In the Matter of AMERICAN DISTRICT TELEGRAPH COMPANY, EMPLOYER *and* LOCAL NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., PETITIONER

Case No. 21–RC–124

SUPPLEMENTAL DECISION

AND

SECOND DIRECTION OF ELECTION

May 12, 1949

On August 5, 1948, the Board issued its Decision and Direction of Election in the above-entitled case.[1]

On August 30, 1948, the Board issued its Order, staying any further proceedings pursuant to the Decision and Direction of Election, reopening the record, and remanding the case to the Regional Director for the purpose of taking evidence as to the unit appropriate for the purposes of collective bargaining.

Pursuant to this Order, a hearing was held before Ben Grodsky, hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer's request for oral argument is hereby denied, as the record and briefs, in our opinion, adequately present the issues and the positions of the parties.

In the original Decision herein, the Board found appropriate a bargaining unit consisting of all of the Employer's plant and operating department employees, excluding sales employees, office and clerical employees, professional employees, supervisors, and guards. The Decision defined the guards excluded from the unit in the following language:

> The term "guards," as used herein, does not refer to men employed to guard the property of customers of the Employer; instead it refers to those employees, if any, who guard the employer's own premises. See *Matter of Brink's Incorporated*, 77 N. L. R. B. 1182.

[1] 78 N. L. R. B. 864.

The Employer took the position at the hearing herein and in its brief that most of the employees in its plant and operating departments are guards within the meaning of Section 9 (b) (3) of the amended Act, and that they therefore may not either be included in a bargaining unit also containing employees who are not guards or be represented by a labor organization which, like the Petitioner (IBEW) also represents employees who are not guards.

The Employer, a California corporation, is one of a Nation-wide system of affiliated corporations engaged in the business of protecting industrial, business, and Government property. It installs and maintains on the premises of its subscribers numerous electrical devices designed to give constant protection through frequent, periodic reporting signals, and to give an alarm in the event of fire or unauthorized entry. Most of these devices are connected by leased wire to the central or subisidiary stations maintained by the Employer, where all alarms activate a visual, audio, or automatic tape recording device. In addition, the Employer provides a watchman's reporting service which initiates an alarm at the Employer's central or subsidiary stations, if a watchman employed by a subscriber fails to "punch in" at the proper time at guard boxes located throughout the subscriber's premises.

The Employer's operations are divided between its plant department and its operating department. The Petitioner seeks to represent the employees in both these departments as a single unit. The plant department, consisting of about 85 employees, supervises installations of equipment, repairs the equipment, and operates a small shop which manufactures protective window screens.

The operating department, consisting of approximately 69 employees, operates the central and subsidiary stations and responds to alarms from subscribers' premises. Aside from the supervisors and 2 employees who are classified as operators and spend all their working time in the central station, *all* the employees in the operating department are classified as "guard operators" or "guards" (hereinafter jointly referred to as guards),[2] and they are all uniformed, deputized, and armed. All guards carry some hand tools and are expected to make temporary repairs whenever they discover that an alarm has been caused by a broken or defective electrical circuit. None of the Employer's guards regularly patrol the premises of subscribers. However, when they discover that a subscriber's watchman is missing from his post, intoxicated on duty, or otherwise unable to protect the subscriber's property, it is their duty to patrol the premises until they are

[2] There is no significant distinction between the duties of guards and the duties of guard operators.

relieved by the subscriber or by another of the subscriber's own watchmen.

The operating department

As noted above, the Employer contends that the Petitioner, which admits to membership employees other than guards, is ineligible to represent any of the employees either in its operating department or plant department, on the ground that all the employees of both departments are "guards" within the meaning of Section 9 (b) (3) of the amended Act. That section 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; . . .

The Petitioner argues that none of the employees whom it seeks to represent are the type of guard covered by Section 9 (b) (3), because none of them protect the property of *their own* employer or the safety of persons on their own employer's premises.

A literal reading of the language of Section 9 (b) (3) militates against the Petitioner's argument, because the word "employer" may reasonably be regarded as referring to the employer of the guarded employees and persons against whom rules are being enforced. Such an application of these words would be in harmony with the results intended by the Congress. But even if a literal reading of the language of Section 9 (b) (3) were to be regarded as lending support to the Petitioner's argument, the Board must look beyond the literal words of the Act when it determines that a strict application of those words would produce a result inimical to that intended by the Congress.[3] Clearly, the Congress intended to insulate plant guards from regular production workers employed on the guarded premises, so that the guards' primary duty of maintaining the security of those premises would not be hampered by any sense of loyalty to fellow employees other than guards.[4]

[3] See *Matter of Advance Pattern Company*, 80 N. L. R. B. 29.

