UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ROY SPA, LLC

and **Case 19–CA–83329**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 2

Ryan Connolly, Esq., for the Acting General Counsel.
Michael Avakian, Esq., for the Respondent.
Timothy J. McKittrick, Esq., for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, **Administrative Law Judge**. I heard this case in Great Falls, Montana, on February 20 and 21, 2013. International Brotherhood of Teamsters Local 2 (the Union) filed the charge on June 18, 2012.[1] On October 31, 2012, the Acting General Counsel issued the complaint alleging, inter alia, that Roy Spa, LLC (the Respondent), as a successor employer, violated Section 8(a)(1) and (5) of the Act on or about July 19, 2012, by unilaterally changing the commission rates paid to employees in the unit represented by the Union and by unilaterally implementing a dress code policy for these employees.

The Respondent filed its answer to the complaint on November 14, 2012 denying nearly every allegation in the complaint. Most significantly, the Respondent denied that the Board had jurisdiction over the Respondent, that it was a successor with any obligation to recognize and bargain with the Union, and that it unilaterally changed any terms and conditions of employment. The Respondent also raised a number of affirmative defenses, including that the complaint was time barred under Section 10(b) of the Act.

[1] The Union amended the charge on August 31, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

Findings of Fact

I. JURISDICTION

The Respondent is a Virginia limited liability corporation headquartered in Centreville, Virginia, that operates barber shops or hair care facilities at several military bases in the United States, including the one at Malmstrom Air Force Base in Montana, which is involved in this proceeding. Joyce Cayli and her husband, Hasan Cayli, are members, i.e., owners of the LLC and admitted agents of the Respondent. On July 12, 2011,[2] the Respondent was awarded the contract to provide hair care services at Malmstrom by Army and Air Force Exchange Services (AAFES), a private nonprofit entity that runs base exchanges for the Department of Defense.[3] The previous operator, the Old Fashioned Barber, had notified AAFES in June that it wanted to terminate its contract because the barber shop at Malmstrom was not profitable. The Respondent commenced operations at Malmstrom on September 1 under a 5-year contract.

The parties stipulated that the Respondent currently has contracts to operate hair care salons at Fort Huachuca Army Base in Arizona, Dyess Air Force Base in Texas, Eglin Air Force Base in Florida, Hanscom Air Force Base in Massachusetts and Malmstrom. The parties further stipulated that, for calendar year 2011, the Respondent had a gross income of $421,028.00, as reported on the Respondent's tax return. No evidence was offered regarding the Respondent's gross revenue or income for calendar year 2012, or for the 12-month period after it commenced operations at Malmstrom.

Counsel for the Acting General Counsel offered into evidence, over the Respondent's objections, monthly concessionaire settlement reports submitted by the Respondent to AAFES showing gross sales of $211,266.65 at Malmstrom for the 12-month period from October 1, 2011, through September 30, 2012. These reports also show that, for the period November 1, 2011, through October 31, 2012, the Respondent paid AAFES, whose office is in Dallas, Texas, a contract fee of 9 percent of gross sales, and other fees for services and equipment, totaling about $20,000. Counsel for the Acting General Counsel also put in evidence, over the Respondent's objections, invoices from a supplier of beauty products that showed, for the period September 2011, through October 2012, the Respondent was billed a total of $4192.15 for products shipped to the Respondent's facility at Malmstrom. Although the invoices show a Texas address for the supplier, the invoices do not identify the exact location from which the products were shipped.[4]

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[2] All dates are in 2011, unless otherwise indicated.

[3] The base exchanges are classified as "non-appropriated fund activities," meaning that no taxpayer dollars are used. AAFES is essentially self-funded, using the revenue from services provided and products sold at the exchange to fund the operation.

[4] The Respondent objected to this evidence because it went beyond the period covered by the parties'

The Acting General Counsel appears to concede that, although the Respondent may meet the statutory definition of interstate commerce by virtue of its operations at military bases in five states, it does not meet the applicable discretionary standard the Board has historically utilized to determine whether a barber shop or beauty salon "affects commerce" within the meaning of the Act. In *O K Barber Shop,* 187 NLRB 823 (1971), the Board held that its retail standard for asserting jurisdiction, i.e., annual gross volume of business of at least $500,000, would apply to such a business. As noted above, the parties stipulated that, at least for calendar year 2011, the Respondent's operations fell short of this mark. The only evidence in the record regarding the volume of business in any later period is what can be gleaned from the monthly concessionaire's settlement report, which shows that Respondent derived only about $200,000 in revenue during its first year of operations at Malmstrom. Counsel for the General Counsel offered no evidence regarding the Respondent's revenue from its operations at the other four facilities in 2012. Because it is the General Counsel's burden to establish facts which show that a respondent meets the Board's jurisdictional standards and because the General Counsel did not meet this burden, I must find that the Respondent did not meet the Board's discretionary jurisdictional standard for asserting jurisdiction over a barber shop or salon.

