuasive: those cases all involve scenarios where the employer's employee complement was either dramatically increasing or decreasing in size. Even assuming what the Employer states in its Motion to Dismiss to be true – that there is significant turnover in its workforce from semester to semester – that is a matter of identity, not quantity.

I therefore conclude that the Employer has not met its burden to make a clear showing that a stay is necessary to guarantee worker free choice.

I now turn to the Employer's argument that a stay is required to avoid intrusions into student privacy and prevent a "head-on collision" between the NLRB election rules and FERPA. I disagree with the Employer's assessment that a stay is necessary. I recognize that FERPA will present certain procedural challenges in this case, but the Employer's compliance with that statute can be achieved while at the same time meeting its obligations under the NLRA. And this can be accomplished without the Employer risking the waiver of its rights under the NLRB election rules. The possible head-on collision can be avoided.

As recognized by both Parties in their filings, FERPA contains mechanisms pursuant to which student information can be lawfully disclosed by an educational institution. The Region will work diligently and creatively with the Parties to explore and take advantage of the avenues that FERPA itself provides for the lawful disclosure of student information.[4] On the NLRA side, the Region can process the petition in accordance with the Board's Rules, using its discretion regarding deadlines where appropriate. Simply put, processing the petition pursuant to the Board's Rules and within the confines of the Employer's obligations under FERPA is doable. Petitions involving similar educational institutions for units where FERPA was implicated have been processed, including at least one that proceeded to a pre-election hearing.[5]

Therefore, in order to address the Employer's valid concerns about protecting student privacy and not running afoul of FERPA and the similarly valid interest of both Parties in connection with the timely processing of the petition, I hereby ORDER a status conference to take place on **Thursday, May 5, 2022 at 10:00 a.m**. via Zoom. At that time, the Parties shall come prepared to discuss the following matters:

---

[4] I find unfounded the Employer's fear that a subpoena seeking, for example, information constituting the Initial List is not a "lawfully issued" subpoena, thereby leaving the Employer unmoored from FERPA's safe harbor in 20 U.S.C. § 1232g(b)(2)(B) if it complies with such a subpoena. Section 11(1) of the Act authorizes subpoenas for evidence "that relates to any matter under investigation or in question." The information sought by a subpoena need only be "reasonably relevant" to an inquiry that is "within the authority of the agency." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); see also *NLRB v. Line*, 50 F.3d 311, 314 (5th Cir. 1995). A subpoena seeking such information as the names, work locations, shifts and job classifications contained in the Initial List are reasonably relevant to the agency's authority to investigate the petition and resolve questions of employee status and unit appropriateness, among others.

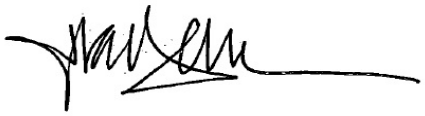
[5] See, e.g. *President and Fellows of Harvard College*, 01-RC-186442 (stipulated election agreement October 21, 2016); *Trustees of Clark University*, 01-RC-290362 (stipulated election agreement March 7, 2022); *Trustees of Dartmouth College*, 01-RC-290146 (stipulated election agreement February 18, 2022); *Fordham University*, 02-RC-291360 (stipulated election agreement March 28, 2022); *Massachusetts Institute of Technology*, 01-RC-289879 (stipulated election agreement March 1, 2022); and *Trustees of Grinnell College*, 18-RC-228797 (Decision and Direction of Election November 5, 2018, subsequent to pre-election hearing).

1. The due date of the Employer's Statement of Position and the Union's Responsive Statement of Position.
2. Regarding the Initial List: the due date and possible modifications to or elimination of the Employer's submission of an Initial List.
3. The Parties' presentation of evidence at the pre-election hearing and FERPA considerations.
4. Subpoena issuance to secure the student-worker information required in connection with the payroll list to check the showing of interest,[6] Initial List, pre-election hearing and/or Voter List.
5. In the event subpoenas issue for student-worker information, the notice the Employer is required to give to students/parents under FERPA, as well as the procedure by which the students/parents will file objections to the release of the subpoenaed information.
6. In the event a Decision and Direction of Election were to issue, the timing of the submission of the Voter List and any FERPA implications associated with the Voter List.
7. Any other issues that arise in connection with FERPA considerations concerning the processing of the petition.

Accordingly, for the reasons set forth above,

IT IS ORDERED that the Employer's Motion to Dismiss or Stay Petition is hereby denied.

Dated: April 19, 2022



IVA Y. CHOE
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

[6]In its Motion to Dismiss, the Employer notes that it is entitled to have the showing of interest checked against an employer-provided payroll list.