UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE

DCI UTILITY INFRASTRUCTURE SERVICES, LLC
(DCI-UIS), wholly owned by DYNAMIC CONCEPTS, INC.[1]

Employer

and Case 05-RC-109209

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 77, AFL-CIO

Petitioner

and

GENERAL AND CONSTRUCTION LABORERS'
LOCAL UNION 657

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, by International Union of Operating Engineers, Local 77, AFL-CIO, herein the Petitioner, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board. The petition, as amended at the hearing, seeks a unit of all full-time and regular part-time engineers[2] who operate or perform work on heavy equipment, excluding all office clerical, professional employees, guards, and supervisors as defined in the Act.

[1] The petition was amended at the hearing to reflect the full and correct legal names of the Employer, Petitioner, and Intervenor.

[2] The employees in the petitioned-for unit are also referred to as "operators" throughout the hearing record.

I. ISSUE & POSITIONS OF THE PARTIES

The central issues in this case are whether the Board's recognition bar or contract bar doctrines prevent the processing of the petition. The Intervenor and the Employer both claim that the petition is barred by the Employer's voluntary recognition of the Intervenor on May 28, May 30, and/or June 14, 2013,[3] and further by Section 9(a) collective-bargaining agreements of May 30 and June 14. The Petitioner contends that the Intervenor and Employer have failed to meet their burdens of establishing these bars, and to find otherwise would deny a historically separate unit of engineers the opportunity to select the bargaining representative of their choosing.

Based on the record as a whole, and careful consideration of the arguments of the parties at hearing and in brief, I find that there is no recognition bar, but the Employer-Intervenor June 14 collective-bargaining agreement bars the processing of the petition.

II. FACTS

The record shows that for a significant period of time, D.A. Foster Trenching Co., herein Foster, performed work for Washington Gas Company within the District of Columbia. Foster installed new gas services, replaced existing gas service lines, and performed emergency work. Relevant to this case, Foster employed laborers, pipefitters, foremen, and operating engineers under two collective-bargaining agreements. Foster entered into a collective-bargaining agreement with the Petitioner on July 17, 2010, pursuant to Section 8(f) of the Act, covering the

[3] All dates are 2013 unless otherwise indicated.

employees in the petitioned-for unit. This contract had an expiration date of June 30, 2013.[4] The record shows that Foster has had collective-bargaining agreements with the Petitioner covering this unit since at least 2007, which was when Owner William McGolrick's time at Foster began.

Foster and the Intervenor were also parties to a collective-bargaining agreement, which covered laborers, pipefitters, and some foremen. Orlando Bonilla, who is the Business Manager for the Intervenor's parent District Council, testified that the Intervenor had represented its unit at Foster for at least the past 20 years. Fosters's agreement with the Intervenor expired sometime in early 2013.[5]

In February, Foster began having discussions with Dynamic Concepts, Inc. to assign Foster's contract with Washington Gas to Dynamic Concepts and sell some of its assets (vehicles, heavy equipment, and tools) to Dynamic Concepts.[6] The assignment of the Washington Gas contract became effective on June 1.[7] Foster alerted the Intervenor to the

[4] This contract was entered into evidence as Board Exhibit 2. A review of this document shows that some pages appear to be missing portions of text, presumably caused by a copying or printing error. These deficiencies are not material to my decision here.

[5] The contract between Foster and the Intervenor was not introduced into the hearing record. Witnesses testified that the Intervenor began negotiations with Foster and then with the Employer as the contract's expiration date approached. Those negotiations occurred sometime between McGolrick's decision in February to sell some of Foster's assets and May 28. While not specifically shown in the record, I also conclude that Foster and the Intervenor had a Section 8(f) relationship, as the Board presumes that the parties in the construction industry intend their relationship to be an 8(f) relationship, and the burden is on the party who seeks to show to the contrary. *Casale Industries, Inc.*¸311 NLRB 951, 952 (1993) citing *John Deklewa & Sons*¸282 NLRB 1375, 1387 fn.41 (1987). Finally, the Intervenor's conduct is consistent with an 8(f) relationship because it entered into a new Section 8(f) relationship with the Employer, rather than asserting the Employer was a Section 9(a) successor.

