Bally's Park Place, Inc. *and* Casino Police and Security Officers, Local 2, affiliated with Federation of Special Police and Law Enforcement Officers, Petitioner. Case 4-RC-14233

August 14, 1981

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

Upon a petition for representation filed on June 5, 1980, under Section 9(a) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Margaret McGovern on July 1 and 10, 1980. At the hearing permission to intervene was granted to Local 40-B, International Brotherhood of Law Enforcement and Security Officers (hereafter Intervenor or Local 40-B). Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 4, this proceeding was transferred to the Board for decision. Thereafter, Intervenor and the Employer filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case the Board finds:

1. The Employer is a Delaware corporation that operates a hotel and casino in Atlantic City, New Jersey. During the 6-month period following the opening of the hotel in December 1979, the Employer received gross revenues in excess of $500,000 from the hotel operation and projects annual purchases and receipts of products valued in excess of $50,000 directly from points located outside the State of New Jersey.

2. The Employer disputes Petitioner's status as a labor organization within the meaning of Section 2(5) of the Act. Petitioner Local 2 was formed in May 1980, and has five unpaid officers, a constitution and bylaws, and an office in New York City. Petitioner's president testified that Local 2 exists for the betterment of security officers' wages, hours, and working conditions, and that it contemplates no members other than security officers. Since Petitioner is willing to represent employees and exists for the purpose of dealing with employers concerning wages, hours, and other terms and conditions of employment, we find that Petitioner is a labor organization within the meaning of the Act.[1] See *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354 (1972); *Gino Morena d/b/a Gino Morena Enterprises*, 181 NLRB 808 (1970).

3. The parties stipulated that pertinent portions of the records in *Resorts International Hotel, Inc.*, Case 4-RC-139-1, and *Boardwalk Regency Corp.*, Case 4-RC-13845, be incorporated by reference in this proceeding. The Board denied review of those cases in which the Regional Director, in December 1979, found that Local 40-B was a labor organization under the Act. The record in *Boardwalk Regency* disclosed that Local 40-B is an organization in which employees participate, and that it was organized for the purpose of dealing with employers concerning wages, hours, and working conditions. As nothing in the more recent record before us either casts doubt upon the evidence in the previous proceedings, or shows that Local 40-B is adifferent sort of organization than it was in December 1979, we find that Local 40-B is a labor organization within the meaning of Section 2(5) of the Act.

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

5. The Employer argues that the petition should be dismissed because Petitioner is uncertifiable under Section 9(b)(3) of the Act.[2] Specifically, the Employer contends that Petitioner is admittedly affiliated with the Federation of Special Police and Law Enforcement Officers (hereafter Federation), which in turn is or has been affiliated with two distinct nonguard unions—"APPLE"[3] and "Allied."[4]

[1] We find no merit to the Employer's claim that it was prejudiced when the Hearing Officer did not permit it to pursue Petitioner's "practical capacity to represent employees" in a financial sense. Here, as discussed, there is sufficient evidence to show Petitioner's labor organization status under Sec. 2(5) of the Act. However, should Petitioner become unable to fulfill its statutory obligations—for financial reasons or otherwise—the Board, under its established power to police its certifications, would entertain a motion to revoke any certification that might issue in favor of Petitioner.

Douglas Oil Company, 197 NLRB 308 (1972), and *International Brotherhood of Service Station Operators of America aka International Brotherhood of Professional Services (Urich Oil Company)*, 215 NLRB 811 (1974), cited by the Employer, are not apposite. In those cases the Board merely noted the absence of financial information about a petitioner where there was considerable other evidence that cast doubt on that petitioner's statutory status as a labor organization.

[2] Sec. 9(b)(3) provides in pertinent part that ". . . 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."

[3] Association of Public and Private Labor Employees.

[4] Allied International Union of Security Guards and Special Police.

