

**Hamburg Industries, Inc., Fidelity Services, Inc. & Industrial Technical Services, Inc. and International Brotherhood of Painters and Allied Trades, AFL-CIO, Local Union 1730, Petitioner. Case 11-RC-3275**

September 7, 1971

DECISION AND DIRECTION OF  
ELECTION

BY CHAIRMAN MILLER AND MEMBERS  
FANNING, JENKINS, AND KENNEDY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Charles M. Williamson. Thereafter, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 11, this case was transferred to the National Labor Relations Board for decision. Briefs have been timely filed by Hamburg Industries, Inc., Fidelity Services, Inc., and the International Brotherhood of Painters and Allied Trades, AFL-CIO, Local Union 1730.

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

Upon the entire record in this case<sup>1</sup> the Board finds:

1. The Petitioner seeks to represent certain employees at Hamburg Industries, Inc.'s plant in Hamburg, South Carolina, and contends that they are employed jointly by Hamburg Industries, Inc., Fidelity Services, Inc., and Industrial Technical Services, Inc.,<sup>2</sup> and not solely by Fidelity as both Hamburg and Fidelity contend.

Hamburg argues that Fidelity is the sole employer of the maintenance and production workers at its plant and that as a separate business entity from both Fidelity and ITS it is not an employer, joint or otherwise, of Fidelity's employees.

Fidelity argues that it alone is the employer of the maintenance and production workers at Hamburg and, since Petitioner sought a unit consisting of employees of Fidelity, Hamburg, and ITS as joint employers, the unit is not appropriate.

ITS was not represented at the hearing and did not file a brief; it appears to be a defunct corporation without employees or contracts to supply labor<sup>3</sup> and is not a joint employer of the maintenance and

production workers employed at Hamburg's plant.

Hamburg is engaged in the business of contracting with railroad companies for the repair, maintenance, and remanufacture of railroad cars at its plant in Hamburg, South Carolina. It has 10 employees at its plant: office clericals, company executives, and 3 superintendents, who are not maintenance or production workers. Hamburg supplies all the necessary tools and supplies and contracts with Fidelity for its entire work force of 283 men including 13 supervisors and also contracts with another firm for its guard force. Hamburg receives a contract from a railroad, estimates the number of men and the length of time necessary to fulfill the contract and then requests that number of men for that length of time from Fidelity. Hamburg instructs Fidelity on the work to be performed and its three superintendents constantly check the performance of the workers and the quality of the work. The work instructions are communicated to the workers by the 13 supervisors supplied by Fidelity. Hamburg can require that work be redone and can terminate its contract with Fidelity at any time for any reason. Hamburg has its own safety rules followed by all employees at its plant, can force Fidelity to remove employees from its plant, can veto overtime, and can change the hours of work for all employees, as it recently did when it requested a work schedule change from five 8-hour days to four 10-hour days and discontinued overtime for the extra 2 hours daily which had been the practice. Hamburg reimburses Fidelity for all of its costs including wages, payroll taxes, social security taxes, workmen's compensation, and pays Fidelity a fee which is a certain percentage of the weekly payroll; the percentage varies according to the amount of the payroll.

Fidelity is engaged in the business of supplying labor; currently it is under contract to three firms, including Hamburg. Fidelity maintains an employment office staffed with its own personnel at Hamburg's plant. It determines the employees' rates of pay and can institute unilateral pay raises; however unless the pay increases are presented to and accepted by Hamburg, the increased labor costs are absorbed by Fidelity alone. Fidelity uses the same employees' handbook, pay scale, and fringe benefits for all of its employees regardless of the company they are contracted to.

In view of Hamburg's considerable control over Fidelity's operations in such critical areas as work instructions, quality control and the right to reject finished work, work scheduling, and indirect control over wages, it is obvious that Hamburg is a joint

<sup>1</sup> Hamburg Industries, Inc.'s and Fidelity Services, Inc.'s requests for oral argument are hereby denied as in our opinion the record, including the briefs, adequately presents the issues herein and the positions of the parties.

<sup>2</sup> Hereafter referred to as Hamburg, Fidelity, and ITS.

<sup>3</sup> ITS, until early 1971, was under contract to Hamburg to supply part of its labor needs.

employer along with Fidelity of all employees at Hamburg's plant engaged in the maintenance and remanufacture of railroad cars. Accordingly, we find that the joint Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The parties stipulated that the Petitioner is a labor organization within the meaning of the Act, and we so find.

