

The Boeing Company and International Association of Fire Fighters, AFL-CIO, CLC, Petitioner.
Case 19-RC-13151

April 29, 1999

DECISION ON REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND BRAME

On March 27, 1996, the Regional Director for Region 19 issued a Decision and Direction of Election in the above-entitled proceeding. In that decision, the Regional Director granted the Petitioner's request to hold an election among 107 firefighters who are presently represented by the Intervenor¹ in a larger unit composed of both firefighters and security guards.² The Petitioner contends, and the Regional Director agreed, that the Employer's firefighters no longer perform any security guard functions or duties and that, as a result, their placement within the existing unit of the Employer's security guards violates Section 9(b)(3) of the Act.³ In so finding, the Regional Director rejected the Employer's contention that its firefighters continue to perform security-related functions that render them guards under the Act.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer and the Intervenor filed timely requests for review, urging the Board to reverse the Regional Director's decision to direct an election among a separate unit of the Employer's firefighters. On May 13, 1996, the Board granted both requests for review.

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

The Board has considered the entire record in this case with respect to the issues under review and adopts the findings and conclusions of the Regional Director as modified below.⁴ As more specifically set forth below,

¹ International Union, United Plant Guard Workers of America and its Local Union No. 5.

² The Board originally certified a unit composed of both the Employer's firefighters and its security guards in *Boeing Airplane Co.*, 116 NLRB 1265 (1956). In that case, the Board concluded that the Employer's firefighters were statutory guards because the firefighters regularly substituted for security guards, were charged with stopping thefts and preventing trespassers from entering the property, and were deputized as deputy sheriffs. *Id.* at 1266.

³ Sec. 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.

⁴ The background and other pertinent facts and findings are set forth in the Regional Director's Decision, relevant portions of which are attached as an "Appendix."

we conclude, for reasons different from those provided by the Regional Director, that the duties and functions undertaken by the Employer's firefighters during periods when other members of the Employer's work force are on strike do not transform the firefighters' status into that of statutory guards.

I. FACTUAL FINDINGS

During the regular course of business, the Employer's firefighters perform traditional firefighters' duties and responsibilities. Accordingly, Boeing Fire Chief Kenneth Kirsch testified that firefighters spend approximately 75 percent of their time engaged in fire prevention activities, including performing regular inspections of buildings, fire protection systems, and equipment. Chief Kirsch testified that firefighters spend the remaining 25 percent of their time engaged in fire suppression and emergency response activities, including developing prefire plans, participating in training sessions, and responding to hazardous materials incidents, rescue situations, medical emergencies, and fire calls. A myriad of specific duties flows from the broad responsibilities of fire prevention and fire suppression, as outlined by the Regional Director in his decision.

The Employer argues, among other things, that during periods when other members of its work force are on strike, it charges its firefighters with security-related responsibilities that cause the firefighters to acquire the status of statutory guards. In making this argument, the Employer offered as an illustrative example its allocation of security-related responsibilities among its employees during the 1995 strike by the International Association of Machinists and Aerospace Workers (IAM). During that strike, as is typical in any strike, the Employer's security force experienced additional demands created by the presence of pickets on or near the property and by the possibility of trespassing or other activity disruptive to the Employer's continued operation during the strike. Consequently, in preparation for the 1995 strike, the Employer devised and implemented "strike plans" at all of its Puget Sound facilities. Those plans sought to prioritize the security functions that required attention during the strike and assign the available personnel accordingly.

During the 1995 strike, the Employer's regular security force assumed greater responsibility for monitoring and responding to activity occurring on the exterior of the buildings and facilities. Consequently, the Employer's 1995 strike plans called for firefighters to increase significantly their interior building tours, which, the Employer argues, is the primary guard-type function assumed by the firefighters during the strike. As a routine matter during nonstrike periods, firefighters regularly conduct building tours to insure that employees operate in fire-safe manners, and to inspect the readiness of the fire response systems. As a result of the firefighters' increased building inspections during the 1995

strike, the Employer calculated, and the Regional Director accepted as true, that firefighters performed approximately 8000 hours of facility inspections and building tours.⁵

The documents evincing the Employer's strike plans as well as testimony by management personnel and firefighters alike indicate that the Employer intended to serve at least two goals by increasing the firefighters' building tours during the 1995 strike. The record demonstrates that of fundamental concern to the Employer during the strike was the fact that its buildings and facilities would be virtually empty, except for skeletal crews attempting to operate in a business-as-usual fashion. These vacated work areas heightened the possibility that hazardous conditions would develop and that no employees would be present to observe or report them. Consequently, the Employer implemented the firefighters' additional building tours to permit them to watch for the development of hazardous conditions resulting from the Employer's continued operation during the strike.⁶ According to the strike plans, the Employer ranked various sites on its property among three categories of risk, and then based the frequency of site tours on the risk category within which they were placed.

The Employer also introduced evidence indicating that it intended the firefighters' augmented building inspections to serve a security-related purpose as well. The Employer states that the extra tours provided the Employer with "increased visibility" throughout its property—a uniformed presence that the Employer hoped would serve as a deterrent to any unauthorized conduct by striking or nonstriking employees. The Employer also charged firefighters with the responsibility of watching for suspicious persons or activities during their tours. So, for example, the Seattle strike plan advised the firefighters that "[i]f you encounter someone in an area where you do not think they belong, ask what business they have in the area and take their name and organization. If you feel uncomfortable performing this chal-

lenge, contact your supervisor or Security and continue on with your inspection as appropriate."⁷

Several firefighters testified that they and many of their colleagues did, in fact, "feel uncomfortable" with the extra security-related responsibility of challenging apparently unauthorized individuals on the Employer's property during the 1995 strike. Their apprehension was aired in prestrike crew meetings called by the Employer to inform firefighters of and prepare them for their role during the strike. Several firefighters testified that during these meetings, concern was expressed about firefighters' direct intervention in "suspicious" situations because they had no professional training or experience in restraining or detaining individuals, in the use of physical force, or in self-defense techniques and, as a result, they feared for their own safety under such circumstances.⁸ Several firefighters testified that the Employer advised them that their main role during the building tours was to be alert for the development of hazardous conditions and that they should simply call for security personnel if confronted with a security-type situation.

With one exception, every fire fighter at the hearing testified that, as a result of concerns raised prior to the strike, they were instructed to notify security immediately should they confront any questionable circumstances.⁹ Similarly, every fire fighter but one testified that he or she had no observations of nor any dealings with any suspicious persons or activities during their strike-related building tours in 1995. Finally, these firefighters indicated that had they made such an observation, they would have abided by the Employer's instructions to notify security instead of intervening themselves.

II. ANALYSIS

Section 9(b)(3) of the Act prohibits the Board from certifying for collective-bargaining purposes a unit of employees that includes both guards and nonguards. This section defines a guard as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the

⁵ The record does not reflect the number of hours firefighters spent conducting building tours during nonstrike periods. As a result, we are able to conclude only that the firefighters conducted an increased number of building tours during the 1995 strike, but we are unable to calculate the magnitude of the increase.

⁶ Chief Kirsch confirmed that the role of the firefighters conducting building tours during the strike was, in part, "to focus on hazardous processes within the building . . . keeping in touch with hazardous operations that managers were now performing that hourly employees used to be performing. . . . [W]e've had some serious incidents during strike activities, and . . . part of the reason why is that we got inexperienced people doing some very hazardous operations. And that was part of [the firefighters'] strike patrol mentality, mindset, as well." The Employer's strike plan also bears out this point. It indicates that "[i]f a strike occurs, the employee reduction would be immediate. These employees were counted on the [sic] provide our department with valuable information when they were here. We need to compensate for their absence, and provide hazard patrols."

⁷ Other strike plan documents reiterate that firefighters were "instructed to question persons that seem out of place for the area being inspected at the time. They have also been informed that if they are not comfortable asking these questions of individuals they encounter within buildings or on property they may request security to come to their location for assistance." In another portion of the plan, the Employer advised the firefighters that "[i]f, while on your routine operations, you notice any unusual activity, report it immediately to Security. They cannot be everywhere at all times so we have to be their eyes and ears as we travel throughout the facilities."

⁸ Chief Kirsch confirmed that firefighters receive no professional training in confronting suspicious individuals or circumstances or in self-defense techniques, and that in a police or security-type situation, firefighters are to report the situation to security and summon assistance.

⁹ The sole exception was Fire Fighter Keith Meckem, who was never asked about his responsibilities or actual experiences during the strike-related building tours.

safety of persons on the employer's premises." In a great many cases, as here, an employer will charge certain employees with duties that are arguably security-related for only a portion of their working hours. Of central concern in such cases is not a numerical accounting of the percentage of time employees spend on such duties but rather the specific nature of the duties themselves. *Rhode Island Hospital*, 313 NLRB 343, 346 (1993).¹⁰ Accordingly, the Board has determined that employees are guards within the meaning of the Act if they are charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities. *Id.* at 347. Guard responsibilities include those typically associated with traditional police and plant security functions, such as the enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status. *Wolverine Dispatch, Inc.*, 321 NLRB 11, 13 (1996); *55 Liberty Owners Corp.*, 318 NLRB 308, 310 (1995); *Burns Security Services*, 300 NLRB 298, 300 (1990), enf. denied 942 F.2d 519 (8th Cir. 1991).

The Board has determined that of particular concern to the drafters of Section 9(b)(3) is the role a disputed employee may play during a period of industrial unrest or strike by other members of an employer's work force. *Burns*, 300 NLRB at 300. In enacting this section of the Act, Congress sought to prevent the conflict of interests that might arise among an employer's guard employees when, during a strike by a unit of nonguard employees represented by the same union that represents the employer's guards, the guards are called upon to enforce the employer's security rules against their striking colleagues. Section 9(b)(3) provides employers with a measure of insulation from this scenario of divided loyalties by precluding the Board from certifying a unit composed of both guard and nonguard employees.

