

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

ARIZONA PUBLIC SERVICE COMPANY

Employer

and

Case 28-RC-093861

**UNITED SECURITY PROFESSIONALS
OF AMERICA, INTERNATIONAL UNION
(USPA) AND ITS LOCAL #08**

Petitioner

and

**INTERNATIONAL UNION OF SECURITY,
POLICE, AND FIRE PROFESSIONALS OF
AMERICA (SPFFA) AND ITS LOCAL #820**

Incumbent Union

DECISION AND DIRECTION OF ELECTION

The United Security Professionals of America, International Union (USPA) and its Local #08 (the Petitioner) seek to represent a unit consisting of all full-time and part-time security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act (the Act) employed by Arizona Public Service Company (the Employer) at the Palo Verde Nuclear Generating Station near Wintersburg and Tonopah, Arizona, (the Unit). The Unit employees are currently represented by the International Union of Security, Police and Fire Professionals of America (SPFFA) and Its Local #820 (the Incumbent). The Employer and the Incumbent are currently parties to a collective-bargaining agreement which is effective by its terms from February 1, 2010, to February 1, 2013. The Incumbent, which did not make an appearance at or participate in the hearing conducted in this matter, contends that the Petition should be dismissed because the Petitioner's status as a labor organization eligible to represent a unit of security guards under Section 9(b)(3) of the Act is unclear.¹ The

¹ The Petition in this matter was filed on November 28, 2012. On November 29, 2012, the Region issued a Notice of Representation Hearing, accompanied by an Affidavit of Service, to the Employer, the Incumbent, and the Petitioner, informing them that a representation hearing would be held on December 5, 2012, at 9:00 a.m., at the Region's office in Phoenix, Arizona. The Region also notified the Incumbent's representatives, during a telephone call, of the scheduled hearing. The Incumbent's counsel informed the Region, by telephone, that the Incumbent would not make an appearance at the hearing. On December 5, 2012, the Incumbent filed with the Region a Motion to Dismiss the Petition and for Other Relief, a Motion to Intervene, and a Notice of Appearance by counsel. The Acting Regional Director referred the Motion to Dismiss and for Other Relief to the Hearing

Employer and Petitioner do not contest the appropriateness of the Unit or the Petitioner's status as a labor organization, or that the Petitioner is a labor organization eligible to represent a unit of security guards under Section 9(b)(3) of the Act. In addition, this case presents the issue of whether the Petition is barred by the existence of the collective-bargaining agreement described above. Based on the record as a whole, and for the reasons more fully describe below, I find that the Petitioner is a labor organization under the Act and is not barred by Section 9(b)(3) from representing the Unit, and that there is no contract in place which would bar an election.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. Hearing and Procedures: The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. Jurisdiction: The record establishes and I find that the Employer, Arizona Public Service Company, a subsidiary of Pinnacle West Capital Corporation, is engaged in the generation and transmission of electricity within the State of Arizona. During the past 12 months the Employer, in conducting its business operations described above, derived gross revenues in excess of \$250,000 and purchased and received at its Arizona facilities goods valued in excess of \$50,000 directly from points outside the State of Arizona. I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is subject to the jurisdiction of the Board.

3. Claim of Representation: This case presents the question of whether the Petitioner is a labor organization eligible to represent guards within the meaning of Section 9(b)(3) of the Act. For the reasons discussed below, I conclude that the Petitioner is a labor organization within the meaning of Section 2(5) and eligible to represent guards within the meaning of Section 9(b)(3) of the Act. The record also establishes, and I find, that the Incumbent is a labor organization within the meaning of Section 2(5) and is eligible to represent guards under Section 9(b)(3) of the Act.

A. Background

The Employer is engaged in the generation and transmission of electricity in Arizona. It maintains a number of facilities, including the Palo Verde Nuclear Generating Station (the Employer's facility), which is located west of Phoenix, Arizona. The Incumbent was originally certified as the representative of the Unit in Case 28-RC-4903. Since the

Officer. At hearing, the Hearing Officer denied the Incumbent's Motion to Intervene, noting that the Incumbent was already party to the proceeding and had an interest in the matter. In addition to the foregoing, I hereby dismiss the Incumbent's Motion to Intervene and for Other Relief. The record shows that though the Incumbent did not participate at hearing, the issues raised by Incumbent's Motion to Intervene and for Other Relief were fully litigated at hearing.

certification the Incumbent and the Employer have been parties to a series of collective-bargaining agreements covering the terms and conditions of the petitioned-for Unit.² The most recent, and current, contract is effective by its terms from February 1, 2010, to February 1, 2013 (the CBA). In addition, the Incumbent and Employer are parties to several Letters of Mutual Understanding (MOUs), none of which extend the expiration date of the CBA.

