UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
DCI UTILITY INFRASTRUCTURE	)	
SERVICES, LLC, wholly owned by	)	
DYNAMIC CONCEPTS, INC.,	)	
Employer,	)	
	)	
and	)	Case No. 5-RC-109209
	)	
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS, LOCAL 77,	)	
AFL-CIO,	)	
Petitioner,	)	
	)	
and	)	
	)	
GENERAL AND CONSTRUCTION	)	
LABORERS' LOCAL UNION 657,	)	
Intervenor,	)	
	)	

PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION TO DISMISS PETITION

Pursuant to Section 102.67 of the Board's Rules and Regulations, Petitioner International Union of Operating Engineers, Local 77, AFL-CIO ("Local 77") respectfully requests review of the August 12, 2013 decision of the Regional Director, Region 5, to dismiss the petition filed by Local 77 seeking to represent a small group of heavy equipment operators employed by the Employer, DCI-Utility Infrastructure Services ("DCI-UIS"). *See* Regional Director's Decision (Aug. 12, 2013) ("Decision"). Although the Region acknowledged that Local 77, which had long represented this group of operators under a series of 8(f) agreements, possessed a sufficient showing of interest that pre-dated the Employer's grant of voluntary recognition to the Intervenor, Laborers International Union Local 657 ("the Laborers"), Decision at 6, 7, the

Region nevertheless found a contract bar because "the Employer and the Intervenor "entered into a Section 9(a) collective-bargaining agreement on June 14," Decision at 8, prior to filing of the petition. As we explain below, that determination is contrary to the Board's established law, and is factually incorrect.

FACTUAL BACKGROUND

Local 77 for many years negotiated a series of 8(f) agreements covering a group of approximately fourteen heavy equipment operators employed by D.A. Foster Trenching Co. ("D.A. Foster"), a company primarily involved in performing work for Washington Gas Company, including the installation of new service, replacement and repair, and emergency jobs. Decision at 2-3. The latest Local 77 agreement with D.A. Foster was negotiated in 2010 and was scheduled to expire on June 30, 2013. *Id.* at 3 & n.4. D.A. Foster's other field employees, including pipefitters and laborers performing shovel work and traffic control, were represented separately by the Laborers Union, also under a series of 8(f) agreements. *Id.* at 3 & n.5. The Laborers' agreement covered approximately 30 employees, Tr. 46:1-4 (McGolrick)[1] – about twice the size of the smaller, specialized unit represented by the Operating Engineers. The Laborers have never represented operators at D.A. Foster. Tr. 61:5-7 (Bonilla). Under their respective agreements, operators commanded greater base wages than paid to the laborers, and also enjoyed a substantially more generous fringe benefit package, which cost approximately $4.00 per hour more than the Laborers' package. Tr. 69:2-16 (Bonilla).

[1] We cite to the transcript of the August 1, 2013 hearing in this matter by page and line number(s), and by identifying the witness or speaker in parentheses. Thus, "Tr. 46:1-4 (McGolrick)," denotes the testimony of Bill McGolrick, owner of D.A. Foster, at page 46, lines 1 through 4. Exhibits introduced at the hearing are denoted as "Int. Exh." (for Intervenor exhibits), "Pet. Exh." (for Petitioner exhibits), and "Emp. Exh." (for Employer exhibits).

