

**Corporacion de Servicios Legales de Puerto Rico
and Union de Abogados de Servicios Legales de
Puerto Rico, Petitioner. Case 24-RC-6913**

June 30, 1988

DECISION ON REVIEW

**BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND BABSON**

On August 14, 1984, the Regional Director for Region 24 administratively determined that the collective-bargaining agreement then in effect between the Employer and the Intervenor, Union Independiente de Trabajadores de Servicios Legales, covering a combined unit of all the Employer's professional and nonprofessional employees, constituted a bar to the conduct of an election herein. Accordingly, she dismissed the instant petition.

Thereafter, in accordance with Section 102.71 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review, maintaining, inter alia, that the contract cannot bar its petition to represent only the Employer's professional employees as those professional employees have never had the opportunity to vote for inclusion in a combined unit pursuant to Section 9(b)(1) of the Act.¹

The Board, by telegraphic order dated November 21, 1984, granted the Petitioner's request for review solely as to this issue and expressly invited the parties to brief the issue on review with particular attention to the policies expressed in *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963), and *Pennsylvania Power & Light Co.*, 122 NLRB 293 (1958), as compared with those expressed in *Utah Power & Light Co.*, 258 NLRB 1059 (1981), and *Wells Fargo Corp.*, 270 NLRB 787 (1984), affd. 755 F.2d 5 (2d Cir. 1985).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the entire record, including the briefs on review, and has decided to affirm the Regional Director's conclusion

that the existing collective-bargaining agreement between the Employer and the Intervenor constitutes a bar to the conduct of an election and, therefore, that the petition must be dismissed.

The basic facts are not in dispute. From 1977 to the date this petition was filed, the Employer and the Intervenor have had successive collective-bargaining agreements that specifically included both professional and nonprofessional employees in a single bargaining unit. The then-current contract, executed on October 14, 1980, expired by its terms on July 1, 1983, but was extended for an additional 3 years by stipulation of the parties. The all-inclusive unit described in the contract was incorporated by reference from the unit originally certified in 1976 by the Puerto Rico Labor Relations Board (Junta de Relaciones del Trabajo de Puerto Rico).² It is undisputed that the Puerto Rico labor statutes did not mandate any type of self-determination election before the combined unit was certified, and that none was held.

In finding that the contract barred the election petition, the Regional Director relied on the Board's decision in *Pennsylvania Power*, supra, in which the petitioner sought to represent a professional unit of engineers and scientists, and the employer sought to include its junior engineers, inasmuch as they also were professional employees who had never voted in a professional unit. The junior engineer classification, however, already was covered by a contract between the employer and another union in a unit that included professional employees. Although conceding the junior engineers were professionals, the Board excluded them from the unit sought on contract-bar grounds.³

This policy was reaffirmed in *Vincent Drugs*, supra, in which the Board distinguished the issue in that case (the validity of an existing contract covering a unit of both professionals and nonprofessionals that had been established by the parties) from the issue presented in *Leedom v. Kyne*, 358 U.S. 184 (1958) (whether a combined unit of professionals and nonprofessionals could be established initially

¹ Sec. 9(b)(1) provides, in pertinent part, that the Board shall not decide that any unit is appropriate for the purposes of collective bargaining " . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of professional employees vote for inclusion in such unit "

To carry out the statutory requirement, the Board has adopted a special type of self-determination procedure known as a *Sonotone* election, whereby the ballots used for the professional employees ask two questions (1) whether they desire to be included in a group composed of non-professional employees; and (2) their choice with respect to a bargaining representative. See *Sonotone Corp.*, 90 NLRB 1236 (1950). If the majority of professionals vote "yes" on inclusion, their votes are counted with those of the nonprofessionals; if the majority vote "no," their votes are counted separately to determine which labor organization, if any, they want to represent them in a separate unit.

² The Board will recognize the validity of a state certification where the election procedure was free of irregularities and reflected the true desires of the employees. See *St. Luke's Hospital Center*, 221 NLRB 1314, 1315-1316 (1976), enf'd 551 F.2d 476 (2d Cir. 1976). The record in this case does not disclose the circumstances under which the parties became subject to the jurisdiction of the National Labor Relations Act.

