BPS Guard Services, Inc., d/b/a Burns International Security Services *and* United Steelworkers of America, AFL–CIO. Case 25–CA–19472

September 28, 1990

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On August 15, 1989, the Board issued its Decision and Order in this proceeding, in which it found that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified representative of the employees in the unit.[1] On August 21, 1989, the Respondent filed a petition for review of the Board's Decision and Order in the Eighth Circuit Court of Appeals.[2] The Respondent contended, as it had before the Board, that the firefighters are guards who, pursuant to Section 9(b)(3) of the Act, cannot be included in a unit of other employees. On September 29, 1989, the Board moved that the case be remanded for reconsideration. On October 31, 1989, the court granted the Board's motion.

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

By letter dated February 27, 1990, the Board informed the parties that it was reconsidering its earlier decision and invited them to file statements of position on the issues raised by the reconsideration. The General Counsel filed a statement of position.

The Board has carefully reviewed its previous Decision and Order in light of the entire record, the briefs in the underlying representation case,[3] and the statement of position, and has decided, for the reasons set forth below, to reaffirm that Decision and Order.

A. *Statement of Facts*

The Respondent provides security and fire protection services to the Burns Harbor, Indiana plant of Bethlehem Steel. It employs 42 plant security personnel, 27 full-time and 5 regularly scheduled part-time fire security personnel (firefighters), 12 regularly scheduled part-time paramedics, and a mechanic.[4] All of those employees, except for the plant security personnel, are employed in the Respondent's fire department under the supervision of a fire department captain and six lieutenants, who report to the captain.[5]

The objective of the firefighters, according to the testimony of Harry Beach, the Respondent's area supervisor, is to protect Bethlehem's property and personnel through the enforcement of the client's rules and regulations ''concerning their part of the service.''[6] In this regard, a firefighter is expected, in the event that the actions, conduct, or language of any person contacted is or are ''beyond reason,'' to make a written report to any of the Respondent's supervisors (i.e., not to supervisors of Bethlehem). Firefighters are to warn and report violators of no-smoking regulations. They also are to observe and report to their supervisors ''slipping, tripping or falling hazards, blocked emergency exits, obstructed aisles, obstructed shut-off valves and switches, improper lighting, horseplay, running and any other conditions or matters that might cause personal injuries or damages to client property.''[7]

In the performance of those duties, the firefighters investigate for fire safety violations and fire hazards.[8] They stand more than 2500 ''fire watches'' each year, during which they observe the actions of Bethlehem's employees and those of other contractors to detect fire and safety violations, in order to prevent personal injury and property damage. The firefighters report all violations to Bethlehem and to the Respondent's lieutenants, who have the authority to shut down an operation until the hazard is removed.[9] Firefighters are never assigned to guard the plant gates or to investigate incidents of theft or vandalism by Bethlehem employees.

The firefighters receive the same orientation as the plant security personnel, and receive training in secu-

[1] 296 NLRB 113. The unit found appropriate consists of:

All full-time and regular part-time fire protection employees employed by the Employer at the Burns Harbor facility of Bethlehem Steel Corporation, including all firefighters, all drivers, all paramedics, and all mechanics; but excluding all office clerical employees, all professional employees, and all guards and supervisors as defined in the Act.

[2] *Burns Security Services v. NLRB*, No. 89–2373.

[3] Case 25–RC–8557.

[4] The Respondent does not contend that the paramedics and the mechanic are guards.

[5] The captain and the lieutenants are statutory supervisors.

[6] Just what Beach meant by the ambiguous quoted phrase is unclear. It cannot be interpreted with confidence, however, to refer to rules and regulations concerning matters other than fire and safety.

[7] The Respondent's ''Handbook for Security Officers'' contains provisions of general applicability concerning security matters, e.g., to report all security violations, safety violations and fire hazards, and to give the alarm and notify authorities in case of fire, intrusion, or disorder. The handbook is distributed to all the Respondent's employees, including the firefighters and security guards as well as the paramedics and the mechanic.

[8] The record contains numerous reports of fire and safety hazards filed by the Respondent's firefighting personnel. One such report concerned an individual who was found smoking in a no-smoking area. Another concerned Bethlehem employees who had parked too close to a fire hydrant. However, although such a report could affect the employees' parking privileges, this report was filed by one of the lieutenants, who are supervisors.

