

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

FJC SECURITY SERVICES, INC.
Employer

and

SPECIAL AND SUPERIOR OFFICERS
BENEVOLENT ASSOCIATION
Petitioner

Case No. 29-RC-11999

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ

Party in Interest

LOCAL 971/550 NATIONAL SECURITY
OFFICERS BENEVOLENT ASSOCIATION

Intervenor

SUPPLEMENTAL DECISION

This Supplemental Decision supplements a prior Decision and Direction of Election (“DDE”) issued in the above-captioned case, on remand from the National Labor Relations Board (“Board”) for further consideration under the newly-revived successor bar doctrine set forth in UGL-UNICCO Service Co., 357 NLRB No. 76 (2011).

History of the case:

FJC Security Services, Inc. (“the Employer” or “FJC”) provides security services to various entities including the Port Authority of New York and New Jersey (“Port Authority”) at John F. Kennedy International Airport (“JFK”) and LaGuardia Airport

("LaGuardia") in Queens, New York. On February 1, 2011, the Special and Superior Officers Benevolent Association ("the Petitioner" or "SSOBA") filed a petition under Section 9(c) of the National Labor Relations Act ("the Act"), seeking to represent a unit of approximately 414 security officers employed under FJC's Port Authority contract at JFK and LaGuardia airports.

As described in more detail below, the predecessor employer, Covenant Aviation Security, had voluntarily recognized Service Employees International Union, Local 32BJ ("Local 32BJ") in 2007 as the collective bargaining representative of security officers working under Covenant's 2007 - 2011 contract with Port Authority at JFK and LaGuardia airports. In the meantime, Local 32BJ had also established a collective bargaining relationship with FJC for its security guards employed at other Port Authority sites, such as Newark Liberty International Airport ("Newark Liberty Airport") in New Jersey. In connection with FJC's take-over of the Port Authority JFK/LaGuardia contract from Covenant in February 2011, FJC agreed to recognize Local 32BJ as representative of the existing JFK/LaGuardia unit, and to "merge" the JFK/LaGuardia unit into Local 32BJ's larger unit of FJC security officers at all Port Authority sites.

Both Local 32BJ and Local 971/550 National Security Officers Benevolent Association sought to intervene in the instant case. Local 32BJ conceded that it is a "mixed" union, accepting to membership both guards and non-guards. Under Section

9(b)(3) of the Act, this Agency cannot certify any union to represent a unit of guards if the union also accepts non-guards to membership.¹

In a pre-election hearing, the parties raised several issues, including whether the petitioned-for security officers work as “guards” as defined in Section 9(b)(3); whether Local 32BJ may appear on the ballot in any election directed herein; whether FJC’s voluntary recognition of Local 32BJ employees created a “successor bar”; whether the petitioned-for two-site unit is appropriate, as opposed to a larger unit encompassing all the Port Authority sites; and whether Local 971 is a labor organization as defined in Section 2(5) of the Act.

On March 18, 2011,² the Regional Director for Region 29 issued a Decision and Direction of Election holding, *inter alia*, (1) that the security officers in the petitioned-for unit are indeed guards; (2) that accordingly, under Section 9(b)(3) of the Act, the incumbent “mixed” union, Local 32BJ, cannot appear on the ballot or obtain certification via a Board-run election; (3) that the petitioned-for unit limited to the Port Authority sites at JFK and LaGuardia airports is appropriate; (4) that, under then-existing Board law,³ there was no “successor bar” or any other bar to holding an election at that time; and (5) that Local 971/555 is a labor organization. The Regional Director therefore directed an

¹ Section 9(b)(3) of the Act provides in part: “[T]he Board shall not ... decide that any unit is appropriate for such purposes [collective bargaining] 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.”

² All dates hereinafter are in 2011 unless otherwise indicated.

³ MV Transportation, 337 NLRB 770 (2002).

election in the petitioned-for unit, with both SSOBA and Local 971/555 on the ballot, but not Local 32BJ.

Local 32BJ then filed a timely request for review. Local 32BJ neither requested, nor did the Board grant, a stay of the election pending the request for review.

An election was held on April 15. As stated above, both SSOBA and Local 971/550 were on the ballot, although Local 32BJ was not. The ballots were impounded pending the Board's decision on the request for review.

