STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

DOUGLAS COUNTY SUPPORT STAFF ORGANIZATION/NSEA, Petitioner, -vs- NEVADA CLASSIFIED SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 6, Respondent.	ITEM NO. 313 CASE NO. A1-045535 **DECLARATORY ORDER**

For Petitioner: Sandra G. Lawrence, Esq.
DYER AND MCDONALD

For Respondent: Michael E. Langton, Esq.
LANGTON & KILBURN

For the EMRB: Salvatore C. Gugino, Chairman
Tamara Barengo, Vice Chairman
Howard Ecker, Board Member

I.

STATEMENT OF THE CASE

On or about August 12, 1992, the Petitioner, DOUGLAS COUNTY SUPPORT STAFF ORGANIZATION/NSEA, hereinafter referred to as "DCSSO", sent a letter soliciting the school bus drivers of the Douglas County School District for the right to represent them for collective bargaining purposes. On August 20, 1992, Respondent, NEVADA CLASSIFIED SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 6, hereinafter referred to as "NCSEA", sent a letter in response to the aforementioned letter, advising DCSSO, in pertinent part, as follows:

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> . . . I am hereby advising you that such action interferes with our recognition as the exclusive bargaining agent for the Douglas County School District Bus Drivers. Bargaining for a successor agreement for the bus drivers is well underway and any window period has long since passed. . . .
>
> You should immediately cease and desist in your organizing effort or we will file with the EMRB for a declaratory judgment and will seek an injunction to stop your illegal raid on N.C.S.E.A., Chapter 6.

On November 6, 1992, DCSSO filed the instant Petition For A Declaratory Order, seeking a clarification of the application of the "contract bar" doctrine and the "window period" as it applies to public sector collective bargaining in Nevada; i.e., clarification as to when the window period arises within which a rival organization can petition for a representation election and to ascertain the effect of the "window period" with regard to bargaining a successor agreement.

In its response to the Petition, NCSEA agreed with DCSSO that clarification of the "contract bar" doctrine and the "window period" is needed, as concerns public sector collective bargaining in Nevada, however, NCSEA contends that said clarification should specifically reflect the intent of NRS 288.217, as it pertains to school district employees; i.e., NCSEA contends that the contract bar doctrine should be extended through the period anticipated by NRS 288.217 for completion of the collective bargaining agreement.

DISCUSSION

The contract bar doctrine was first recognized, and adopted by this Board in Reno Police Protective Association

vs. City of Reno, Case No. A1-045338, EMRB Item No. 120 (September 30, 1981). In adopting the contract bar doctrine, this Board stated, in pertinent part:

> [W]e here adopt and apply the "contract bar" doctrine to recognition considerations in public employment relations in Nevada, ...
>
> We find the "contract bar" doctrine consistent with the policy and purpose of NRS Chapter 288. In our opinion, not only does the doctrine as here applied promote stability in bargaining relationships and agreements fostered by NRS Chapter 288, but because recognition is a mandatory subject of bargaining under the Act, and also contractual, the mutual obligations arising should not, and cannot be avoided by unilateral withdrawal of recognition during the term or duration of existing labor agreements.

EMRB Item No. 120, at 5. Continuing, the Board stated, pages 6 and 7:

> We hold that given the existence of a labor agreement covering a given bargaining unit, an employer should not, and cannot, entertain claims or requests for recognition from another employee organization, except during the "window period".
>
> * * *
>
> The open time for determination of recognition arises within the statutory period the recognized organization seeks to open negotiations for a future labor agreement to succeed the agreement whose term is expiring at the end of the current fiscal year.

The "window period" alluded to in Reno Police Protective Association (EMRB Item No. 120), supra, opens when the recognized organization seeks to open negotiations for a successor labor agreement [usually on or a few days before February 1, pursuant to NRS 288.180(1)]. It closes when negotiations commence [usually within a matter of days or weeks following written notice of the organization's desire to

negotiate, filed pursuant to NRS 288.180(1)]. Except for this window period, the "contract bar" prohibits an employer from entertaining claims or requests for recognition from another employee organization during the term of an existing labor agreement. Lander County Board of Commissioners vs. Lander County Law Enforcement Employees Assn., Case No. A1-045443, EMRB Item No. 223 (June 1989).