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

4. The Petitioner seeks to represent a unit of all employees engaged in the maintenance and remanufacture of railroad cars, who are normally working at Hamburg Industries, Inc., Hamburg, South Carolina, but excluding all office clerical employees, guards, and supervisors as defined in the Act. The parties agreed to the composition of the unit with the exception of the leadmen. The Petitioner contends that leadmen are in fact supervisors, and not rank-and-file employees as both Hamburg and Fidelity contend, and should be excluded from the unit. We do not agree.

There are 18 leadmen each with a crew that has a designated job function. They are hourly paid and do some manual work, paperwork, inspections, help employees with their job skills, and generally set the pace for production; Fidelity and Hamburg both refer to leadmen as "Pushers." If a work problem develops the leadmen take no disciplinary action themselves, but report the facts to a foreman who makes his own independent investigation to determine what action is to be taken. There is no persuasive evidence that leadmen satisfy the statutory definition of "Supervisor."

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

All employees including leadmen engaged in the maintenance and remanufacture of railroad cars at Hamburg Industries, South Carolina, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

[Direction of Election<sup>4</sup> omitted from publication]

CHAIRMAN MILLER, dissenting in part:

I disagree with my colleagues' finding that a joint-employer relationship exists between Hamburg In-

dustries, Inc. and Fidelity Services, Inc. Rather, I find that the evidence in the record clearly establishes that Fidelity alone is the sole employer of the maintenance and production employees at Hamburg's plant. In the past, in order to determine whether a joint-employer relationship exists, the Board has taken special cognizance of the presence or absence of factors such as common ownership, common control over labor relations policy, and close direct day-to-day supervision over the contractor's employees. (See, for example, *Hychem Constructors, Inc.*, 169 NLRB 274.) None of these factors are present in the instant case. Although the Union attempted to prove that a common corporate relationship existed, the unrefuted testimony established that the two companies have no common officers or stockholders.

The contractual arrangement between Fidelity and Hamburg is a typical cost-plus agreement. In furtherance of that agreement, Hamburg exercises only the degree of control necessary to police the cost aspects of the agreement and to see that Fidelity furnishes the quality of service agreed upon in the contract. Accordingly, Fidelity's practice is to discuss wage increases with Hamburg prior to their institution. However, the record establishes that Fidelity has instituted standard increases when it has seen fit, and that Hamburg has always approved such increases. Hamburg naturally has the right to reject work done by Fidelity's employees, if it is not of sufficient quality to meet the specifications of the railroad companies requesting the work. However, this right merely exists to enable Hamburg to police the contract. It does not operate to create an employment relationship between Hamburg and Fidelity's employees. Apart from this limited quality and cost control, the employees are entirely under Fidelity's supervision. They are hired by Fidelity and assigned to a jobsite where Fidelity has a contract, as Fidelity sees fit. Regardless of the job to which they are assigned, they all receive a Fidelity employee handbook, which does not apply to Hamburg's own employees. The employees work directly under Fidelity's supervision and have no contact with any Hamburg personnel. While Hamburg can insist that a Fidelity employee be removed from the job, it has never exercised this right. Even if it were to do so, the determination of whether to terminate the employee or simply transfer him to another jobsite would still belong to Fidelity. Thus, discipline and discharge of the employees are solely under Fidelity's control.

<sup>4</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right 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, *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed

by the Employer with the Regional Director for Region 11 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

It should be noted that Fidelity has been involved in previous Board litigation in connection with its relationship with Columbia Nitrogen Corporation. In *Fidelity Maintenance & Construction Company, Inc.*,<sup>5</sup> 173 NLRB 1032, Fidelity and Columbia Nitrogen were alleged to be joint employers. The factual situation was almost identical to that in the instant case except that Columbia Nitrogen was more involved with Fidelity's employees in that it per-

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<sup>5</sup> The record shows that on January 1, 1971, for expansion purposes, Fidelity Maintenance and Construction Company changed its name to

formed certain interviewing and testing services for Fidelity with respect to employment applicants. The Trial Examiner's Decision held that Fidelity and Columbia Nitrogen were not joint employers of Fidelity's employees. Although the Board did not find it necessary to pass on this aspect of the case, I agree with the Trial Examiner's Decision on the joint-employer issue and I would make the same finding in the instant case.

Fidelity Services, Inc