BEFORE THE
NATIONAL LABOR RELATIONS BOARD

FJC SECURITY SERVICES, INC.,

Employer,

SPECIAL AND SUPERIOR OFFICERS BENEVOLENT ASSOCIATION,

Petitioner, 29-RC-11999

LOCAL 32BJ, SERVICE EMPLYEES INTERNATIONAL UNION, AFL-CIO, CLC

Intervenor,

LOCAL 971/550 NATIONAL SECURITY OFFICERS BENEVOLENT ASSOCIATION

Intervenor.

SPECIAL AND SUPERIOR OFFICERS BENEVOLENT ASSOCIATION'S STATEMENT IN OPPOSITION TO SEIU LOCAL 32BJ'S REQUEST FOR REVIEW

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STATEMENT OF RELEVANT FACTS

The Port Authority of New York and New Jersey (Port) contracts with private security companies to provide security guard services at various Port locations. These contracts have a four year term and grant the Port the exclusive right to renew the contract for up to two additional two year terms. Exhibits P-2, P-3.

The Petitioned–For Unit

The guards in the petitioned-for unit work at JFK and LaGuardia airports pursuant to a contract that was recently entered into between FJC and the Port. This contract is effective for the four year term February 1, 2011 to January 31, 2015. Tr. 94. The guards in the petitioned-for unit worked for Covenant Aviation Security LLC (Covenant) up until January 31, 2011, when FJC took over the operations at JFK and LaGuardia airports. During the time Covenant had the Port contract for JFK and LaGuardia airports, the guards in the petitioned-for unit were represented by Local 32BJ pursuant to a voluntary recognition. Board Exhibit 2 (Stipulation 7(c)).

Before they worked for Covenant, the guards in the petitioned-for unit worked for Haynes Security Incorporated (Haynes). During the time Haynes had the Port contract for JFK and LaGuardia airports, the guards in the petitioned-for unit were represented by the Special and Superior Officers Benevolent Association (SSOBA). During the time the guards in the petitioned-for unit worked for Haynes, the Port combined the JFK airport and LaGuardia airport into one Port contract, at which time the JFK and LaGuardia bargaining units became

one. Stipulation 7(b).

Before they worked for Haynes, the guards at JFK, which at the time were considered a separate bargaining unit, worked for FJC. In 1996, the Board certified the SSOBA as the exclusive bargaining representative of the FJC guards working at JFK under FJC's contract with the Port. Stipulation 7(a); Exhibit P-1 (Decision and Certification of Representative in Case No. 29-RC-8546).

The Other Port Sites

In addition to having the Port contract for JFK/LaGuardia where the petitioned-for bargaining unit employees work, FJC also has a contract covering fourteen other Port sites in New Jersey and New York, which was referred to at the hearing as the Port Consolidated Contract. Tr. 63. The term of the current Port Consolidated Contract is March 1, 2008 to February 29, 2012. Exhibit P-3; Tr. 62, 89. Because the contract expires February 29, 2012, the Port will put the contract out to bid 120 days before the expiration date, Tr. 93, *i.e.*, November 1, 2011, which is only about seven months from now, and probably much less by the time the Board issues its decision. As noted above, the Port contract for JFK/LaGuardia, which covers the petitioned-for unit, expires January 31, 2015. Tr. 84.

The project sites covered under the Port Consolidated Contract are:

- Newark Airport, where FJC employs 275 guards. Tr. 59.
- PATH trains, where FJC employs 75 guards. *Id.*
- The Teleport, where FJC employs 25 guards. Tr. 60.
- Staten Island Bridges, where FJC employs 35 guards. *Id.*

- George Washington Bridge, where FJC employs 30 guards. *Id.*
- New York leased properties (4 buildings), where FJC employs 25 guards. *Id.*
- New Jersey leased properties (1 building), where FJC employs 6 guards. *Id.*
- World Trade Center site, where FJC employs 180 guards. Tr. 61.
- Port Ivory in Staten Island, where FJC employs 12 guards. *Id.*
- Bathgate Industrial Park, where FJC employs 6 guards. *Id.*
- Brooklyn Cruse Terminal, where FJC employs between 11-30 guards. *Id.*

Based upon FJC Senior Vice President David Link's employee head count, therefore, FJC employs approximately 700 security guards at the consolidated sites.

