Madison Square Garden *and* Council 4, AFSCME, AFL–CIO, Petitioner. Case 34–RC–1812

March 15, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 2, 2000, the Regional Director for Region 34 issued a Decision and Direction of Election finding, among other things, that 13 of the Employer's employees should be excluded from the petitioned-for unit because 11 of them were guards under Section 9(b)(3) of the Act, and 2 employees, Juan Ortiz and Skip Ward, were supervisors under Section 2(11) of the Act. Both the Petitioner and the Employer filed requests for review of the Regional Director's decision.

On May 25, 2000, the Board granted the Petitioner's and Employer's requests for review and remanded the case to the Regional Director to determine the supervisory status of all 13 employees. The election took place on May 31, 2000, with 11 of the disputed supervisors voting under challenge. The Region impounded the ballots.

On June 13, 2000, the Regional Director issued a Decision on Remand finding that 12 of the 13 "supervisors" are not statutory supervisors.[1] The Employer filed a timely request for review of the Regional Director's Decision on Remand, and the Petitioner filed a brief in opposition to the Employer's request for review.

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

The Employer's request for review of the Regional Director's Decision on Remand is denied, as it raises no substantial issues warranting review.[2] Having carefully considered the entire record with respect to the guard issue, we affirm the Regional Director's decision that "supervisors" are statutory guards.[3]

The Regional Director set forth a full analysis in his Decision and Direction of Election, attached hereto as an appendix, as to why the disputed employees are guards.[4] In agreement with that analysis and contrary to our dissenting colleague, we find that the "supervisors'" functions designed to enhance security are sufficient to establish that they are guards within the meaning of Section 9(b)(3). Our dissenting colleague concedes that to adopt her position would require reversing longstanding Board precedent. See, e.g., *Allen Services Co.,* 314 NLRB 1060 (1994); *Rhode Island Hospital*, 313 NLRB 343 (1993); *A. W. Schlesinger Geriatric Center,* 267 NLRB 1363 (1983); *Holiday Hotel*, 134 NLRB 113 (1961); and *Pinkerton's National Detective Agency*, 111 NLRB 504 (1955). We do not agree that these cases "unjustifiably expanded" the definition of a guard under Section 9(b)(3), and we thus see no need to "reexamine" Board law in this area. Because of this, and because of values inherent in the doctrine of stare decisis, we would not reverse precedent. Finally, we do not believe that precedent is being expanded in this case.

ORDER

It is ordered that the case be remanded to the Regional Director for action consistent with this decision.

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues and the Regional Director, I find that the Employer's "supervisors"[1] are not guards within the meaning of Section 9(b)(3) of the Act.

The Employer manages events at the Hartford Civic Center. Its employees are event staff employees, who serve as ticket takers, ushers, and inspectors.[2] If these employees encounter a problem with a patron, such as the patron's attempt to bring into the Civic Center a bottled drink or camera or a patron's refusal to move from a seat to which he does not have a ticket, they call one of the "supervisors" for assistance. The "supervisors" attempt to resolve the dispute amicably, but if the attempt fails, the "supervisors" request the assistance of the police stationed at the Center to detain, eject, or arrest the patron.

In performing these duties, the "supervisors" regularly patrol the Center and carry "open mike" two-way radios. Their "uniform" consists of black pants, white shirt, purple tie, and purple sports jacket.[3] The "supervisors" wear a gold nametag identifying them as "supervisors."[4] The "supervisors" are not armed.

On these facts, the Regional Director concluded that the "supervisors" were statutory guards because they "regularly perform security functions which requires them to enforce rules against patrons and staff in order to protect the Employer's facility, as well as to protect other

[1] The Regional Director affirmed his finding that Juan Ortiz is a statutory supervisor. Neither party sought review of this finding.

[2] Contrary to his colleagues, Member Hurtgen would grant review on the supervisory issue, but limited solely to the disputed supervisors' authority to impose discipline.

[3] Since Juan Ortiz is a statutory supervisor, we find it unnecessary to reach Ortiz' guard status. See fn. 1, above.

[4] We have not attached the Decision on Remand since it deals only with the question of whether these individuals are supervisors.

[1] I join Chairman Truesdale in denying the Employer's request for review of the Regional Director's decision that the "supervisors" are not statutory supervisors within the meaning of Sec. 2(11) of the Act.

[2] The Board previously denied review of the Regional Director's finding that the event staff employees are not statutory guards. *Madison Square Garden*, 325 NLRB 971 (1998).

[3] Event staff employees wear the same uniform, except that they wear a purple sweater instead of the sports jacket.

[4] The event staff employees wear a silver nametag.

patrons and staff while at the facility." While I do not dispute that the "supervisors" perform functions designed to enhance security, I do not find these functions sufficient to establish that the "supervisors" are guards within the meaning of Section 9(b)(3).

Significantly, the "supervisors" are not armed, and they do not wear traditional guard uniforms. Nor is there any evidence that they receive any special training in security matters. Further, if an issue with a patron escalates to the point that the "supervisor" deems it necessary to eject or arrest a patron, the "supervisor" requests the assistance of a police officer.