B. Petitioner’s Status as a Labor Organization Eligible to Represent Guards Under Section 9(b)(3) of the Act

One of the principal issues presented in this case is whether the Petitioner is eligible to represent guards under Section 9(b)(3) of the Act. Under Section 2(5) of the Act, a statutory “labor organization” may be any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Act also provides, at Section 9(b)(3), that in determining appropriate bargaining units, the Board shall not:

...decide that any unit is appropriate for such purposes 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.

No party contends that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act. To the contrary, the record shows, and I find, that Petitioner is a labor organization under Section 2(5). As to Petitioner’s status under Section 9(b)(3) of the Act, the record establishes that the Petitioner – the International and its locals – exclusively represents guards. It does not represent any non-guard employees. The Petitioner is not affiliated with any other unions that represent employees other than guards. Accordingly, the record shows, and I find, that the Petitioner is eligible under Section 9(b)(3) to represent employees in the Unit at issue in this case.

4. Statutory Question: A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

²The parties appearing at hearing agreed that the Unit at issue in this case is that which is currently represented by the Incumbent.

5. Unit Finding

The record shows, the Employer and the Petitioner agree, and I find, that the Unit petitioned-for is comprised of full-time and regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the Act and is an appropriate unit under the Act. In addition, the record shows, and I find, that the Petition was timely filed and is not barred by the existence of a contract.

A. The Petition Was Timely Filed During the Open Period and Is Not Barred by the Existing Collective-Bargaining Agreement

The Incumbent's majority status is presumed for the duration of the contract, not to exceed three years, and the contract constitutes a "bar" to the filing of a representation petition. *El Torito-La Fiesta Restaurants, Inc. v. N.L.R.B.*, 929 F.2d 490, (9th Cir. 1991); *Pioneer Inn Associates v. N.L.R.B.*, 578 F.2d 835 (9th Cir. 1978) (contract-bar rule applies even if majority of employees withdraw their support of union). As noted above, the Incumbent and Employer are parties to the CBA, which is effective by its terms from February 1, 2010, to February 1, 2013. The Petition in this case was filed on November 28, 2012, and served on the Employer and the Incumbent on November 29, 2012.

Though the Petition was filed during the effective dates of the parties' CBA, that fact does not bar the processing of the Petition or the directing of a representation election. The Board provides for the filing and processing of representation petitions during a 30-day "open period" between the 90th and 60th days prior to the expiration date of an existing collective-bargaining agreement, followed by a 60-day "insulated period" during which no petition can be timely filed. *Trinity Lutheran Hosp.*, 218 NLRB 199 (1975) and *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962). Accordingly, inasmuch as the instant Petition was filed within the open period, I find that the processing of the Petition and the conduct of an election based on such a petition are not barred by the existence of the CBA.

Based on the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time security officers employed by the Employer at its Palo Verde Nuclear Generating Station located near Wintersburg, Arizona; excluding all other employees, office clerical employees, professional employees, sergeants, captains, leaders, and supervisors as defined in the Act.

There are approximately 232 employees in the Unit found appropriate herein.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election that will issue subject to the Board's Rules and Regulations.³ The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

**UNITED SECURITY PROFESSIONALS OF AMERICA,
INTERNATIONAL UNION (USPA) AND ITS LOCAL #08,**

or

**INTERNATIONAL UNION, SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA (SPFPA)) AND ITS LOCAL #820**

or

NEITHER

³ Employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election. The notices shall remain posted until the end of the election. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays. A party shall be estopped from objecting to non-posting of notices if it is responsible for the non-posting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least five days prior to the commencement of the election that it has not received copies of the election notice. Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within **seven (7) days** of the date of this Decision, the Employer file with the undersigned, two (2) copies of election eligibility lists containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Regional Office, 2600 North Central Avenue, Suite 1400, Phoenix, Arizona, 85004, on or before **December 28, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

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, DC 20570-0001. This request must be received by the Board in Washington by January 4, 2013. The request may be filed electronically through the Agency's website, www.nlr.gov.⁴ The request may not be filed by facsimile.

Dated at Phoenix, Arizona, this 21st day of December 2012.

/s/ Michael J. Karlson

Michael J. Karlson, Acting Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004

⁴ To file the request for review electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located on the Agency's website, www.nlr.gov.