

Elite Protective & Security Services, Inc. and Security Officer's Cooperative, Petitioner. Case 17-RC-10461

November 30, 1990

ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On May 16, 1990, the Regional Director for Region 17 issued his Decision and Direction of Election, finding, among other things, that the Petitioner was not disqualified from representing guards under Section 9(b)(3) of the Act.¹ Thereafter, the Employer filed a timely request for review. The Board has carefully reviewed the record in this proceeding with respect to whether the Petitioner may represent guards pursuant to the Act.² It concludes, for the reasons set forth by the Regional Director, and the additional reasons set forth below, that the Petitioner may represent guards.

The Employer, located in Tulsa, Oklahoma, provides security services to customers on a fee-for-service basis. The Petitioner seeks to represent all the Employer's full-time and regular part-time security guards employed from the Employer's Tulsa facility and employed within the Tulsa metropolitan area.

The Petitioner is an unincorporated and unaffiliated association that has no bylaws or rules and regulations with respect to membership. It has held one organizational meeting, which it invited all security guards in Tulsa to attend. The Petitioner has a model collective-bargaining agreement to cover "rates of pay, rules and working conditions of all [Petitioner] members . . . engaged in security or investigative duties."

As noted, the Employer contends that the Petitioner cannot represent security guards because the Petitioner allegedly has not limited its membership to guards, but permits anyone to join. We agree, however, with the Regional Director that the record fails to establish that the Petitioner impermissibly admits to membership employees other than guards. The Board's longstanding practice indicates a reluctance to disqualify a union from representing guards based on supposition or speculation that nonguards are members of the union.

The theoretical chance that a nonguard employee could join a guard union where, for example, a union constitution might be interpreted as permitting nonguards to become members, is insufficient to deny certification to such a union. As the Board recently stated in *Burns Security Services*, 278 NLRB 565, 568 (1986), "the noncertifiability of a guard union must be

shown by definitive evidence. Otherwise the rights of guards to be represented by a union and of guard unions to represent guards would be seriously undermined."

Similarly, in *NLRB v. J. W. Mays, Inc.*, 675 F.2d 442 (2d Cir. 1982), enfg. 253 NLRB 717 (1980), the court agreed with the Board that, absent evidence that nonguards were actually members of the union, the union could be certified. In that case, one of three officer/members of the union worked part-time in a nonguard capacity. The court concurred in the Board's conclusion that a member's nonguard job did not warrant the union's disqualification. The court noted that "in a fledgling union with no funds, such employment was a necessary and temporary expedient wholly unrelated to the purpose of the law's prohibition." 675 F.2d at 444. The court further noted that the union's constitutional provision that employees with titles other than "guard" may become members was "irrelevant" since no nonguards had in fact become members or been solicited for membership. *Ibid.* The court noted that the Board provides for revocation of certification if a union certified to represent guards admits nonguards to membership. *Ibid.* See also *Sentry Investigation Corp.*, 198 NLRB 1074 (1972) (though Section 9(b)(3) may literally be read to disqualify a petitioner because it accepts any nonguards as members, the purpose of the statutory provision is to prevent a guard union from bargaining on behalf of nonguard members); *Pinkerton's National Detective Agency*, 124 NLRB 1076 (1959) (that petitioner sought to represent a unit of employees that employer claimed were not guards does not mean that such employees will be admitted to membership so as to lead to petitioner's disqualification); *International Security Corp.*, 223 NLRB 1129 (1976).

Consistent with this precedent, we conclude, in agreement with the Regional Director, that the current record does not establish that the Petitioner admits to membership employees other than guards so as to warrant Petitioner's disqualification here. Actually, the Petitioner does not technically have members, but instead embraces the idea of "associates." Although, as our dissenting colleague points out, the Petitioner apparently has no requirements as to who may become an associate, it does not follow that any nonguard can, will, or has become an associate (or member) of the Petitioner.³ Absent such specific evidence, the Petitioner cannot be disqualified. See *Burns*, *supra*.⁴

³In response to the hearing officer's question, the Petitioner's representative testified that the Petitioner does not admit into membership employees other than guards.

⁴We note that the Employer subpoenaed a listing of the Petitioner's membership, and that the hearing officer granted the Petitioner's request to revoke the subpoena in that respect. However, the Employer introduced no evidence that would directly or inferentially show that the Petitioner represents or admits to membership nonguards. Thus, the Employer's subpoena in this regard is a mere "fishing expedition." *Burns*, 278 NLRB at 555-556. Indeed, the

¹The relevant portion of Sec. 9(b)(3) states:

[N]o labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership . . . employees other than guards.

²Pursuant to the Board's Rules and Regulations, Sec. 102.67(d), "the Board may, in its discretion, examine the record in evaluating the request [for review]."

Accordingly, the Board affirms the Regional Director's decision in this regard, and denies the Employer's request for review in all other respects.

MEMBER OVIATT, dissenting.

In directing an election in this case, the Regional Director found that any certification of the Petitioner, Security Officer's Cooperative, as the collective-bargaining representative of a unit of security guards would not contravene the requirements of Section 9(b)(3) of the Act. I disagree.

Section 9(b)(3) provides, in pertinent part, that:

No labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership . . . employees other than guards.

The Regional Director found that the Petitioner is an unincorporated association with no bylaws, regulations, or membership requirements. Indeed, the record reveals that the Petitioner had no "membership that exists as such." Rather, as the Regional Director found, the Petitioner has a category of participant called "associate," which, in the Regional Director's words, "embraces security guards" Although not specifically discussed by the Regional Director, the Petitioner's representative at the hearing testified without

Employer's primary thrust in contending that the Petitioner is not qualified to represent guards is the suggestion that police officers were associates of the Petitioner. However, the Board recently reaffirmed that a guard union's admission into membership of municipal police officers did not constitute admission of "employees other than guards" into the union in contravention of the prohibition of Sec. 9(b)(3), and thus the Employer's argument in this regard clearly lacks merit. See *Children's Hospital of Michigan*, 299 NLRB 430 (1990).

contradiction that his organization had no requirements limiting who could become an associate.

On this state of the record, I am unwilling to conclude that the Petitioner qualifies for certification as a representative of guards under Section 9(b)(3). For the Petitioner to qualify as a "labor organization" under Section 2(5), employees must participate in the Petitioner. See, e.g., *NLRB v. Yeshiva University*, 444 U.S. 672, 682–690 (1980); *Masters, Mates & Pilots v. NLRB*, 539 F.2d (5th Cir. 1976); *United Truck & Bus Service Co.*, 257 NLRB 343 (1981). In the absence of a category of employee participant in the Petitioner denominated "member," it is fair to infer that being "an associate" is akin to being a "member" within the meaning of Section 9(b)(3).¹ Because there are no restrictions, apparently anyone can become an associate in the Petitioner. It follows that employees other than guards may be admitted to the Petitioner, or may participate as associates in the Petitioner, which is tantamount to their being members.² Thus, the certification of the Petitioner as the representative of the guard unit sought in this case falls within the 9(b)(3) prohibition on certifying as the representative of a guard unit a union that admits both guards and non-guards to membership. Accordingly, in my view, the Regional Director erred in not dismissing the petition.

¹ Thus, the Petitioner's representative testified that employee participants in the Petitioner carry authorization cards to be signed and have met to discuss grievances, and that the associates designated him their representative by "verbal consensus."

² At the hearing, in response to a leading question by the hearing officer, the Petitioner's representative stated that the Petitioner does not "admit into membership" employees other than guards. This testimony does not save the Petitioner. Because there is no "membership" category—only "associates"—the representative's response is besides the point.