In or around February 2013, prior to expiration of the Local 77 agreement, Bill McGolrick, the owner of D.A. Foster, entered into an agreement with Dynamic Concepts, Inc. ("DCI"), a Washington, D.C. –based corporation owned by Pedro Alfonso, to assign to DCI the Washington Gas contract work, effective June 1, 2013, and to sell the associated assets, including the company's vehicles, equipment, and tools, to DCI. Decision at 3. McGolrick advised the Laborers Union of the impending sale, and offered to introduce the Laborers to DCI officials. Decision at 3-4; Tr. 51:6-14 (Bonilla). Meetings ensued between Laborers officials, D.A. Foster officials, and DCI officials, including Pedro Alfonso, DCI's managing partner. Decision at 4; Tr. 51-57 (Bonilla); Tr. 63:7-8 (Bonilla). According to Laborers official Orlando Bonilla, who was present at these meetings, Alfonso expressed his view that DCI "would be more competitive as a new business owner by having one agreement with one union instead of having two," Tr. 54:5-8 (Bonilla); Decision at 4, particularly an agreement that offered a significantly cheaper package than the Local 77 agreement, Tr. 67:6-17, Tr. 69:2-10 (Bonilla); *see also* Tr. 111:9-25 (Alfonso). As Bonilla admitted, the Laborers "didn't object to that [plan], and we went ahead and drafted an agreement that we believed would cover the entire workforce." Tr. 54:5-8 (Bonilla). Local 77 was not advised of the impending sale transaction, was not introduced to DCI, and was not present at any of these meetings. Decision at 4; Tr. 71:15-19 (Bonilla).

Following weeks of discussion, the Laborers, D.A. Foster, and DCI agreed to hold a meeting with the D.A. Foster workforce on Tuesday, May 28, 2013, the day after Memorial Day. Decision at 4; Tr. 73:9-21 (Frederick); Tr. 59:1-5 (Bonilla). Local 77 was not informed about the meeting. *Id.*; Tr. 79:24-25 (Frederick). In advance of that meeting, which was to be held in the late afternoon at the Clarion Hotel in Prince George's County, Maryland, Tr. 26:15-18, the

Laborers finalized an 8(f) collective bargaining agreement, Int. Exh. 1, as well as a "Memorandum of Agreement," which purported to convert that agreement from an 8(f) pre-hire agreement into a 9(a) agreement, Int. Exh. 3; Tr. 60:8-13 (Bonilla). The Memorandum of Agreement was sent by email to Alfonso prior to the meeting, with a cover letter from Bonilla. Int. Exh. 2; Tr. 57:16-24 (Bonilla).

At that meeting, McGolrick announced to employees that he was selling the company. Decision at 4. Employees were introduced to DCI officials, including Alfonso, and Laborers officials, including Anthony Frederick, Business Manager of Local 657. Tr. 27:6-9 (McGolrick). Local 77 representatives were not present. Tr. 79:24-25 (Frederick). The Laborers' officials proceeded to meet with employees, including operators represented by Local 77, and to collect authorization cards. Tr. 75:6-14 (Frederick). As the Laborers' and the Employer concede, however, a majority of the operators did not, in fact, sign authorization cards for the Laborers at the meeting. *Compare* Tr. 123:18-124:3 (Alfonso) (none of the operators joined a union on May 28) and Tr. 79:21-23 (Frederick) (three operators signed cards). Nevertheless, the Laborers and the Employer assert that a majority of the D.A. Foster workforce – even if not a majority of the operators -- signed cards on May 28 designating the Laborers as their representative, Post-Hearing Brief of Intervenor at 5; Post-Hearing Brief of Employer at 5, and that the parties, by handshake, agreed to convert their 8(f) CBA to a 9(a) agreement effective immediately, *id.* The Employer and Laborers contend that they memorialized that understanding by executed a Memorandum of Agreement on May 30. Int. Exh. 4. Despite these parties' purported entry into a CBA on May 28, however, it is undisputed that the entire workforce actually remained employees of D.A. Foster and continued on D.A. Foster's payroll, Tr. 38:23-39:11 (McGolrick); Decision at 4 and n.8, working under the terms and conditions of the unions' respective 8(f)

agreements with D.A. Foster. Indeed, DCI-UIS did not commence operations until June 1, Tr. 125:16-19 (Alfonso), nor did it hire any former D.A. Foster operators until that date. Tr. 169:2-10 (Alfonso).