The Board has consistently ruled that a guard union is "affiliated indirectly" with a nonguard union within the meaning of Section 9(b)(3) of the Act, where "the extent and duration of [the guard union's] dependence upon [the nonguard union]," or vice versa, "indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action."[5] Thus, the Board has permitted substantial latitude when a guard union is assisted by a nonguard unionmerely during the former's formative stages.[6] However, where the assistance rendered continues beyond the formative stages, the Board has found an indirect affiliation between guard and nonguard organizations.[7]

The Board applied these standards when it previously considered Federation's relationship with APPLE in *Wells Fargo Guard Services Division of Baker Protective Services, Inc.*, 236 NLRB 1196 (1978), and found no affiliation within the meaning of Section 9(b)(3). Thus, the Board in *Wells Fargo* concluded that, although Federation had assisted APPLE in its formative stages, there was no evidence that since May 1977 Federation had assisted APPLE in the formulation of its policies and in deciding its course of action. At the hearing in this proceeding, Federation's president since 1975, Daniel Cunningham, confirmed that Federation had been involved with APPLE for only a limited period of time in 1977. Accordingly, we find no present or past affiliation between Federation and APPLE that disqualifies Petitioner from certification by virtue of its admitted affiliation with Federation.

We also find that Petitioner is not uncertifiable because of any relationship between Federation and Allied. Federation President Cunningham acknowledged a connection between Federation and Allied, including at least one common officer. However, Cunningham unequivocally testified that Allied represents only guards. In contrast, the testimony of Wells Fargo's branch manager, Albert Black, upon which the Employer relies, is less direct and often recounts statements made about something outside of Black's personal knowledge. For example, Black testified that he was told that Allied had contracts covering nonguards with Snyder Nursing Home and Spencer Gifts. However, these assertions were unsubstantiated. We find that the record fails to establish that Allied represents other than guards. Consequently, any affiliation between Federation and Allied would not under Section 9(b)(3) prevent the certification of labor organizations, like Petitioner, affiliated with Federation.

6. The Employer contends that Local 40-B is uncertifiable because of its current affiliation with "the Council,"[8] an organization of building and construction trade unions that admits nonguard employees to membership. We agree with this contention.[9]

As previously noted, pertinent portions of Board proceedings in *Boardwalk Regency* and *Resorts International* are incorporated by reference into this proceeding. In those cases, the Regional Director found that Local 40-B was affiliated "directly or indirectly" with the Council as of December 12, 1979, the date both decisions issued. In *Boardwalk Regency* the Regional Director noted:

> [T]he council formally admitted [Local 40-B] to membership, and [Local 40-B's] business manager attended and participated in Council business meetings on a weekly basis until the day before the hearing. [Local 40-B] has held itself out publicly as an affiliate of the Council by declaring such affiliation on its stationery, and business cards, and it has engaged in picketing a construction site pursuant to the Council's decision and picketing schedule. Although, on the day before the hearing, [Local 40-B] sent a telegram stating that it did not wish to be affiliated with the Council, I find that this was not a genuine and bona fide offer to sever its affiliation with the Council, particularly where later that day it's business agent attended a Council meeting, made no mention of any intention to withdraw from the Council, and according to the Council's minutes, was appointed to a Council committee. There is no evidence in the record as to what action, if any, the Council took in response to the telegram or the subsequent letter. [pp. 2-3.]

[5] *The Magnavox Company*, 97 NLRB 1111, 1113 (1952).

[6] See *Rock-Hil-Uris, Inc. d/b/a The New York Hilton at Rockefeller Center*, 193 NLRB 313, 314, fn. 6 (1971), and cases cited therein.

[7] *Id.* See also *The Wackenhut Corporation*, 223 NLRB 1131 (1976), and *International Harvester Company, Wisconsin Steel Works*, 145 NLRB 1747 (1964).

[8] Atlantic, Cape May and Part of Burlington, Ocean and Cumberland Counties Building Trades Council.

[9] In its brief Intervenor renewed a motion to reopen the record which was previously denied by the Board without prejudice. Intervenor desires to call additional witnesses to rebut the testimony of Albert Black, a witness presented by counsel for the Board's Regional Office. We fail to perceive both why a request for a continuance was not made on the record prior to the close of the hearing in this proceeding and why Intervenor waited 1 month following the hearing to file its original motion. Further, Intervenor's business agent testified on rebuttal with respect to Black's testimony. Accordingly, the motion is hereby denied.

Member Jenkins would have granted the original motion and is still willing to reopen the record to receive additional evidence. However, he is willing to accept the Board's prior decision to the contrary as the law of the case, and on that basis agrees with this Decision and Direction of Election.

Local 40-B's requests for review of each case were denied by the Board.

