

Desert Palace, Inc., d/b/a Caesars Palace and Local 151, International Union of Police and Protection Employees, I.W.A., Petitioner. Case 31-UC-47

April 1, 1974

DECISION AND ORDER CLARIFYING CERTIFICATION

BY CHAIRMAN MILLER AND MEMBERS
FANNING AND JENKINS

Upon a petition for clarification of unit duly filed by Local 151, International Union of Police and Protection Employees, I.W.A., herein called Local 151 or Petitioner, on July 19, 1973, and amended on July 24, 1973, a hearing was held on August 23, 1973, before Hearing Officer Susan B. Kunk of the National Labor Relations Board. On October 1, 1973, the Regional Director for Region 31 issued an order transferring the case to the Board for decision. Thereafter, briefs were timely filed by the Petitioner, and by the Employer, Desert Palace, Inc., d/b/a Caesars Palace.

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 that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

The petition herein filed seeks clarification of a unit of the Employer's security employees at its Las Vegas, Nevada, operation, which unit was certified by the Board in 1970 in behalf of the Petitioner. The Petitioner requests a clarification which would find that the classification of plainclothes investigators should be added, without an election, to those already included in the unit.¹ The Petitioner, in its brief, argues that when the unit herein was first certified the Board's decision in the *Pinkerton's*² case forbade the inclusion of employees similar to those in question in a guard unit, but that since that time the Board has reversed itself and now accepts them as being guards within the meaning of the Act.³

The Employer contends, however, that, inasmuch as part of the duties of the plainclothes investigators is to investigate alleged misconduct of uniformed guards, to include plainclothes investigators in the guard unit would create a conflict of interest which Congress attempted to avoid by prohibiting the

inclusion of nonguard employees in a unit of guards. Alternatively, the Employer contends that, even if we find the Act does not prohibit the accretion of investigators to the existing unit, the fact that investigators have been employed full time since shortly after the original certification and have never been included in the unit precludes Petitioner from seeking these employees now by means of the instant petition. As its final contention, the Employer argues that the record shows a separate community of interests among the plainclothes investigators which therefore entitles them to decide for themselves whether they wish to be represented along with the other security personnel or whether they desire separate representation.

The record discloses that on March 18, 1970, Local 151 was certified by the Board as the exclusive bargaining representative of a unit of "all security officers." This certification issued following an election directed by the Regional Director in which a majority of the valid ballots cast were for Petitioner. Prior to that time, the Employer's security officers were unrepresented.

The facts show that the position of plainclothes investigators has existed from the inception of the Union's representation of the Employer's security officers. They also show that two contracts have been negotiated since that time, neither covering the employees in issue here. These facts indicate to us the inappropriateness at this time of our including these employees in the unit by means of the instant petition.⁴ The fact that the exclusion of the plainclothes investigators may have come about because of what was then Board precedent, since changed, is in our view beside the point. The point is that the investigators have not, since the summer of 1970, been included in the unit; they were not included in the latest 1973 contract, despite Petitioner's attempt so to include them. Regardless of whether their exclusion was the result of the Board's change of precedent, the fact is they have never, despite their existence for several years and the negotiation of an intervening contract, had an opportunity to express themselves for union representation. The Board has not traditionally blanketed such employees into an existing unit under the "accretion" doctrine. However "fair" such an inclusion might be to the petitioning union, it would not be fair to the unrepresented investigators, who, as indicated, have never been given an opportunity to vote on representation. An RC petition filed at the appropriate time would provide an opportunity for these employees to

¹ "Included: All security officers employed by Desert Palace, Inc., d/b/a Caesar's Palace, at Las Vegas, Nevada. Excluded: All other employees, office clerical employees and supervisors as defined in the Act"

² *Pinkerton's National Detective Agency, Inc.*, 124 NLRB 1076

³ *Burns Security Systems, Inc.*, 188 NLRB 222, issued January 29, 1971.

⁴ *Northwest Publications, Inc. d/b/a San Jose Mercury and San Jose News*, 200 NLRB No. 20; *Wallace-Murray Corporation, Schwitzer Division*, 192 NLRB 1090

express whether or not they desire to be represented along with the other employees in the unit, without our disrupting the bargaining relationship established over some time by the Employer and Petitioner. Accordingly, we shall dismiss the petition.⁵

ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.

MEMBER JENKINS, dissenting:

Unlike my colleagues, I would grant Petitioner's request to include these plainclothes investigators in the unit of security guards.

Initially I note my disagreement with the majority's conclusion that Petitioner has somehow waived its right to ask the Board to determine whether in fact certain employees should be included in the unit by means of our unit clarification procedure. The facts of this case show that Petitioner, throughout its dealings with respect to the Employer's security personnel, acted in accordance with the principles applicable under Section 9 of the Act and the decisions of the Board. It seems to me unfair to refuse Petitioner's request to clarify the unit solely on the basis of its past action (or inaction) which we compelled under rules which we have since changed.

The essential facts as to what occurred over the history of Petitioner's representation are not in dispute. Shortly after the certification issued in March 1970, the Employer's chief of security, Jack Manis, participated in a meeting with representatives of Local 151, including its then attorney, Bill Davis. The meeting concerned the Employer's use from time to time of uniformed guards as plainclothes investigators. The attorney for Local 151 protested this practice, asserting that for legal reasons Local 151 could not represent plainclothes investigators and its members could not be used for this type of work. In its brief, Petitioner points out that it took this position based on our decision in *Pinkerton's National Detective Agency, Inc.*, 124 NLRB 1076, wherein, although *in dicta*, it was stated that a union which represents security guards runs the risk of losing its certification under Section 9 of the Act if it

⁵ In view of our disposition herein, we need not reach the other contentions raised by the Employer.

accepts into membership nonsecurity guard employees. The Board in that case found that certain plainclothes investigators were not guards within the meaning of the Act. Subsequent to the above meeting, the Employer hired its first full-time plainclothes investigator in the summer of 1970. Presently three such employees are on the Employer's payroll.

The Petitioner had refused to represent these employees because we had indicated that it would not do so consistent with its certification. It changed its position only after we reversed our view as to the status of plainclothes investigators.⁶ In *Burns*, the Board clarified a guard unit by adding a group of plainclothes security officers whose duties were essentially the same as the employees in issue here, and in so doing explicitly overruled *Pinkerton's* on this issue. Thus Petitioner, under our *Pinkerton's* decision, would have run the serious risk of losing its certification and all the rights thereunder had it initially accepted these employees into membership. Petitioner's refusal can hardly be viewed as a voluntary act by which Petitioner relinquished rights it would ordinarily enjoy under our procedures governing unit clarification petitions.

In the *Wallace-Murray* case, on which my colleagues rely, the employer knew and voluntarily accepted the fact that the union represented its guard employees as well as its production employees. The Union in this case has not voluntarily declined to represent the employees, but has done so only under the compulsion of the Board's *Pinkerton's* decision.

Finally, the record shows that wages for plainclothes investigators have always been set according to the contract scale for uniformed guards. They are hired and supervised by the same personnel and perform duties which, although differing from uniformed guards in some respects, are nonetheless essentially the same as the plainclothesmen in *Burns* and as such are within the statutory definition of guards. I would therefore include the plainclothes investigators in the certified guard unit. This would not disrupt the Employer's operation and would be in accord with our decision in *Burns*.

⁶ *Burns Security Systems, Inc.*, 188 NLRB 222.