Operators alerted Local 77 to the events of the May 28 meeting and, very early the next morning, May 29, Local 77 representatives collected authorization cards from all thirteen of the operators who reported to work. Decision at 6. On the morning of Friday, May 31, Local 77 officials visited the D.A. Foster yard and spoke with Alfonso. Tr. 129:22-123:8 (Alfonso). Later that afternoon, Local 77 Business Manager Joshua VanDyke e-mailed a letter to Alfonso informing him that the operators had expressed their desire to continue to be represented by Local 77, demanding recognition, and advising that the Employer's recognition of or dealing with any another union would be improper. Pet. Exh. 2.

Alfonso did not respond to that letter for almost two weeks. In the meantime, on June 1, DCI-UIS officially took over the Washington Gas work previously performed by D.A. Foster, Tr. 38:24-39:3 (McGolrick); Tr. 66:17-23 (Bonilla); Tr. 97-98 (Freeland); Tr. 157:20-158:23 (Alfonso), hired the entire former D.A. Foster workforce, Tr. 149:10-12 (Alfonso), and used the vehicles and other equipment purchased from D.A. Foster to perform the work, Tr. 147:24-149:9 (Alfonso). Beginning that same day, operators began working under the Laborers' agreement. Although DCI-UIS and the Laborers maintained the base wage rate paid to operators, Tr. 90:6-10 (Bonilla), operators received the Laborers' cheaper fringe benefit package.

Alfonso finally responded to Local 77's demand on June 14. He declined to recognize Local 77, claiming that "a majority of our workforce have signed cards designating LIUNA Local 657 as their collective bargaining representative which is sufficient for DCI UIS to work directly with LIUNA and Local 657 for our corporate union representation. Local 657 is

supported by a majority of DCI's employee's [sic] and DCI has extended 9(a) recognition to that Local." Pet. Exh. 3. Alfonso further informed Local 77 that his company's recognition of the Laborers' "legally precluded" him from "entertaining requests for recognition of the DCI workforce by any other unions." *Id.* Although the record showed that the Laborers and the Employer that same day executed a second Memorandum of Agreement purporting to effect 9(a) conversion of the CBA, Pet. Exh. 1, Alfonso's letter did not advise Local 77 that a collective bargaining agreement had been reached.

Local 77 subsequently filed this election petition seeking to represent its historical unit of operators. Tr. 13:20-14:22 (stipulation as to appropriateness of unit). Laborers' Local 657 intervened and, following a hearing at which both Employer and Laborers representatives testified at length about their relationship and their dealings, all parties submitted post-hearing briefs.[2]

At the hearing and in their briefs, the Laborers and the Employer disavowed the signed Memoranda of Agreement – both the May 30 and the June 14 documents – and instead steadfastly contend that recognition was extended on May 28, following collection of cards at the meeting, and that the contract was converted to a 9(a) agreement on that date. As the Laborers wrote:

> Notwithstanding the date on which the [MOA] was formally signed, [Local 657 Business Manager Anthony] Frederick clearly testified that DCI-UIS extended recognition to Local 657 as the exclusive representative on May 28, 2013. . .

[2] Simultaneously with filing its election petition, Local 77 also filed unfair labor practice charges against both DCI-UIS and the Laborers, contending unlawful coercion was used in the effort to secure authorization cards, and that the Laborers received material assistance from DCI-UIS, in violation of the Act. Those charges remain pending. As Local 77 recently informed the Region, the Employer on August 16 announced to the operators that it was refunding all of the dues paid to the Laborers pursuant to these authorization cards – the cards that, of course, form the foundation of the 9(a) recognition and contract on which the Employer and Laborers, and the Region, rely to bar the election requested by Local 77 from proceeding.