Based on this legislative history, the Board will scrutinize the duties and responsibilities assumed by the disputed employees during periods of industrial unrest or strike. This scrutiny of strike-related duties, however, is not unlike the scrutiny applied by the Board to the duties

assumed by the disputed employees in a nonstrike context. See, e.g., *Burns*, 300 NLRB at 301 and fn. 21 (firefighters were not statutory guards in part because their strike-related duties were not "security-related duties such as traffic and crowd control and patrolling for striker misconduct"). Consequently, we examine the nature of an employee's strike-related duties in the same manner that we examine their nonstrike related duties. In each case, the focus of our inquiry is whether the disputed employee engages in guard responsibilities that are not a minor or incidental part of their overall responsibilities. *Rhode Island Hospital*, 313 NLRB at 347.

We recognize, as the Board did in *Burns*, supra, 300 NLRB at 300, that one court of appeals—the Eighth Circuit—has taken a much broader view of Section 9(b)(3) than has the Board. Thus, in *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324 (8th Cir. 1987), the court concluded that Section 9(b)(3) status "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[.]" without regard to whether that authority is exercised during periods of industrial unrest or during periods of normal operations. *Id.* at 329; see also *BPS Guard Services Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991). Our dissenting colleague has endorsed this Eighth Circuit view. The Board, however, has respectfully declined to adopt this approach, which would capture within its expansive sweep large categories of prototypically nonguard employees, who, for instance, may have been charged with the simple reporting of health and safety infractions during periods of normal operations. Based on our analysis of the legislative history surrounding the enactment of Section 9(b)(3), as well as the plain language of the statute, we have concluded that Congress intended that it have a more limited application. See *Burns*, 300 NLRB at 299–301. "Hence, when employees enforce[] 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." *Id.* at 300. When employees allegedly assume security or police-type functions during periods of industrial unrest, as we have in the instant case, we will determine their status under Section 9(b)(3) by analyzing whether the disputed guard responsibilities are a minor or incidental part of their overall responsibilities.

Applying our analysis to the facts of this case, we agree with the Regional Director that the Employer's firefighters are not statutory guards. In particular, we conclude that during the 1995 strike, the firefighters retained as their primary and essential function the prevention and suppression of fires. This conclusion is underscored, rather than diminished, by the Employer's in-

¹⁰ In *Rhode Island Hospital*, the Board, among other things, found that the shuttle van drivers were guards within the meaning of the Act. The shuttle van drivers were specifically charged with certain responsibilities, such as being on the lookout for and reporting security problems or rules violations. They also responded to threatening violations when needed. It is significant, however, that in concluding that these duties cloaked the drivers with statutory guard authority, the Board specifically found that such duties were "not a minor or incidental part of their overall responsibilities." *Id.*, 313 NLRB at 347. As we find here, any such duties performed by the firefighters are clearly minor and incidental to their primary function of protecting the Employer's premises from fire hazards.

crease in the firefighters' strike-related building tours. During nonstrike periods, the Employer's firefighters conduct regular inspections of facilities as a routine part of their job in order to ensure both the readiness of fire protection systems and the safety of the Employer's ongoing operations. Accordingly, these building tours are, by their very nature, essentially fire- and safety-related tours. While the Employer increased the frequency of these tours during the 1995 strike, the firefighters' expanded deployment was primarily targeted not at those areas found to be at an increased security risk, but rather at those areas found to be at an increased *fire and safety risk* based on the Employer's own hazard assessment. Moreover, the firefighters testified that during the strike, they conducted building tours in essentially the same fashion as they had always conducted them, albeit with increased frequency. Generally speaking, the firefighters' building tours remained fundamentally fire- and safety-related in nature during the strike, and an increase in frequency of those tours does not transform what is otherwise a nonguard responsibility¹¹ into a guard responsibility. Consequently, while the Employer may have heightened its firefighters' overall duty to protect the Employer's property and the safety of those on its premises during the 1995 strike by stepping up the frequency of the building tours, that heightened responsibility remained inherently fire- and safety-related in character.

While the firefighters' facility inspection duty during the 1995 strike was primarily driven by the Employer's fire- and safety-related exigencies, the record indicates that the Employer also relied on the firefighters' increased presence inside its facilities to act as an early warning system for security-related incidents. This security-related responsibility is demonstrated by the Employer's written instructions to the firefighters during the strike to be alert for suspicious activity while on their tours and question unfamiliar individuals on the premises. The firefighters' testimony makes clear, and the Employer does not dispute, however, that those instructions were adjusted in response to the firefighters' expressed concerns that they were "uncomfortable" in performing security-related functions. As a result, firefighters were also instructed to report suspicious activity to the security department rather than deal directly with it themselves. In addition, the record furnishes no instance

¹¹ The protection of the Employer's property and its inhabitants from fire and other hazards, the enforcement of the Employer's fire and safety regulations, and the performance of other traditional fire fighting responsibilities are not per se guard responsibilities. See, e.g., *Burns*, 300 NLRB at 300-302 (firefighters whose primary duties entail fighting fires and ensuring fire safety and who incidentally enforce fire and safety rules are not guards). In those cases in which the Board has found firefighters to be statutory guards, we have determined that "the firefighters' duties encompassed traditional police and plant security functions" in addition to their primary fire fighting responsibilities. *Id.* at 300.

in which firefighters discovered and directly intervened themselves in a suspicious incident during the 1995 strike. Based on this record, we conclude that firefighters were charged with, at most, a reporting function that was largely appurtenant to the substantial demands placed on them by their overall fire- and safety-related responsibilities. As a result, to the extent that the firefighters' 1995 strike-related duties conferred upon them some limited guard responsibilities, those responsibilities were only a minor and incidental part of their overall responsibilities during the strike and, thus, do not transform the firefighters into statutory guards.

Our dissenting colleague suggests that the firefighters in this case are guards under the Act because they are charged with the responsibility of enforcing fire and safety rules, as well as other kinds of rules, during nonstrike periods. We disagree. At the outset, in reaching this conclusion, our colleague is applying the expansive view of the Eighth Circuit, which, as discussed, *supra*, the Board has declined to adopt. The Eighth Circuit's view is an overly broad definition of guard status which captures within its terms employees who do not engage in traditional security functions on a regular and ongoing basis. In addition, the Board has said that the enforcement of fire and safety rules are not inherently guard duties. See fn. 11, *supra*. Further, as discussed by the Regional Director, instructions and directives that confer the authority on firefighters to enforce other than fire and safety-related company rules do not endow them with guard status unless that authority is exercised as more than a minor and incidental part of their other, nonsecurity related duties. That is not the case here. The Employer's compilation of security reports does not show otherwise, and our dissenting colleague's reliance on those reports as indicating that firefighters participated in some fashion in a security function is misplaced. As the Regional Director fully discussed, those reports were a nonrandom compilation, selectively culled by the Employer, which do not demonstrate that any security function was more than a minor and incidental part of the firefighters' overall fire and safety-related responsibilities.

Similarly, we disagree with our dissenting colleague that *MGM Grand Hotel*, 274 NLRB 139 (1985), *A. W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983), and *Wright Memorial Hospital*, 255 NLRB 1319 (1980), establish that the firefighters' responsibility to report security problems confers guard status. In none of those cases did the Board find that a reporting function alone, without other significant security-related responsibilities, could confer guard status. So, for instance, in *MGM Grand*, aside from the reporting function, the J.C.-80 operators were charged with monitoring an electronic system for fire and security incidents, including inspecting door exit alarms, stairwell motion detectors, and a watch tour system. In *A. W. Schlesinger*, the disputed

employees assumed security responsibilities after the employer eliminated its contract security guards. They spent between 50 and 75 percent of their time on security-related functions, including locking and unlocking doors, monitoring the property during shift changes, making hourly rounds of the property, and ensuring that parking lots were illuminated. Finally, in *Wright Memorial*, in the absence of a hospital security force, the Employer's ambulance drivers made security rounds twice per shift. In other words, in each of these cases, an essential attribute of the disputed employees' responsibility encompassed monitoring the Employer's property for security purposes and reporting any findings to others equipped to deal with them. Here, by contrast, the essence of the firefighters' responsibilities—during both strikes and nonstrike periods—was to monitor the Employer's property for fire and safety risks. The additional charge to report security problems during strikes was purely incidental to that primary function. As a result, the employees' reporting functions in *MGM Grand, A. W. Schlesinger* and *Wright Memorial* were reflective of, rather than distinct from, the essential responsibilities of the disputed employees.

Accordingly, we affirm the Regional Director's decision that the Employer's firefighters are not guards within the meaning of Section 9(b)(3) of the Act, and remand this case to him for further appropriate proceedings.¹²

MEMBER BRAME, dissenting.

I would dismiss the petition because I disagree with the Board's interpretation of Section 9(b)(3) here and in *Burns Security Services*.¹ In my view, the Board should make "guard" determinations in conformity with the construction of Section 9(b)(3) set forth by the United States Court of Appeals for the Eighth Circuit in *McDonnell Aircraft Co. v. NLRB*² and *BPS Guard Services, Inc. v. NLRB*.³ Under the court's construction of the statute, employees—even without security-type functions—are considered guards where they have "the obligation to protect the employer's property combined with the responsibility to enforce rules against fellow employees."⁴ Applying this standard, I would find that the present duties and responsibilities of the Employer's firefighters require their continued inclusion in the existing guard unit.

¹² The Employer also contends that the Regional Director erred by including within the unit of firefighters the Employer's fire dispatchers. We conclude that this issue may best be handled through use of the Board's challenge procedure. Accordingly, the Regional Director's decision is amended to permit these individuals to vote subject to challenge.

¹ 300 NLRB 298 (1990), enf. denied 942 F.2d 519 (8th Cir. 1991).

² 827 F.2d 324 (8th Cir. 1987).