On August 26, the Board decided to revive its successor bar doctrine in UGL-UNICCO Service Co., 357 NLRB No. 76 (2011). Specifically, the Board held that when a successor employer recognizes an incumbent representative of its employees, the previously-chosen representative is entitled to represent those employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status. The Board further refined successor bar by defining the "reasonable period" of time for bargaining as follows: (1) where the successor employer has expressly adopted the existing terms of employment as the starting point for bargaining, without making unilateral changes, the reasonable period for bargaining will be six months; and (2) where the successor employer unilaterally establishes initial terms of employment before proceeding to bargain, the reasonable period will be 6 to 12 months. Id., slip op. at p.9. Finally, the Board stated that it would apply the doctrine retroactively in representation cases. Id., slip op. p.8.

On September 21, the Board granted Local 32BJ's request for review on the successor bar issue in the instant case, and remanded the case to the Region for reconsideration in light of its UGL-UNICCO decision.

In the meantime, FJC and Local 32BJ had continued their negotiations for a contract covering guards at all of their Port Authority sites, but had not reached agreement. In December 2011, the Region obtained a factual stipulation from the parties to that effect, and invited to parties to brief the legal issues raised by the Board's remand.

The parties' positions

Local 32BJ contends that the Board must apply the successor bar doctrine in these circumstances, even though Local 32BJ is a mixed guard/nonguard union representing the unit of guards. In January 2012, when the parties filed briefs addressing the successor bar issue, Local 32BJ acknowledged that the six-month reasonable period of time under UGL-UNICCO had passed. However, Local 32BJ argued that the April 14 election should not have been held *at that time* because the parties had only been negotiating for a few months (January to April 2011), i.e., still within the six-month "reasonable period." Local 32BJ therefore contends that it would be improper to open the ballots now and, instead, that SSOBA's petition must be dismissed, and the election declared null and void.

SSOBA's brief does not specifically address whether Local 32BJ's status under Section 9(b)(3) would prevent the application of successor bar herein. However, SSOBA disputes whether FJC is truly a "successor" employer in these circumstances, inasmuch as FJC and Local 32BJ already had a collective bargaining relationship at other Port Authority sites, and had agreed to apply their Port Authority Rider and Master MOA to employees at the JFK and LaGuardia sites (with modifications) until they negotiated a new Port Authority Rider. SSOBA further argues that, if successor bar were applied, the

six-month insulated period has now passed. Thus, SSOBA contends that the ballots from the April 2011 election should be opened and counted.

Neither the Employer nor Local 971/555 took any position regarding the successor bar issue.

The issue

In short, this case raises the issue of whether the successor bar doctrine can apply to an incumbent mixed guard-nonguard union representing a unit of guards. If UGL-UNICCO is applied retroactively in this situation, then the April 2011 election improperly occurred during the six-month reasonable period of time for bargaining. In that case, the Region would have to set aside the election now. On the other hand, if the Board would not apply successor bar where the recognized union is nonqualified under Section 9(b)(3), then the April 2011 election was not barred, and the ballots could be opened and counted.

Detailed facts re: FJC's recognition and bargaining with Local 32BJ

As stated above, FJC contracted with Port Authority to provide security services at JFK and LaGuardia airports, for a four-year period from February 1, 2011, to January 31, 2015. FJC employs approximately 283 security officers under the Port Authority contract at JFK, and approximately 130 at LaGuardia. Thus, the petitioned-for unit has approximately 413 security officers combined at the two airports.

Back in 2007, Covenant Aviation Security won the Port Authority contract for guards at both JFK and LaGuardia. Covenant voluntarily recognized Local 32BJ as the collective bargaining representative of the security officers. The Covenant – Local 32BJ collective bargaining agreement (Jt. Ex. 4) was effective from September 1, 2007, to January 31, 2011.

In the meantime, Local 32BJ developed a collective bargaining relationship with FJC at other sites. Those parties signed a Memorandum of Agreement in 2009 (Jt. Ex. 7, which the parties also called the “Master Agreement”) in which FJC recognized Local 32BJ as representative of a broad range of security officers in the greater New York and New Jersey area. Local 32BJ associate general counsel Elizabeth Baker testified that the parties also apply separate contractual “riders” to employees at specific sites. Indeed, after FJC was awarded a contract to provide security services at various Port Authority locations including Newark Liberty Airport in 2008, FJC and Local 32BJ had negotiated a “Port Authority Rider” (Jt. Ex. 6).⁴ This rider was scheduled to expire on March 1, 2011, a few weeks after the pre-election hearing in the instant case.

