

Wells Fargo Guard Services, a Division of Baker Protective Services, Inc. and United Security Guard Guild. Case 22-CA-9502

September 9, 1980

DECISION AND ORDER

On May 9, 1980, Administrative Law Judge Edwin H. Bennett issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions, the General Counsel filed exceptions and a brief, and the Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We find merit in the General Counsel's exception to the failure of the Administrative Law Judge to order the Respondent to mail a copy of the notice to all of its security guards at their home addresses. The Administrative Law Judge's recommended Order provides that the Respondent post a remedial notice only at its Lawrenceville, New Jersey, facility.

The security guards work at approximately 25 different facilities throughout the State of New Jersey and they report daily to the facility to which they have been assigned. They do not regularly visit the Respondent's Lawrenceville facility. The security guards receive their paychecks and are notified of all personnel matters by a supervisor at their place of work, or through the mails. We conclude that mailing of the notices to the security guards at their home addresses would be the most and, in fact, only effective means of reaching the employees involved herein. Accordingly, we shall modify the recommended Order to include a provision for mailing the notice to all security guards at their home addresses.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wells Fargo Guard Services, a Division of Baker Protective Services, Inc., Lawrenceville, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(b):

"(b) Mail a copy of the attached notice marked 'Appendix'¹¹ to all security guards at their home

addresses, and post copies at its facility in Lawrenceville, New Jersey. Copies of said notice, on forms to be provided by the Regional Director for Region 22, after being duly signed by a representative of the Respondent, shall be mailed or posted, as appropriate, immediately upon receipt thereof. The posted notices shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material."

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge: This case was heard at Newark, New Jersey, on November 26, 1979.¹ The charge and amended charge were filed on September 18 and October 9, respectively. Respondent admits receipt of said charges on September 28 and October 10, respectively.²

The first amended complaint, which is the operative document herein, was issued on October 22, as part of an Order consolidating the instant case with Case 22-CA-9175. This latter case was severed by an order of the Regional Director for Region 22, on November 23, thus rendering moot a motion for partial summary judgment in that case filed by Respondent and referred to the Administrative Law Judge for ruling by Order of the Board dated November 26. The complaint before me alleges in essence that Respondent unlawfully refused to recognize and bargain with the United Security Guard Guild, herein called the Guild, notwithstanding that on July 20, the Guild was certified as the exclusive collective-bargaining representative of Respondent's guards employed at its Lawrenceville, New Jersey, office. Respondent concedes the issuance of said certification but asserts that, for various reasons, it was improperly issued. It admittedly is refusing to bargain in order to obtain a review of the representation proceedings which culminated in said certification.³

¹ All dates are in 1979 unless otherwise stated.

² Although Respondent admits receipt, it does not admit service of the documents on September 19 and October 9, respectively, as alleged in the complaint. With respect to the amended charge, the affidavit of service does establish that it was served by registered mail on October 9, as alleged. However, with respect to the charge, there is no proof submitted by the General Counsel to establish that it was served in any manner on September 19. Accordingly, I deem Respondent's admission that it received the charge on September 28, as proof of its service on or about that same date. The dates of the filing and service of the charge and amended charge have no bearing on any of the issues involved herein.

³ At the hearing Respondent candidly stated its view that the case could have been handled by way of a Motion for Summary Judgment filed with the Board by the General Counsel. The General Counsel, on the other hand, asserted that he was proceeding by way of a hearing in order to permit Respondent an opportunity to litigate its affirmative defenses raised by the answer. However, at such time as Respondent sought to introduce its evidence, the General Counsel objected on the ground that Respondent was seeking to relitigate the representation proceedings.

Upon the entire record,⁴ and after due consideration of the statements of position made during the hearing by the General Counsel, Respondent, and the Guild, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains various places of business in the State of New Jersey where it is engaged in the business of providing security guard services including a location at Lawrenceville, New Jersey, the only facility involved in this proceeding.

During the calendar year 1978, Respondent provided security guard services valued in excess of \$50,000 in States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Guild is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Representation Proceedings

As earlier indicated the sole issue involved in this proceeding is whether or not a certification which had issued to the Guild in Case 22-RC-7744 was valid. Respondent contends the Regional Director and the Board acted erroneously in granting the certification based on the evidence and legal arguments previously submitted. Moreover, it asserts that new evidence has come to its attention subsequent to the issuance of the certification which warrants reconsideration of the various decisions made by the Board in the representation proceedings. Therefore, a review of those proceedings is appropriate.