³ 942 F.2d 519 (8th Cir. 1991).

⁴ *McDonnell*, supra, 827 F.2d at 326.

I.

The Employer manufactures aircraft at various facilities, including its Puget Sound area facilities, in the State of Washington. The Intervenor currently represents an existing 322-member unit consisting of all plant security guards and firefighters working for the Employer at the Puget Sound area locations. More than 40 years ago, the Board found that the Employer's firefighters were properly included in the unit as statutory guards.⁵ At that time, the Board stated, "[A]lthough the primary function of the firemen is fire prevention and fire protection work, an essential part of their duties and responsibilities is the enforcement of other plant protection rules."⁶ Now the Petitioner seeks to sever the Employer's current complement of 107 firefighters from this certified guard unit. The Petitioner contends, contrary to the positions taken by the Intervenor and the Employer, that the firefighters working for the Employer today no longer perform guard duties within the meaning of Section 9(b)(3) of the Act. The Regional Director agreed with the Petitioner's contention, and he ordered a severance election for the firefighters. The Board approves this decision, but with a modified rationale.

II.

Section 9(b)(3) of the Act provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes 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.

Thus, a union like the Petitioner, which admits nonguards to membership, cannot represent Boeing firefighters if they meet the statutory status of guards.

The differences between the approaches taken by the Board here and in *Burns* and the Eighth Circuit in *McDonnell* and *BPS Guard Services* present a significant issue of statutory interpretation. The Board agrees with the Eighth Circuit that, in enacting Section 9(b)(3), "Congress was concerned about the problem of divided

⁵ See *Boeing Airplane Co.*, 116 NLRB 1265 (1956).

⁶ *Id.* at 1266.

loyalties on the part of plant guards in times of industrial unrest.”⁷ The Board also agrees that, “[T]he statutory concept of guards obviously is not limited to individuals who function as police officers.”⁸ Nonetheless, “[E]xisting 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).”⁹

In *Burns*, the Board found that the company’s firefighters who provided services to customer Bethlehem Steel did not fall within the meaning of “guard” under Section 9(b)(3) because, e.g., they did not patrol the plant for security breaches, deny unauthorized persons access to the facility, check parcels of persons entering or exiting the plant, or prevent thefts.¹⁰ Even though acknowledging that the *Burns* firefighters “may, by reporting unsafe working conditions to their lieutenants, even cause jobs to be shut down until the unsafe condition is eliminated,” the Board concluded that these firefighters’ enforcement of such safety rules did not warrant a finding that they were statutory guards.¹¹

III.

On review of *Burns*, the Eighth Circuit in *BPS Guard Services* rejected the Board’s construction of Section 9(b)(3). The court summarized the firefighters’ duties as follows:

[They] inspect for fire hazards, obstructed fire equipment, doors, and hallways, and are charged with enforcing the no-smoking policy. . . . [They] are responsible for inspecting and maintaining the fire prevention/protection equipment . . . and they . . . oversee [hot work such as burning and welding] and are responsible for ensuring that any such work is performed in compliance with appropriate fire safety rules. . . . [They] are charged with responsibility to report violations of certain fire and safety rules. . . . [T]heir primary form of rule enforcement is the written report.¹²

In finding striking factual similarities between the duties of the *Burns* and *McDonnell* firefighters and 9(b)(3) guard status for the *Burns* firefighters, the court relied on its earlier analysis of the statute in *McDonnell*. In *McDonnell*, the court had found that Congress enacted Section 9(b)(3) in response to the Supreme Court’s reversal of the Sixth Circuit’s decision in *NLRB v. Jones & Laughlin Steel Corp.*¹³ More particularly, the Eighth

Circuit found that Section 9(b)(3) essentially came into existence because Congress favored the Sixth Circuit’s reasoning that “guards who belong to a union also representing members who are not guards would experience conflicting loyalties in the event of a strike because their obligation to the employer and the community would be impossible with their obligation to the striking union.”¹⁴

I believe the Eighth Circuit is correct. As noted, Section 9(b)(3) states, in pertinent part, that the guard exclusion extends to “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.” The text of the statute does not distinguish among “rules,” differentiating enforcement of security rules from fire and safety rules. Rather, all rules pertaining to the protection of the employer’s property and the “safety” of the persons on the employer’s premises are included within the provision’s scope. Nor does the statute require that most or all of the putative guard’s time be spent in enforcing rules to protect persons and property.

Nevertheless, in *Burns*, the Board focused on that part of Section 9(b)(3) referring to “any individual employed as a guard to enforce against employees and other persons rules.” [Emphasis added.] According to the Board,

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. . . . [W]e 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. [Emphasis added and footnotes omitted.]¹⁵

I cannot agree. The phrase “as a guard” is more logically construed as the general function performed by any individual when enforcing any rule against employees to protect property or personal safety, rather than the individual’s status as a security officer. This interpretation harmonizes with decisions finding guard status among persons employed in job classifications like those summarized by the court in *McDonnell*.¹⁶

The Board and reviewing courts have consistently declined to restrict the application of section 9(b)(3) to “plant security guards,” *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5, 9 (2d Cir.), cert. denied, 474 U.S. 901, 106 S.Ct. 225, 88 L.Ed. 225 (1985), finding on various occasions that unarmed courier service drivers, *Local 851, Int’l Brotherhood of Teamsters v. NLRB*,

⁷ *Burns*, 300 NLRB at 301; *Lion Country Safari*, 225 NLRB 969, 970 (1976).

⁸ *Burns*, 300 NLRB at 301.

⁹ *Id.* at 299.

¹⁰ *Id.* at 300.

¹¹ *Id.* at 299.

¹² 942 F.2d 519, 525.

¹³ 154 F.2d 932 (1946), revd. 331 U.S. 416 (1947). See 2 Leg. Hist. 1541 (LMRA 1947) (statement of Senator Taft).

¹⁴ See *McDonnell*, 827 F.2d at 326.

¹⁵ *Burns*, 300 NLRB at 300.

¹⁶ 827 F.2d at 326.

732 F.2d 43, 44 (2d Cir. 1984); fitting room checkers, *Broadway Hale Stores, Inc.*, 215 NLRB 46 (1974); timekeepers, *Tulsa Hotel Management Corp.*, 135 NLRB 968, 971 n. 8 (1962); armored car guards, *Armored Motor Service Co.*, 106 NLRB 1139, 1140 (1953); and receptionists, fire patrolmen, chauffeurs and investigators, *Republic Aviation Corp.*, 106 NLRB 91 (1953), come within the ambit of the section 9(b)(3) definition of “guard.”

If the Board is correct in its construction of the phrase “a guard” in *Burns*, it should logically limit statutory guard status to persons who function strictly as plant security guards.¹⁷ Yet the Board has wisely chosen not to do so.

In finding fire prevention/suppression specialists not to be guards in the underlying case before the court in *McDonnell*, the Board had stated that “any duties they perform relating to security are clearly incidental to their primary functions of fire prevention and suppression.”¹⁸ The court, however, correctly rejected this view as “contrary to the legislative purpose and plain language of the statute” and “inconsistent with previous Board decisions.”¹⁹ In this, the court detected the fallacy lying at the heart of the Board’s position in requiring the employees to “perform security and other police-type functions as major and continual parts of their jobs” to be deemed guards:²⁰

[S]uch 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

¹⁷ The legislative history recited by the *Burns* Board, 300 NLRB at 301 fn. 18, 1 Leg. Hist. 540 (House Conference Report), cannot support its interpretation of Sec. 9(b)(3) since it merely paraphrases the language that eventually became the final text of the provision.

The Board’s concern also expressed in *Burns* that the Eighth Circuit’s interpretation of Sec. 9(b)(3) would encompass as a guard “any employee . . . endowed with the authority to enforce any rule whatsoever that the employer has promulgated” is unfounded. 300 NLRB at 301 [emphasis in original]. The court itself emphasized that its interpretation of the statute was guided by Congress’ purpose in enacting Sec. 9(b)(3), i.e., to avoid the potential of divided loyalty in any employee who is vested with the authority to enforce rules and regulations for the protection of company property and personal safety. See *McDonnell*, 827 F.2d at 329. In fact, it is this “measuring stick” that the court used to exclude the *Burns* firefighters as 9(b)(3) guards. The court determined that their duties would “clearly create a potential for divided loyalty if the firefighters are included in the same bargaining unit as the employees whose conduct the firefighters monitor and against whom they are required to testify.” *BPS Guard Services*, 942 F.2d at 526.

¹⁸ 279 NLRB 357, 358 (1986).

¹⁹ 827 F.2d at 329.

²⁰ *Id.*

exists whenever any employee is vested with rule enforcement obligations in relation to his co-workers.²¹

IV.

The record shows that the firefighters, as part of Boeing’s security and fire protection department, are responsible for the protection and safety of company employees and property. The firefighters provide fire protection and fire prevention services throughout the Employer’s Puget Sound area facilities during three work shifts, 24 hours a day, and 7 days a week. They ensure the operability of the company’s fire protection systems and the controlling of hazardous processes used in the Employer’s manufacturing operations. The firefighters inspect and test fire equipment, including fire extinguishers, valves, fire hydrants, and they issue welding permits, hot work permits, and permits for certain types of heat-shrink zap guns. They also perform several different security support functions at major events hosted by Boeing for special dignitaries visiting its operations. Some firefighters are drivers, whose duties include the operation of fire engines and their equipment. Other firefighters are inspectors, whose duties include patrolling the buildings in search of fire safety hazards, training nonunit employees in the use of fire extinguishers and emergency evacuation procedures, and testing new fire prevention equipment.²²

The firefighters have significant company rule enforcement duties and security responsibilities. If the firefighters observe violations of safety and fire hazard rules, they have the authority and responsibility to shut down the job if it presents a hazardous condition. The firefighters are responsible for enforcing the company rules, are subject to discipline for failure to do so, and are so informed during their initial training. The testimony of Kenneth Kirsch, the Employer’s fire chief, particularly illuminates this point. Kirsch testified that the Employer maintains a set of company rules governing employee conduct and contains specific requirements with regard to fire, safety, and security. The firefighters are specifically trained to enforce the company rules. According to Kirsch, during new employee orientation sessions, they are told that in their role as uniformed firefighters

if you see a person violating company rules, like stealing something, you have a responsibility to report it. And it’s—you got a job to do there and so it’s made very clear in these briefings as well.

