

To grant the requested units would seriously fragmentize the community of interest among all the employees. Furthermore there is no evidence that the Employer has a truckdriver as such. Instead it appears that many employees drive a truck for short periods of time, none for more than 50 percent of the time. Additionally, the two job classifications with the strongest community of interest would be placed in different units; namely the cement finisher and the cement finisher's helper.

Neither the laborers nor the operating engineers constitutes a craft or departmental unit.³ Accordingly, the only appropriate unit would be an overall unit including all the employees employed by the Employer, excluding supervisors.

The Employer contends that the petition should be dismissed because none of the Unions involved herein has geographical jurisdiction broad enough to embrace the Employer's normal area of operations. The Board has consistently refused to predicate unit findings upon the scope of a local's territorial jurisdiction. The Petitioner and Intervenor may withdraw from the election upon timely notice to the Regional Director.⁴

Accordingly, we find that 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: All employees employed by Broomall Construction Company in the Pennsylvania counties of Northampton, Bucks, Montgomery, Chester, Delaware, Lancaster, Dauphin, Lebanon, Schuylkill, Carbon, Luzerne, Monroe, Lehigh, Berks, and York; and the county of Burlington in New Jersey; but excluding watchmen, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

MEMBERS RODGERS and FANNING took no part in the consideration of the above Decision and Direction of Election.

³ *Truss-Mart Corporation, et al.*, 121 NLRB 1430; *Greene Construction Company, et al.*, 133 NLRB 152.

⁴ *Paxton Wholesale Grocery Company*, 123 NLRB 316.

Montgomery Ward & Co., Incorporated and Retail Store Employees Union Local No. 1099, Retail Store Clerks International Association, AFL-CIO. *Case No. 9-RM-267. May 25, 1962*

SUPPLEMENTAL DECISION AND ORDER

On November 22, 1961, the Board issued a Decision and Direction of Election¹ in the above-entitled case, finding appropriate a unit of

¹ Not published in NLRB volumes.

137 NLRB No. 26.

employees at the Employer's Covington, Kentucky, catalog store, and directing an election therein. In its decision, the Board found that the Employer's 5-year contract with the Union, executed August 1, 1958, and effective from June 1, 1958, to June 1, 1963, was inoperable as a bar to the Employer's petition which was filed during the third year of that contract. Thereafter, the Union filed a petition for reconsideration of the Board's decision, asserting that the decision would unfairly permit an employer to escape its contract obligations. The Union's International filed a statement in support of the Union's position. The Employer filed a statement in support of the Board's decision urging, as the Board had found, that the Board's contract-bar rules do not preclude the filing of any petition after the expiration of the 2-year contract-bar period. As additional grounds for holding the contract no bar, the Employer reiterated the following contentions it made when the case was first presented to the Board but which were not passed upon by the Board in the earlier decisions: (a) that the contract in question was executed by Local 1594 of the Retail Clerks, and that the Union is not the legal successor to Local 1594; and (b) that a substantial change in the Employer's operations and in the character of the unit had occurred since the execution of the contract.

The Board having considered the petition for reconsideration and the entire record in this case, including all briefs, finds merit in the Union's contention and hereby grants the petition for reconsideration.²

We are now persuaded, for the reasons set forth below, that where, as here, the incumbent union is the certified bargaining representative,³ a current contract should constitute a bar to a petition by either of the contracting parties during the entire term of that contract. Accordingly, we hold that absent a conflicting timely claim by a rival union, a petition by either of such parties to a contract is timely only when filed at the proper time with respect to the contract's expiration date. To that extent, the Board's rule that a contract of unreasonable duration will not bar a petition timely filed at or near the end of the first 2 years of its duration⁴ will not apply to the employer and the certified union.⁵

The primary objective of the Board's contract-bar doctrine is the achievement of a reasonable balance between the frequently conflicting aims of industrial stability on the one hand and freedom of choice by

² The Union's request for oral argument is hereby denied as the record, including the briefs of the parties, adequately present the issues and the positions of the parties.

³ As hereinafter found, Local 1099 is the legal successor of Local 1594, the certified union. As such, it is entitled to the benefits of the certification.

⁴ *Union Carbide and Carbon Corporation v. N.L.R.B.*, 244 F. 2d 672, 673 (C.A. 6); *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990, 992.