Under these circumstances, I find that the "supervisors" are like the receptionists in *Wolverine Dispatch, Inc.,* 321 NLRB 796 (1996), and the doorpersons and elevator operators in *55 Liberty Owners Corp.,* 318 NLRB 308 (1995)—all of whom the Board found not to be statutory guards. I recognize that there are Board cases, relied on by the Regional Director, that lend support to a finding that the "supervisors" are statutory guards. See *Allen Services Co.*, 314 NLRB 1060 (1994); *Rhode Island Hospital*, 313 NLRB 343 (1993); *A. W. Schlesinger Geriatric Center,* 267 NLRB 1363 (1983); *Holiday Hotel*, 134 NLRB 113 (1961). However, in my opinion, the Board in these cases unjustifiably expanded the definition of a guard under Section 9(b)(3) of the Act.

In enacting Section 9(b)(3), Congress intended to insure that during a strike an employer would have "a core of plant protection employees who could enforce the employer's rules for protection of his property and persons thereon without being confronted with a division of loyalty between the employer and dissatisfied fellow union members." *McDonnell Aircraft Corp.*, 109 NLRB 967, 969 (1954). The Board has a duty not to construe the statutory language too broadly because of the restrictive nature of Section 9(b)(3). See *Brink's Inc.*, 226 NLRB 1182, 1186 (1976) (concurring opinion of Chairman Murphy). Thus, employees treated as "guards" are deprived of the full organizational and bargaining rights afforded by the Act to all other employees. In progressively expanding the definition of "guard" beyond the statutory purpose, and without practical necessity, the Board has lost sight of the express general policy of the Act to protect employee free choice. And it has lost sight of the original divided loyalties problem underlying the enactment of Section 9(b)(3). I therefore believe that the Board should reexamine its law with respect to statutory guards and acknowledge that it has erroneously expanded its interpretation of Section 9(b)(3). I decline to compound this error by expanding the definition further in this case.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.[2]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is a Delaware corporation engaged in the entertainment business. Solely involved in this proceeding are the Employer's operations at the Hartford Civic Center which it manages and where it presents exhibitions, concerts, and sporting events. The Petitioner, which currently represents the Employer's facility workers at the Civic Center, seeks to represent approximately 76 event staff employees. In 1998, the Petitioner sought to represent the same employees of the same Employer at the same facility in Case 34–RC–1565. In its Order Denying Review, reported at 325 NLRB 971 (1998), the Board upheld the undersigned's Decision and Direction of Election in which I found, contrary to the Employer's contention, that none of the event staff employees in issue therein were guards within the meaning of the Act.

In the instant case, the Employer again contends, contrary to the Petitioner, that all of the event staff employees are guards within the meaning of the Act, and that the Petitioner is prohibited by the Act from representing them because the Petitioner admittedly represents and admits to membership nonguards. Based on the foregoing, the Employer in its posthearing brief moved to dismiss the petition. Inasmuch as the Employer relies entirely upon the record in Case 34–RC–1565 for its contention

[1] The Employer and the Petitioner have stipulated to adopt as part of the record in the instant matter the record in *Madison Square Garden*, Case 34–RC–1565.

[2] During the hearing, the undersigned denied the Employer's special appeals from the hearing officer's denial of its request to sequester witnesses and to the hearing officer's ruling that the Employer "may not delve into the credibility of witnesses." The Employer renewed its objections to both rulings in its posthearing brief. For the reasons set forth in my Orders denying both special appeals (copies of which are hereby admitted into the record as Board Exhibits 2 and 3), I find no merit to the Employer's objections. Moreover, I note that in its posthearing brief, the Employer admitted that the parties had "ample opportunity during the two proceedings that have addressed the same issues, to present evidence, testimony and 'significant facts' in support of their respective positions," and that "the Hearing Officer, in order to complete the record, asked an abundance of questions of both the Employer's and Union's witnesses."

that the event staff employees are guards under the Act, and has proffered no additional evidence regarding their alleged guard status, there is no basis to disturb the Board's previous ruling that the event staff employees are not guards under the Act. Accordingly, its motion to dismiss the petition is denied.

However, the Employer further contends that certain other individuals whose guard status was not determined in Case 34–RC–1565 should be excluded from the petitioned-for unit as supervisors within the meaning of the Act. In this regard, in Case 34–RC–1565, the parties stipulated that the following seven individuals were statutory supervisors: Donna Konvent, Dianne Dowdell, Juan Ortiz, Ron Brown, Skip Ward, Juliet Little, and Robin Tofil. As a result, there was no consideration or determination of the guard status of these seven individuals. In the instant matter, as noted above, the Employer contends that six of these seven individuals (one, Donna Konvent, apparently is no longer employed by the Employer), along with seven other individuals presently occupying the same or similar positions (Mickey Colon, Rosa Dinoto, Bob Glass, Jim Martinelli, Sharon Shea, Elaine Thibault, and Alan Victor), are supervisors under the Act. The Employer has advanced no position on the guard status of the 13 disputed supervisors. The Petitioner agrees that Juan Ortiz and Skip Ward should be excluded from the petitioned-for unit as supervisors under the Act, but contends that the remaining 11 individuals are neither supervisors nor guards under the Act.