On December 28, 1978, the Guild filed a petition seeking an election in a unit consisting of all the security guards employed by Respondent at its Lawrenceville, New Jersey, location. The petition was signed by Robert F. O'Brien, attorney, whose law firm has represented the Guild throughout these proceedings. The hearing on that petition was conducted on January 12. Although the transcript of that proceeding is rather voluminous and was not made a part of the record herein, all parties conceded at the hearing before me that one of the issues litigated in that hearing was whether or not the Guild was disqualified from representing a unit of guards by virtue of Section 9(b)(3) of the Act because of its alleged affiliation with a nonguard union. In support of that position, Respondent litigated numerous arguments including a contention that one Harry J. Martin controlled the Guild, was its chief operating officer, and in fact was its *alter ego*. It further was contended by Respondent that Martin, as a member of the Retail Clerks union, was the

bridge by which the Guild had an impermissible affiliation with the Retail Clerks. That argument was pursued at the representation hearing and evidence was adduced by Respondent with respect thereto, as well as with respect to other alleged contacts between the Guild and the Retail Clerks. Respondent urged upon the Regional Director that the evidence warranted a conclusion that the two unions were affiliated, thus disqualifying the Guild from representing guards.

On January 22, the Regional Director for Region 22 issued a Decision and Direction of Election in which, *inter alia*, an election was ordered in a unit of all full-time and regular part-time security guards employed by Respondent at its Lawrenceville branch excluding all office clerical employees, casual employees, managerial employees, professional employees, field inspectors, and all other supervisors as defined in the Act.⁵ In that Decision, the Regional Director also rejected Respondent's contention that the Guild was barred by Section 9(b)(3) of the Act from being certified for the appropriate unit. In doing so, the Regional Director considered the various contentions raised by Respondent including its assertions regarding Harry J. Martin. It is noted that although the Decision does not refer to Martin by name, it does refer to two officers of the Guild who also were members of other unions. Respondent acknowledged before me that one of those unnamed officers was Martin. The Decision further provided that a request for review thereof could be had by filing such request with the Board in Washington, D.C., by February 5. Respondent failed to avail itself of this opportunity to seek review of the Regional Director's Decision.

A mail ballot election was conducted between February 16 and 28. A tally which issued disclosed that of 172 eligible voters, 120 ballots had been cast of which 54 were cast for representation by the Guild and 62 were against such representation. In addition, there were four challenged ballots.

On March 6, the Guild filed timely objections to the election. One of the objections asserted that Respondent had wrongfully interfered with the election by distributing a facsimile of the Board ballot.

On March 23, the Regional Director for Region 22 issued a Supplemental Decision, Order, and Direction of Second Election, finding, *inter alia*, merit to the Guild's said objection and ordering a new election. That Decision further provided that review thereof could be had by filing such a request with the Board in Washington, D.C., by April 5. Respondent did file a request for a review of that Supplemental Decision which request was denied by the Board on April 19.

A second mail ballot election was conducted between April 17 and 30. The tally which issued with respect to that election shows that of 165 eligible voters 67 voted for representation by the Guild, 59 voted against such representation, there were 4 challenges and 2 void ballots. On May 7, Respondent filed its timely objections to the conduct of the second election. Two of those objections dealt with allegations relating to Harry J. Martin's

⁴ Respondent filed a motion, dated December 19, to correct the transcript in various respects. On January 14, 1980, the General Counsel filed an unopposed response to that motion in which he proposed certain modifications to Respondent's proposed corrections. Respondent's motion as modified by the General Counsel's response is granted and the two documents are received in evidence as Resp. Exh. 9 and 9(a). In addition, the transcript, p. 12, l. 1, further is corrected to change the letters "DD and E" to "D and D of E." These initials stand for "Decision and Direction of Election."

⁵ Respondent does not contest the appropriateness of this unit.

connections to the Guild. It was asserted by Respondent that on April 4, Martin had falsely advised the unit employees that he had resigned his position in the Guild. In support, Respondent relied on a newspaper article dated May 4, in which Martin was referred to as a Guild consultant. This evidence was presented to the Regional Director during the investigation of Respondent's objections. Respondent further contended that Martin had failed to disclose to the employees the identity of those individuals responsible for the functioning of the Guild, thus misleading employees about the Guild's true identity. Respondent's request for a hearing on its objections was denied.

On July 20, the Regional Director for Region 22, following an administrative investigation, issued a Second Supplemental Decision and Certification of Representatives in which, *inter alia*, no merit was found to any of Respondent's objections. That Second Supplemental Decision provided that a request for review could be had by filing same with the Board in Washington, D.C., by August 2. Respondent filed its request for review which was denied by the Board by telegraphic order issued on September 20. In addition to the evidence previously submitted to the Regional Director in support of its objections, Respondent also asked the Board to consider additional evidence (considered below) which it mailed to the Board on September 18. According to the records, the Board received this additional evidence on September 26, and consequently it was rejected as untimely filed.