> Alfonso confirmed that DCI-UIS ha[d] an understanding prior to May 28, 2013 that DCI-UIS would recognize Local 657 as soon as the Local obtained authorization cards from a majority of employees. Alfonso also confirmed that he recognized Local 657 on May 28, 2013, upon being informed that Local 657 had collected authorization cards from a majority of employees who had signed on to be employees of DCI-UIS. Alfonso also testified that the only reason he did not sign the formal recognition agreement on May 28, 2013 was that he wanted to make minor changes to the text of the agreement to make the Employer's name accurate and to add a date of the collective bargaining agreement. [Intervenor Brief at 5-6.]

The Employer took an identical position:

> Employer entered into a 9(a) agreement with Intervenor on May 28, 2013. . . .As of May 28, 2013, subsequent to Intervenor and Employer entering into an 8(f), Employer recognized Intervenor and entered into an agreement pursuant to Section 9(a) of the Act. . . . There is no doubt that the Employer proved by a preponderance of the evidence produced during the hearing, that the 9(a) Agreement was effective on May 28, 2013. [Employer Brief at 6, 9]

Local 77, in turn, pointed out that an election should proceed *regardless* of the actual date of conversion, because Local 77 indisputably possessed an adequate showing of interest prior to *any* such date, either by reason of its status as an 8(f) incumbent, *Stockton Roofing*, 304 NLRB 699 (1991), or because of the cards it collected on the morning of May 29, see *Smith's Food & Drug*, 320 NLRB 844, 845 (1996); *American National Can*, 321 NLRB 1164 (1996). *See* Petitioner's Brief at 6-11.

The Region agreed that Local 77 had presented a sufficient showing of interest predating the Employer's grant of 9(a) recognition, regardless of when recognition had occurred. Applying the rule in *Smith's Food*, the Region thus determined that recognition presented no bar to an election. Decision at 7. Nevertheless, the Region dismissed the petition based on its finding – advanced by none of the parties, and, indeed, contrary to all of the evidence presented at the hearing – that the Laborers and the Employer "*entered into a Section 9(a) collective-bargaining agreement on June 14*, and

this contract predates" the petition and thus should be accorded bar quality. Decision at 8 (emphasis added). As we explain below, review should be granted because the Decision is both factually and legally in error.

ARGUMENT

I. THE REGION'S FINDING THAT 9(a) CONVERSION OCCURRED ON JUNE 14 IS CLEARLY ERRONEOUS

The Region provided no evidentiary citation for its finding that the Laborers and the Employer "entered into a Section 9(a) collective-bargaining agreement on June 14" – the fulcrum for its order barring the election. A review of the record shows that it is devoid of support for such a claim.

The collective bargaining agreement itself bears an execution date of May 28. Int. Exh. 1. Notably, the Laborers (followed by the Employer) take the position that "the only possible dispute here is whether [] recognition was given on May 28 or May 30," Intervenor's Brief at 10, and go on to insist that the earlier date is the correct one, pointing to uniform testimony from each of their witnesses as to the counting of cards following the May 28 employee meeting, and the handshake exchanged between Alfonso and Laborers' officials to signal that their agreement, as of that moment, was transformed from an 8(f) contract into a 9(a) contract. Although they acknowledge that the formal Memorandum of Agreement converting the relationship and the CBA was not executed until May 30 – the day *after* Local 77 collected cards – they dismiss the significance of that written agreement, contending that the MOA was a "perfunctory document that memorialized" the oral conversion agreement of May 28 (despite language in the May 30 agreement to the contrary). Tr. 117:16-18 (Alfonso).

Nary a word is said about the later-executed June 14 Memorandum of Agreement, and the record is bare of evidence as to its intended purpose. Both the Employer and the Laborers

objected even to its introduction. Tr. 118:1-11 (Laborers objection during Alfonso testimony), Tr. 122:14-18 (Employer objection during Alfonso testimony). Neither party's brief makes any attempt to explain the document, much less argue its significance; indeed, the Laborers do not even mention it all. Under questioning, Alfonso acknowledged that the document was executed after the Laborers obtained a majority of cards from the operators, Tr. 134:2-8, Tr. 157:2-9 (Alfonso), but otherwise provided no clues as to his reason for executing it.