The basis for the Board's determination of the "window period" lies in NRS 288.160(3) and NAC 288.145. NRS 288.160(3)(c) states:

> 3. A local government employer may withdraw recognition from an employee organization which:
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> . . .
>
> (c) Ceases to be supported by a majority of the local government employees in the bargaining unit for which it is recognized; or
>
> (Emphasis added.)

NAC 288.145 states:

> A local government employer shall request a hearing before the board before withdrawing recognition of an employee organization pursuant to NRS 288.160. No hearing on the withdrawal of recognition of an employee organization will be entertained during the negotiation period immediately following the February 1 deadline for notification by the employee organization of its desire to negotiate unless the local government employee organization:
>
> 1. Voluntarily withdraws as the bargaining representative; or
>
> 2. Fails to notify the employer pursuant to NRS 288.180 that it desires to negotiate.
>
> (Emphasis added.)

The Board's intent in adopting NAC 288.145 was to restrict the practice of employers withdrawing recognition of the bargaining agent during negotiations as a bargaining

tactic. Las Vegas Valley Water District vs. Water Employees Association and Las Vegas Valley Public Employees Association, Case No. A1-045462, EMRB Item No. 251 (August 1990). However, since an employee organization challenging an incumbent organization for the right to represent the employees of a particular bargaining unit, on the basis of majority representation, obviously hopes to effect withdrawal of recognition of said incumbent organization, it logically follows that claims or requests from a challenging employee organization are subject to the same contract bar and window period that apply to the employer.

Notwithstanding the Board's determination that the window period opens when the recognized organization seeks to open negotiations for a successor labor agreement and closes when negotiations commence, the Board is persuaded that modification of its policy regarding the "contract bar" and "window period" is now necessary and appropriate.

When the Board adopted the contract bar doctrine in 1981, it did so primarily to "promote stability in bargaining relationships"; see Reno Police Protective Association (EMRB Item No. 120), supra. The instant Petition For A Declaratory Order evidences the need for a contract bar doctrine which also recognizes the importance of "employee freedom of choice" to change or eliminate bargaining representatives.

The contract bar rule adopted by the NLRB is designed to balance the twin goals of employee freedom of choice and industrial stability. In an NLRB case which was appealed to

the Ninth Circuit, the NLRB explained its contract bar rules as follows:

> The Board's contract bar rules are designed to balance the twin goals of employee freedom of choice and industrial stability. . . . This contract bar rule provides employee or union petitioners the opportunity to file petitions at reasonable, identifiable times to change or eliminate the employees' bargaining representative if they so desire, and at the same time affords a reasonable period of stability for the contracting parties and employees. The Board has also provided for a "window period" during which petitions may be filed to be timely with respect to an existing contract. And when an employee, or other petitioner, seeks to determine the proper time to file a representation petition, it is axiomatic that one would look first to the existing contract between the employer and the union to determine the appropriate dates for filing such a petition.

Marriott Corp. [Bob's Big Boy], 108 LRRM 1297-98, 259 NLRB No. 4 (1981).

The NLRB also has recognized an "insulated period" during which it will not allow a rival organization, (or a disenchanted individual for that matter), to file an election petition. In Vanity Fair Mills, 107 LRRM 1331, 256 NLRB No. 168 (1981), the NLRB discussed the "window period" and the "insulated period" as follows:

> It is well established as a general proposition that an existing collective bargaining agreement acts as a bar to an election within the unit covered by that agreement, and precludes the filing of a petition for any such election. There are, however, two qualifications to that general proposition which are relevant to the instant case.
>
> First, there is an "open period" from 60 to 90 days prior to the expiration date of the existing contract, during which period the existence of the contract will not act as a bar to

a petition for an election within the unit covered by the contract.

Thereafter, however, during the final 60 days of the term of an existing collective bargaining agreement - the "insulated period" - the contract again becomes a bar to petitions for elections. Deluxe Metal Furniture Company, [121 NLRB 995, 42 LRRM 1470 (1958)].