Since it is clear that Local 40-B was uncertifiable because of its affiliation with the Council as of December 12, 1979, we must ascertain whether that affiliation has since ceased. Claiming that it has, Local 40-B introduced at the instant hearing recently printed stationery and business cards which omit reference to an affiliation with the Council. Local 40-B also introduced letters dated December 18, 1979, sent to the Council's president and to an employer with whom it had a collective-bargaining agreement. The letters state that Local 40-B's relationship with the Council has been terminated. Finally, Local 40-B's business agent, Joseph LaMaina, testified that he has not attended the Council's business meetings or participated in its affairs since October 1979.

Other evidence at this hearing, however, indicates that officials of Local 40-B and the Council publicly manifest a continuing relationship. Thus, security officer Louis Orsino reported that Local 40-B's business agent, LaMaina, told him in June 1980 that Local 40-B is "backed up" by the Council. Former security guard Russel Nonneman similarly testified that in June 1980, LaMaina told him that, if Local 40-B struck, it would receive a lot of assistance from the Council. Wells Fargo Branch Manager Albert Black also testified about statements made to him by LaMaina, indicating that the Council had voted to picket if Local 40-B was refused recognition by an employer. Additionally, Black testified that in April 1980 the Council's vice president, Brennan, told him that "LaMaina's union is part of the Council." These public manifestations of a continuing relationship and affiliation between Local 40-B and the Council are particularly significant when coupled with the fact that the Council has never confirmed—formally or otherwise—Local 40-B's purported disaffiliation expressed in its December 1979 letter to the Council. Thus, we conclude that Local 40-B has failed to demonstrate that its relationship with the Council has changed significantly since December 1979, when the Board declined to review the Regional Director's finding that an affiliation existed within the meaning of Section 9(b)(3).

However, although Intervenor is uncertifiable under Section 9(b)(3) of the Act, we hold that Intervenor's name should appear on the ballot. In *The Wackenhut Corporation*,[10] a majority of the Board, reversing longstanding precedent, held that the purpose of Section 9(b)(3) was not served by allowing a nonqualified union to intervene and appear on the ballot with a qualified labor organization in an election among guards. We cannot agree with the analysis of Section 9(b)(3) as set forth in *Wackenhut*.[11] When a qualified labor organization, as here, has filed a petition for a guard unit, it is proper to permit nonqualified unions to intervene and participate in the election. Should the nonqualified union be successful in the election, only the arithmetic results will be certified. The Act deprives a nonqualified union only of the benefits of certification. Guards have the right to designate as their bargaining agent a union which the Board is proscribed from certifying. By permitting a nonqualified intervenor to appear on the ballot, we will be acting in accordance with Section 9(b)(3) and will be contributing to stable labor relations by allowing employees to express fully their wishes as to a collective-bargaining agent. Thus, we hold that the statutory proscription in Section 9(b)(3) against certifying affiliated labor organizations to represent "guard units" does not prohibit putting such labor organizations on the ballot and certifying the arithmetic results when the election is won by such organization.[12] Accordingly, we shall

[10] 223 NLRB 83 (1976).

[11] Chairman Fanning and Member Jenkins dissented in *Wackenhut*. Thus, in ruling on this case, they are adhering to and applying the views set forth in that dissent.

[12] Therefore, to the extent inconsistent herewith, *Wackenhut Corporation, supra*, is overruled. We shall return to the principles and practice set forth in cases such as *The William J. Burns International Detective Agency, Inc.*, 138 NLRB 449, 452 (1962), see also *Rock-Hil-Uris, Inc. d/b/a The New York Hilton at Rockefeller Center, supra* at fn. 3.

Member Zimmerman finds that the relevant legislative history also supports the proposition that Intervenor is disqualified by Sec. 9(b)(3) from Board certification, but nevertheless should be permitted to appear on the ballot and, if it wins the election, the arithmetic results should be so certified.

At issue here is that portion of Sec. 9(b)(3) which states that:

> . . . no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

The language of Sec. 9(b)(3) is, in part, contrary to the intent of Congress as expressed in its own legislative history. Congress enacted Sec. 9(b)(3) in response to the Supreme Court's decision in *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416 (1946). There, the Court held the Act to permit an employer's plant guards and its production and maintenance employees to be represented by the same union. In so doing, the Court reversed a Sixth Circuit Court of Appeals' decision, which had found such a mixed unit illegal because "[i]n the case of industrial unrest and strikes on the part of production employees, the obligations of the plant guards . . . would be incompatible with their obligations to the union which, since it represents production employees, authorizes and directs the strike." *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 154 F.2d 932, 935 (6th Cir. 1946).

