

1 STATE OF NEVADA
2 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
3 RELATIONS BOARD

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

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

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

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

17 I.

18 STATEMENT OF THE CASE

19 On or about August 12, 1992, the Petitioner, DOUGLAS
20 COUNTY SUPPORT STAFF ORGANIZATION/NSEA, hereinafter referred
21 to as "DCSSO", sent a letter soliciting the school bus drivers
22 of the Douglas County School District for the right to
23 represent them for collective bargaining purposes. On August
24 20, 1992, Respondent, NEVADA CLASSIFIED SCHOOL EMPLOYEES
25 ASSOCIATION, CHAPTER 6, hereinafter referred to as "NCSEA",
26 sent a letter in response to the aforementioned letter,
27 advising DCSSO, in pertinent part, as follows:
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1 . . . I am hereby advising you that such action
2 interferes with our recognition as the exclusive
3 bargaining agent for the Douglas County School
4 District Bus Drivers. Bargaining for a successor
5 agreement for the bus drivers is well underway and
6 any window period has long since passed. . . .

7 You should immediately cease and desist in your
8 organizing effort or we will file with the EMRB
9 for a declaratory judgment and will seek an
10 injunction to stop your illegal raid on
11 N.C.S.E.A., Chapter 6.

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

21 In its response to the Petition, NCSEA agreed with DCSSO
22 that clarification of the "contract bar" doctrine and the
23 "window period" is needed, as concerns public sector
24 collective bargaining in Nevada, however, NCSEA contends that
25 said clarification should specifically reflect the intent of
26 NRS 288.217, as it pertains to school district employees;
27 i.e., NCSEA contends that the contract bar doctrine should be
28 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

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

4 [W]e here adopt and apply the "contract bar"
5 doctrine to recognition considerations in public
6 employment relations in Nevada,

7 We find the "contract bar" doctrine consistent
8 with the policy and purpose of NRS Chapter 288.
9 In our opinion, not only does the doctrine as here
10 applied promote stability in bargaining relation-
11 ships and agreements fostered by NRS Chapter 288,
12 but because recognition is a mandatory subject of
13 bargaining under the Act, and also contractual,
14 the mutual obligations arising should not, and
15 cannot be avoided by unilateral withdrawal of
16 recognition during the term or duration of
17 existing labor agreements.

18 EMRB Item No. 120, at 5. Continuing, the Board stated, pages
19 6 and 7:

20 We hold that given the existence of a labor
21 agreement covering a given bargaining unit, an
22 employer should not, and cannot, entertain claims
23 or requests for recognition from another employee
24 organization, except during the "window period".

25 * * *

26 The open time for determination of
27 recognition arises within the statutory period
28 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

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

8 The basis for the Board's determination of the "window
9 period" lies in NRS 288.160(3) and NAC 288.145. NRS
10 288.160(3)(c) states:

11 3. A local government employer may withdraw
12 recognition from an employee organization which:

13 (c) Ceases to be supported by a majority of
14 the local government employees in the bargaining
15 unit for which it is recognized; or

16 (Emphasis added.)

17 NAC 288.145 states:

18 A local government employer shall request a
19 hearing before the board before withdrawing
20 recognition of an employee organization pursuant
21 to NRS 288.160. No hearing on the withdrawal of
22 recognition of an employee organization will be
23 entertained during the negotiation period
24 immediately following the February 1 deadline for
25 notification by the employee organization of its
26 desire to negotiate unless the local government
27 employee organization:

28 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

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

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

18 When the Board adopted the contract bar doctrine in
19 1981, it did so primarily to "promote stability in bargaining
20 relationships"; see Reno Police Protective Association (EMRB
21 Item No. 120), *supra*. The instant Petition For A Declaratory
22 Order evidences the need for a contract bar doctrine which
23 also recognizes the importance of "employee freedom of choice"
24 to change or eliminate bargaining representatives.

25 The contract bar rule adopted by the NLRB is designed to
26 balance the twin goals of employee freedom of choice and
27 industrial stability. In an NLRB case which was appealed to
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1 the Ninth Circuit, the NLRB explained its contract bar rules
2 as follows:

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

22 Marriott Corp. [Bob's Big Boy], 108 LRRM 1297-98, 259 NLRB No.
23 4 (1981).

24 The NLRB also has recognized an "insulated period"
25 during which it will not allow a rival organization, (or a
26 disenchanted individual for that matter), to file an election
27 petition. In Vanity Fair Mills, 107 LRRM 1331, 256 NLRB No.
28 168 (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

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

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

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

15 The second important qualification to the
16 contract bar principle is that only contracts of
17 "reasonable duration" will act as bars to
18 petitions for elections. The Board has held that
19 collective bargaining agreements of three years'
20 duration or less are contracts of reasonable
21 duration. General Cable Corporation, 139 NLRB
22 1123, 1125, 51 LRRM 1444 (1962). Thus, contracts
23 with fixed terms of more than three years will act
24 as bars to election petitions only during the
25 first three years of the contract. Consequently,
26 when an existing collective bargaining agreement
27 has a fixed term of more than three years, the
28 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

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

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

26 The State of California's Public Employee Relations
27 Board (PERB) also has adopted the contract bar doctrine and
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1 three (3) different window periods; i.e., different window
2 periods are applicable to different categories of employees.
3 After reviewing the California PERB and NLRB regulations, the
4 EMRB has concluded that it would be appropriate, in the
5 interest of providing employee freedom of choice as well as
6 promoting stability in bargaining relationships, to amend and
7 clarify our rules pertaining to the contract bar and window
8 period. Accordingly, the Board hereby

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

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

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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. Gugno*
SALVATORE C. GUGINO, Chairman

By *Tamara Barengo*
TAMARA BARENGO, Vice Chairman

By *Howard Ecker*
HOWARD ECKER, Member