Mr. Link testified that the sites were consolidated by the Port in 2003. Tr. 63. He also testified that at the time FJC was awarded the Port Consolidated Contract, the guards at each site were employed by assorted private security guard companies, such as Haynes, each of which had individual contracts with the Port. Tr. 63-64.

Mr. Link testified that at some point FJC extended voluntary recognition to Local 32BJ. Tr. 108. As confirmed by Elizabeth Baker, in-house counsel for Local 32BJ, none of the guards employed by FJC that Local 32BJ represents have ever had an opportunity to vote whether they wish to be represented by Local 32BJ. Tr. 158.

FJC's and Local 32BJ's Attempt to Accrete the JFK/LaGuardia Airport Bargaining Unit into the Port Consolidated Contract Bargaining Unit

Even before it commenced operations at JFK/LaGuardia on February 1, 2011, FJC and Local 32BJ agreed that the 413 member bargaining unit of

JFK/LaGuardia guards would "merge" into the approximately 700 member Port Consolidated Contract bargaining unit.[1] *See* Joint Exhibit 5. Accordingly, the newly constituted merged unit swelled to over 1,100 members, none of whom have ever had an opportunity to vote in an election to determine if they wanted Local 32BJ to be their exclusive bargaining representative. Tr.157-58.

ARGUMENT

This case does not involve run of the mill representation case issues. Local 32BJ's request for review asks the Board to rewrite close to thirty years of well established law concerning § 9(b)(3). *See* Request for Review - Arguments B and C at 8-29. It is the SSOBA's understanding that the efforts of Local 32BJ and other SEIU locals across the county to organize security guards is part of a policy instituted at the international level to increase its "market share" in the representation business.

Although the SEIU clearly is free to explore potential areas in which to grow its business, it would be improper for its former associate general counsel to participate in the Board's decision making process, if for no other reason than the apparent appearance of a potential conflict of interest or impropriety in that deciding this case would create in reasonable minds a perception that Member Becker's impartiality could be impaired. *See SEIU Local 121RN (Pomona Valley Hospital)*, 355 NLRB No. 40 (2010) at 5-13 (Member Becker's rulings on various recusal motions).

[1] Mr. Link testified that 283 guards work at JFK and 130 work at LaGuardia. Tr. 69.

Unlike *Watkins Security Agency of D.C., Inc.*, 356 NLRB No. 12 (2010), where Member Becker participated in the decision to remand the case for a hearing, this case puts the merits of the issue squarely before the Board.

This is not a plain vanilla Board case. It is a case where Local 32BJ candidly seeks have the Board effectively eviscerate § 9(b)(3) of the Act. Common sense and fundamental principles requiring unquestionable impartiality required of any adjudicative body dictate that a former SEIU attorney should not be part of the decision making process in this case.

POINT ONE

THE REGIONAL DIRECTOR CORRECTLY RULED THAT LOCAL 32BJ CANNOT BE ON THE BALLOT BECAUSE IT IS A MIXED GUARD UNION

The Parties stipulated that the SSOBA is a labor organization that admits to membership only guards. Board Exhibit 2 (Stipulation No. 3). The Parties also stipulated that Local 32BJ admits into membership non-guards. Stipulation No. 2.

Section 9(b)(3) of the Act states that "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." In this regard, "although the Board does not prohibit employers from voluntarily recognizing such labor organizations to represent units of guard employees or even mixed units, *we will not permit the Board's processes to be utilized to that end.*" *Brink's Inc.*, 272 NLRB 868, 870 (1984) (emphasis added).

