

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Brownsville, Texas

**FJC SECURITY SERVICES, INC.
Employer**

and

**FEDERAL CONTRACT GUARDS OF AMERICA (FCGOA),
INTERNATIONAL UNION
Petitioner**

and

Case No. 16-RC-10932

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, INTERNATIONAL UNION
SECURITY OFFICERS OF AMERICA,
INTERNATIONAL UNION
Intervenor**

DECISION AND DIRECTION OF ELECTION

FJC Security Services, Inc. (Employer) is a New York corporation that provides security services, including services to the federal government in and around Brownsville, Texas.¹ Under Section 9(c) of the National Labor Relations Act, Federal Contract Guards of America (Petitioner) filed a petition seeking to represent the following employees employed by the Employer:

All full-time and regular part-time security officers and guards performing security and guard duties within the South Texas area, in and

¹ The Employer did not attend the hearing. However, the record reflects that in other cases the Employer has been subject to the Board's jurisdiction. Within the past year, a representative period, the Employer purchased and received goods in excess of \$50,000 directly from points outside the State of Texas.

around Brownsville, Harlingen, McAllen, Hidalgo, Pharr, Roma, and Los Indios, Texas, excluding all office clericals, supervisors and managers as defined in the Act.

The Employer currently employs approximately 50 employees in the classifications that Petitioner seeks to represent. On October 14, 2008, Intervenor UGSOA (Incumbent Union) was certified as the exclusive bargaining agent for these employees in Case Number 16-RC-10858 which involved the predecessor employer, Superior Security Services, Inc. The record reflects that Incumbent Union remains the bargaining representative of the petitioned-for unit but does not have a contract with the Employer.

Incumbent Union contends that Petitioner is not a labor organization within the meaning of Section 2(5) of the Act and, even then, is affiliated with a non-guard union. A hearing officer of the Board held a hearing, and parties were afforded the right to file post-hearing briefs.² Having carefully considering the record and the parties' briefs, I find that Petitioner is a labor organization as defined in the Act and that the record does not demonstrate any improper affiliation with any other organization. In discussing these findings, I first will discuss the labor organization status and then the affiliation issue.

I. PETITIONER IS A LABOR ORGANIZATION

As noted above, Incumbent Union contends that Petitioner is not a labor organization under the Act. Based upon the following discussion, I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

² The Employer did not file a post-hearing brief. Both Petitioner and Incumbent Union filed briefs. Incumbent Union requested that Petitioner provide a number of documents via an undated subpoena. However, after reviewing Incumbent Union's request, I find that the requested documents will not change the ultimate determinations in this case, and I am granting the Petitioner's motion to Revoke Subpoena Ad Testificandum.

The record reflects that employees have engaged in organizing campaigns, including but not limited to, rallies, pickets, card-signing, meetings, and communications in various locations across the country and in Texas, on behalf of Petitioner. Petitioner's President and chief organizer testified that the Petitioner exists solely for the purpose of "dealing with employers concerning conditions of work or concerning other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment" as well as "to better the lives of working men and women working in the security industry around the country, for all terms and conditions of employment." The record shows that Petitioner currently is not the certified collective bargaining representative of any employees. It has no existing collective bargaining relationship with any security company. The record further shows that Petitioner has no dues-paying members, bylaws, or a constitution.

In the following discussion, the statutory definition of labor organization is reviewed and then applied. Additionally, the other information presented on the record is discussed.

A. The Statutory Definition of Labor Organization and Applicable Test

In Section 2(5) of the Act, "labor organization" is defined as:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Based upon this statutory language, the Board interpreted this definition with a two-part test:

In order to be a labor organization under Section 2(5) of the Act, two things are required: first, it must be an organization in which

employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment.

Alto Plastics Mfg. Corp., 136 NLRB 850, 851-852 (1962).

Thus, Petitioner will be found to be a labor organization if it meets both elements of the *Alto Plastics* test. See *Family Service Agency San Francisco v. NLRB*, 163 F.3d 1369, 1384 (D.C. Cir. 1999), enforcing 325 NLRB No. 86 (1998).

B. Application of the Test

1. Employee Participation in the Purported Labor Organization

Regarding the first requirement of *Alto Plastics*, the record demonstrates that employees actively participate in activities with Petitioner. The record reflects that employees have engaged in organizing campaigns, including but not limited to, rallies, pickets, card-signing, meetings, and communications in various locations across the country and in Texas. Further, the petition filed in this Region offers unequivocal evidence that employees are associated with Petitioner. In addition to filing the instant petition, evidence also reveals that Petitioner has filed other representation petitions and at least one unfair labor charge with the Board. Incumbent Union argues that Petitioner's activities have been limited to the distribution and review of organization material. However, the record clearly reflects that Petitioner has engaged in a number of other activities.³ The petition filed in this matter as well as the activities described above demonstrate that the first prong of the test, employee participation, in *Alto Plastics* is met.

