

Advance Industrial Security, Inc. and International Union, United Plant Guard Workers of America (UPGWA), Petitioner. Case 31-RC-2882

March 21, 1975

DECISION AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a petition duly filed on July 29, 1974,¹ under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on December 20 before Hearing Officer Louis S. Eberhardt. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director for Region 31 transferred this case to the Board for decision. Thereafter, the Intervenor² filed a brief.

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, the Board finds:

1. Advance Industrial Security, Inc., a Florida corporation, with its home office in Atlanta, Georgia, is engaged in the business of furnishing security personnel and other services. The parties stipulated that during the past calendar or fiscal year the Employer provided services for governmental agencies in connection with national defense valued in excess of \$50,000. On the basis of these facts and in accord with the stipulation of the parties, we find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The parties stipulated and we find that the Petitioner and the Intervenor are labor organizations as defined in the Act and claim to represent certain employees of the Employer.

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

4. The following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All guards performing services for the Employer at the Sandia Corporation, Tonopah Test Range, Tonopah, Nevada, including all its offices and facilities thereto, excluding all clerical employees and supervisors as defined in the Act and all other employees.

5. The Employer provides security guard service at the Sandia Corporation test site at Tonopah, Nevada. It obtained the contract from the Atomic Energy Commission in 1974. Prior thereto, the contract had been held by Wackenhut from 1965 until 1974. Before Wackenhut had the contract, it had been held by Federal Services from 1954 to 1965. During the entire period prior to the Employer's obtaining its contract, the Intervenor had collective-bargaining agreements from 1954 to 1974 with Federal Services and Wackenhut, respectively. The last contract with Wackenhut had an expiration date of July 1, 1975.

On March 4, the Intervenor filed 8(a)(1), (2), and (5) charges against the Employer in Case 31-CA-4302, alleging that since February 8, the Employer, as an alleged successor to the prior employer subject to a collective-bargaining agreement with the Intervenor, refused to bargain in good faith with the Intervenor and had illegally discharged or refused to hire nine employees of the predecessor. An amended charge was filed deleting reference to Section 8(a)(5). The parties thereafter entered into a settlement agreement.

On July 2, the nine aforementioned employees filed a complaint with the United States Department of Labor, charging the Employer with engaging in age discrimination in violation of the Age Discrimination in Employment Act of 1967. This matter as of the hearing was still pending before the Labor Department, and there has been no determination by that Agency that there has been a violation. If a violation is found to have occurred, the remedy will include reinstatement.

On September 30, the Intervenor filed charges against the Employer in Case 31-CA-4777, alleging violations of Section 8(a)(1) and (5) of the Act. The merits of the 8(a)(5) allegation turned in part on whether the employees who were allegedly denied employment on the basis of age discrimination should be counted toward the Intervenor's majority status.

On October 30, the Intervenor moved under Rule 60(b) of the Federal Rules of Civil Procedure, seeking reinstatement of the original 8(a)(5) allegations in Case 31-CA-4302. On December 3, the Regional Director issued a letter refusing to issue a complaint in Case 31-CA-4777 upon the ground that "all the operative facts necessary to establish the alleged 8(a)(5) violation occurred outside the 10(b) limitation period." An appeal was taken by the Intervenor which was denied by the General Counsel on February 12, 1975.

¹ All dates hereinafter are in 1974, unless otherwise stated

² Independent Guard Association of Nevada, Local No. 1, appeared as Intervenor.

The Intervenor asserts that the Board should not proceed with this case pending its appeal of the Regional Director's refusal to issue a complaint in Case 31-CA-4777 and his refusal to reinstate the 8(a)(5) portions of the charge in Case 31-CA-4302. That argument is now moot as the appeal has been denied.

In addition, the Intervenor in effect seeks to have the Board in this representation proceeding make an independent determination as to whether the General Counsel should have issued a complaint in the aforementioned unfair labor practice proceedings. It is well established that the General Counsel has final authority under the Act to determine whether to proceed on a charge. Accordingly, where unfair labor practice allegations are asserted in a representation case as ground for finding individuals eligible, the Board holds the individuals ineligible where, as here, the charges have been found to be nonmeritorious by the General Counsel.³

Finally, the Intervenor requests that the Board not proceed with this representation proceeding until the proceeding before the Department of Labor has been concluded, for, if the discrimination allegations are found meritorious and the Employer had not engaged in conduct violative of age discrimination, those nine individuals would be employed. Accordingly, it asserts no showing of interest could have been attained by the Petitioner and the petition is the "fruit" of the unlawful conduct of the Employer.

In *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962), the Board, in considering the validity of ballots cast in an election, held that it would defer its ruling on the challenges to the voting eligibility of two individuals whose terminations were the subject of pending grievances because their status on the eligibility and election dates depended on the outcome of the grievances. Similarly, the Board has permitted "independent contractors" to cast challenged ballots in a decertification election despite a union's claim that the election should be deferred until such time as an arbitrator issued his award determining whether or not

these individuals had been converted from their former status as unit employees into "independent contractors" in violation of the contract.⁴ The Board has also voted subject to challenge employees who were discharged but who were seeking reinstatement, backpay, and other relief in Federal district court under the Labor-Management Reporting and Disclosure Act.⁵

The rationale of the Board in those cases is equally applicable herein. The subject matter of the pending Labor Department proceeding is not relevant to the primary issue before us, which is whether the election petitioned for should be directed. It raises an issue of eligibility as to certain individuals, but the resolution of that question in no way reaches the primary issue before us. The Board has long followed the procedure of permitting employees to vote by challenged ballot where their eligibility could not be determined on the existing record. The fact that the eligibility of individuals may turn on some question other than an employer's alleged unfair labor practices is irrelevant. The only issue is whether the individuals were employees within the unit on the critical dates. A finding favorable to the Intervenor's position will result in a holding that the disputed individuals were employees on the critical dates, while a contrary finding will result in a determination that they were not. Any such disposition would have an impact on the election only in the event the votes could be determinative, but if their votes affect the results it would be improper for us to disenfranchise them completely. Accordingly, the nine individuals shall be permitted to vote in the election directed herein, and their ballots shall be challenged by the Board agent. If the votes of these individuals are found to be determinative upon tallying the unchallenged ballots, the Regional Director at that time shall make a further investigation and report as to the above eligibility matters.

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

³ *Times Square Stores Corporation*, 79 NLRB 361 (1948).

⁴ *Pepsi-Cola Bottling Company of Merced-Modesto*, 154 NLRB 490 (1965).

⁵ *Grand Lodge International Association of Machinists and Aerospace Workers, AFL-CIO*, 159 NLRB 137 (1966).