[6] The Employer in this case, DCI Utility Infrastructure Services, LLC, is a wholly-owned subsidiary of Dynamic Concepts, Inc. There are references in the transcript suggesting that Foster's assets and contract with Washington Gas were sold to Dynamic Concepts, Inc., and then leased to the Employer. It also appears that Pedro Alfonso is a principal of both Dynamic Concepts, Inc., and the Employer, and acted on their behalves. For simplicity, and for the purposes of this decision only, "the Employer" may refer to Dynamic Concepts, Inc, DCI Utility Infrastructure Services, LLC, or the two entities collectively.

[7] According to McGolrick, Foster was still in existence at the time of the hearing and retained some assets, but was not presently operating.

upcoming sale of assets and assignment of the Washington Gas contract to the Employer, and the Intervenor and the Employer had several meetings to discuss the Intervenor representing the Employer's employees once the Employer began operations. The Petitioner was not informed of Foster's sale of assets or assignment of the Washington Gas contract to the Employer, and was not present at these meetings. According to Intervenor official Bonilla, the Employer's managing partner Pedro Alfonso said that he believed he "would be more competitive as a new business owner by having one agreement with one union instead of having two." On May 28, the Employer and the Intervenor executed a Section 8(f) agreement covering the Employer's entire field workforce, including the operators who had historically been represented by Petitioner.

On May 28, Foster held a meeting for its employees, in which they were informed of the upcoming sale to the Employer. Also present at this meeting were the Employer and the Intervenor. The Petitioner was not at this meeting, and the record does not show that the Petitioner was given any notice of the meeting. During the meeting, McGolrick announced to the employees that he was selling Foster, and introduced Alfonso and officials of the Intervenor. The employees began to complete applications for the Employer, and authorization cards designating the Intervenor as their bargaining representative.

Alfonso testified that the employees remained employees of Foster until May 31, and were not employees of the Employer until they were added to the payroll on June 1.[8] He further testified that all employees had to complete an application, and that no one was considered an employee until they completed their paperwork to work at the Employer. Alfonso testified that

[8] McGolrick testified that all Foster employees were terminated on May 31.

about 30-35 laborers and one or two operators completed applications on May 28, followed by a "large number" of operators who completed applications on May 31. However, Alfonso also testified that employees "literally became employees" when they completed their applications on May 28.

At the conclusion of the May 28 meeting, the Intervenor presented Alfonso with the authorization cards signed by the employees at the meeting. Alfonso and Intervenor representative Anthony Frederick shook hands, and Alfonso recognized the Intervenor as the majority representative of the Employer's workforce, including the operators.

Although the Intervenor had prepared a written recognition agreement (MOA) and sent it to Alfonso prior to the start of the May 28, meeting, the record shows that Alfonso wanted the agreement changed to reflect the full and correct name of the Employer before signing it. On May 30, the Employer and the Intervenor signed a corrected version of the MOA recognizing the Intervenor as the Section 9(a) representative of the Employer's employees and converting the May 28, collective-bargaining agreement to a Section 9(a) contract.

By a letter dated May 31, Petitioner informed the Employer that it had a contract with Foster for many years, and that "100% of the operators have expressed their desire to be represented by" the Petitioner. The Petitioner demanded to be recognized as the operators' bargaining representative. The letter also states that the Petitioner was aware that the Employer "intends to enter into an agreement with the Laborers that would cover the former D.A. Foster operators." The record does not show that this letter included any showing of interest from the operators.

On June 14, the Intervenor and Employer executed another version of their May 30 MOA. This document is identical to the May 30 agreement in that it recognizes the Intervenor as the Section 9(a) representative of the Employer's employees and converts the collective-bargaining agreement to a Section 9(a) agreement. The June 14, MOA, however, recites that the parties' collective-bargaining agreement was dated June 1, not May 28. Alfonso testified that this was a mistake because the Employer and Intervenor entered into only one collective-bargaining agreement, and that was on May 28. The purported purpose of this June 14, recognition was that the Employer had hired more employees since beginning operations, and this recognition reflected that the Intervenor continued to represent a majority of the Employer's workforce.

By a letter dated June 14, the Employer denied the Petitioner's May 31, demand for recognition, explaining that it had already granted Section 9(a) recognition to the Intervenor.