³ 122 NLRB at 294 fn. 2. The Board found no merit in the contention that, because the junior engineers had never exercised their right to vote as professional employees under Sec. 9(b)(1) of the Act, the contract bar rule did not apply. Accord: *Westinghouse Electric Corp.*, 116 NLRB 1545, 1546 (1956), *Westinghouse Electric Corp.*, 112 NLRB 590, 592 (1955), enf'd. 236 F.2d 939 (3d Cir. 1956). See also *S.S. White Dental Mfg. Co.*, 109 NLRB 1117, 1118 fn. 3 (1954) (petition for severance of professional employees from mixed unit having previous bargaining history with employer was filed at a time following expiration of the collective-bargaining agreement; election directed).

by the Board without first affording the professional employees a self-determination election).⁴

In requesting that the parties brief the issue on review, the Board was concerned that *Utah Power*, supra, and *Wells Fargo*, supra, may have undermined the application of the contract-bar rule as applied to a mixed professional-nonprofessional unit where a separate professional unit is sought. However, a close reading of those cases has shown that the holding of *Pennsylvania Power*, supra, and its forerunners has not been so eclipsed.

Utah Power involved the separate and distinct question of what is the appropriate unit in a decertification election where the recognized unit was a mixed one of professionals and nonprofessionals. In decertification elections, the voting unit generally must be coextensive with the certified or recognized unit;⁵ however, because the professional employees had never had an opportunity to vote in a self-determination election as authorized by Section 9(b)(1), the Board concluded that an exception to the general rule was warranted and therefore the professionals by themselves could vote on continued representation and it was not necessary that the election be conducted in the existing, all-inclusive unit.

The facts of the instant case parallel *Utah Power* only insofar as it is the professional employees here who seek to take themselves out of the mixed unit. Thus, while *Utah Power* would authorize the Board to entertain a decertification petition seeking a unit of only the professional employees, we find nothing in that opinion which suggests that such a petition may be filed at any time, even during the period of a collective-bargaining agreement. Indeed, the Board in *Utah Power* observed that the petition there "was initiated at an appropriate time,"⁶ although it cannot be determined from the decision the status of the contract at the time of the filing. In any event, if the Board in *Utah Power* intended to remove the contract-bar rule as an impediment in such cases, it surely would have done so in a more forthright manner, particularly in the face of *Pennsylvania Power* and other authorities.

Similarly, *Wells Fargo* offers no support for overruling *Pennsylvania Power* and *Vincent Drugs*. That

case involved an interpretation of Section 9(b)(3), which bars the Board from certifying a mixed unit of guards and nonguard employees, or from certifying a union as the representative of a guard union if the union admits nonguards as members. The Board specifically noted in *Wells Fargo* that Section 9(b)(1) was inapplicable to that case, and that it would not read into Section 9(b)(3) the various legislative comments directed toward Section 9(b)(1) of the Act.⁷ If *Wells Fargo* has any pertinence to the instant case, it actually buttresses the applicability of the contract-bar doctrine here. In enforcing the Board's conclusion in *Wells Fargo* that the employer was privileged, following expiration of its collective-bargaining agreement with the mixed guard union, to withdraw recognition, the Second Circuit specifically noted the continuing viability of the Board's decision in *Burns Detective Agency*,⁸ that "[a]n employer who voluntarily recognizes a mixed guard union may not *discontinue* the relationship during the *contract period*."⁹

Finding contract-bar principles inapplicable to the present case would be contrary to the Board's general approach toward employers' voluntary recognition of collective-bargaining representatives. In a mixed unit of professional and nonprofessional employees, as with most other units, an employer under the general rules of voluntary recognition need only be satisfied that the union has the majority support of the entire unit.¹⁰ Board law has never intimated that an employer can predicate voluntary recognition only on separate demonstrations of majority support from professionals and nonprofessionals. Moreover, as the Board explained in *Vincent Drugs*, the legislative history of Section 9(b)(1) does not demonstrate an outright hostility to voluntarily recognized mixed units. Neither *Utah Power* nor *Wells Fargo* presented any new evidence to impeach this earlier interpretation.