⁵ The Board has long held that an uncertified union may file a petition during the existence of its contract which would otherwise bar an election where it seeks the benefits of certification. *General Box Company*, 82 NLRB 678. However, the Board will not process a similar petition by a certified union. *Botany Mills, Inc.*, 101 NLRB 293. We have also held that a petition by an employer who has a contract with an uncertified union is subject to the contract-bar rules. *Pazan Motor Freight, Inc.*, 116 NLRB 1568, 1570.

employees in the selection of their bargaining representatives on the other hand. By that doctrine, the Board seeks to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative if they wish to do so. The need to weigh those conflicting aims arises, for example, where the employer and the designated union exercise their discretion in agreeing to the term of the contract and, during that term, the employees seek to change their representative. In such circumstances, the Board's contract-bar rules provide a 2-year period during which a valid contract of longer duration constitutes a bar to rival representation claims or to employee action to decertify the incumbent. Consideration of the basis of this 2-year rule and its intent reveals clearly that the sole reason for the possible disruption of a contractual relationship is to give effect to the employees' right to freedom of choice. There is no other valid rationale for the Board's conducting an election in disregard of the agreement of the *parties* as to the term thereof or for the Board to permit the *parties* to disregard their own agreement except by mutual consent, as where the contract is not asserted as a bar.

This valid reason does not exist in the circumstances present here. The parties to the contract are not rival claimants and a petition by either of them does not indicate possible employee dissatisfaction with the existing condition. Rather, such possible dissatisfaction or desire for a change is presented as a reason for conducting an election only when a timely petition for certification or for decertification is filed by a rival union or by the employees or someone acting on their behalf and such petition is supported by at least a 30-percent showing of interest. As we make no change in our rule that such petitions may be filed during the term of a contract of unreasonable duration as long as the filing occurs at the prescribed times, the rights of the employees are and continue to be fully protected and remain unaffected by our decision herein.

It is thus clear that, contrary to the view of our dissenting colleagues, our determination with respect to an employer's right to file a petition under the circumstances of this case does not constitute an encroachment on "the proper exercise of the employees' freedom of choice." This being so, we cannot interpret our contract-bar rules in such a way as to permit employers or certified unions⁶ to take advantage of whatever benefits may accrue from the contract with the knowledge that they have an option to avoid their contractual obliga-

⁶ To the extent the holding of *Botany Mills, Inc.*, *supra*, might be subject to a different interpretation as to the time at which a petition by a certified union may be filed with respect to its contract, it is hereby modified to accord with our decision herein.

tions and commitments through the device of a petition to the Board for an election.⁷

We find no merit in our colleagues' position that this decision is in conflict with that portion of Section 9(c) (2) which provides that "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought" It is manifest from the legislative history that this provision was enacted for the sole purpose of requiring that the Board give equal treatment to affiliated and independent labor organizations.⁸ There is no support whatsoever for the interpretation of that language as requiring that the Board treat all petitioners identically regardless of the facts of each situation. On the contrary, the contract-bar doctrine itself requires, and the Board frequently has, made distinctions among filing parties based on the circumstances of the particular case.⁹ The courts have long recognized that the contract-bar doctrine is a creation of the Board¹⁰ and that it may, in the Board's discretion, be applied or waived as the facts

⁷ We have not in the past permitted a party to avoid its valid commitments or contractual obligations in other respects through the use of the Board's processes and we see no warrant for concluding that a different rule should be applied to petitions by the contracting parties. See, e.g., *Spielberg Manufacturing Company*, 112 NLRB 1080 (arbitration awards), *Speidel Corporation*, 120 NLRB 733 (waiver of bargaining rights concerning a given subject); *The Cessna Aircraft Company*, 123 NLRB 855, and *Biggs Indiana Corporation*, 63 NLRB 1270 (agreement by union not to seek to represent certain categories of employees during the contract term); *Sinclair Refining Company*, 132 NLRB 1660 (contract terms considered in determining employer's obligation to supply information).

⁸ Conference Report No. 510 on H.R. 3020 at p. 48, Legislative History of the Labor Management Relations Act, 1947, vol I, p. 552; Senate Report No. 105 on S. 1126 at p. 25, Legislative History of the Labor Management Relations Act, 1947, vol I p. 431.