[9] Paul Riley, the Respondent's fire department captain, indicated at one point in his testimony that a firefighter could shut a job down on his own authority. That statement, however, was elicited by a leading question by the Respondent's counsel. Riley later testified, this time in his own words, that if the ''fire watch'' is not satisfied that a job is safe, he is supposed to notify his lieutenant; if the lieutenant, after viewing the jobsite, agrees that the job is unsafe, he will shut the job down until changes are made. In fact, Riley recounted one incident in which a firefighter reported an unsafe condition to him, and he (Riley) told the Bethlehem foreman that the job had to be shut down. On the basis of all the testimony, we find that the firefighters do not have the authority to shut a job down on their own, and that that authority reposes in the Respondent's supervisors.

rity matters as well. The firefighters wear uniforms that are different from those worn by plant security personnel. Whereas some of the plant security personnel are armed, none of the firefighters carry weapons. The firefighters are registered as private detectives by the State of Indiana. One of the firefighters currently works as a security guard at other locations of the Respondent; several others have done so in times past.

Beach testified that he had been informed by Bethlehem's labor relations superintendent that it was Bethlehem's intention, in the event of a strike, to use the Respondent's firefighters to augment patrols within the plant. Fire Captain Riley, however, testified that in the 3 years he had been with the Respondent, there had never been a strike at Bethlehem that he could remember, and that he could not recall ever having been told that the firefighters might be used as guards in the event of a strike.

B. *Discussion*

Section 9(b)(3) of the Act provides that the Board shall not

> decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

The Respondent, relying heavily on the Eighth Circuit's decision in *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324 (8th Cir. 1987) (*McDonnell III*),[10] contends that the firefighters are guards within the meaning of Section 9(b)(3) because they enforce rules to protect Bethlehem's property and the safety of persons on its premises, and because Bethlehem plans to use them to augment its in-plant patrols in the event of strikes. We disagree on both counts.

Addressing the Respondent's second argument first, we find that there is no probative evidence that Bethlehem actually has a plan to use the firefighters to augment patrols in the event of a strike. No written plan was offered in evidence, and Beach's testimony, being only a recitation of what he assertedly was told by a Bethlehem official, is clearly hearsay. Moreover, Riley, the Respondent's captain of firefighters, had heard of no such plan even though he had been with the Respondent for some 3 years.

The duties of the Respondent's firefighters do include, however, the enforcement of its fire and safety rules. As indicated above, in addition to reporting numerous kinds of unsafe conditions, the firefighters are instructed to report violations of no-smoking rules, running, and horseplay, and may, by reporting unsafe working conditions to their lieutenants, even cause jobs to be shut down until the unsafe condition is eliminated. We find, however, that the firefighters' enforcement of such rules does not warrant a finding that they are statutory guards.

In *McDonnell Aircraft Corp*., 109 NLRB 967 (1954) (*McDonnell I*), the employer's firefighters enforced its fire prevention rules by watching for violations and ordering offending employees to desist. The Board found that the rules enforced by the firefighters encompassed only a limited segment of the employer's plant protection rules, and that their enforcement was only incidental to the employees' firefighting duties. Accordingly, the Board found that the firefighters' enforcement of fire prevention rules was not sufficient to bring them within the statutory definition of guards. Id. at 969. Likewise, in *Petroleum Chemicals*, 121 NLRB 630, 632–633 (1958), and *Cities Service Oil Co*., 145 NLRB 467, 472 (1963), the Board held that safety inspectors who enforced safety regulations were not guards.[11] Thus, existing Board precedent holds that where employees enforce only the employer's fire and safety rules, even against fellow employees, and do so only incidentally to their other duties, those employees will not be found to be guards within the meaning of Section 9(b)(3).

Those earlier Board decisions find support in the legislative history of Section 9(b)(3), which indicates that Congress enacted Section 9(b)(3) out of concern over the possibility that plant guards could be represented by unions that also represented production employees.[12] Congress expressed its approval of the Sixth Circuit's 1946 decision in *NLRB v. Jones & Laughlin Steel Corp*., 154 F.2d 932 (6th Cir. 1946), revd. 331 U.S. 416 (1947), in which the court declined to enforce a Board decision finding appropriate a unit of guards and nonguard employees. The court found that, in cases of industrial unrest and strikes by production workers, the guards (who were members of the municipal police force, had investigated thefts and accidents on the employer's premises, and had made arrests for major felonies) would have obligations to the public that would be incompatible with their obligations to the union that authorized and directed the strike. 154 F.2d at 933–935.