The Supreme Court opinion left Congress unpersuaded and Congress specifically sought to restore vitality to the courtof appeals decision. II Leg. Hist. 1572 (NLRA, 1947) (Remarks of Senator Taft). Thus, the House-passed bill would have excluded guards from coverage of the Act altogether. *Id.* at 168. The conferees, however, were not prepared to go that far; they reported the compromise that constitutes the current provision. The Conference Report on Sec. 9(b)(3) referred with specific approval to the circuit court opinion in *Jones & Laughlin* and its rationale that a divided loyalty among guard employees would undermine labor peace. *Id.* at 1541. "Clearly the Congress intended [by this provision] to insulate plant guards from regular production workers employed on the

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place Intervenor's name on the ballot but, in the event it is successful in the election, only the arithmetic results will be certified.

7. The parties stipulated to the following unit which we find appropriate for purposes of collective bargaining within the meaning of the Act:

> All security officers employed by the Employer in connection with its hotel/casino located at Park Place and Boardwalk, Atlantic City, New Jersey, excluding office clericals, professional and surveillance employees, all supervisors as defined in the Act including sergeants, lieutenants, and captains, and all other employees.

[Direction of Election and *Excelsior* footnote omitted from publication.]

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guarded premises, so that the guards' primary duty of maintaining the security of the premises would not be hampered by any sense of loyalty to fellow employees other than guards." *N.L.R.B.* v. *American District Telegraph Co. of Pa.*, 205 F.2d 87 (3d Cir. 1953).

Thus, Congress' primary concern was that guards not be represented by the same union that represents other employees at the premises they protect. The plain language of Sec. 9(b)(3) is, however, simultaneously broader and narrower than the issue raised by *Jones & Laughlin*. That Sec. 9(b)(3) bars us from certifying as representative of a guard unit a union that admits nonguard employees to membership, even if it represents no other employees at the site. At the same time, nothing in the Act bars a guard from joining a union that represents other employees at the plant, or prohibits that union from simultaneously representing guard and nonguard employees, as long as the Board's processes are not invoked to certify that union as the guard's representative. These results cannot be reconciled with the legislative history.

If we were to be consistent with that history, rather than with the language of the statute, we might draw a distinction between the treatment to be accorded contract guard units, such as those involved in *Wackenhut*, and on-premises guard units as presented in this case.

In *Wackenhut* the union sought a unit of all guards employed by the Employer in the State of Hawaii. Wackenhut provided guards to a variety of employers, some of whose employees presumably were represented by different unions. Further, it is likely that any union active in the State might, in the future, represent nonguard employees of an employer whose premises are protected by Wackenhut, even if it did not then do so. Consistent with the legislative history, we might decline to permit any union representing other employees in the State to participate in such an election in a contract guard unit conducted under our auspices. In effect, this is what our *Wackenhut* decision accomplished.

Here, by contrast, the guards work only for Bally and protect only the premises of its casino. There is no evidence to suggest that the Atlantic, Cape May and Part of Burlington, Ocean and Cumberland Counties Building Trades Council represents any other Bally casino employees, or that it might seek to do so in the future. Thus, pursuant to the legislative history, we could permit Intervenor to participate in a Board election, certify it as the representative if it wins the election, and still vindicate the congressional intent of Sec. 9(b)(3).

At the same time, we could well be justified in distinguishing between contract and noncontract (on-premises) guard situations by finding the former so fraught with the potential conflict the statute seeks to avoid that we should not in any way lend to it our election process. However, Member Zimmerman concludes that the language of Sec. 9(b)(3) itself does not permit such a construction, regardless of the congressional intent. Further, given the incongruity between Sec. 9(b)(3)'s language and its purpose, he feels compelled to read its language narrowly.

Nothing in the terms of Sec. 9(b)(3) prohibits the Board from its pre-*Wackenhut* practice of permitting nonguard unions to participate in representation elections conducted among guard employees and of certifying the arithmetic election results when such unions are victorious. *The William J. Burns International Detective Agency, Inc.*, 138 NLRB 449, 452 (1962). That practice does accord with the Act's general purpose to facilitate the identification of a collective-bargaining representative which is the choice of a majority of unit employees.