⁹ For example, the *General Box* case, *supra*, which the dissenting opinion cites with approval and which our dissenting colleagues have themselves applied in innumerable cases, itself makes a distinction in the application of the contract-bar rules in permitting an uncertified union to petition at a time when the existing contract would bar a rival claim, although neither an employer (*Pazan Motor Freight, Inc.*, *supra*) nor a certified union (*Botany Mills, Inc.*, *supra*) could do so. Other instances of different treatment accorded on the basis of the existing conditions are too numerous for an exhaustive listing. Some examples are: (1) The holding that an employer who has recognized an uncertified union may, near the end of an existing contract, file a *General Box* type petition although the employer continues to recognize and bargain with the incumbent union, whereas in the usual situation the petition would be dismissed on the ground that no question of representation exists under such circumstances. *J. P. O'Neil, et al., d/b/a J. P. O'Neil Lumber Company*, 94 NLRB 1299, 1301; *Schye & Sullivan, et al.*, 115 NLRB 1427; *American Lawn Mower Co.*, 108 NLRB 1589. Compare *United States Gypsum Company*, 117 NLRB 1677, with *United States Gypsum Company*, 116 NLRB 1771. (2) The holding that the Board will process a petition filed after a new contract is signed where a union had previously requested recognition but refrained from filing a timely petition in reliance on the employer's statements or other conduct, although the same contract would be a bar if the claimant had merely requested recognition prior to its execution but had delayed filing the petition with the Board. *Greenpoint Sleep Products*, 128 NLRB 548; *Deluxe Metal Furniture Company*, 121 NLRB 995, 998-999.

¹⁰ See, e.g., *Kearney & Trecker Corp. v. NLRB*, 210 F. 2d 852 (C.A. 7), cert denied 348 U.S. 824.

of a given case demand in the interest of stability and fairness in collective bargaining.¹¹

In view of the above, we hereby reverse the decision of November 22, 1961, that the petition herein was timely filed because filed during the third year of a 5-year contract.

In view of our reversal of the finding in the earlier decision, it now becomes necessary to consider the Employer's aforementioned additional claims that the contract is no bar because (a) the Union is not the legal successor to Local 1594, which executed the contract, and (b) that there has been a substantial supervening change in the Employer's operations and the bargaining unit since the execution of the contract.

As to (a), Local 1594 of the Retail Clerks, which executed the contract, was certified by the Board on May 31, 1955, following an election in Case No. 9-RC-2486, conducted pursuant to a stipulation for certification upon consent election. It later merged with Locals 981, 1099, and 1109 of the Retail Clerks, all in the Greater Cincinnati area, the surviving local being known as Local 1099. Prior to the merger, the affairs of the individual locals were being managed by a single group of the International's representatives, and the same group continued this function following the merger. The Employer continued to check off dues to Local 1099 for some 9 to 10 months following the merger. In these circumstances, and in view of the lack of evident significant change in the union membership, officers, or administrators of the local, or in its day-to-day relationships with the Employer, and the apparent understanding of both the Employer and the Union that the consolidated group intended to function as a continuation of the constituent unions, we find, contrary to the Employer, that Local 1109 is the successor to Local 1594, within the meaning of the Act.¹²

As to (b), the record shows that the contract in question was executed on August 1, 1958 and covered the Employer's Covington, Kentucky, retail store employees. On Saturday, December 17, 1960, the Employer terminated this retail store operation, and on the following Monday, reopened at the same location as a catalog store, retaining 14 of its former complement of 52 employees, which it later reduced to its current complement of 8 employees. Hours, benefits, and other conditions of employment have remained substantially unchanged. The changeover from the retail store, which had a catalog department, to the catalog store operation required no more than 2 months of employee instruction. While there are differences between the two types

¹¹ For example, in *Kearney & Trecker Corp v N.L.R.B.*, *supra*, the court set aside 101 NLRB 1577 on other grounds but enforced that decision insofar as it is relevant to the instant case, in *National Biscuit Division (National Biscuit Co) v Boyd Leedom*, 265 F. 2d 101 (C.A.D.C.), cert. denied 359 U.S. 1011, the Board's schism rule was held to be within the allowable limits of the Board's discretion and not prohibited by Section 9(c)(2). Accord, *N.L.R.B. v. Grace Company*, 184 F. 2d 126 (C.A. 8); *N.L.R.B. v. Libbey-Owens-Ford Glass Company, et al.*, 241 F. 2d 831 (C.A. 4).