B. *The Refusal To Bargain*

On July 19, the Guild, by its counsel O'Brien, requested that Respondent meet with it to negotiate an agreement. Inasmuch as the request for review was yet pending, Respondent made no reply to the request. On September 10, the Guild, by its self-styled advisor, Harry J. Martin, requested that Respondent furnish it with a list of guards employed at the Lawrenceville branch. It is this September 10 request which was in mailgram form that Respondent sought to bring to the Board's attention on September 18. And it is this request by Martin which forms the basis for the allegations in the complaint that Respondent is refusing to furnish a list of unit employees to the Guild upon a request by that organization dated September 10. On September 21, the Guild again wrote to Respondent requesting a meeting for the purpose of conducting collective-bargaining negotiations. On October 4, Respondent replied to the previous request for bargaining and information and addressed the reply to Harry Martin. In that reply, Respondent stated that it believed the Guild had not been freely chosen by the employees, that the certification had been unlawfully issued, and "that as is necessary in order to contest the lawfulness of such Certification, Wells Fargo will not bargain with you as the representative of its employees."

C. *The Unfair Labor Practice Hearing*

Respondent is aware of the well-settled rule that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a pro-

ceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁶ Respondent, in the hearing before me, conceded that it had no issues, positions, or arguments to advance which had not previously been made in the representation proceedings but that it did have evidence not previously available to present in support of its contentions which would warrant reconsideration by the Board of its earlier decisions leading to the certification. An examination of Respondent's two affirmative defenses appearing in its answer to the complaint illuminates this matter.

First, Respondent contends the certification is invalid because of the false assertion made to employees and the Board that Martin had severed his connection with the Guild. This defense, it will be recalled, is identical to one of the objections to the second election filed by Respondent on May 7. The second affirmative defense asserts that the Guild, by virtue of its affiliation with a nonguard union is disqualified by Section 9(b)(3) of the Act from being certified as the bargaining representative for a unit of guards. This is identical to the position taken by Respondent at the initial hearing on the petition. Moreover, both defenses deal with Martin's connection to the Guild, for according to Respondent, it is through Martin and other unnamed, unknown, and hidden individuals that the forbidden link exists between the Guild and Retail Clerks.⁷ Respondent reasoned that the fraudulent assertion concerning Martin's purported severance of his connections with the Guild not only was deceitful, thus impacting on the election, but also proved that other persons, presumably officials of nonguard unions, controlled the Guild.

Notwithstanding Respondent's artful argumentation the question remains whether or not it was prepared to offer newly discovered or previously unavailable evidence in support thereof. To this end, Respondent sought to call as its witness Robert F. O'Brien, the attorney of record for the Guild throughout these proceedings. Respondent offered to prove through O'Brien that, as recently as November 20, Martin was in active control of the Guild's affairs because on that date O'Brien admitted as much in a conversation with John F. Cannon, Respondent's attorney herein. In addition, Respondent claimed it could furnish new evidence through materials subpoenaed by it from the Guild, from Martin, from Local 1371 Retail Clerks Union, and from O'Brien in his capacity as attorney for both the Guild and Local 1371. With respect to the subpoenas served on the Retail Clerks and on the Guild, they sought various records relating to the identity of those individuals serving as officers, trustees, or officials of the Guild subsequent to January 12.

⁶ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁷ Respondent was asked whether or not it contended there was any other nonguard union with which the Guild allegedly was affiliated. Although Respondent could not suggest the identity of any other such union, it stated its position to be that the Board has an affirmative obligation to establish the nonexistence of a forbidden affiliation once the issue has been raised. I reject this position as without legal merit, and consequently an evidentiary hearing at the unfair labor practice stage of the case to explore this allegation of affiliation is unwarranted.

The subpoena served on Martin similarly requested various records establishing the identity of individuals acting on behalf of the Guild in various capacities but without limitation as to date. The subpoena directed to Mr. O'Brien sought his records relating to correspondence with the Guild and Retail Clerks reflecting on the names of individuals acting for or on behalf of the Guild. Respondent conceded that in the representation case hearing on the petition it had not subpoenaed records of the kind now sought in the case at bar, and it offered no explanation for its failure to do so. And, it will be recalled Respondent did not seek review of the Regional Director's decision in that case in which, *inter alia*, Respondent's contention that the Guild was affiliated with a non-guard union was found to be without merit.⁸

The mere fact that Respondent framed its subpoenas to the Guild and to the Retail Clerks in terms of records subsequent to January 12 (the date of the original representation case hearing) does not save these subpoenas, or the examination of the witnesses pursuant thereto, from the rule against relitigation. Respondent emphasized that if it had been permitted to conduct an examination pursuant to its subpoenas it would have been able to unmask the true controlling forces of the Guild. This lack of knowledge, however, is not the legal equivalent of newly discovered or previously unavailable evidence. Reduced to its essentials, Respondent's position is a disguised attempt to conduct the kind of investigation it could have engaged in at the initial hearing on the petition for it does not even suggest that post January 12, records would differ in any significant or meaningful way from records prior to that date. To escape this obvious conclusion, Respondent argues that post-certification events would illuminate the correctness of its position. Once again, however, to permit such unending inquiry effectively would result in a circumvention of the rule barring relitigation of common issues. The net result of Respondent's position then is that it claims compliance with the intent of the rule by offering "newly discovered" or "previously unavailable" evidence at the expense of the very rule itself.