It is undisputed that Local 32BJ is not a § 9(b)(3) labor organization. Stipulation No. 4. Indeed, its parent organization, the Service Employees International Union, is best known for representing residential and commercial building maintenance employees. Therefore, under the plain language of the Act and well established Board law, Local 32BJ is not eligible to represent the FJC guards by way of a Board certification. Accordingly, the Regional Director correctly ruled that Local 32BJ lacks standing to be an intervenor in this RC case.

In *University of Chicago*, 272 NLRB 873, 874 (1984), decided the same day as *Brink's*, the Board held that mixed guard unions are not entitled to intervene in representation cases:

> [W]e have reevaluated our policy regarding intervention by noncertifiable unions in Board conducted elections. We have carefully considered the language and the history of Section 9(b)(3) and conclude that its purpose was to prevent a guard-nonguard union from participating in a Board-conducted election as either a petitioner or an intervenor.

Applying the *University of Chicago* rule in this case makes perfect sense. There simply is no point in allowing Local 32BJ to intervene because it is statutorily precluded from being certified. There's no reason, therefore, for it to appear on the ballot. Granting intervenor status would be tantamount to permitting the Board's processes to be utilized to an unauthorized end, which is contrary to *Brink's* and its progeny.

Recognizing that *University of Chicago* keeps it off the ballot, Local 32BJ asks the Board to overrule that decision. Tr. 167. The Board is urged to reject Local 32BJ's invitation to overturn twenty-seven years of settled Board law. Allowing a union that cannot as a matter of law be certified makes no sense and

serves no purpose. If the guard employees do not wish to be represented by the guard only union(s) on the ballot, they are free to exercise their § 7 right to vote no, in which case they will be free to sign authorization cards for a mixed union, like Local 32BJ, which then could seek voluntary recognition – which is what they do now. *See University of Chicago*, 272 NLRB at 876 n.25 ("Under our interpretation of Sec 9(b)(3) guards retain their Sec 7 right to select a union of their choice including a guard nonguard union but the Board will not encourage such a selection by affording a guard nonguard union – in the capacity of an intervenor – access to a Board conducted election.").

Local 32BJ has not proffered any compelling reason for the Board to reconsider let alone overrule *Brink's* and *University of Chicago.* Rather, when the onion is peeled, the only reason appears to be that the SEIU has made the business decision to increase its membership rolls by organizing security guards. The Act, however, was not enacted to benefit the business objectives of labor organizations.

In a creative attempt to evade the plain language of § 9(b)(3), Local 32BJ argues that § 9(b)(3) only applies when the guards protect the property of a statutory employer and, in this case, the Port Authority is not an employer under the Act. Local 32BJ presented this argument in *Watkins Security Agency of D.C., Inc.,* 356 NLRB No. 12 (2010). Although the Board remanded the case for a hearing, the dissent eloquently exposed the flaws in Local 32BJ's argument:

> The theory upon which the remand here is based essentially holds that Section 9(b)(3) of the Act should be construed to mean that guards who in fact perform guard duties at the premises of employers that are not covered by the Act are nonguards as a matter of law. That such a tortured

> reading would lead to an untenable result should come as little surprise, and is amply illustrated by the obvious result in the present case. Here, the Petitioner, a union which admits to membership *only guards,* sought to represent a unit of guards. However, if the Intervenor's semantic slight of hand passes muster with my colleagues, such guards have become nonguards. Then the Petitioner faces a substantial challenge to the purpose for which it was founded. It could continue to participate in this election proceeding, but a victory in that election would be most Pyrrhic. The Petitioner would then admit to membership nonguards, barring it from thereafter participating in elections to represent statutory guards and placing its representation of other statutory guard units at risk.
>
> Thus, unions that exclusively represent guard units whose members protect the property of private sector entities would effectively be barred from representing guards who are, or may be, assigned to protect the property of a public or other nonstatutory employer. On the other hand, unions that clearly admit nonguards to membership could be certified to also represent guards based solely on the happenstance of whose premises they happened to be assigned to protect. I do not believe that Section 9(b)(3) was enacted either to effectively bar traditional guard unions from representing those employed as guards on the premises of nonstatutory employers; or, to insure that such guards can be represented solely by unions which admit to membership only nonguards.