We point out that in the instant case there were legally recognized opportunities during the window periods in 1980 and again in 1983 in which to file a timely petition. There is no evidence to suggest that the professional employees were precluded from availing themselves of those opportunities. Given this bargaining history, we conclude that it is not unreasonable to defer the exercise of the professional employees' right of self-determination until the end of the then-current contract.

Further, we note that the contract-bar doctrine is but another instance of the Board's striking an accommodation among three competing interests: the

⁴ 144 NLRB at 1253-1254. In *Vincent Drugs*, the specific issue before the Board was whether the union had violated Sec. 8(b)(1)(A) and (2) of the Act by attempting to have a professional employee who had never joined the union discharged through use of the union-security clause in a contract covering a combined unit.

⁵ See generally *Campbell Soup Co.*, 111 NLRB 234 (1955).

⁶ 258 NLRB at 1061 fn 14 (emphasis added), citing *International Telephone & Telegraph Corp.*, 159 NLRB 1757, 1764 fn. 15 (1966), enfd. as modified 382 F.2d 366 (3d Cir. 1967) (professionals in mixed unit may seek self-determination "at an appropriate time and in an appropriate proceeding"). In *JTT*, the Board noted that it was not an appropriate time for professionals to seek a self-determination election because the employer there had not remedied its unfair labor practices.

⁷ 270 NLRB at 787-788 fn 6.

⁸ 134 NLRB 451 (1961)

⁹ *Wells Fargo*, supra, 755 F.2d at 10 (emphasis added)

¹⁰ See *Garment Workers v. NLRB*, 366 U.S. 731 (1961)

freedom of an employer and a union to enter into a collective-bargaining relationship, the stability of bargaining relations once established, and employee freedom of choice—all of which underlie the Act's ultimate goal of fostering industrial peace.¹¹ Thus,

¹¹ The contract-bar doctrine was first articulated in *National Sugar Refining Co.*, 10 NLRB 1410, 1415 (1939). See also *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), as modified by *Leonard Wholesale Meats*, 136 NLRB 1000 (1962) (time for filing petitions). The legislative history of the 1947 Taft-Hartley amendments shows that the amendments authorizing employer and employee representation petitions (Sec. 9(c)(1)(A) and (B)) were not intended to affect the contract-bar rule. The House bill, H.R. 3020, as reported, did not explicitly address the continuing applicability of the contract-bar doctrine, but the bill was attacked on the grounds that it would effectively eliminate the rule and allow the processing of a representation petition at any time. H. Rep. No. 245, 80th Cong. 1st Sess. 88-89 (1947) (minority report), reprinted in 1 *Legislative History of the Labor-Management Relations Act of 1947*, at 376-377 (1959) (Leg. Hist.). Sec. 9(c)(1) in the Senate bill, S. 1126, as reported and passed by the Senate as an amendment to H.R. 3020, referred to the filing of petitions "in accordance with such regulations as may be prescribed by the Board" (1 Leg. Hist. 245), and the Senate report expressly stated that nothing in Sec. 9(c)(1) was intended to affect "the present

for a limited period of time, employee choice as to union representation is subordinated to the goal of fostering the stability that can come about through a freely established bargaining contract. Accordingly, and inasmuch as Congress, in its enactment of Section 9(b)(1) in 1947, said nothing to restrict the application of the contract-bar doctrine, we conclude that it is applicable in this case, or perhaps more accurately, that this case does not constitute an exception to that established doctrine, and we affirm the Regional Director's dismissal of the petition.

Board's rules of decisions with respect to dismissal of petitions by reason of . . . an outstanding collective agreement as a bar to an election." S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947). "In other words," the report explained, "the Board could still dismiss an employee or employer petition if a valid contract were still in effect." *Id.* It was the Senate language that was finally enacted (We note, of course, that in 1947 the bar period was only 1 year. It was not until 1962, in *General Cable Corp.*, 139 NLRB 1123 (1962), that the Board extended the bar period to 3 years.)