³ Incumbent Union cites *M.J. Santulli Mail*, 281 NLRB 170 (1986). This citation is for case *Cal-Am Partners d/b/a Amcot Coal* and is concerned with a successorship matter. In that case, the Board found that the organization is a labor organization under Section 2(5) of the Act. Further, the Board in *M.J. Santulli Mail*, 281 NLRB 1288 fn. 1 (1986), finds the same. Both cases are inapposite to the proposition for which Incumbent Union offers them.

2. Purpose of the Purported Labor Organization

The second prong of the *Alto Plastics* test requires that a statutory labor organization “exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment.” *Alto Plastics*, 136 NLRB at 851-852. An organization that is established for the purposes of representing employees and intends to do so if certified, even when the organization lacks structural formalities, such as enacting a constitution or bylaws or failing to collect dues consistently, also meets the statutory requirements of a labor organization. *Coinmach Laundry Corp.*, 337 NLRB 1286-1287 (2002), citing, *inter alia*, *Butler Mfg. Co.*, 167 NLRB 308 (1967). Also see *Yale University*, 184 NLRB 860 (1970); *Retail Clerks Int’l Assoc.*, 153 NLRB 204 (1965); *Stewart-Warner Corp.*, 123 NLRB 447 (1959).

Petitioner here is a nascent union. The law is well-settled that a union in its early stages of development and that has not yet won representation rights may be deemed a labor organization. Therefore, although evidence reveals that Petitioner has not been certified as the bargaining representative of any employees, Petitioner is not disqualified from being deemed a “labor organization” under the Act. Uncontroverted testimony by Petitioner’s President demonstrates that Petitioner exists for the purposes of dealing with employers concerning wages, hours and other terms and conditions of employment. As such, the second prong of the *Alto Plastics* test is met.

C. Other Evidence Adduced on the Record Is Inapplicable to the Analysis

Incumbent Union adduced record evidence of matters pertaining to the Petitioner’s activities that may concern the Department of Labor (DOL). Incumbent

Union specifically contends that Petitioner failed to file certain forms with DOL and that it maintains office space only in the President's home.

The Board unequivocally states such matters are irrelevant to the determination of whether an organization is a "labor organization" under the Act. The Board maintains that violations of the Labor-Management Reporting and Disclosure Act of 1959 are not litigated before the Board in the form of a query on Section 2(5) status. See, *inter alia*, *Westside Community Mental Health Center, Inc.*, 327 NLRB 661 (1999); *Caesar's Palace*, 194 NLRB 818 (1972); *Harlem River Consumers Cooperative*, 191 NLRB 314 (1971); and, *Neiser Supermarkets*, 142 NLRB 513 fn. 3 (1963). The same is true regarding a violation of the Labor Management Relations Act of 1947. *Chicago Pottery Co.*, 136 NLRB 1247 (1962). Because the Board will not redress infractions that concern DOL, the instances raised by Incumbent Union are not relevant to this proceeding.

Alto Plastics maintains that the sole consideration in determining whether an entity is a labor organization under the Act is whether the entity meets both elements of the above-described two-prong test.

[T]he fact that it is an ineffectual representative . . . that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

Alto Plastics, 136 NLRB at 851-852.

Because the Board's holding in *Alto Plastics* is controlling, these additional issues raised by Incumbent Union are irrelevant to whether Petitioner is a labor organization under the Act. Accordingly, I find that Petitioner is a labor organization because it meets both elements of the two-part test described in *Alto Plastics*.

II. SECTION 9(b)(3) DOES NOT PROHIBIT PETITIONER FROM ACTING AS BARGAINING REPRESENTATIVE FOR THE UNIT

Incumbent Union contends that Petitioner is either directly or indirectly affiliated with a non-guard union. As such, Incumbent argues that Petitioner is unable to act as bargaining representative of the petitioned-for unit.

A. The Statutory Limitation as to “Guards”

Section 9(b)(3) of the Act provides that the Board shall not certify a labor organization “as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.”

B. The Application of the Statutory Limitation as to “Guards”

Petitioner is at its early stages of formation and Petitioner’s activities have been almost exclusively limited to organizing. Petitioner’s President testified that he and others personally funded many of Petitioner’s activities and expenses, including office space and office equipment. At hearing, Incumbent Union questioned Petitioner’s association with a number of other unions. The record reflects that, until early 2009, Petitioner’s President was employed by the UFCW. The evidence does not demonstrate that he maintains an employment association with the UFCW or any other non-guard union after that time. Petitioner’s President testified that he only maintained personal friendships with staff from the UFCW. Although Incumbent argues that Petitioner was involved in at least one Teamsters picket, the record is inconclusive on the extent of any participation Petitioner or its President had with a Teamsters picket.

1. Direct Affiliation

Incumbent Union's primary argument rests in the President's involvement with other non-guard unions. Incumbent Union contends that the record demonstrates that Petitioner is actively affiliated with the International Brotherhood of Teamsters and the United Food and Commercial Workers (UFCW). However, the record does not demonstrate that Incumbent Union is directly affiliated with any other union. The record evidence only reflects prior employment and current personal relationships. The record discusses that Petitioner's President and/or other individuals associated with Petitioner may have been involved in a Teamsters picket, but the extent of that involvement is inconclusive.