¹² *Union Carbide & Carbon Corp v. N.L.R.B.*, *supra*

of operation, these differences appear primarily to concern the Employer's administration, rather than its labor relations. Labor relations have remained centralized under a single manager in Chicago, Illinois, who plays a primary role in bargaining and contract negotiation in behalf of the stores.¹³ In these circumstances, we find that there has not been a sufficiently substantial change in either the Employer's operations or the character of the bargaining unit to remove the contract as a bar.

Accordingly, we find that the contract is a bar to the instant petition, and we shall therefore order that the petition be dismissed, and shall amend the certification to conform herewith.¹⁴

[The Board set aside the Board's Decision and Direction of Election of November 22, 1961, dismissed the petition, and amended the certification in Case No. 9-RC-2486 by substituting therein, as the representative of the employees, Retail Store Employees Union Local No. 1099, Retail Clerks International Association, AFL-CIO, for Retail Clerks International Association, Local 1594, A.F.L.]

MEMBERS RODGERS and LEEDOM, dissenting:

We disagree with our colleagues' decision, which reverses, on reconsideration, a Board finding that the contract was no bar to the Employer's petition.

The Board's contract-bar doctrine unqualifiedly declares that a period of 2 years, but no longer, is a reasonable time during which employees must, in the interest of bargaining stability, forgo their freedom of choice in the selection or rejection of bargaining representatives. Following the expiration of the 2-year period, the employees are entitled to complete freedom of choice in the selection of representatives. The several types of representation petitions constitute different avenues for bringing this about; no one of these avenues can be closed to employees, as does the majority decision, without encroaching to that extent on the proper exercise of the employees' freedom of choice.

The decision of the majority here is basically inconsistent with both the intent of Board's contract-bar doctrine,¹⁵ and with the mandatory

¹³ Catalog store employees in the Employer's chain share equally in incentive pay, whereas retail store employees receive individual incentive pay. Both groups receive basic pay. The administrative differences between the catalog and retail operations include separate chains of supervisory authority, separate company divisions and warehousing, the existence of sales forces in retail stores, and the fact that catalog stores sell by sample only. The differences in employee functions are largely concerned with the use of different types of forms and accounting procedures.

¹⁴ *Lloyd A. Fry Roofing Company, et al.*, 118 NLRB 587. The fact that the Union has not requested such amendment is immaterial as the Board has the authority to police its certification by clarification, amendment, or even revocation, on its own motion. *The Bell Telephone Company of Pennsylvania*, 118 NLRB 371, 373. The Order herein is not to be construed as a new certification or an extension of the previously issued certification.

¹⁵ Contrary to our colleagues' assertion, there is nothing in the Board's contract-bar doctrine which limits the applicability of the 2-year rule to "rival" petitions. Rather, the

language of Section 9(c)(2) of the Act, which reads in part as follows:

In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. . . .

Clearly, the contract here would not constitute a bar to a petition filed by a rival union. Indeed, the contract here would not constitute a bar if this union were uncertified and if it, itself, had filed a representation petition.¹⁶ Thus, in holding that it does bar the Employer's petition and that for this reason no question concerning representation exists, our colleagues, contrary to the express provisions of the Act, have fixed different "rules" for determining the existence of such a question, and have made their decision dependent on "the identity of the persons filing the petition."

For these reasons, we would affirm the Board's earlier decision.

Board has stated unequivocally and without limitation that " any contract having a fixed term in excess of 2 years shall be treated, for the purposes of contract bar, as a contract for a fixed term of 2 years. . . ." *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990, 992

¹⁶ *General Box Company*, 82 NLRB 678; *Natona Mills, Inc.*, 97 NLRB 11; *Pazan Motor Freight, Inc.*, 116 NLRB 1568

Western States Regional Council No. 3 International Woodworkers of America, AFL-CIO and International Woodworkers of America, Local 3-101, AFL-CIO¹ and Priest Logging, Inc.²
Case No. 19-CC-168. May 25, 1962

DECISION AND ORDER

On January 25, 1962, Trial Examiner Eugene K. Kennedy issued his Intermediate Report, attached hereto, in the above-entitled proceeding, finding that the Respondents had not engaged in any unfair labor practices and recommending that the complaint be dismissed. Thereafter, Respondent Regional Council and the General Counsel filed exceptions and supporting briefs.³

The Board⁴ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in

¹ Hereinafter referred to as the Regional Council and the Local, respectively.

² Hereinafter referred to as Priest.

³ The exceptions of Respondent Regional Council went solely to the failure of the Trial Examiner to find that it was not properly named as a Respondent

⁴ Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Leedom, Fanning, and Brown].