If a new contract is entered into during this final 60-day insulated period of the expiring contract, then the new contract will become a bar to petitions for elections for the duration of that contract, subject to the qualification discussed in the following paragraph.

The second important qualification to the contract bar principle is that only contracts of "reasonable duration" will act as bars to petitions for elections. The Board has held that collective bargaining agreements of three years' duration or less are contracts of reasonable duration. General Cable Corporation, 139 NLRB 1123, 1125, 51 LRRM 1444 (1962). Thus, contracts with fixed terms of more than three years will act as bars to election petitions only during the first three years of the contract. Consequently, when an existing collective bargaining agreement has a fixed term of more than three years, the 60-90 day open period for the filing of petitions for election is measured from the third anniversary date of the start of the contract and not from the expiration date of the contract, and the 60-day insulated period is likewise the 60 days immediately preceding the third anniversary of the contract, and not the 60 days immediately preceding the expiration of the contract.

It is apparent from the foregoing that the contract bar doctrine and window period adopted by the Board in 1981, do not provide the desired balance between employee freedom of choice and industrial stability; i.e., the window period (which opens when the recognized organization seeks to open negotiations for a successor labor agreement and closes when negotiations commence) is susceptible to artificial manipulation through collusion or by unilateral action by the

employer. For instance, in order to prevent a rival organization from petitioning for recognition and attempting to replace the incumbent employee organization, the parties (employer and incumbent employee organization) could schedule negotiations to commence immediately upon receipt of the incumbent organization's written notice of its desire to negotiate, pursuant to NRS 288.180(1). Also, under the Board's present definition of the window period, there is nothing to prevent an employer from creating instability in the bargaining relationship by delaying the commencement of negotiations to afford a rival organization the opportunity to petition for recognition.

Adoption of NLRB's window period (60 to 90 days prior to the expiration of the existing contract), however, would not appear to be appropriate for collective bargaining under NRS Chapter 288, inasmuch as many contracts expire on June 30 and, due to the requirement [pursuant to NRS 288.180(1)] that employee organizations give notice on or before February 1 when the negotiations require the budgeting of money, negotiations generally are well under way at the time said window period would arise. If the window period in which a rival organization can challenge the incumbent organization arises during negotiations, instability in the bargaining relationship will almost certainly be created, contrary to the Board's initial purpose in adopting the contract bar doctrine.

The State of California's Public Employee Relations Board (PERB) also has adopted the contract bar doctrine and

three (3) different window periods; i.e., different window periods are applicable to different categories of employees. After reviewing the California PERB and NLRB regulations, the EMRB has concluded that it would be appropriate, in the interest of providing employee freedom of choice as well as promoting stability in bargaining relationships, to amend and clarify our rules pertaining to the contract bar and window period. Accordingly, the Board hereby

ORDERS AND DECLARES that: Effective with the date of this Order, the contract bar doctrine is amended to provide that during the term of an existing labor agreement of up to three (3) years duration and during negotiations for a successor agreement (through factfinding and/or binding arbitration), recognition of an incumbent employee organization may not be withdrawn or challenged by a rival organization, except pursuant to NRS 288.160(3) [unless the incumbent employee organization voluntarily withdraws as bargaining representative or fails to notify the employer pursuant to NRS 288.180(1) that it desires to negotiate - see NAC 288.145]. This contract bar will apply, except during the following window periods:

A. The window period which opens when the incumbent organization files notice pursuant to NRS 288.180(1) of its desire to negotiate a successor agreement and closes when negotiations for a successor agreement commence.

/ / /

B. A 30-day window period which opens 242 days prior to the expiration date of the labor agreement and closes 212 days prior to the expiration date. [Example: For a labor agreement with a term of July 1, 1993 through June 30, 1994, this window period will begin at 12:01 A.M. on November 1, 1993 and end at Midnight on November 30, 1993.]

Each party shall bear its own attorney's fees and costs in the above-captioned matter.

DATED this 13th day of May, 1993.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By _____
SALVATORE C. GUGINO, Chairman

By Tamara Barengo
TAMARA BARENGO, Vice Chairman

By _____
HOWARD ECKER, Member

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