The Board has dismissed representation petitions filed by labor organizations that admit employees other than guards into membership. *A.D.T. Co.*, 112 NLRB 80 (1955) and *Wackenhut Corp.*, 169 NLRB 398 (1968). However, in this case, no record evidence demonstrates that Petitioner has any non-guard members.

This evidence is insufficient to conclude that Petitioner is directly affiliated with any other union.

2. Indirect Affiliation

An indirect affiliation exists when a non-guard union participates in guard affairs to such an extent and duration that the guard union loses the freedom to formulate its own policies. However, the Board has applied this standard with some latitude, particularly when guard unions were in their formative stages. *Wells Fargo Guard Services*, 236 NLRB 1196 (1978) and *Magnavox Co.*, 97 NLRB 1111 (1952).

The record contains no evidence suggesting that Petitioner is wholly controlled by any other organization. Petitioner's President testified that he and others personally funded many of Petitioner's activities and expenses, including office space and office equipment.

At hearing, Incumbent Union questioned Petitioner's association with a number of other unions. Incumbent Union's primary argument rests in the President's involvement with other non-guard unions. The record reflects that, until early 2009, Petitioner's President was employed by the United Food and Commercial Workers (UFCW). The evidence does not demonstrate that he maintains an employment association with the UFCW or any other non-guard union. Petitioner's President testified that he only maintained personal friendships with staff from the UFCW. The Petitioner is at its early stages of formation and Petitioner's activities have been almost exclusively limited to organizing. Incumbent Union did not present evidence that Petitioner is controlled or directed by any non-guard union.

In *Magnavox*, 97 NLRB at 1112, the Board held that guard unions may appropriately receive assistance from non-guard unions, especially during their infancy, but the inquiry will turn to the "extent and duration" of the aid from the non-guard union. Where a labor organization has "never taken any action without the assistance" of a non-guard union, it may be found to be indirectly affiliated with the non-guard union. *Id.* at 1113.

The record here does not demonstrate that any claimed assistance is of such an extent or duration as to find an indirect affiliation. The Incumbent Union has failed to demonstrate the Petitioner is disqualified from representation of the petitioned-for unit

based on any indirect association with a non-guard union. I, therefore, find that Petitioner is not directly or indirectly affiliated with any other union at present. Additionally, I find that Petitioner is a labor organization within the ambit of Section 2(5) of the Act. Therefore, an election is directed in the unit stated below.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding and in accordance with the above discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.⁴
4. The Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act, and each claims to represent certain employees of the Employer.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time security officers and guards performing work at the Roma, Texas port of entry, Hidalgo, Texas port of entry; Pharr, Texas port of entry; Benson Tower in McAllen, Texas; FBI Building in McAllen, Texas; Social Security office in McAllen, Texas; Los Indios, Texas port of entry; the Department of

⁴ FJC Security Services, Inc. (Employer) is a New York corporation that provides security services, including services to the federal government in and around Brownsville, Texas. Within the past year, a representative period, the Employer purchased and received goods in excess of \$50,000 directly from points outside the State of Texas.

Homeland Security and Immigration in Harlingen, Texas; the EOIR location in Harlingen, Texas; the Social Security Building in Harlingen, Texas; the IRS in Harlingen, Texas; the Gateway port of entry in Brownsville, Texas; the B&M port of entry; the Los Tomates port of entry in Brownsville, Texas; Social Security office in Brownsville, Texas and the Federal Courthouse in Brownsville, Texas.

EXCLUDED: All office, clerical, professional employees and supervisors as defined by the Act, as amended.

IV. DIRECTION OF ELECTION

IT IS HEREBY ORDERED the National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective by the Petitioner, Federal Contract Guards of America, International Union, or the Intervenor, United Government Security Officers of America, International Union, or by neither labor organization. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the voting group who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In addition, those employees who have been employed by the Employer for 30 days or more within the 12 months preceding the eligibility date for the election or employees who have had some employment in those 12 months and have been employed for 45 days or more within the 24 months prior immediately before the eligibility date are eligible to vote, but excluding those employees who were terminated for cause or quit voluntarily prior to the completion of the last job for which they were

employed. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Voting group employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. The Employer to Submit List of Eligible Voters

To ensure 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 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Fort Worth Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the

voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Fort Worth Regional Office, 819 Taylor Street, Suite 8A24, Fort Worth, Texas 76102, on or before **April 19, 2010**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (817) 978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Fort Worth Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by 5:00 p.m. EDT on **April 26, 2010**. **The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,⁵ but may not be filed by facsimile.**

DATED at Fort Worth, Texas this 12th day of April, 2010.

**Martha Kinard, Regional Director
National Labor Relations Board
Region 16
Rm. 8A24 Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102-6178**

⁵ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.