[10] The court denied enforcement of the Board's decision in *McDonnell Aircraft*, 279 NLRB 357 (1986) (*McDonnell II*).

[11] See also *Nash Kelvinator Corp*., 107 NLRB 644, 645 (1953), in which safety department employees who checked for fire hazards and also checked other employees to see whether they were wearing safety equipment were found not to be guards.

[12] See 2 Leg. Hist. 1541 (LMRA 1947) (extended remarks of Sen. Taft).

The Board has interpreted the legislative history of Section 9(b)(3) as indicating the intention of Congress to avoid conflicting loyalties on the part of plant protection employees, and to ensure an employer that he would have a core of such employees to enforce plant rules during a period of unrest and strikes by other employees. *McDonnell I*, 109 NLRB at 969; *Lion Country Safari*, 225 NLRB 969, 970 (1976); *Blue Grass Industries*, 287 NLRB 274, 300 (1987).[13] Hence, when employees enforced employers' safety rules during normal operations, and not during strikes and other incidents of industrial unrest, the Board has found that such rule enforcement duties were not related to circumstances in which Congress felt conflicting loyalties might exist, and that the employees in question therefore were not guards. *McDonnell I*, 109 NLRB at 969; *Lion Country Safari*, 225 NLRB at 970.[14]

To be sure, the Board in a number of cases has found firefighters to be statutory guards. In those cases, however, the firefighters' duties encompassed traditional police and plant security functions as well as enforcement of fire and safety regulations. Thus, in *Reynolds Metals Co.*, 198 NLRB 120 (1972), firemen were required to stand gate duty to prevent the removal of company property and to check parcels being carried into and out of the plant, and were authorized to physically remove violators of company rules; some had been issued firearms. Similar duties were required of the firefighters in *North American Aviation*, 161 NLRB 297 (1966), who were also expected to patrol buildings in the event of a strike. Likewise, firefighters in *Boeing Airplane Co.*, 116 NLRB 1265 (1956), substituted for guards in emergency situations, were charged with stopping thefts and preventing trespassing, and were deputized as deputy sheriffs. Firefighters in *United Technologies Corp.*, 245 NLRB 932 (1979), assisted guards in controlling traffic and were authorized to issue speeding tickets; two were deputy sheriffs who were empowered to carry firearms and to make arrests.[15] Similarly, in *MGM Grand Hotel*, 274 NLRB 139 (1985), operators who monitored an electronic fire-prevention system, and were found to be guards, also monitored door exit alarms, stairwell motion detectors, and other security systems. These decisions, involving firefighters and other employees who performed traditional guard functions in addition to their duties to enforce fire and safety regulations, thus are distinguishable from but not inconsistent with *McDonnell I*, *Petroleum Chemicals*, and *Cities Service*, in which the employees in question did not perform such security functions, or did so only sporadically.

We are, of course, aware that the Eighth Circuit takes a different view. The court in *McDonnell III* found that

> [T]he Board's restriction of section 9(b)(3) application to the enforcement of security rules only cannot be reconciled with the plain language of the statute. More importantly, such a restriction is inconsistent with the recognized function of section 9(b)(3) which is to provide the employer with a core of plant protection employees, particularly during a time of labor unrest. The congressional intent was to avoid the potential for split allegiance which would serve to jeopardize that plant protection. The potential for divided loyalty is not limited to ''security'' or ''police-type'' rule enforcers but instead exists whenever any employee is vested with rule enforcement obligations in relation to his co-workers. [827 F.2d at 329.]

For several reasons, however, we respectfully disagree with this interpretation of the statute.

We question the court's assertion that the ''plain language'' of Section 9(b)(3) means that its application is not limited only to employees who enforce security rules. Section 9(b)(3) states that an appropriate unit may not include, together with other employees, ''any individual employed *as a guard* to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises [emphasis added].'' Were it not for the words ''as a guard,'' we think the court would be correct in interpreting Section 9(b)(3) as applying to any person employed to enforce any of the employer's rules against employees and others.[16] But that phrase does appear in the statute, and we shall not presume that Congress intended it to be without effect.[17] On the contrary, we think that Congress meant ''as a guard'' as words of limitation, and that the logical inference is that Congress, by including that phrase, intended to limit the reach of Section 9(b)(3) to those employees whose duties encompass the security-type functions generally associated with guards.[18]

[13] In other decisions, however, the Board has discussed the divided-loyalty issue without limiting it to situations involving strikes or other kinds of industrial unrest. See, e.g., *Walterboro Mfg. Corp.*, 106 NLRB 1383, 1384 (1953); *United States Gypsum Co.*, 152 NLRB 624, 627 (1965).