Having essentially conceded this point, the Acting General Counsel relies exclusively on the national defense standard as the basis for asserting jurisdiction here. The "national defense" standard was first articulated in *Ready Mixed Concrete & Materials, Inc.,* 122 NLRB 318, 320 (1958). The Board in that case "determined that it best effectuates the policies of the Act to assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards." The employer in that case supplied substantial quantities of ready-mixed concrete for construction of an air force base. The Board believed it had a special responsibility as a Federal agency to reduce the number of labor disputes that could adversely affect the national defense.

The Board first applied the national defense standard to assert jurisdiction over a barbershop located on a military base in *Spruce Up Corp.,* 181 NLRB 721 (1970). Although the Board found that "the Respondent's services at Fort Bragg are supplied exclusively to military personnel at a special rate and are essential to members of the armed forces," it also noted that the parties had stipulated to facts establishing that the employer met the Board's discretionary retail standard. Similarly, in *Gino Morena Enterprises,* 181 NLRB 808 (1970), the Board applied the national defense standard where the evidence showed that the employer's operations satisfied the Board's discretionary jurisdictional standard. These two cases are thus distinguishable from the instant case because jurisdiction would have been asserted even absent any involvement with the military services.

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stipulation as to gross revenue. In the written stipulation, counsel for the Acting General Counsel had agreed to amend "the relevant time periods in the pleadings, where necessary, to correspond to the . . . period referenced above," i.e., calendar year 2011. At the hearing, counsel argued that this amendment only applied to gross revenue and did not apply to the period alleged in the complaint with respect to inflow. In light of my finding, to be discussed, that the Respondent did not meet the Board's discretionary jurisdictional standard in any 12-month period, I find it unnecessary to revisit my ruling admitting this evidence.

In two more recent cases, the Board declined to assert jurisdiction over barber shops and hair care facilities at military installations under the national defense standard. *Pentagon Barber Shop,* 255 NLRB 1248 (1981); *Fort Houston Beauty Shop,* 270 NLRB 1006 (1984). In *Pentagon Barber Shop,* supra, the Board relied on the factors that the barber shop was located in a public concourse, outside the designated security areas, and that it was easily accessible to the general public because of its location near a major subway entrance. The Board also found significant the fact that the employer's barber shop was not the only place where military personnel could get a haircut. The Board reasoned that, in light of these distinguishing characteristics, a strike or labor dispute involving the employer's employees "could not conceivably cause a significant disruption to work at the Pentagon."

In *Fort Houston Beauty Shop*, supra, the Board declined to assert jurisdiction even though the beauty shop was located on the military base and performed services exclusively for military personnel and their dependents. The Board noted that 80 percent of the employer's customers were dependent wives and children with the remaining 20 percent consisting of WAC (Women's Army Corps) soldiers and army doctors. The only "army haircuts" were those provided to the WAC soldiers and army doctors, who were free to use any of the other seven barber shops on base or to go off base for a haircut. The Board also noted that the employer did not provide regulation haircuts to male military customers and that base personnel had access to seven barber shops on base and other facilities nearby. The Board, in explaining the national defense standard, stated as follows:

> The Board asserts jurisdiction over such enterprises because the Board "has a special responsibility as a Federal agency to reduce the number of labor disputes which might have an adverse effect on the Nation's defense effort." [cite omitted.] This does not mean that the national defense standard will be invoked whenever an employer's services are performed for part of the defense establishment. Rather, a case-by-case analysis is required to determine the impact a labor dispute might have on the defense facility.

Supra, 270 NLRB at 1007. The Board concluded that, on the facts of that case, a labor dispute was not likely to have an adverse effect on the normal functioning of the army post or substantially impact national defense.

The facts of this case lie between *Spruce Up* and *Gino Morena* on one hand and *Pentagon* and *Fort Houston* on the other. The Respondent's facility at Malmstrom is located within the designated security area of the base with limited access to the general public. When Respondent began operations, and for the first 10 months at least, the overwhelming majority of its customers were male members of the military seeking what is commonly referred to as a "regulation" or "military" haircut. Beginning in July 2012, when the Respondent moved its shop to a new base exchange building, it was transformed from a barber shop to a "family hair care salon" with the goal of expanding its customer base to include more women. This change was specifically required by the Respondent's contract with AAFES. In order to facilitate this change, the contract also required for the first time that all of the Respondent's employees at Malmstrom have a cosmetology license. Such a license is broader than the barber's license that

several of the predecessor's employees held and allows the licensee to work with chemicals, e.g., for hair coloring and permanents. These are services that are not typically performed for male members of the military.

The record evidence also shows that, while located on a secure military base, the general public does have limited access to the Respondent's facility. A visitor to the base must show identification, and be subject to search at the gate. There is a museum located on the base that the public is invited to visit and school groups often tour the base. The record does not show whether the Respondent has ever provided services to any member of the general public. It appears that the Respondent's customer base is still limited to members of the military, their dependents, contractors working on base and retired military who live in the area. Census records show that approximately 3500 people live on the base, approximately 56 percent of whom are male.