In the Decision and Direction of Election in Case 34–RC–1565, it was specifically noted that event staff employees did not have the authority to detain or arrest anyone at the facility, or to eject anyone from the facility. Rather, any such problems involving patrons which were encountered by event staff employees were referred to the Employer's supervisors or to the police. The record in the instant matter reflects the same limitations on the authority of event staff employees. However, as described in more detail below, the record further reflects that the eleven individuals in dispute, all of whom have the title "supervisor" (hereinafter referred to as supervisor), are responsible, in conjunction with the police, for the detention, ejection or arrest of patrons.

As noted in the prior Decision and Direction of Election, event staff employees known as "inspectors" are "stationed at the main entrance where they 'pat down' or use an electric wand to check patrons for contraband, i.e., bottles and cans." The record in the instant case reveals that inspectors also perform a visual inspection of all patrons to see if they are bringing anything else in that is inappropriate or against house policy, such as a camera. In the event that an inspector discovers inappropriate items in the possession of an incoming patron, the inspector takes no further action, and instead turns the matter over to one of the disputed supervisors who oversee the ticket taking operation at the three entrances to the facility. The supervisor is then responsible for dealing with the patron, with the authority to deny the patron's entrance to the facility.

As further noted in the prior Decision and Direction of Election, event staff employees known as "ushers" are stationed in the arena "at the top and bottom of the Civic Center aisles where they ensure that patrons with tickets are in the proper location." The record in the instant case reveals that if an usher confronts a situation where two or more patrons claim the same seats, the matter is turned over to the assigned supervisor for that section, who is responsible for resolving the conflict with the patrons. More significantly, in the event of any altercation or incident between or among patrons, the assigned supervisor is responsible for dealing with the situation, and with the assistance of the police may eject patrons.

The record contains conflicting evidence regarding the amount of time spent by supervisors in performing the duties described above. In this regard, there is testimony that supervisors spend approximately 85 to 100 percent of their time performing such duties, whereas there is other testimony that certain supervisors spend approximately 85 percent of their time performing the same duties as the event staff employees assigned to their areas. There is no dispute, however, that all 11 supervisors have the authority to exercise, and have exercised in the course of their employment, all of the supervisor duties described above.

All supervisors regularly patrol within their assigned area and carry "open mike" two-way radios,[3] whereas only a few event staff employees in certain critical locations may carry such a radio. The radios are used by the supervisors, inter alia, to summon medical personnel in the event of an injury or illness to a patron or employee, to communicate with their superiors, and to respond to calls for assistance from other supervisors or to request assistance from other supervisors.

The supervisors' uniform consists of black pants, white shirt, purple tie and purple sports jacket. Event staff employees wear a purple sweater in place of the sports jacket. The supervisors wear a gold nametag which identifies them as "supervisor," whereas event staff employees wear a silver nametag. Supervisors are paid approximately $3 per hour more than event staff employees; they may purchase discounted skybox tickets; and they have permanently assigned lockers, whereas event staff employees may only utilize a locker if one is available.

Based upon the foregoing and the record as a whole, I find that the 11 disputed supervisors are guards within the meaning of Section 9(b)(3) of the Act. At the outset, I note that the supervisors wear a distinctive uniform and identification tag which distinguishes them from all other event staff employees; they carry a two-way radio at all times which keeps them in constant communication with each other as well as their superiors; and they are paid a significantly higher rate of pay than event staff employees. More significantly, I note that the supervisors constitute an essential part of the Employer's security procedures for protecting its facility, its patrons and its staff. In carrying out the Employer's security procedures, the supervisors regularly perform security functions which requires them to enforce rules against patrons and staff in order to protect the Employer's facility, as well as to protect other patrons and staff while at the facility. *Allen Services Co*., 314 NLRB 1060, 1062 (1994); *Rhode Island Hospital*, 313 NLRB 343, 346 (1993); *A. W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983); *Holiday Hotel*, 134 NLRB 113, 121 (1961). Although such security functions may in some instances represent a small

[3] "Open mike" radios allow anyone with such a radio to hear all conversations on that frequency.

portion of their overall job duties, it is well established that it is the nature of the duties performed by guards and not the percentage of time performing such duties which is controlling. *Rhode Island Hospital*, supra, citing *Walterboro Mfg. Co*., 106 NLRB 1383 (1953); *Wells Fargo Alarm Services*, 289 NLRB 562 (1988*)*. Accordingly, I shall exclude the 11 disputed supervisors from the petitioned-for unit.[4]

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time event staff employees employed by the Employer at the Hartford Civic Center; but excluding facility staff, stagehands, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit described above at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. These eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by Council 4, AFSCME, AFL–CIO.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before May 9, 2000. No extension of time to file the list shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 16, 2000.

[4] In light of my finding above that the 11 disputed supervisors are guards, it is unnecessary to determine whether they are also supervisors within the meaning of the Act.