FJC’s senior vice president David Link, Jr. testified that Port Authority awarded the 2011-2015 contract at JFK and LaGuardia to FJC on December 28, 2010, about one month before predecessor Covenant’s contract was scheduled to expire (on Jan. 31, 2011). Link further testified that FJC followed its usual practice of hiring its predecessor’s employees (i.e., the Covenant employees) after a vetting process. All of the security officers hired by FJC for the JFK and LaGuardia sites were former Covenant employees there, and FJC voluntarily recognized Local 32BJ as the employees’ representative. On January 20, 2011, FJC and Local 32BJ signed a letter (Jt. Ex. 5) which: (1) acknowledged the recognition; (2) merged the former Covenant unit at JFK

⁴ The Port Authority Rider covers a unit of approximately 680 to 700 FJC employees working at Newark Liberty Airport, as well as PATH train locations, The Teleport in Staten Island, bridges in Staten Island, the George Washington Bridge, various office properties leased by Port Authority in NY and NJ, the World Trade Center site, Port Ivory in Staten Island, the Bathgate Industrial Park in the Bronx, and the Brooklyn Cruise Terminal. The contract effective dates are “August 8, 2007” to March 1, 2011. Link stated that he did not know why the contract started in August 2007, months before its Port Authority contract took effect in March 2008.

and LaGuardia into the larger FJC-Local 32BJ unit covering all of the Port Authority sites; and (3) stated that the parties would apply the existing Port Authority Rider and Master MOA (Jt. Exs. 6 and 7) to employees at JFK and LaGuardia, with certain specified modifications. Baker testified that, around the same time as January 20 recognition letter, the parties started negotiations for a new Port Authority Rider, which would cover *all* of FJC's locations under Port Authority contract, including the newly-added employees at JFK and LaGuardia.⁵ Baker further testified that, as of the date of the pre-election hearing in February 2011, two negotiating sessions had taken place, and a third was scheduled for the week after the hearing.

The parties stipulated that there is no contract bar to an election in this proceeding. It should be noted that, at the time SSOBA filed its petition on February 1, 2011, the FJC – Local 32BJ 2007- 2011 Port Authority Rider being applied to the petitioned-for employees at JFK and LaGuardia (as modified in the recognition letter, Jt. Ex. 5) was in its fourth year.

Finally, the parties' recent stipulation revealed that FJC and 32BJ met to negotiate a new Port Authority Rider several times in 2011, including dates in January, February, May and November. However, those parties did not reach a final agreement.

DISCUSSION

This case brings together various seemingly-contradictory concerns.

On one hand, in adopting election-related bars, the Board has sought to protect

⁵ Adding the number of FJC employees under the Port Authority contract at JFK and LaGuardia (414) to the existing unit of FJC employees under the 2007 -2011 Port Authority Rider at Newark Liberty Airport and other locations (approx. 680 -700), the bargaining unit represented by Local 32BJ would total about 1094 to 1114.

newly-recognized unions, giving them a fair chance to bargain collectively on behalf of employees without challenge to their status. The Board finds this protection especially important in successor situations, where the change of employers may “seriously destabilize” collective bargaining. UGL-UNICCO, *supra*, 357 NLRB No. 76, slip op. at 5.

On the other hand, Congress’ enactment of Section 9(b)(3) of the Act reflects its concern about the risk of divided loyalty if an employer’s guards were members of the same union as nonguard employees. Congress sought to discourage “mixed” guard unions and nonguard unions from representing units of guards by making the certification process unavailable to them. This area of the law, in turn, contains its own internal tensions between conflicting concerns, i.e., the Board’s desire to carry out Congress’ intent in enacting Section 9(b)(3) while still preserving some labor stability where nonqualified unions in fact represent guard units.