The Board is urged to adopt the rationale set forth in Member Hayes' well reasoned dissent in *Watkins* and reject Local 32BJ's attempt to turn § 9(b)(3) on its ear. As the Regional Director stated in his Order Denying Motion to Intervene in the *Watkins* case:

> A plain reading of [§ 9(b)(3)] demonstrates that it includes two separate, distinct, and independent prohibitions: (1) against combining in a single bargaining unit guards and nonguard employees of an employer; and (2) against certifying a labor organization as the representative of a unit of guards if it admits to membership, or is affiliated with an organization which admits to membership, employees other than guards. While Local 32BJ's argument that the District of Columbia is not an "employer" as defined in Sec. 2(2) has relevance to the first prohibition, it has no application to the second since that prohibition does not mention an "employer." Rather, the second prohibition comes into play where a "labor organization" seeks certification in a unit of "guards," and the labor organization (or one with which it is directly or indirectly affiliated) admits into membership "employees" other than guards.

Id. at 3 (the Board may take administrative notice of the RD's Order in Case 5-RC-16491, dated August 16, 2010, which is available on the Board's website). *See also Firstline Transportation Security, Inc.*, 347 NLRB 447 (2006) (holding that private security company that provides airport screening services pursuant to a contract with the Transportation Security Administration is subject to the Board's jurisdiction and noting (at p. 449) that the Regional Director found that § 9(b)(3) precluded the Steelworkers and Machinists from representing the guards).

Finally, even if Local 32BJ's premise was legally viable, the record in this case reveals that the guards do, in fact, protect property of private entities, such as the private airlines that have airplanes and equipment at the airport. In this regard, FJC's David Link testified that the guards protect both "air side" areas where planes take off and "land side" areas, which are the "passenger public viewing section of the airport." Tr. 146. As Mr. Link acknowledged, the guards' functions include preventing, observing and reporting unauthorized entrance into the jet way area and hangers where damage might be done to an airplane. Tr. 131-33. *See also* Tr. 122 (guards also responsible for enforcing FJC rules and policies); Tr. 72 (guards patrol parking lots at the airports). Accordingly, not only do the guards protect Port property, they protect the property of non-public employers, which even under Local 32BJ's theory brings them within the scope of § 9(b)(3).

For all these reasons and those stated in the Regional Director's Decision and Direction of Election, Local 32BJ's request for review should be denied.

POINT TWO

THE REGIONAL DIRECTOR CORRECTLY RULED THAT THE ELECTION SHOULD NOT BE DELAYED UNTIL THE BOARD ISSUES A DECISION IN *UGL-UNICCO SERVICE COMPANY*

There is no legitimate justification for the Board to sit on this case until it issues a decision in *UGL-UNICCO Service Company*, 355 NLRB No. 155 (2010) (granting review in order to decide whether it should modify or overrule *MV Transportation*, 337 NLRB 770 (2002), and return to the successor bar doctrine as set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999)).[2]

The fact that *UGL-UNICCO* is before the Board is no reason to put off certifying the election results here. First off, it is speculative that the Board will modify or overrule *MV Transportation.* Moreover, even if the Board decides to modify *MV Transportation*, it is speculative that the modification would necessarily impact upon the disposition of this case. Further, given the uncertainties of litigation, it is unknown whether *UGL-UNICCO* ultimately will even result in a Board decision. For example, following the Board's remand in *Watkins Security Agency of D.C., Inc.,* 356 NLRB No. 12 (2010), discussed in Point One of this Statement, it appears from the Board's website that the case (5-RC-016491) is closed because the Petition was withdrawn.

