

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

DISTRICT LODGE 10, INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner,

and

Case No. 18-RC-265466

MILWAUKEE ART MUSEUM, INC.

Employer.

THE PETITIONER’S STATEMENT IN OPPOSITION

In accordance with rules and regulations of the NLRB, § 102.67(f), (29 C.F.R. Part 102.67(f)) Petitioner District Lodge 10, International Association of Machinists and Aerospace Workers, AFL-CIO, submits its Statement in Opposition to the Employer’s Request for Review of the Regional Director’s Decision and Direction of Election.

I.

The employer’s request does not meet the applicable standard of review pursuant to 29 C.F.R. § 102.67(d).

Current Board rules, as laid out in § 102.67(d), clearly state the “compelling reasons” upon which the Board may grant a request for review. The Employer is arguing that that the Board should grant their request based on § 102.67(d)(4) “That there are compelling reasons for reconsideration of an important Board rule or policy.” The Employer fails however to state a single compelling reason upon which to base their argument, instead challenging the validity of long standing case law and Board precedent, cases which they admit follow the same “fact pattern”.

In regards to case law and Board precedent, § 102.67(d)(1) allows for review *if* a substantial question of law or policy is raised because of the absence of, or departure from officially reported Board precedent. This is clearly not the case here however, as the Regional Director’s decision

was based on relevant case law lending to well-established legal precedent set in *E.R. Squibb & Sons*, 77 NLRB 84 (1948), *Pinkerton National Detective Agency, Inc.*, 90 NLRB 532 (1950) and *Dynair Services, Inc.*, 314 NLRB 161 (1994) which in itself establishes no “absence of, or departure from officially reported Board precedent”.

While the Employer would like to *believe* they have introduced a novel legal argument into the interpretation and application of 29 U.S.C. § 159(b)(3), the fact remains that this very same argument regarding “the order in which the union sought to recognize the guard and non-guard units” were the basis of *E.R. Squibb & Sons* and its progeny, *supra*, establishing a lengthy legal precedent to support the Union’s position.

E.R. Squibb & Sons states “[t]he Act, however, does not bar the converse, certification of a union as representative of a unit of production and maintenance employees just because that union happens to be affiliated directly or indirectly with a union already representing guards.” *Pinkerton* expands on this, and clearly provides that “the Act does not prohibit the Board from certifying a labor organization which itself represents guards as the representative of employees other than guards.” In *Dynair*, the most recent example the Regional Director cited in her decision, these same principles from *Squibb* and *Pinkerton's* were again upheld. In *Dynair* the Board stated “Thus, we find, contrary to the Employer's assertion, that its appeal does not present a novel issue but rather is clearly controlled by the *Pinkerton's* precedent.”

II.

It is evident that the employer’s argument completely ignores the plain meaning of the words contained within 29 U.S.C. § 159(b)(3).

In relevant part, 29 U.S.C. § 159(b)(3) states:

“the Board shall not... (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified 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.”

The Union is neither petitioning for a mixed unit of guards and non-guards, nor asking the Board to certify the unit of guards already represented by the Union under its decades-old voluntary recognition agreement.

Further, the language in 29 U.S.C. § 159(b)(3) specifically references the term “unit” when discussing the limitations placed on the Board; as in “...decide that any unit is appropriate...” and, “...no labor organization shall be certified as the representative of employees in a bargaining unit...”. It cannot be ignored that Congress did not use the term *union* to articulate their intent, they used the term unit, leaving the possibility, in situations such as this and *E.R. Squibb & Sons* and its progeny, for the same union to represent both a unit of guards and a separate unit of non-guards.

In this regard, while the Employer may argue that the petition should be barred for reasons as discussed above, they have agreed that the petitioned-for unit itself is appropriate for the purposes of collective bargaining. It is a well-established that there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be “appropriate,” that is, appropriate to ensure to employees in each case “the fullest freedom in exercising the rights guaranteed by this Act.” *Morand Bros. Beverage Co.*, 91 NLRB 409, 417–418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996).

III.

29 U.S.C §159(b)(3) is not a *power* legislatively transferred by Congress to the Board to determine the appropriateness of a bargaining unit, it is instead a limit on its powers to certify a unit of guards in circumstances where: 1) guards would be included in a mixed unit of guards and non-guards; or 2) guards would be represented by a union which admits non-guards.

In its petition, the Union has not asked the Board to conduct an election which includes any employees of the Employer “...employed as a guard to enforce against employees and other

persons rules to protect property of the employer or to protect the safety of persons on the employer's premises...". To the contrary, the Union specifically listed guards in the exclusions portion of the petitioned-for unit description as follows:

“Excluded: All other Employees, Office Clerical Employees, Professional Employees, Guards and Supervisors, as defined by the Act.”¹

The Union does not deny that it has, for many years, represented a unit of guards employed by the Employer, in a separate unit than that which is petitioned for in this case, under a decades-old voluntary recognition agreement. The Employer knew full well at the time they granted voluntary recognition to the Union to represent its guards that The International Association of Machinists and Aerospace Workers represented non-guard employees elsewhere; and certainly considered, or should have considered, the potential for its other employees to eventually seek representation from the same union.

In this regard, the Employer’s voluntary recognition of a mixed union gives rise to an inference that the Employer deemed the risk of divided loyalties either negligible or non-existent. And even if the possibility exists, the Employer accepted that risk, *de facto*, by their decision to voluntarily recognize the unit of guards.

Put simply, the time for the Employer to have considered issues arising from potential mixed loyalties would have been decades ago when they were considering whether or not to grant voluntary recognition to the unit of guards. To now try and use 29 U.S.C §159(b)(3) as a means of denying the petitioned-for non-guard employees access to a fair election and certification of their own bargaining unit would be inconsistent with the legislative intent of the Act itself.

IV.

Any interpretation of 29 U.S.C §159(b)(3) which barred an election or the certification of representative for a group of non-guard employees would deny the petitioned-for unit’s access to their basic Section 7 rights and frustrate the legislative intent of the Act itself.

¹ While the above represents the language included in the Union’s original petition, the Union and Employer stipulated at hearing to the exclusions as follows: Excluded: All other employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

As stated above, it is clear that the legislative intent of 29 U.S.C. § 159(b)(3) was to place limits on the Board's powers to certify groups of guards under certain circumstances, not to deny Section 7 rights from non-guard employees wishing "... to bargain collectively through representatives of their own choosing...", thereby preventing them from "the fullest freedom in exercising the rights guaranteed by this Act."

Based on the foregoing, the Union urges The Board to deny the Employer's Request for Review, and to uphold the Decision and Direction of Election issued by Region 18.

Filed this 23rd day of October, 2020 at Oakbrook Terrace, Illinois by:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

A handwritten signature in blue ink that reads "William J. LePinske". The signature is written in a cursive style with a large initial 'W'.

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MILWAUKEE ART MUSEUM, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020 a copy of the Union's Statement in Opposition of the Employer's Request for Review of the Regional Director's Decision and Direction of Election in case #18-RC-265466 was served upon:

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