For example, the Board has held that it is not unlawful for an employer to extend voluntary recognition to a mixed guard/nonguard union. Wells Fargo Armored Service Corp., 270 NLRB 787 (1984) at fn. 5, citing NLRB v. Motor Corp., 404 F.2d 1100 (6th Cir. 1968). The Board has also held that, where a nonqualified union represents a unit of guards and has a contract in effect, the contract may bar an election. Burns International Detective Agency, 134 NLRB 451 (1962); Stay Security, 311 NLRB 252 (1993). Furthermore, even where an employer has voluntarily recognized a nonguard union to represent an inappropriate mixed unit of guards and nonguards, the Board will not entertain an employer’s petition to clarify the guards out of the unit during a contract term. Wallace-Murray Corp., 192 NLRB 1090 (1971). Thus, at least in some

circumstances, the Board extends protection to the collective bargaining relationship involving nonqualified unions representing guards.

However, consistent with Congress' intent, the Board has refused to allow nonguard unions to intervene or participate in elections for guard units. University of Chicago, 272 NLRB 873 (1984). And in Brink's, 272 NLRB 868 (1984), the Board held that an incumbent-but-nonqualified union representing a guards unit cannot use the Board's unit clarification procedure to clarify additional employees into the unit. Furthermore, in Wells Fargo Armored Service Corp., 270 NLRB 787 (1984), *aff'd* 755 F.2d 5 (2nd Cir. 1985), *cert. denied* 474 U.S. 901 (1985), the Board held that an employer has the right to unilaterally withdraw recognition of a mixed-guard union upon the expiration of the collective bargaining agreement, and that it (the Board) would not issue a bargaining order to remedy the alleged violation of Section 8(a)(5) in those circumstances. See also Temple Security Inc., 328 NLRB 663 (1999)(employer allowed to withdraw recognition of nonguard union representing guards unit, after expiration of collective bargaining agreement); Northwest Protective Service, Inc., 342 NLRB 1201 (2004). Thus, to some extent, the Board has expressed reluctance to allow nonqualified unions to use the Board's processes (such as unit clarification or bargaining orders) to gain what they could not gain via certification.

It appears that the Board has never precisely considered recognition bar or successor bar in the context of an incumbent but nonqualified union under Section 9(b)(3). The Region could find no case law exactly on point, nor do the parties cite any in their briefs. Nevertheless, in this procedural posture, the Board has asked the Region to reconsider its prior Decision in light of the renewed successor bar doctrine. The

undersigned will therefore attempt to reconcile the somewhat-conflicting concerns described above, as I believe the Board would reconcile them.

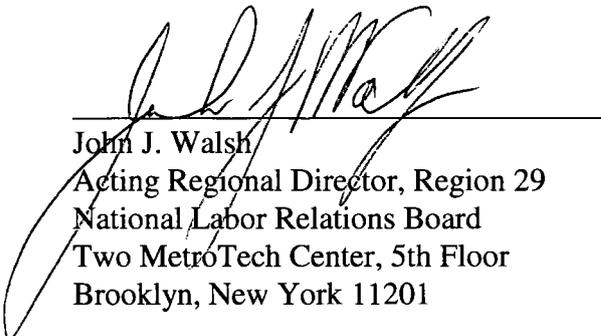
After consideration of all the foregoing principles, it is my view that the Board would not apply successor bar in the context of an incumbent-but-nonqualified union. It appears from the cases cited above that the Board's protection of stability in such cases may apply *only* when a collective bargaining agreement is in effect, such as the contract given bar quality in Stay Security, *supra*. Given Congress' intent to disfavor nonqualified unions when it enacted Section 9(b)(3), it appears that the Board would not extend protection to the status of such unions when there is no contract in effect. To that end, if FJC decided to withdraw recognition prior to execution of a collective bargaining agreement, Local 32BJ would have no recourse to the Board's processes. Accordingly, despite the Board's concern for nascent collective bargaining relationships in the successor situation, I do not believe the Board would bar an election sought by a guards' union while a nonqualified union representing a unit of guards attempts to negotiate its first contract with a successor employer.

I therefore conclude that the April 2011 election herein, conducted pursuant SSOBA's petition, was not barred at that time by the nascent successor relationship between FJC Security and Local 32BJ at the petitioned-for JFK and LaGuardia sites. Accordingly, based on all the foregoing, I recommend opening the ballots from April 2011 election and issuing the appropriate tally and certification.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 7, 2012**. The request may be filed electronically through the Agency's website, www.nlr.gov,⁶ but may **not** be filed by facsimile.

Dated: February 22, 2012.



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⁶ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, click on the NLRB Case Number, and follow the detailed instructions.