On July 16, the Petitioner filed the instant representation petition. I take administrative notice that the petition was supported by a showing of interest supported by at least 30% of the operators, and the operators' signatures were all dated May 29.

III. RECOGNITION BAR

As a general rule, an employer's good-faith voluntary Section 9(a) recognition of one union, supported by an unassisted and uncoerced majority of employees, will bar a representation petition filed by another union for a reasonable period of time. *Sound Contractors*, 162 NLRB 364 (1967); *Josephine Furniture Co., Inc.*, 172 NLRB 404 (1968). However, under the Board's limited exception to this rule established in *Smith's Food and Drug*

Centers, 320 NLRB 844 (1996), I find that there is no recognition bar preventing the processing of this petition.

In *Smith's Food & Drug Centers*, the Board held that in rival union organizing situations, a voluntary and good-faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest for a majority of unit employees will bar a petition of a competing union, unless the petitioner demonstrates a 30-percent showing of interest that predates the recognition. 320 NLRB at 846. The Board has also held that a current or recently-expired Section 8(f) agreement constitutes a sufficient showing of interest. *Stockton Roofing Co.*, 304 NLRB 699 (1991).

Therefore, I find that by dint of its then-current 8(f) contract with Foster, the Petitioner had a showing of interest that pre-dated the Section 9(a) recognition given to the Intervenor on May 28. Further, I find that the Petitioner's showing of interest supporting the instant petition—as discussed in the fact section above—predates the Employer's first written Section 9(a) recognition of the Intervenor on May 30. Accordingly, I find that there is no recognition bar preventing the processing of this petition.[9]

[9]As a general rule, the Board does not permit the litigation of unfair labor practices in representation hearings. *Times Square Stores Corp.*, 79 NLRB 361 (1948); *Texas Meat Packers*, 130 NLRB 279 (1961); *Cooper Supply Co.*,120 NLRB 1023 (1958); *Capitol Records*, 118 NLRB 598; and *Virginia Concrete Corp.*, 338 NLRB 1182 (2003). Thus, I do not consider here whether the circumstances surrounding the Employer's voluntary recognition of the Intervenor was an unfair labor practice. For the purposes of this decision only, I presume that the authorization cards obtained by the Intervenor and presented to the Employer on May 28 demonstrated that the Intervenor represented an unassisted and uncoerced majority of the Employer's employees.

IV. CONTRACT BAR

The Board's contract bar rule prevents the processing of a petition during the term of an existing collective-bargaining agreement that is three years or less, unless the petition is filed within a "window period" of 60-90 days before the contract's expiration. *Hexton Furniture Co.*, 111 NLRB 342 (1955); *General Cable Corp.*, 139 NLRB 1123 (1962); *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). A Section 8(f) contract will serve as a bar after the parties' relationship is converted from Section 8(f) to Section 9(a). *VFL Technology Corp.*, 329 NLRB 458 (1999).

In this case, I do not need to determine whether the Employer and Intervenor entered into a Section 9(a) collective-bargaining agreement on May 28 or May 30 (and any implications flowing from them having purportedly entered into such an agreement on those dates), because I find that they entered into a Section 9(a) collective-bargaining agreement on June 14, and this contract predates the Petitioner's July 16 representation petition by over one month.

As of June 14, the Employer had begun its normal operations, had hired a substantial and representative complement of employees in all relevant classifications, had granted Section 9(a) recognition to the Intervenor, and converted the parties' collective-bargaining agreement to a Section 9(a) agreement. Also as of June 14, the Petitioner had not presented the Employer with any objective showing of interest or evidence of majority support, nor had it filed a representation petition with the Board. Even though the Employer had knowledge of the Petitioner's organizing activity prior to June 14, the Board has held that this knowledge is irrelevant to a contract-bar determination. *Hamilton Park Health Care Center*, 298 NLRB 608 (1990).

Accordingly, I find that the petition in this case is barred by the Employer-Intervenor Section 9(a) collective-bargaining agreement as of June 14, and thus, the petition must be dismissed.

V. ORDER

The petition is dismissed.

VI. RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Section 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **August 26, 2013**, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102. 114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board my grant special permission for a

longer period within which to file.[10] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

/s/ Wayne R. Gold

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, Suite 600
Baltimore, Maryland 21201

Dated: August 12, 2013

[10] A request for an extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, D.C., and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.