Kirsch further pointed out that section 2 of the company rules (i.e., “Failure to comply with security and fire protection regulations”) involves

²¹ *Id.*

²² Since 1988, the Employer has required the firefighters to be certified as emergency medical technicians. The firefighters do not carry weapons and are not empowered as deputy sheriffs, as were their counterparts 40 years ago.

Safeguarding of classified information, entering or leaving company premises—premises other than designated entrances or exits, opening any exterior gate, doors, or exits where guards are not station[ed], failure to wear and properly display your identification badges, lending or borrowing identification badges, violation of company traffic or parking regulations, possession of weapons or explosives while on company premises without authorization, possession of cameras on company premises without authorization, and smoking in prohibited or hazardous areas.

Furthermore, the Employer submitted voluminous reports that sufficiently document the firefighters' important role in observing, reporting and enforcing the company rules,²³ including both fire-related rules and those rules against trespassing, vandalism, fighting and theft, and rules preventing access to unauthorized areas. For example, firefighters have reported unauthorized persons on company premises; stopped unauthorized vehicles from entering company property; searched the premises for reported stolen company keys; investigated the company's restroom facilities for evidence of vandalism by fire; reported employee fighting on company property; and directed employees to quit smoking in prohibited or hazardous areas.

During the 9-week strike conducted by the International Association of Machinists (IAM) in 1995, in addition to their normal security responsibilities, the firefighters were assigned to perform building tours and other security duties. The Employer's unchallenged documentary evidence shows that the firefighters assumed greater responsibility for inspecting and monitoring the buildings' outside areas during the strike. They

²³ My colleagues reluctantly acknowledge that the Boeing firefighters have these responsibilities, but they diminish the importance of the reporting function exercised by the firefighters as an indication of statutory guard status. They state that the firefighters "simply call for security personnel if confronted with a security-type situation" and "were also instructed to report suspicious activity to the security department rather than deal directly with it themselves." They conclude that the firefighters "were charged with, *at most*, a reporting function that was largely appurtenant to the substantial demands placed on them by their overall fire- and safety-related responsibilities." (Emphasis added.)

The majority's analysis in this respect is contrary to existing Board law. In *MGM Grand Hotel*, 274 NLRB 139, 140 fn. 10 (1985), in finding guard status for employees who simply monitored an automated fire and security system, the Board said, "The fact that the J.C.-80 operators *must* notify a security officer does not detract from their guard status. The Board held in *A.W. Schlesinger Geriatric Center*, 267 NLRB 1363, 1364 (1983), that 'it is sufficient that [the employees in question] possess and exercise responsibility to observe and report infractions, as this is an essential step in the procedure for the enforcement of the [employer's] rules.'" (Emphasis added.) In *A.W. Schlesinger*, also at 1364, the Board stated the fact that the disputed employees "may report to supervisors, if present, or notify the police does not detract from their guard status." Indeed, in *Burns* itself, the Board cited with approval its holding in *MGM Grand Hotel*, 300 NLRB at 300. Accord: *Wright Memorial Hospital*, 255 NLRB 1319, 1320 (1980) ("immaterial" that ambulance drivers who also make security rounds do not themselves enforce rules to protect persons and property, but merely observe and report infractions).

also significantly increased their interior building tours and performed over 8000 hours of strike patrols during the IAM strike involving thousands of Boeing's employees. In fact, the Employer's written strike plans and directives reveal that the firefighters were expected to perform security responsibilities on strike patrols and they were directed to

Look for any individuals or suspicious persons working in the building. If you encounter someone in an area where you do not think they belong, ask what business they have in the area and take their name and organization. If you feel uncomfortable performing this challenge, contact your supervisor or Security and continue on with you inspection as appropriate.

Based on the foregoing facts, I find that the Employer's firefighters meet the statutory test for guards. The duties of the Boeing firefighters correspond to those listed by the court in *McDonnell* and *BPS Guard Services*. Here, as in *McDonnell*,

[T]he certification of a nonguard union . . . poses a significant danger of divided loyalty. The firefighters are vested with substantial obligations regarding the protection of company property and the safety of persons on the employer's premises. This obligation is heightened during periods of labor unrest. The potential for a conflict of loyalty could arise, for example, if, during a strike, the firefighters are called upon to assist in the event of a fire or other threat to company property. The firefighters may not only be asked to cross their union's picket lines, but they may also be required to enforce plant rules and regulations against their fellow striking union members. This conflict of loyalty may seriously impair the continued protection of the employer's facility.²⁴

Accordingly, I would dismiss the petition because the Petitioner is disqualified from representing a guard unit by the statute since it admits nonguard employees to membership.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer manufactures aircraft at various locations, including its Puget Sound, Washington area facilities involved herein, which are: Plant 2, Developmental Center, Seattle, Boeing Field, Seattle, Renton, Kent Space Center, Auburn, Everett, Tulalip, and Frederickson. The existing unit of all plant guards and firemen employed by the Employer in the State of Washington was certified by the Board in case 116 NLRB 1265 (1956) (19-RC-1874), in which the Board concluded that the firemen were guards within the meaning of Section 9(b)(3) of the Act.⁴ Petitioner contends that present-day firefighters are

²⁴ 827 F.2d at 329-330.

⁴ Sec. 9(b)(3) of the Act provides that the Board shall not

not guards and seeks to sever the firefighters from the certified unit of guards and firefighters, currently represented by the Intervenor. The Employer and Intervenor contend that the firefighters are guards as found by the Board in 1956. There are about 107 firefighters, 215 security guards, and 72,000 total employees.

The primary duties of the firefighters are fire prevention and emergency response. Fire prevention includes insuring that all fire protection systems and equipment are in good condition. Firefighters regularly inspect such systems and equipment, including monthly inspections of over 18,000 fire extinguishers and about 4000 valves, and yearly inspections of all hydrants and testing of 91,000 feet of hose. Control of hazardous processes is an important fire prevention activity. Firefighters go into the factory buildings to issue hot work permits for soldering, welding, and any other open-flame activity, and then issue permits for certain types of heat-shrink "zap guns" used on board aircraft. Over 15,000 such permits are issued in a year. Firefighters inspect spray-paint operations. They stand by during fueling and defueling activities on airplanes. They respond to a variety of emergencies, including aircraft and structural fires, hazardous materials incidents, rescues from confined spaces, and medical emergencies. Firefighters also perform specified functions during special events. Documentary evidence in the record is detailed and specific with respect to the assignments given to firefighters during such events. For example, at the annual stockholders meeting, firefighters are stationed around the area to be available to provide emergency medical response, to facilitate clearing and opening emergency exits if necessary and to be prepared to manually operate otherwise automated fire control systems which are deactivated during the meeting to prevent inadvertent operation. The Employer's airport facilities are occasionally used for the arrival and departure of foreign and national dignitaries. Special planning for deployment of personnel is made for each such event. Typical of such plans is that developed for a head of state and dignitary visit in September 1994. The fire protection operating plan provided for a specific fire engine to be stationed in a specific fire station, special handling of emergency medical services and any hazardous materials incidents, special instructions for the operation of fire alarm systems, fire prevention sweeps the day prior to the visit and again 2 hours prior to the visit, and fire department staffing on the flightline and inside the factory.

On a routine day, a firefighter reports to the station, performs equipment maintenance such as checking the fire engines, crash rescue vehicles, and pickup trucks to assure that they are properly equipped, functioning, and fueled. Another routine duty is the issuance of hot work permits. The firefighter is dispatched to an area in the factory where open-flame work is to be performed. The permit specifies the date, time, location, number of people involved, and a description of the work to be done. The firefighter assesses the area for hazards set forth on a checklist,

[D]ecide 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.

for a nearby fire extinguisher, and for any other applicable fire protection. There may also be specific requirements such as removing debris from the area. An expiration time for the permit is given by the firefighter. Because of the danger of static electricity igniting fuel vapors, firefighters are present at all fueling and defueling of airplanes. Firefighters also stand by during the takeoff of the first flight of a new airplane, watching for any problems such as smoke or flame coming from the plane. Firefighters inspect all sprinkler valves twice a month. On any sprinkler system needing work, a firefighter closes the relevant valve and drains off the water prior to the work being done. After the work is done, a firefighter returns to insure that the valve is restored and that the system is functioning properly. Firefighters daily inspect the very early smoke detection apparatus (VESDA) attached to airplanes on the assembly line. Each time an airplane is moved down the line, the VESDAs must be detached and reattached at the new location. Firefighters routinely inspect structures to note features which would be significant in the event of fire, such as possible hazards. They also regularly walk through buildings which are not occupied on off-shifts, to check for possible hazards such as machines left on.

Some fire department employees are driver/operators whose prime responsibility is the operation of the fire engines and the equipment on them. There are also inspectors whose duties include walking through buildings as assigned to look for fire prevention and life/safety hazards. They train other employees in the use of fire extinguishers and emergency evacuation procedures. Inspectors perform "confidence testing" on new fire prevention systems such as sprinklers during the installation process, and routine testing of existing systems. Firefighters respond to calls involving medical emergencies. Beginning in 1988, all newly hired firefighters have been required to be certified emergency medical technicians (EMTs). Firefighters are also charged with responding to hazardous materials incidents, airplane crashes, and rescue situations.