Respondent's position is tantamount to an attempt to continually file objections to an election for an indefinite period which, if allowed, would result in the uncertainty and lack of finality in the election procedures that the Board continually condemns.⁹ Respondent's position is particularly lacking in merit based as it is on the most nebulous, speculative, and inconsequential of claims. Thus, Respondent's objections to the second election raised the contention of improper affiliation by the Guild with a nonguard union through Martin's role in the two unions. In its defenses raised in this proceeding one of the prongs of its attack with respect to the alleged misrepresentation concerning Martin's severance from the Guild is that this has a direct bearing on whether or not the Guild had a Section 9(b)(3) affiliation with a non-

guard union. The only "new" support offered in connection with the defense was the conversation between lawyers Cannon and O'Brien and the single piece of evidence previously proffered to the Board in its request for review and rejected as untimely filed. In view of the foregoing, I conclude that no newly discovered or previously unavailable evidence has been offered by Respondent, nor has it asserted the existence of any special circumstances warranting reexamination of the Board's determinations in the representation proceeding.

The request of the Guild to bargain and its request for information, and Respondent's refusal to bargain and its refusal to furnish the information, all are admitted. It being established that the Guild is the certified bargaining representative and as there are no issues to be litigated or to be resolved by a hearing, I hereby make the following further findings:

1. The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time security guards employed at Respondent's Lawrenceville, New Jersey, office, but excluding all office clerical employees, casual employees, managerial employees, professional employees, field inspectors and all other supervisors as defined in the Act.

2. Between the dates of April 17 and 30, 1979, a majority of employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director, Region 22, designated the Guild as their representative for the purpose of collective bargaining with Respondent.

3. On July 20, 1979, the Guild was certified as the collective-bargaining representative of the employees in said unit and the Guild continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

4. Commencing on or about July 19, 1979, and at all times thereafter, the Guild has requested Respondent to bargain collectively with it as the exclusive bargaining representative of all the employees in the above-described unit.

5. Commencing on or about September 10, 1979, and at all times thereafter, the Guild has requested that Respondent furnish it with a list of the names and addresses of the employees in the above-described unit.

6. Commencing on or about October 4, 1979, and continuing at all times thereafter to date, Respondent had refused, and continues to refuse, to recognize and bargain with the Guild as the exclusive representative for collective bargaining of all employees in said unit, and to furnish the Guild with the names and addresses of the employees in said unit.

CONCLUSIONS OF LAW

By refusing to recognize and bargain with the Guild as the exclusive collective-bargaining representative in the appropriate unit described above and by refusing to furnish the Guild with the names and addresses of employees in said unit, Respondent has engaged in unfair labor

⁸ Sec. 102.67 (f) of the Board's Rules and Regulations provides that the failure to request review precludes relitigation in any related subsequent unfair labor practice proceedings of any issue which was or could have been raised in the representation proceeding with the same force as if review had been denied.

⁹ *Reichart Furniture Company*, 236 NLRB 1698 (1978).

practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I find it necessary to order that it cease and desist therefrom, and, upon request, bargain collectively with the Guild as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement. Further, it will be recommended that Respondent furnish to the Guild the names and addresses of all employees in the said unit.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, I recommend the initial period of certification be construed as beginning on the date Respondent commences to bargain in good faith with the Guild as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf. 350 F.2d 57 (10th Cir. 1965).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The Respondent, Wells Fargo Guard Services, a Division of Baker Protective Services, Inc., Lawrenceville, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Security Guard Guild, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time security guards employed at Respondent's Lawrenceville, New Jersey, office, but excluding all office clerical employees, casual employees, managerial employees, professional employees, field inspectors and all other supervisors as defined in the Act.

(b) Refusing to furnish to the Guild the names and addresses of all employees in the aforesaid unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement, and furnish to said labor organization the names and addresses of all unit employees.

(b) Post at its facility in Lawrenceville, New Jersey, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Security Guard Guild, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to furnish to the above-named Union the names and addresses of all employees in the unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement, and we will furnish to said Union the names and addresses of all unit employees:

All full-time and regular part-time security guards employed at our Lawrenceville, New

Jersey, office, but excluding all office clerical employees, casual employees, managerial employees,

professional employees, field inspectors and all other supervisors as defined in the Act.

WELLS FARGO GUARD SERVICES, A DIVISION OF BAKER PROTECTIVE SERVICES, INC.