[4] Senator Taft made the following report to the Senate concerning this section:

> Section 9 (b) is also the same as Section 9 (b) of the Senate amendment with the exception of an addition of a third clause relating to plant guards. As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the Sixth Circuit in the Jones and Laughlin case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although this case was recently reversed by the

We have examined carefully the legislative history of Section 9 (b) (3) but have not discovered, nor has the Petitioner cited to us, any evidence that the Congress intended to draw a distinction between plant guards hired directly by an employer and plant guards who are employed by a guard service. Clearly, this Board would be thwarting instead of implementing the intent of the Congress if it adopted a rule under which a labor organization that represented nonguards could also be certified as a bargain representative for guards, simply because those guards protected property which did not belong to their own employer. As the employees in the Employer's operating department are plant guards primarily engaged in the protection of property against fire and theft, we find, in accordance with the foregoing, that they are guards within the meaning of Section 9 (b) (3) of the amended Act.[5] We shall therefore exclude them from the unit hereinafter found appropriate.[6]

The plant department

We cannot, however, agree with the Employer's contention that its 85 employees in its plant department, like those in the operating department, are guards within the meaning of Section 9 (b) (3). The record reveals hat there is little interchange of employees between the 2 departments, that they are separately supervised, and that they are located at different addresses in the city of Los Angeles. Further, it appears that the employees in the plant department, who are primarily electricians and electrical maintenance men, are engaged for the most part in installing and maintaining the electrical devices which initiate the alarms that are received by the Employer's guard stations. Except for the night repairmen, none of the employees of the plant department are uniformed, deputized, or armed. Occasionally some of the night repairmen are armed. In most instances, how-

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Supreme Court on the ground that the Board had it within its power to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding, that this was an abuse of the discretion permitted to the Board under the act. One of the Members of the Board has also expressed this view in a number of dissenting opinions. Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership. Cong. Rec. Sen. June 5, 1947, page 6601.

[5] See *Matter of Young Patrol Service*, 75 N. L. R. B. 404.

[6] In reaching this conclusion, we are not unmindful of our Decision in *Matter of Brink's Incorporated*, 77 N. L. R. B. 1182, wherein the Board (Member Murdock dissenting) found that armored truck guards were *not* guards within the meaning of Section 9 (b) (3). Insofar as that Decision relied upon the fact that the employees there involved were not plant guards, it is reaffirmed. However, insofar as it relied upon the fact that the property which they protected did not belong to their own employer, it is hereby *reversed*.

ever, they are unarmed because they are usually dispatched only in company with a guard from the Employer's operating department, or not sent out until after the guard has made an examination and determined that he is unable to repair defective electrical appliance.

In view of the foregoing and upon the entire record, we conclude, as we have done in separate proceedings involving two of the Employer's sister corporations,[7] that the Employer's plant department employees are *not* guards within the meaning of Section 9 (b) (3) of the Act. Accordingly, we find that all the employees of the plant department of American District Telegraph Company, Los Angeles, California, excluding sales empoyees, office and clerical employees, professional employees, and supervisors constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

SECOND DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Twenty-first Region, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, as amended, among the employees in the plant department unit found appropriate above, who were employed during the pay-roll period immediately preceding the date of this Direction of Election, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by Local No. 11, International Brotherhood of Electrical Workers, A. F. of L.

CHAIRMAN HERZOG and MEMBER HOUSTON, dissenting in part:

We cannot agree with the finding of our colleagues that the men in this Employer's operating department are "guards" within the particular meaning of Section 9 (b) (3) of the Act. The fact that their sole function is to guard the premises of persons other than their own

[7] *Matter of American District Telegraph Company of San Francisco*, 78 N. L R B. 150; *Matter of American Protection Company*, Case No. 9–R–2304, decided May 26, 1948.

employer seems to us to take them outside the statutory definition. We would adhere to the entire holding in the *Brinks* case, in which two of our colleagues also joined, and not reverse it in any respect. Because these men protect the premises of their employer's subscribers, and *not* their own employer's premises, we would authorize the use of the Board's processes to permit them to select the Petitioner as their representative.

Section 9 (b) (3) of the Act clearly provides that the Board shall not find appropriate any bargaining unit which includes, together with other employees "any individual employed as a guard to enforce against employees and others rules to protect property *of the employer* or to protect the safety of persons *on the employer's premises.*" [Italics supplied.] The majority concludes that the terms "employer" and "employer's," in italics immediately above, may reasonably be regarded as referring to the employer of the guarded employees or the employer of employees against whom rules are being enforced. We cannot agree with this conclusion, because we believe that its net effect is to render meaningless Congress' use of the terms "employer" and "employer's."

Had Congress intended to apply the limitations of this section to all guards, regardless of who employed them or whose property they protected, it need not have described the property protected as the "property of the employer." Nor indeed did it have to restrict the safeguarding of persons to those on "the employer's premises." But Congress did use both these phrases. Adopting the common rule of statutory construction that the words of a statute are presumed to have been used with *some* intent, we are unable to find, as our colleagues appear to have done, that these words have no significance. We believe, therefore, that the term "employer" must be taken to refer to the guard's own employer.

We agree with our colleagues that the over-all intent of Congress in enacting Section 9 (b) (3) was to attack the problem of divided loyalty which concerned this Board and disturbed the courts in those cases, decided before 1947, in which the same labor organization sought to represent both an employer's guards and those of his employees who were not guards whose derelictions the former might be expected to report. However, we do not believe that the majority opinion implements that over-all intent. It appears to do the precise opposite. For it invites the employees of this Employer's operating department to seek representation by some unaffiliated labor organization which represents only guards and watchmen, and which would presumably also—and alone—be eligible to represent the watchmen employed by the Employer's subscribers. As such subscriber's watch-

men are normally likely to be the only employees on protected premises when an alarm is received, the majority decision, instead of isolating the guards from the guarded, tends to draw the two groups closer together. This will tend to enhance rather than to diminish the very opportunities for collusion which Congress seems to have thought a source of temptation if both associated in the same labor organization.