The Employer's security chief testified that firefighters occasionally provide gate relief for security guards for brief periods such as restroom breaks or because a security guard is required at another location. He said that firefighters are not regularly scheduled to provide gate relief, that he did not know how often such gate relief activities occur, but that they occur more frequently in Everett than other locations. The record is contradictory as to whether firefighters in Everett man gates regularly. The Employer's fire chief testified that at the Everett facility, firefighters are assigned twice a week to man a gate on the third shift for about 1.2 to 1.5 hours. Keith Mathers, a firefighter employed at the Everett facility on the third shift, testified that in 1992 or 1993, firefighters in Everett assisted security at one gate three or four times a week, but that in the past 2 years, the third shift firefighters have only done that work occasionally, sometimes once a week, sometimes only once a month. Mathers said that on such occasions, he has sat inside a shack while a security guard checked the badges of persons entering, and that his role was to issue a temporary pass to any person who needed one. The firefighters do not carry weapons and are not deputized as deputy sheriffs as were their counterparts in 1956.

Security guards control 12 gates on a 24-hour basis and another 30 to 35 gates for fewer hours per day. There are at least 30 unmanned gates which employees may enter by running the magnetic strip on their employee badges through a reader. Security guards are trained in the use of firearms and pepper

mace, both of which they carry while on duty. On the day shift, there is one security officer on patrol by car at each of the major facilities. That guard responds to calls such as assisting an employee getting into a vehicle if the keys were locked in, jump-starting cars, unlocking doors, taking reports on incidents, and emergencies. There are two or three guards assigned to provide relief on gates. They also patrol and are available for emergencies. On the second and third shifts, weekends, and holidays, security guards perform key tours in buildings, which involve following a regular route through a building. The buildings are equipped with Detex clocks at various points—the security officer swipes a card through the clock, recording the time of the visit. Security guards also respond to fires and hazardous materials incidents, in which their role is to keep people out of the way, to keep ingress and egress routes clear, and to evacuate buildings not part of the hot zone. Security guards are trained to handle people who need to be detained. Gaylord Baker, the Employer's chief of uniformed security operations, testified that security guards do not patrol on foot inside buildings during the day shift because the security operation lacks sufficient personnel to staff that activity and there are firefighters in the buildings on that shift conducting their routine inspections and issuing permits. Baker described two incidents in his twenty years' employment with Boeing security in which security guards have drawn their weapons. One such incident involved the apprehension of a nonemployee who had entered the Employer's parking lot and been recognized as a person wanted by Seattle police. There is no evidence that any firefighters responded to that incident. A second incident was the suspected hijack of an aircraft, as described above, to which both security and fire personnel responded in a manner that Garvey described as, "Anything that rolled that day was heading there."

Donald Jarvey, the Employer's deputy director of security, and fire protection, testified that firefighters perform certain security functions, including gate reliefs, patrols of areas including key tours, and/or perimeter patrols or random patrols through buildings and facilities. However, Jarvey admitted that in his current management position he is distanced from the day-to-day activities of bargaining unit firefighters, that he doesn't think firefighters currently perform key tours and couldn't recall when they last did them, and that his personal knowledge of any firefighters manning gates or providing gate relief dates from prior to 1981. Jarvey testified that firefighters are responsible for enforcing all company rules⁵ and are subject to discipline for not enforcing such rules, that in his view firefighters have the same enforcement obligation as do security guards. He did not testify to any specific examples of enforcement by firefighters of any rules other than fire protection rules. He said that the mere presence of a uniformed⁶ firefighter in the

workplace is a deterrent to employee misconduct and that firefighters provide surveillance in the workplace. He did not offer any specific examples in support of such testimony. He characterized the assignments of firefighters during emergency response situations and major events such as stockholder meetings, visits by dignitaries, and roll-out ceremonies for new aircraft as being "support" for security functions. He testified that at unspecified times firefighters have been summoned to open up limited access areas, or to open up gates to allow personnel to enter or depart. With respect to hazardous materials incidents, he said that both security and fire personnel respond, as firefighters would establish incident command, don protective clothing and enter the area of the incident, perform any required rescue, and assist the hazardous materials teams in mitigating the incident. Security guards would assist in employee evacuation as necessary and establish secure perimeters to keep out unauthorized persons. He said that firefighters "can" participate in securing the perimeter and would do so if necessary, but he gave no examples of that having occurred. He also said that traffic control would be handled by security guards but that firefighters "could" handle it, depending on the situation. He said that in the past during times of major layoffs in about 1969 to 1971 and again sometime in the early 1980's, fire personnel performed security duties such as manning gates and key tours.

Kenneth Kirsch, the Employer's fire chief, testified that in emergency response situations, firefighters will be used at the scene of the emergency for entry, rescue, working the "decontamination corridor" and evacuation of buildings that have been declared to be the hot zone, and they have personal protective equipment, including special clothing and breathing apparatus. Security guards do not have such protective equipment, and in such situations they assist in evacuation of non-hot zone buildings, secure the perimeter of the scene, and keep people out. Firefighters sometimes "have a role" in controlling the entry of personnel and vehicles into the area, but such role is unspecified in the record. Kirsch said that Employer policies that apply to both firefighters and security guards are a vehicle accident review board, the same instructions for safe operation of vehicles, and the same no-smoking policy with respect to areas where they are permitted or forbidden to smoke. Kirsch testified that if a firefighter who witnesses a violation of company rules, such as a trespasser on the airfield while the firefighter is standing by, or a theft. The firefighter has the responsibility to immediately report that infraction to management, through management channels, or to take unspecified "appropriate action." He said that Security has summoned firefighters to assist with a disgruntled employee or one who has had an emotional breakdown, and to assist in pursuit of trespassers. Fire Chief Kirsch testified with respect to three incidents included among a large number of security incident reports. On March 6, 1995, a firefighter reported the presence on company property of a vehicle with four suspected trespassers inside. On November 30, 1995, firefighters in Renton were standing by at an outdoor location on company proper where a crew was removing flood debris which was threatening some bridges. A trespasser in a vehicle entered a gate which had been opened by the firefighters, and firefighters pursued the vehicle across company property while they were calling for security support. On June 30, 1993, security guards were called to a building where a man

⁵ The company rules are published in the company telephone directory. They specify proscribed activities under seven headings, which are: engaging in un-American activities; failure to comply with security and fire protection regulations; failure to comply with safety, health or environmental regulations; dishonesty; unacceptable conduct or performance; and neglect of duty.

⁶ Firefighters wear navy blue pants and shirts. Fire inspectors wear navy blue pants and a white or light blue shirt. Security guards wear navy blue pants with a light blue stripe and a navy blue shirt. They may wear an optional navy blue baseball-style cap with the logo, "Boeing Security." Firefighters and security guards each wear the sleeve

patch and badge of their respective department. In addition, security guards wear sidearms on their belts.

was sitting on the edge of the roof with his feet dangling over the side. Security and fire department supervisors were summoned to the scene, seized the man, and removed him from the roof. Kirsch said that firefighters do not normally perform outside plant patrol duties, although they will if requested to do so by Security because of a specific report of suspicious activity in a parking lot. He did not testify to any specific instances in which such request had been made. Asked if there were situations in which fire personnel testify in legal proceedings arising out of security incidents, Kirsch gave as an example the recent testimony of Chief Johnson in Renton Municipal Court about the trespasser who entered the premises while flood debris was being cleaned up.

Kirsch said that firefighters are not trained to detain people or to use force. In a police or security type of situation, a firefighter is supposed to report and summon assistance. Firefighters are expected to use their own judgment in taking action without compromising their own safety. Kirsch said that such situations are very rare. Kirsch testified that it is "common knowledge" that firefighters have responsibility to enforce company rules. He testified that firefighters enforce no-smoking rules only in hazardous locations. He testified that firefighters are told in new-hire training that they have a responsibility to report any observations of other employees breaking company rules, such as stealing, but he offered no specific examples.

The Employer has experienced four labor strikes: by the Teamsters Union in 1976, and by International Association of Machinists (IAM) in 1977, 1989, and 1995. The most recent strike lasted from October 6 to December 14, 1995. In a pre-strike planning meeting, security chief Baker approached fire chief Kirsch and requested assistance with manpower during the strike. Baker told Kirsch that there were not enough security guards to man areas where picketing was expected to be involved and to simultaneously perform key tours of buildings. Kirsch agreed to assign firefighters to building tours in place of security guards performing key tours, but decided that the firefighters would merely record by hand the times they entered and left a building, rather than use the Detex devices. Kirsch explained that the value of the walk-through inspection would have been lost if the firefighters had used the Detex devices because the firefighters would have been focusing on going from point A to point B to find the next Detex location. Kirsch said he wanted the firefighters to instead concentrate on hazardous processes within the buildings because relatively inexperienced managers were performing work of the striking employees and that in past strikes some serious incidents had occurred as a result. In addition, there were buildings normally occupied by hourly employees which were vacant during the strike, with the resulting loss of the early reporting system of employees reporting emergencies. Therefore, firefighters needed to inspect such buildings frequently. At the Everett facility, firefighters conducted about 90 building tours in each 24-hour period during the strike, as compared to about four in nonstrike circumstances. Such building tours were recorded at all locations on inspection sheets which list all buildings to be inspected by one firefighter on one shift, provide spaces for recording the times the buildings were entered and exited and the name of the firefighters making the inspections, and instruct the inspector to look for hazards and suspicious situations. The firefighters were also instructed to watch out for striking employees on the premises and to report any suspicious activity.