In light of this record, the Region's elevation of the June 14 document to dispositive status is baffling. No party advanced a theory based on a June 14 conversion, and the Region points to nothing in the record that led it to disregard the identical Memorandum of Agreement executed on May 30, or to ignore the uniform testimony of every witness regarding the May 28 grant of recognition. Indeed, there is nothing in the record or the text of the document from which one could reasonably conclude that the June 14 document was intended to have *any* effect, much less the definitive effect the Region attributes. The Region's conclusion is plainly erroneous: to prevent an election from proceeding based on an agreement expressly disavowed by *both* of the parties would, we believe, be unprecedented, and would ill-serve the Act's careful balance between employee choice and stable labor-management relations.

II. REGARDLESS OF WHEN CONVERSION OCCURRED, THE REGION'S DECISION DISMISSING THE PETITION IGNORED ESTABLISHED BOARD LAW LIFTING THE BAR RULES WHEN PETITIONER'S SHOWING OF INTEREST PREDATES RECOGNITION, AS IT INDISPUTABLY DID HERE

A. As the Board recently observed, "the Board, with court approval, [has] gradually developed a coherent body of jurisprudence . . . barring election petitions or other challenges to a union's representative status for a reasonable period after a legally recognized and enforceable bargaining relationship was established." *Lamons Gasket*, 357 NLRB No. 72 (slip op.), at 6 (2011). The bar rules are by no means absolute: rather, they are informed by a system of

exceptions designed to balance the "competing interests [of] effectuating employee free choice, while at the same time promoting voluntary recognition and reasonably protecting the stability of collective-bargaining relationships." *Smith's Food & Drug*, 320 NLRB 844, 845(1996).

Situations in which more than one union may legitimately compete for representative status present special concerns. In such a case, the Board has observed, the risk is high that "a mere accident of timing, or clever strategic planning by one of the competitors" will supplant the Board's established election process and that gamesmanship, as opposed to true employee desire, will "dictate[s] the outcome for the employees." *Rollins Transp. Sys., Inc.*, 296 NLRB 793, 794 (1989). The bar rules in these circumstances are too readily used as a sword, with "the employees' right to decide among competitors eclipsed by the union that successfully jockeys itself first into the Board's sphere of protection." *Id.*

The Board has consequently applied bar principles sparingly in such situations. In *Rollins Transp. Co.*, the Board initially adopted a blanket rule eliminating the bar in *all* cases where an unrecognized union petitions for election based on support obtained prior to the employer's recognition of its competitor. *Id.* at 793. The Board subsequently refined that rule to require the unrecognized union to demonstrate that it possessed, at the time of recognition, at least the threshold employee support necessary to initiate an election petition. *Smith's Food*, *supra*, 320 NLRB at 845-846. The *Rollins* rule, although founded on a desire "to eliminate all ambiguity regarding employee desires as well as any possibility of collusive, 'sweetheart' deals between employers and unions," swept too broadly, the *Smith's Food* Board found. *Id.* at 846. Requiring a threshold showing addressed the concerns that animated *Rollins* in a more targeted fashion, limiting the class of situations in which voluntary bargaining relationships could be

challenged only to those in which the petitioning union could legitimately stake a claim for representative status.

The principle of *Smith's Food* applies equally to situations in which a contract quickly follows upon recognition. In *American National Can*, 321 NLRB 1164 (1996), the employer voluntarily recognized a union as the representative of a 400-person wall-to-wall unit, concluding a contract a mere three weeks later. *Id.* at 1164. The Board nonetheless ordered an election to proceed in a smaller unit of craftsmen, because it was "undisputed that the Petitioner had secured the requisite 30-percent showing of interest in the petitioned-for unit prior to the Employer's voluntary recognition of the Intervenor." *Id.*[3]