[14] The employees in question in *Lion Country Safari* did not enforce rules against other employees. 225 NLRB at 969.

[15] See also *Chance Vought Aircraft*, 110 NLRB 1342, 1344 (1954) (firefighters who enforced *all* company rules, safeguarded property against sabotage, espionage, and depredation, aided in quelling disturbances, and had been assigned to guard posts, held to be guards); *Republic Aviation Corp.*, 106 NLRB 91, 94 (1953) (fire patrolmen found to be guards where they reported incidents of sabotage and thievery); *A.F. Publicover & Co.*, 134 NLRB 573, 574 (1961) (fire inspectors who substituted for and assisted guards in the performance of guard duties, and were special municipal police officers, held to be guards).

[16] As a matter of fact, the Board itself has, on occasion, slipped into just that usage. See, e.g., *Lion Country Safari*, 225 NLRB 969 fn. 2; *McDonnell I*, 109 NLRB at 969. We think that usage by the Board was inadvertent, and we disavow it.

[17] A cardinal principle of statutory construction is that effect must be given, if possible, to every word and phrase in a statute. 2A Sutherland, *Statutory Construction* § 46.06 (4th ed.).

[18] The legislative history states that Sec. 9(b) of the conference report contains a description of the individuals who are considered to be guards. 2 Leg.

Second, although we agree with the court that Congress' concern in enacting Section 9(b)(3) was to avoid the possibility of divided loyalty on the part of plant protection employees during times of labor unrest, we respectfully disagree with the court's finding that the potential for divided loyalty exists whenever *any* employee is endowed with the authority to enforce *any* rule whatsoever that the employer has promulgated. The scope of this finding is too broad, in our estimation, to be squared with Congress' purpose in enacting Section 9(b)(3). Clearly, Congress was concerned about the problem of divided loyalties on the part of plant guards in times of industrial unrest. Under the court's interpretation, however, a secretary whose duties during normal times included reporting to her supervisor violations of the employer's no-smoking rules would be considered a guard within the meaning of Section 9(b)(3). Such a scenario, which we doubt the court envisaged, is a far cry from the situation in *Jones & Laughlin*, in which the court of appeals was concerned with employees who were municipal police officers and who investigated thefts on the employer's premises and made arrests for major felonies. Although the statutory concept of guards obviously is not limited to individuals who function as police officers, we think that, at least during normal times (i.e., not involving strikes or other kinds of ''industrial unrest''), it cannot be stretched so far as to include employees who carry out no security functions at all.

Applying our analysis to the facts of this case, we reaffirm our previous finding that the Respondent's firefighters are not statutory guards. The client's only regulations that the firefighters enforce pertain exclusively to fire and safety. Moreover, although the firefighters apparently spend much of their time checking for fire and safety violations, the specific rules that they enforce *against other employees* are limited. The firefighters' enforcement of fire regulations *against other employees*, including standing fire watches and enforcing Bethlehem's no-smoking rules, appears to be only incidental[19] to their duties to fight fires and ensure fire safety. See *McDonnell I*, 109 NLRB at 968–969. The only other safety rules they are specifically charged with enforcing *against other employees* are those concerning running and horseplay (and there is no evidence that those rules have ever actually been enforced).[20] The firefighters are never assigned to guard the gates or to investigate theft or vandalism, and there is no probative evidence that Bethlehem intends to use them to augment its patrols in the event of a strike.[21] In short, there is no evidence that the firefighters actually perform any security functions typically performed by guards.[22] On the basis of all the foregoing, we find that the enforcement of rules and regulations against other employees is not an essential part of the firefighters' duties, and that they are not guards within the meaning of Section 9(b)(3). Accordingly, they were properly included in a unit of nonguard employees, and the Respondent violated Sec-

Hist. 1537 (remarks of Sen. Taft); 1 Leg. Hist. 540 (House Conference Report, statement of House managers). The conference report, however, contains only the language that eventually was enacted as Sec. 9(b)(3): ''any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises[.]'' We interpret the legislative history not as indicating that Congress considered all individuals who possess the powers enumerated in Sec. 9(b)(3) to be guards, but only that possession of those powers is a necessary, but not sufficient, prerequisite to a finding of guard status.