Any personnel encountered inside otherwise empty buildings were to be asked to identify themselves and their reason for being in the building. If the firefighter foresaw a confrontation developing, a security guard could be summoned. During the strike, firefighters toured more buildings than they normally inspect. They also toured more frequently than normal. Daily activity reports covering the 1995 strike and detailing by name the amount of time each firefighter at each location spent in specific activities such as crew meetings, facility inspections, valve inspections, station maintenance, and so on, are in evidence. There are separate job codes on the documents for "facility inspection" (job code 13) and "security assignment" (job code 19). Kirsch testified that at most facilities, the building patrols made by the firefighters were wrongly recorded as something other than as security assignments, and that thousands of hours were miscoded. Kirsch also testified that the miscoding could be corrected by reviewing and comparing other documents in evidence. On brief, the Employer summarizes its own review and comparison of such documents and concludes that during the strike firefighters worked more than 8,000 hours on strike-related security assignments, citing as an example that in Renton in September 1995 firefighters spent 147.1 hours performing facility inspections and in October 1995 spent 1089.2 hours performing facility inspections. There is no reason to dispute the Employer's calculations in this regard, and it is clear that the number of facility inspections conducted by firefighters increased during the strike.

The Board has held that under Section 9(b)(3) guards are employees who perform security functions involving the protection of an employer's property as an essential part of their duties, and those security functions must encompass traditional police and plant security functions as a major and continual part of their job duties. *Inland Steel Co.*, 308 NLRB 868 (1992), and cases cited therein.

In the 1956 case involving the unit herein, the Board found:

The primary duty of the firemen is to prevent and fight fires of aircraft and buildings. However, firemen substitute for guards in emergency situations at the Seattle and Renton plants, and regularly substitute for guards at Moses Lake. Moreover, even the regular duties of the firemen consist not only of enforcing the Employer's fire prevention rules, but also stopping thefts of the Employer's property and preventing trespassers from coming on the Employer's property. The record also shows that the firemen are deputized as deputy sheriffs.

Thus, although the primary function of the firemen is fire prevention and fire protection work, an essential part of their duties and responsibilities was the enforcement of other plant protection rules.

In that case and other cases, the Board has found that where the firefighters' duties included traditional police and plant security functions as well as enforcement of fire and safety regulations, the firefighters were guards.

In *Chance Vought Aircraft, Inc.*, 110 NLRB 1342 (1954), the Board found firemen to be guards where the firemen made regularly scheduled detex patrols of buildings, and the enforcement of plant rules and regulations as well as checking for fire hazards was an essential element of the patrols. The record contained considerable documentary evidence and other proof including the testimony of one fireman that firemen did in fact enforce plant rules and regulations.

In *North American Aviation, Inc.*, 161 NLRB 297 (1966), firemen and patrolmen had the same direct supervision, received the same training in both police and fire procedures, and wore the same uniforms with patches and badges reading, "Protective Services." Both firemen and patrolmen performed detex patrols for the purpose of checking for fire and safety hazards, breach of security practices, and violations of company rules. Both firemen and patrolmen were responsible for reporting and if necessary citing all violations and violators found during the course of a detex patrol. Firemen had regular duty manning gates for 45 to 90 minutes per day either alone or assisted by a patrolman. While on gate duty, firemen were responsible for permitting the admittance of authorized personnel, checking parcels carried into the plant, enforcing rules against bringing prohibited items into the plant, and preventing unauthorized removal of company property. Every two or three years, at the times negotiations for new collective-bargaining agreements covering the production and maintenance employees were being conducted, the employer made strike preparations which included provisions for firemen to patrol buildings for the protection of employees and property and for the security of classified material, while patrolmen would be on exterior patrol with the same duties. In those circumstances, the Board found the firemen to be guards.

In *Reynolds Metals Co.*, 198 NLRB 120 (1972), the Board found firemen to be guards where the firemen were charged with the enforcement of all company rules and regulations; were required to stand gate duty where they were responsible for preventing removal of company property, checking parcels carried into and out of the plant, and admitted authorized personnel to the premises; patrolled the parking lots and issued citations for parking violations; were authorized to physically remove anyone in violation of company rules; had been issued firearms; wore uniforms and badges identical to those worn by security guards, and received the same company manual and first aid training as the guards. At least 25 percent of the firemen's time was spent performing guard duties, and the enforcement of company rules was a continual part of their responsibility and a significant portion of the requirements of their job. In *United Technologies Corp.*, 245 NLRB 932 (1979), all firemen were former guards on a line of progression of promoting guards to firemen to guard sergeants, and thus were guards who were currently specializing in fire protection. The firemen assisted guards in controlling traffic and were authorized to issue tickets or write incident reports for infractions of all company rules and regulations, including speeding; they reported directly to guard sergeants, and two had been chosen by the employer to receive additional training and become deputy sheriffs. In finding the firemen to be guards, the Board said that the percentage of time they spent in guard duties was not controlling where a significant portion of their job was the performance of guard duties and enforcement of company rules.

In *M. K. Morse Co.*, 302 NLRB 924, 927 (1991), three employees were found to be guards where they regularly toured the plant for fire protection purposes, to safeguard the premises from intruders, and otherwise to protect plant property from damage, had been told their primary job was "security" and to "check everything in the plant," made hourly tours punching security clocks at various stations, opened the plant office and plant gates for operations, and had been told to "go after" anyone trying to break into the plant. In *Waterboro Mfg. Corp.*, 106 NLRB 1383 (1953), watchmen who spent 75 percent of

their time performing unit work were found to be guards where they spent 25 percent of their time making plant rounds, punching timeclocks at regular intervals, and reporting infractions of company rules. In *American Lawn Mower Co.*, 108 NLRB 1589 (1954), three boiler firemen/watchmen were found to be guards where on weekends and holidays two of them spent 15 to 20 minutes of each hour making rounds for plant protection purposes, and the third spent that amount of time making rounds every day. A fourth employee was also determined to be a guard as he replaced any of the regular firemen who were absent, an event which occurred two or three times a year, and he instructed any newly hired boiler firemen in their watchman duties. He otherwise was employed as a maintenance man. The Board found him to be a guard because he spent "some part of his working time in guard duties."

In *Watchmanitors, Inc.*, 128 NLRB 903 (1960), the Board found the employees at issue to be guards where they spent 10 to 90 percent of their time actively engaged in guard duties such as patrolling and checking entrances of buildings in which they were employed, and during the entire time they were on duty they were responsible for the safety of the building and its contents and were required to report to police any threat to the customer's property. Some wore uniforms or carried firearms or both. They spent nonguard time performing general maintenance duties.

In *The Wackenhut Corp.*, 196 NLRB 278 (1972), the Board found security toll operators on an expressway to be guards where they were responsible to visually check each car as it approached to determine if it had any hazardous defects, including a drunk driver. If so, the operator was to stop the vehicle, or in the event of controversy notify the plaza supervisor or a policeman stationed nearby. The operator was also required to deny access to pedestrians and to bicycle, motorcycle, or horseback riders, to watch out for acts of sabotage, and to seek to prevent drivers from making "U" turns. The Board found that the lack of evidence as to the frequency or amount of time devoted to those duties as compared to their other functions was not determinative as it was apparent that enforcement of the turnpike authority rules was a continual part of their responsibility and a significant portion of the requirements of their job. In *Supreme Sugar Co.*, 258 NLRB 243 (1981), watchmen were found to be guards where their duties included being on watch for trespassers and responsible to take immediate steps if a trespasser were seen, they were the employer's sole guardians against loss or damage to property during the times they were working and their obligation to observe and report was a continuing one. In *Wells Fargo Alarm Services*, 289 NLRB 562 (1988), service technicians, whose primary function was to repair and service security devices at customers' locations, were found to be guards where an essential component of their work was to be dispatched to a customer's property to protect it until police arrived. Over 20 percent of such dispatches were made by service technicians.

In *BPS Guard Services*, 300 NLRB 298 (1990) (BPS, herein), the Employer provided security and fire protection services to Bethlehem Steel Corporation's Burns Harbor plant in Chesterton, Indiana. The firefighters received the same orientation program as the security guards also employed by BPS, wore uniforms which differed from those of the security guards, and were registered as private detectives in the State of Indiana. The firefighters had a variety of duties including a requirement that they testify in grievance/arbitration hearings at

Bethlehem, maintain a professional distance between themselves and Bethlehem employees, conduct various fire and safety checks, maintain fire and safety equipment, monitor Bethlehem's employees for compliance with fire and safety standards, and to report in writing any violation of fire or safety rules discovered. The Board found the firefighters not to be guards where the only employer rules enforced by the firefighters were those pertaining to fire and safety, including rules concerning running and horseplay, and their enforcement of rules against other employees was only incidental⁷ to their duties to fight fires and ensure fire safety. The firefighters in BPS were never assigned to guard gates or to investigate theft or vandalism. The Board concluded that the enforcement of rules and regulations against other employees was not an essential part of the firefighters duties and they were not guards. The Eighth Circuit⁸ disagreed, finding that as the firefighters were required to report violations of fire and safety rules and to testify against other employees at grievance-arbitration hearings, the firefighters' duties clearly created potential for divided loyalty. The Board itself had noted that in enacting Section 9(b)(3) Congress was concerned to avoid the possibility of divided loyalty on the part of plant protection employees during times of labor unrest. BPS, at 301. The Circuit Court considered that the "measuring stick of Section 9(b)(3) status" is the "danger of divided loyalty." In its decision, the Circuit Court specifically says with respect to the requirement that BPS firefighters report violations of fire and safety rules and testify against other employees in Bethlehem's grievance/arbitration hearings:

Such duties clearly create a potential for divided loyalty if the firefighters are included *in the same bargaining unit* as the employees whose conduct the firefighters monitor and against whom they are required to testify. (Emphasis added.)