B. That result naturally flows from the Board's concern in *Rollins* and *Smith's Foods* that employees' right to vote for the representatives of their choosing not be undone by "clever strategic planning": indeed, if that right could be vitiated by immediately signing a contract, the *Smith's Foods* rule would have little meaning. As the Board has observed, the contract bar provides "*reasonabl[e]* protect[ion]" of collective-bargaining relationships, *Lamons Gasket*, *supra* – not blind protection. And, in the narrow class of credible, competing union representation claims addressed by *Smith's Foods*, any "reasonable" protection of labor-management relationships must yield to the imperative of employees' free selection of their own representatives: application of the contract bar in a case where *Smith's Foods* clearly mandates removal of the recognition bar would be self-defeating in any setting, simply substituting one "accident of timing" or set of "clever strategic plans" for another.

[3] The Intervenor suggested in its post-hearing brief that the contract in *American National Can* was reached after the petition was filed. Intervenor's Brief at 10. This is pure speculation: indeed, the fact that the Board saw fit to include that fact in its recounting strongly suggests that the Board considered this a material fact, an unlikely conclusion if the existence of the contract could have had no effect on the outcome.

Moreover, applied in the construction industry, where conversion of pre-hire agreements into 9(a) contracts occurs *simultaneously with recognition*, *John Deklewa & Sons*, 292 NLRB 1375, 1383 (1987), uncoupling of recognition bar and contract bar would permit favored rival unions to replace 8(f) incumbents – and employers to do away with craft representation and instead impose wall-to-wall units -- with two strokes of a pen, leaving employees without any opportunity for election for years. In such circumstances, reflexive use of the contract bar rules, no less than the recognition bar rules, would have the effect of "impos[ing] a collective-bargaining representative on the employees on the basis of the employer's action rather than the employees' free choice," *Rollins Transp.*, 296 NLRB at 795 -- and doing so for far longer periods than *Smith's Foods* and *Rollins* contemplated.

C. The Region's Decision here would lead to precisely this result: immediate displacement of Local 77, an incumbent, long-term representative, by an employer who admittedly favored, for cost reasons, a single, different union for its "corporate representation," Pet. Exh. 3 -- *despite* the fact that Local 77 unquestionably proffered an adequate showing of interest that pre-dates *any* recognition of the Laborers by the Employer. Decision at 6-7. Following the rule in *Smith's Foods*, the Region correctly determined that Local 77's showing of interest precluded application of the recognition bar. *Id.* at 7. In the next breath, though, it found the petition barred by the parties' 9(a) contract – a contract that, of course, not only is *premised upon* but is *simultaneous with* the *9(a) recognition* that the Region has already found constitutes *no* bar to election.

Such a result not only is illogical, but is insupportable under *Smith's Foods* and *American National Can*. Indeed, the Region's Decision ignores *American National Can* entirely, failing even to cite the case, much less distinguish it. Instead, the Region rests its conclusion on the

Board's cursory ruling in *Hamilton Park Health Care Center*, 298 NLRB 608 (1990), a decision issued prior to *Smith's Foods* and *American National Can* – and not to our knowledge, cited since – that, without articulating any rationale, purports to limit the *Rollins* rule to recognition bar, rather than contract bar, situations. The careful analysis engaged in by the Board's opinions in *Smith's Foods* and *American National Can* easily supersedes whatever precedential value *Hamilton Park* could command. Moreover, even assuming that uncoupling of recognition and contract bars would, as *Hamilton Park* suggests, be warranted in *some* group of cases, this case, arising in the unique setting of the construction industry where 9(a) recognition and contract conversion occur of a piece, plainly lies outside that category. Properly applied, the principles announced in *Smith's Foods* and *American National Can* require removal of *both* the recognition *and* contract bars so that the election may proceed in the stipulated unit.

CONCLUSION

For all of the foregoing reasons, Local 77 respectfully requests that its request for review of the Regional Director's Decision be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that counsels for all parties were served a copy of this brief via e-mail on this 26th day of August, 2013, as follows:

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