The evidence also shows that, while the Respondent operates the only hair care facility, or barber shop, on base, there are a number of barber shops and salons in the Great Falls vicinity, including one, the Eastside Barber Shop, located just outside one of the gates. It is undisputed that a haircut at the Eastside Barber Shop costs about $1 less than one at the Respondent's on-base facility. While it may be more convenient for base residents to get a haircut at the Respondent's facility on base, nothing precludes a service member or other potential on base customer from utilizing these other businesses off base.

The record contains no evidence that would show what, if any impact, a labor dispute or strike by the Respondent's employees would have on the operations at the base specifically, or on the national defense generally. The language in the Board's *Fort Houston* decision is particularly apt here. The Acting General Counsel appears to rely here solely on the fact that the Respondent has a contract to provide services on a military base as sufficient to assert the "national defense" standard. The Board, in its most recent decision regarding jurisdiction over hair care facilities on military bases, suggest that is not enough. *Fort Houston Beauty Shop,* supra, 270 NLRB at 1007.

On the record here, I conclude that the Acting General Counsel has not met his burden of proving that the Board has jurisdiction over the Respondent's operations at Malmstrom under the national defense standard. Nothing in the record establishes that haircuts are vital to the national defense, or that the military operations at Malmstrom would be disrupted or adversely affected if service members and their dependents could not get a haircut, permanent, hair color, or any of the other services offered by the Respondent due to a strike or other labor dispute. While the provision of the Respondent's services is a convenience to Malmstrom personnel, it is not necessary to the defense of our nation. Because there is no other basis for asserting jurisdiction established by the record evidence, I recommend that the Board decline to assert jurisdiction in this case and that the complaint be dismissed.

II. ALLEGED UNFAIR LABOR PRACTICES

While it is not necessary for me to determine whether the Respondent violated the Act as alleged in the complaint, the relevant facts are straightforward and not in much dispute. As

previously noted, the previous contractor operating the barber shop at Malmstrom was the Old Fashioned Barber. The Union had a collective-bargaining agreement with that employer which expired on May 5, 2010. On June 30, 2011, after the Union had received notice from AAFES that the Old Fashioned Barber had terminated its contract to operate the shop, effective August 31, 2011, the Union executed a new collective-bargaining agreement for the term May 6, 2011, through May 5, 2013. The Union did not provide AAFES with a copy of this new agreement until July 7, 2011, after the bid solicitation period for a new contractor to take over the operation had closed. The bid solicitation and the bid submitted by the Respondent were based on there being no collective-bargaining agreement in place.

There is no dispute that the Union's business representative, Max Hallfrisch, and Cayli, the Respondent's owner and agent, had several communications, written and oral from August 2011, through November 2011, in which Hallfrisch attempted to have the Respondent adopt the collective bargaining it had negotiated with the Old Fashioned Barber. It is clear that the Respondent never agreed. While these communications were cordial, and included discussion of several work issues, the Respondent never agreed to recognize the Union as the 9(a) representative of its employees at Malmstrom.

The record evidence also shows that, when the Respondent took over the barber shop at Malmstrom, it retained all of the employees previously employed by the Old Fashioned Barber,[5] continued to operate the business at the same location serving the same customers, utilizing the same equipment, without any hiatus. However, the record also shows that in July 2012, as envisioned by its contract with AAFES, the Respondent moved to a new location, changed the type of services performed from a barber shop to a full service salon, and change the customer base to increase the number of women for whom it provided hairstyling services. The employee complement also changed between September and July 2012. By the time of the conversion, only three unit employees remained. The other two, who did not have cosmetology licenses, left their employment. The Respondent increased its complement to nine employees, all with cosmetology licenses. In addition, pursuant to the terms of its contract with AAFES, the Respondent changed its hours of operation when it moved to the new location. The Respondent was now open 7 days a week, including Sundays, a day that it had previously been closed.

While the evidence would suggest a general refusal to recognize and bargain with the Union, the complaint only alleges a refusal to bargain regarding two discrete subjects, i.e., the change in commission rate and the adoption of a dress code.[6] This may very well be due to the fact that any such general refusal to recognize and bargain occurred more than 6 months before the Union filed its charge on June 18, 2012. In any event, the evidence does show that the Respondent did not notify the Union in advance before it changed the commission rate and began to enforce the existing dress code. I need not determine whether this conduct violated the Act because the Board does not have jurisdiction in this matter.

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[5] There were five unit employees and two supervisors working in the Malmstrom barber shop on September 1 who all previously worked for the Old Fashioned Barber.

[6] While alleged as a change, the record indicates that AAFES always had a dress code for its concessionaire's employees. The dress code may not have been enforced when the Old Fashioned Barber had the concession.

CONCLUSIONS OF LAW

1. The Respondent, Roy Spa, LLC, is not an employer engaged in interstate commerce with a sufficient volume of business to meet the Board's discretionary standard for asserting jurisdiction over a retail barber shop or hair care salon.

2. The Respondent's operations at Malmstrom Air Force Base in Montana have not been shown by the Acting General Counsel to meet the national defense standard for the assertion of jurisdiction.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 28, 2013

Michael A. Marcionese
Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.