In *Shattuck School*, 189 NLRB 886 (1971), a night watchman who kept a record, including vehicle license numbers, of any strangers on the campus, reported any necessary repairs or hazards he observed, made regular rounds in which he turned off lights and certain motors, and was employed because the employer's insurance required an individual to patrol the premises for fire or other emergency protection, was found by the Board not to be a guard, as his primary duty was to check fire hazards and he did not enforce rules to protect the property of the employer or safety of persons on the premises. In *Lion Country Safari*, 225 NLRB 969 (1976), the Board declined to find that gatemen and tower observers were guards, where the gatemen took customers' tickets, advised them about the employer's safety rules and checked the customers automobiles for unsafe conditions, and the tower observers watched customers inside the wildlife preserve to make sure the customers observed the employers' rules and that the animals remained in their designated sections of the preserve. A gateman who judged a customer's automobile to be unsafe referred the customer to the employers automobile maintenance or rental facility; a tower observer who observed a rule infraction by a customer relayed a message by radio to a ranger who then drove to the customer and enforced the rule. The Board found that the gatemen and tower operators merely observed and reported

violations of rules designed to protect park patrons and the animals during normal operations of the business, did not enforce rules against employees and had only limited contact with customers insofar as enforcement of the employer's rules was concerned. The Board concluded that the duties of the gatemen and tower operators were directed toward preservation of safety during the normal operations of the business and that these activities were not the circumstances in which Congress felt conflicting loyalties might exist.

In *Hoffman Security, Ltd.*, 302 NLRB 922 (1991), the Board found hospital receptionists supplied by the employer along with security officers not to be guards where the receptionists' primary functions were merely to greet visitors, provide information and directions, and observe and report irregularities, in circumstances in which visitors often passed the receptionists' desk unobserved and there was a 24-hour guard service present. The Board noted that the receptionists did not control admission, did not inspect packages or other items carried in or out of the building, and had not been instructed to take any action when they saw items being carried out. In *Inland Steel*, supra, emergency medical service (EMS) employees were found not to be guards where their primary duties involved driving the ambulance and providing emergency medical services to employees; they did not make periodic rounds, had no patrol duties, were not interchangeable with employees who normally performed guard duties; and while plant protection employees were required to accompany EMS employees to the site of an in-plant emergency, at the scene the EMS employees confined their activities to giving treatment and transporting sick or injured persons. EMS employees also were required to give fitness tests to employees suspected of intoxication, and, if the employee failed the test, send the employee home for the remainder of the shift, an activity found not to be the type of regular rule enforcement recognized by the Board in finding guard status under the Act. *Inland Steel*, supra at 871-872. Most recently, in *55 Liberty Owners Corp.*, 318 NLRB 308 (1995), at issue were doorpersons and elevator operators who monitored and regulated access into buildings, denied entrance to unauthorized persons, and observed and reported irregularities. The Board found the doorpersons and elevator operators not to be guards, noting that they did not make rounds, were not trained in security, were not armed, were instructed not to use physical force, did not inspect suspicious packages, and did not ask off-duty employees to leave. The Board found that their guard-like functions of asking unauthorized persons to leave were incidental to their primary non-guard duties and that there was no other evidence that they enforced rules against employees or other persons to protect the safety of persons on the premises or the property itself.

On brief the Employer contends that its firefighters are guards within the meaning of Section 9(b)(3) because: firefighters and security guards receive the same training on enforcement of company rules; the Employer relies on the firefighters' uniformed presence in buildings, as testified to by Jarvey; there are more than 1200 security incident reports in the record documenting security activities by firefighters; firefighters are charged with enforcement of rules against smoking in prohibited or hazardous areas, but security officers are not so charged; firefighters have access to master keys which admit them to almost every part of the Employer's facilities; Kirsch testified that, "At times firefighters have been summoned to open up limited access areas, open up gates to allow personnel

⁷ The Board in *BPS* took care to clarify that by "incidental" it meant "being likely to ensue as a chance or minor consequence" rather than "occurring merely by chance or without intention or calculation."

⁸ *Burns Security Services v. NLRB*, 942 F.2d 519 (8th Cir. 1991).

to come in or out so that—ingress, egress on a point;” and Kirsch’s affirmative response to Intervenor’s leading question, “And may I assume there’s, of course, a responsibility, if [a perimeter gate] is unlocked, to—at some point to secure it so as to prevent unlawful ingress and egress? Is that correct?” Based on Mathers’ testimony, the Employer contends that firefighters in Everett regularly assist security at gates about once a week. The Employer also cites three security incident reports of occasions in which firefighters relieved security guards on gates so that the guards could respond to a summons for assistance. The Employer also relies on evidence of joint response by firefighters and security guards to emergency situations such as hazardous material incidents, bomb threats, aircraft hijacking, fire and emergency/rescue scenes, medical assists, and vehicle accidents; on evidence that security officers have requested firefighters’ assistance in dealing with disturbed or disgruntled employees or visitors and at least one suicide attempt; and on Jarvey’s testimony that, “We have them do patrols of areas. . . . there have been times when they’ve actually done the recorded key tours, or they can do perimeter patrols or random patrols through the buildings and facilities. . . . looking for unusual activity or vulnerabilities and that sort of thing.”

The existence of published company rules and written or oral instructions and directions to firefighters to enforce all company rules does not establish that firefighters in fact regularly enforce all such rules, irrespective of whether their training on the subject is identical to the training of Security guards. *Chance Vought Aircraft, Inc.*, 110 NLRB 1342 (1954). As has been noted above, Jarvey’s testimony with respect to the deterrent value of the presence of uniformed firefighters within buildings is generally speculative and unsupported by specific evidence. Jarvey’s testimony is diluted by his admission that he is out of touch with the day-to-day activities of bargaining unit firefighters. With respect to the responsibility of firefighters but not of security guards to enforce the rule against smoking in prohibited or hazardous areas, clearly the rule is substantially a fire protection/safety rule of the type the Board traditionally finds to be outside the ambit of Section 9(b)(3). Baker, in testifying that security guards do not enforce that particular rule, said that such enforcement is “a fire department function.” The mere fact that firefighters have access to master keys does not per se establish that they perform any guard functions. Kirsch’s testimony that firefighters have been summoned to open limited access areas, or to open gates to allow ingress and egress, or have a responsibility to secure an unlocked perimeter gate and documentary evidence that on three occasions firefighters have relieved security officers on gates to free the guards to respond to other matters do not, without more, establish that such activities are a major and continual part of the firefighters’ job duties.⁹ I do not read Mathers’ testimony as saying that firefighters in Everett regularly substitute for guards at gates once a week, but rather that firefighters in Everett provide administrative or clerical type assistance to security guards at gates with a frequency of between once a week and once a month, evidence which falls short of establishing guard status of the firefighters as a whole. With respect to those events and incidents to which firefighters and security guards both respond, there is consider-

⁹ In *Tac/Temps*, 314 NLRB 1142, 1143 (1994), the Board found that, “the fact that some checkers occasionally substitute for the guards while the guards take a break or secure the building does not compel a finding that the checkers are statutory guards or show that they would have divided loyalties at times of labor unrest.”

able evidence in the record that on such occasions firefighters perform traditional firefighter functions. The fact that security guards may also be present and performing security duties does not convert the activities of the firefighters to guard activities. Moreover, one would not expect emergency personnel to rigidly adhere to their own rules of exacting jurisdictional lines at the time of real or possible emergencies. Such would have a potential of defeating the purpose of these employees.

Throughout its brief, the Employer relies heavily on documents which are included in Joint Exhibit 19, which consists of approximately 1200 security incident reports.¹⁰ The documents included in the exhibit were extracted by three security supervisors from security officer reports dating from January 1989 to January 1996. The selected reports fall into four categories: emergencies involving both security and fire protection personnel; fire safety violations where a security officer found a safety violation while on a key tour such as a hazardous condition, water leak, coffee pot left on, or any type of audible or visible alarm; security officer dispatch by the fire dispatcher to various emergency alarm service calls; and any major event, hazardous materials operation, security, fire planning, fire prevention, or review boards. The Employer cites examples of such reports in support of its contention that its firefighters perform security guard functions. In some of the cited reports, firefighters have reported vandalism or damage to company property or have been involved in active pursuit by vehicle of trespassers, while in other such reports, only some fire-related matter is documented, such as a theft of fire extinguishers or a report by a maintenance employee of fire debris in a restroom, and in yet other reports, there is no mention of firefighter activity at all. It is clear from Baker’s testimony that the selection process by which the reports in evidence were culled from the total such reports available¹¹ sought reports in which security guards were in some way involved in incidents which also involved firefighters, fire protection equipment, or fire safety rules. On brief, the Employer attempts to characterize the reports in evidence as supporting its contentions that firefighters regularly deal with such matters as theft, unauthorized access, vandalism, and protection of company property. Even assuming *arguendo* that the Employer’s characterization of such reports is accurate, the reports represent only about one percent of the total number of security incident reports filed. Further, 1200 reports covering a period of seven years represents an average of 171 reports per

¹⁰ Security chief Baker testified that he directed three security supervisors to compile Jt. Exh. 18 by reviewing security incident reports dating from 1989 to the present and selecting those which fell into one of four categories. Baker further testified that Jt. Exh. 19 was compiled in the same manner. Based on Baker’s testimony, it would appear that Jt. Exh. 18 is a listing of the documents contained in Jt. Exh. 19, although a random check reveals that some number of documents included in 19 are not listed in 18 and, further, that there are multiple documents in 19 which address the same occurrence. For purposes of discussion here, I will assume that 18 is a list of the contents of 19, and that 19 contains approximately 1200 documents, as shown by the tally on 18.

¹¹ Baker testified that in the last 2 years, there were a total of about 18,000 security incident reports filed per year. Petitioner calculates that there would have been at least 108,000 such reports filed from 1989 to the present.

year, or about 1.6 such report per year per fire fighter.¹² Thus the reports do not establish that firefighters are engaging in the contended activities on any regular basis amounting to a “major and continual part of their job duties.” Likewise, the Employer contends that the testimony of employee witnesses at hearing “demonstrated that firefighters regularly engage in security activities,” relying in this regard on fire inspector DeFreece’s acknowledgment that she has a duty and responsibility to report violators of company rules and has done so, and fire fighter Mathers’ testimony with respect to an incident which occurred in March 1994 in which he encountered a suspicious individual on company property and reported the person to security.