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[2] The Board asked that the following questions be addressed: "(1) Should the Board reconsider or modify *MV Transportation*? (2) How should the Board treat the "perfectly clear" successor situation, as defined by *NLRB v. Burns Security Services*, 406 U.S. 272, 294 295 (1972), and subsequent Board precedent? Notice and Invitation to File Briefs at 2.

Second, as the Regional Director observed, Local 32BJ already obtained all of the benefits of a successor bar before the petition was filed. It not only had an opportunity to bargain with FJC, it entered into two written agreements with FJC covering the unit of guards at JFK/LaGuardia. *See* Joint Exhibit 5; Intervenor Exhibit 1. The fact that Local 32BJ and FJC opted to negotiate and sign the agreements they did rather than a true collective bargaining agreement covering the JFK/LaGuardia guards was a conscious decision on their part.

Nothing prevented Local 32BJ and FJC from signing a CBA covering the former Covenant employees working at JFK/LaGuardia, which may have resulted in a contract bar in this case. Instead, for reasons known only to them, Local 32BJ and FJC determined that it was in their respective institutional interests for the JFK/LaGuardia guards to lose their historic separate identity through a merger or so-called accretion of the JFK/LaGuardia guards into a bargaining unit covering guards working for FJC at the other Port sites. *See* Joint Exhibit 5. The obvious benefit to Local 32BJ, if the tactic succeeded, would have been that the JFK/LaGuardia guards would not so easily be able to decertify from the Port-wide bargaining unit. The SSOBA believes the JFK/LaGuardia guards wanted nothing to do with such a ploy and sought out the SSOBA to again be their bargaining representative. If that's what the employees want, they will elect the SSOBA (or the sham intervenor Local 971/550 National Security Officers Benevolent Association) as their bargaining representative in the Board election. If that's not what they want, they are free to reject the SSOBA (and the sham intervenor Local 971/550) at the ballot box. In that case, the JFK/LaGuardia guards presumably

will be caught back in the net of the Local 32BJ-FJC recognition agreement. But at least they will have had an opportunity to vote in a Board election, which is more than they'll ever have if Local 32BJ has its way. The purposes of the Act in protecting the representational interests of employees, as opposed to the institutional interests of labor organizations and employers, thus will be served.

Finally, with all due respect, the Board's track record of deciding cases in less than an expeditious manner does not bode well for a decision in *UGL-UNICCO* issuing any time soon. For example, the Board decision in *Dana Corporation*, 356 NLRB No. 49 (2010) notes that the Board issued a notice and invitation to the parties and interested amici to file briefs addressing certain issues in the case on March 30, 2006. The *Dana* decision, however, did not issue until December 6, 2010, more than four years and eight months later. In this case, FJC's contract with Port for the JFK/LaGuardia project expires in early 2015. After that, it's unknown whether FJC will even remain at the site or if a new contractor will be awarded the Port contact. Therefore, to delay processing of the Petition could well result in the guards being unable to exercise their § 7 rights to select a bargaining representative of their own choosing while they are FJC employees.

CONCLUSION

For all the foregoing reasons and those stated in the Regional Director's Decision and Direction of Election, the Board is urged to dismiss Local 32BJ's request for review.

Dated: Melville, New York
April 8, 2011

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE BY E-MAIL

I certify that on April 8, 2011, I served the foregoing **SPECIAL AND SUPERIOR OFFICERS BENEVOLENT ASSOCIATION'S STATEMENT IN OPPOSITION TO SEUI LOCAL 32BJ'S REQUEST FOR REVIEW** upon:

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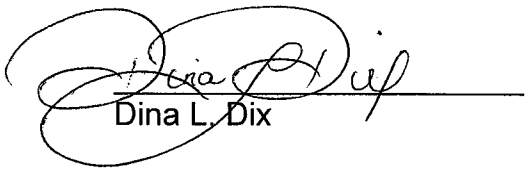

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