[19] The Respondent argues that the firefighters' rule-enforcement duties cannot be found to be ''incidental'' to their other duties, because rule enforcement cannot be said to fall with the dictionary definition ''occurring merely by chance or without intention or calculation.'' The same dictionary (Webster's New Collegiate), however, contains a second definition of ''incidental,'' that is, ''being likely to ensue as a chance or minor consequence.'' It is in this second sense, i.e., that the firefighters' rule enforcement duties are a relatively minor consequence of their firefighting and fire prevention responsibilities, that we employ the term ''incidental.''

[20] Cf. *Chance Vought Aircraft*, supra, 110 NLRB at 1345 (written instructions and directions concerning rule enforcement responsibilities, without more, not sufficient to confer guard status).

The firefighters are authorized to issue traffic tickets only for blocking fire hydrants and then only with the assistance of plant patrol personnel. That authority, such as it is, thus is clearly incidental to the firefighters' reponsibility to enforce fire safety rules. And, as we have noted, the only such ticket of which the record contains evidence was issued by a lieutenant, not by a unit member.

[21] In this regard, this case differs from *McDonnell III*, in which the court found that the firefighters were specifically charged with enforcing rules regarding, inter alia, the unauthorized removal of classified material and other property and, in the event of a strike, with performing security-related duties such as traffic and crowd control and patrolling for striker misconduct. 827 F.2d at 329.

[22] As noted in fn. 7 above, the Respondent's handbook, which is distributed to the firefighters, contains general admonitions to report security violations. Those provisions, however, do not require a finding that the firefighters have responsibility for plant security at Bethlehem's Burns Harbor facility. First, there is no record evidence that the firefighters there have ever exercised such authority. The only testimony regarding traditional guard functions concerned gate assignments and the investigation of theft or vandalism, and established that the firefighters never perform those duties. In addition, as we have observed, the handbook also is distributed to the paramedics and to the mechanic, none of whom is alleged by the Respondent to be a guard. Employees with no greater responsibilities for plant security than those possessed by rank-and-file employees have been held not to be guards. *Cities Service Refining Corp*., 121 NLRB 1091, 1092–1093 (1958). Finally, the Respondent has not, in any of its submissions to the Board, cited those provisions of the handbook as evidence of the firefighters' asserted guard status. (By contrast, the Respondent has repeatedly cited the provision of the handbook that calls for firefighters to ''maintain a professional distance'' between themselves and Bethlehem employees.)

Bethlehem's ''Plant Conduct Notice'' lists numerous infractions for which discipline may be imposed, some of which (e.g., theft, unauthorized presence) involve security matters. However, the record establishes only that firefighters are responsible for reporting horseplay and safety violations: there was no testimony that they enforce any of the other rules.

That one of the firefighters may work as a guard at another of the Respondent's facilities does not affect our decision. Beach testified only in general and summary fashion about this matter, indicating only that one of the firefighters worked as a security guard at another location; he did not testify about any duties performed by that employee. Moreover, Riley's testimony indicates that that employee is a part-time firefighter, but not whether he is regularly employed by the Respondent; thus, the record does not establish whether that individual would be included in the unit sought (see fn. 1, supra). And even if we were to find that individual to be a guard, that finding would mean only that he should be excluded from the unit (assuming he otherwise would be included), not that the entire unit was inappropriate.

tion 8(a)(5) by refusing to bargain with the Union as the certified representative of employees in that unit.[23]

[23] In finding that the firefighters are not guards, we do not rely on the fact that they apparently do not enforce Bethlehem's rules and regulations personally, but only report violations to their superiors. It is well established that individuals may be found to be guards even if they possess and exercise only the responsibility to observe and report infractions. *Wright Memorial Hospital*, 255 NLRB 1319, 1320 (1981). Nor do we rely on the fact that the Respondent also employs security guards at the Bethlehem plant; the presence of such personnel does not preclude a finding that firefighters also are guards. See, e.g., *Reynolds Metals Co*., supra.

ORDER

The National Labor Relations Board reaffirms its earlier Order in this case[24] and orders that the Respondent, BPS Guard Services, Inc., d/b/a Burns International Security Services, Chesterton, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[24] 296 NLRB 113 (1989).