Joint Exhibit 37 documents monthly fire protection activity with respect to the number of manhours expended in each of numerous categories, including “security support.” Fire chief Kirsch defined “security support” as meaning: “Security post activity. Requests to open up a gate for persons that may be entering or exiting the plant. Security post is—manning a specific gate is one of the primary.” Kirsch agreed that the exhibit does not record all instances which may have occurred in which fire protection personnel enforced rules regarding, for example, suspicious activity. Petitioner’s brief presents a table prepared on the basis of Joint Exhibit 37 and showing a monthly breakdown of the percentage of manhours firefighters spent performing security support functions monthly at each of the Employer’s facilities as represented in the exhibit:

January 1995	Auburn/Frederickson (0.08%), Everett (0.02%), Renton (0.05%), Seattle (0.0%)
February 1995	Auburn/Frederickson (0.07%), Everett (0.01%), Renton (0.08%), Seattle (0.0%)
March 1995	Auburn/Frederickson (0.01%), Everett (0.02%), Renton (0.05%), Seattle (0.0%)
April 1995	Auburn/Frederickson (0.05%), Everett (0.02%), Renton (0.03%), Seattle (0.0%)
May 1995	Auburn/Frederickson (0.03%), Everett (0.02%), Renton (0.08%), Seattle (0.0%)
June 1995	Auburn/Frederickson (0.03%), Everett (0.03%), Renton (0.00%), Seattle (0.0%)
July 1995	Auburn/Frederickson (0.02%), Everett (0.09%), Renton (0.0%), Seattle (0.0%)
August 1995	Auburn/Frederickson (0.02%), Everett (0.01%), Renton (0.02%), Seattle (0.0%)
September 1995	Auburn/Frederickson (0.08%), Everett (0.02%), Renton (0.05%), Seattle (0.0%)

¹² The Employer cites eight such reports based on incidents involving Fire Inspector DeFreece. The reports span the period April 1990 to February 1995, and number one per year except that there are four in 1994, which amounts to an average of two per year, slightly higher than the overall average per year per fire fighter, but not sufficient to establish guard status.

As can readily be gleaned, Joint Exhibit 37 does not establish that the security support activities of the firefighters documented thereon amount to a “major” part of their job duties.

The documentary evidence and record testimony support a conclusion that during the strike the firefighters were assigned additional duties which included such guard type activities as looking for suspicious circumstances of unauthorized persons on the premises. In addition to their normal firefighter duties, they were performing some security guard duties. However, Fire Chief Kirsch was clear that performance of security guard key tours by firefighters would have interfered with the firefighters’ primary duties in making walk-through inspections to look for any developing hazards or emergencies in unoccupied buildings and to assure that inexperienced management personnel performing hazardous processes did not inadvertently cause any emergency. There is no evidence or contention that the security guard duties assigned to the firefighters during the strike have continued since the strike ended. Therefore, the firefighters’ duties during the strike are not dispositive of the issue herein.¹³ There is no evidence in the record that strikes occur with regular frequency among the Employer’s production employees, nor any evidence that the Employer has repetitively used firefighters during strikes in the manner they were assigned during the 1995 strike, nor any evidence with respect to the likelihood of future strikes such as was found in *North American Aviation*, supra. Even though the building inspection and walk-through duties of firefighters were increased during the recent Machinists’ strike and may be broadly considered to have replaced the normal key tours by security guards during that time, there is no issue of potential divided loyalties here inasmuch as even if the firefighters choose Petitioner as their representative they will not be represented in the same bargaining unit as other employees, the critical “measuring stick” applied by the Eighth Circuit in *BPS*.¹⁴ Further, strikes by employees of the Employer are not regular events, having occurred in the past only 4 times at intervals of 1 year, 12 years, and 6 years.

The fire prevention duties of the firefighters include regular inspections of fire protection systems and equipment. Firefighters regularly walk through buildings while making such inspections and when issuing hot work permits. Firefighters responding to emergency situations perform fire fighting and emergency medical treatment duties at the scene. Firefighters participation in special events such as stockholders’ meetings, dignitary visits, and roll-out ceremonies all involve fire protection and safety duties. Testimony that the mere presence of a uniformed firefighter in the workplace is a deterrent to employee misconduct, that firefighters have the responsibility to enforce all company rules and that such responsibility is

¹³ *Meadow Valley Contractors*, 314 NLRB 217 (1994) (duties which have ceased prior to the pertinent time period or date are no longer relevant in making a determination with respect to an employee’s status as of the pertinent date or time period).

¹⁴ There is no evidence that Petitioner currently represents any of the Employer’s employees.

“common knowledge” is merely speculative and unsupported by the record. That both firefighters and security guards respond to emergency situations does not establish that firefighters are guards, as it is clear that in emergency situations firefighters and security guards have separate roles. There is evidence that security guards are routinely not assigned to make key tours of buildings on the day shift in part because fire department personnel are frequently present in the buildings during the first shift. Such evidence does not establish guard status of the fire department personnel, who are present in the buildings to conduct their routine inspections of fire protection systems and equipment and to issue permits.

The record does not establish that firefighters regularly man gates in place of security guards. There is some evidence that they do so in Everett, but such evidence is otherwise contradicted in the record and therefore cannot be relied on here.¹⁵ Firefighters have occasionally been requested by Security or on their own initiative pursued trespassing vehicles, but such incidents are rare. Firefighters are expected to use a fire vehicle to block the passage of a hijacked aircraft on a runway but there has been only one such actual occurrence and in that incident the security chief took the initiative of parking his automobile in front of the aircraft. Unlike their predecessors in the mid-1950s, present-day firefighters are not deputized as law enforcement officers, nor do their regular duties include stopping thefts of the Employer’s property or preventing trespassers from entering the property. There is no evidence that the firefighters are expected to testify against other employees in grievance/arbitration hearings such as was noted by the Circuit Court in *BPS*, supra, nor can such conclusion be drawn from the evidence that Chief Johnson recently testified in Renton Municipal Court about a trespasser.

Jarvey’s testimony that firefighters perform key tours and perimeter patrols, that firefighters are responsible for enforcing all company rules and subject to discipline for not enforcing such rules, that firefighters “can” participate in securing a perimeter in a hazardous materials incident, and “could” handle traffic control is non-specific and generally unsupported by the record. His testimony that firefighters “support security” in emergency response situations and during major events is inconsistent with record evidence that firefighters and security guards normally have clearly defined separate roles on such occasions and the lack of specific evidence that firefighters have performed any substantial designated security functions in emergency responses or during major events. Likewise, Kirsch’s testimony that firefighters sometimes have a role in controlling entry of personnel and vehicles into an emergency area and that firefighters will patrol outside the plant if so requested by Security is non-specific and unsupported by the record. Such evidence is insufficient to establish that firefighters engage in such activities to any significant degree.

The record does not establish that the firefighters’ responsibility to enforce all company rules translates into activities performed by them as part of their normal duties. Baker testi-

fied that firefighters are not regularly assigned to gate duty. Kirsch testified that involvement of firefighters in police or security types of situations is very rare. The Board’s standard for determining guard status as set forth in *Inland Steel*, supra, clearly requires that for employees to be found to be guards, guard duties must be an essential part of those employees’ duties and police and security functions must be a major and continual part of their job duties, not merely that the employees at issue are authorized to perform such duties should the occasion arise. It is also clear from the numerous cases cited herein that guard duties entail *looking for* opportunities to enforce company rules, not merely possessing authority to enforce such rules on occasions when violations chance to be observed during the course of carrying out assigned nonguard duties. Kirsch’s testimony that the firefighters have the obligation to enforce company rules such as a trespasser on the airfield while the fire fighter is standing by is strongly indicative that the firefighters are not guards and that any such rule enforcement by firefighters is merely incidental to their fire protection duties.

While the record herein establishes that firefighters may from time to time engage in guard activities such as observing the Employer’s property for trespassers or other suspicious activity, traffic control, or gate relief, the record fails to establish that such activities are repetitively assigned or are performed on any but a random and haphazard basis. Thus it has not been established here that the firefighters engage in any guard activities as a major and continual part of their job duties.

Based on all of the foregoing and the record as a whole, it is clear that the duties of the Employer’s firefighters have substantially changed since 1956. Firefighters no longer regularly engage in traditional police and plant security functions to any meaningful degree. I conclude, therefore, that the firefighters herein are not guards within the meaning of Section 9(b)(3) of the Act, and I shall direct that a severance election be conducted among them.

The Appropriate Unit. The existing unit includes all plant guards and firemen employed by the Employer in the State of Washington. The petition requests a unit of all firefighters employed by the Employer in King, Snohomish, and Pierce Counties, Washington. At hearing, Petitioner sought to clarify the unit sought by amending it to include all firefighters, driver/operators, dispatchers, crew chiefs, inspectors, and dispatchers A. Such unit description fails to clearly distinguish between the unit sought herein and the security guard contingent, which includes at least dispatchers. Furthermore, I find that the geographic restriction of the unit to King, Snohomish, and Pierce Counties is inconsistent with the existing unit which includes all of the State of Washington. Record evidence establishes that there are no firefighters employed at the Employer’s Spokane location. The record does not reveal whether the Employer still maintains a facility at Moses Lake as it did in 1956, nor does the record reveal whether the Employer maintains any facilities in Washington in addition to those identified in the record herein as being all of the Employer’s facilities in King, Snohomish, and Pierce Counties. Inasmuch as it is logically

¹⁵ *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990).

consistent to include all of the firefighters in the existing unit in the unit found appropriate herein, I conclude that the appropriate unit includes all firefighters, fire driver/operators, fire dis-

patchers, fire crew chiefs, and fire inspectors employed by the Employer in the State of Washington.

There are approximately 107 employees in the unit.