

**NATIONAL LABOR RELATIONS BOARD
REGION 5**

**DCI UTILITY INFRASTRUCTURE
SERVICES, LLC, wholly owned by
DYNAMIC CONCEPTS, INC.,**

Employer,

Case No. 05-RC-109209

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

Petitioner,

**GENERAL AND CONSTRUCTION
LABORERS' LOCAL UNION 657,**

Intervenor.

**INTERVENOR'S OPPOSITION TO
PETITIONER'S REQUEST FOR REVIEW**

The Intervenor, Construction and General Laborers' Local Union 657, affiliated with the Laborers' International Union of North America, (hereinafter, the "Union" or "Local 657"), files this Opposition to the Petitioner's Request for Review of the Regional Director's Decision and Order dismissing the petition for an election filed by International Union of Operating Engineers, Local 77, AFL-CIO.

In its request for review, Local 77 asks the Board to overrule the longstanding authority of *Hamilton Park Health Care Center*, 298 NLRB 608 (1990), in order advance what Local 77 describes as the important policy of avoiding displacement of a long-term, incumbent representative. Local 77's purported policy rationale, however, does not offer any compelling reason for overturning Board precedent. The NLRA already offers adequate protection to long-

standing, incumbent representatives who obtain majority recognition under § 9(a). Local 77's problem, however, was that it only had § 8(f) status, and over the period of several decades it failed to obtain recognition under § 9(a). Local 77 obviously now regrets that failure, but it is not the Board's responsibility to alter national labor policy to rectify Local 77's mistakes.

Local 77 compounded its troubles by delaying for over six weeks before filing the underlying petition for an election, even though it had ample notice that Local 657 intended to pursue exclusive representation of operators at DCI UIS. It was Local 77's six-week delay, and not a gap in the law, that led the Regional Director to dismiss the petition as barred by the contract bar.

In all, Local 77 fails to present any extraordinary circumstance warranting the acceptance of this request for review or for overturning *Hamilton Park Health Care Center*. This case presented a straightforward application the Board's contract bar doctrine, and no exception applied. Local 77's request for review, therefore, should be denied.

FACTS

The petition commencing this matter was filed on July 16, 2013, and served thereafter. A pre-election hearing was held on August 1, 2013. At the hearing, the following witnesses gave testimony: on behalf of the Intervenor, Orlando Bonilla, Anthony Frederick, and Ronald Freeland; on behalf of the Employer, Pedro Alfonso. A third-party witness, William J. McGolrick, also testified. Petitioner did not present any witnesses.

The first witness of the hearing was William J. McGolrick, owner of D.A. Foster Trenching Company. McGolrick testified that he had been the owner of D.A. Foster Trenching for six years. In February of 2013, D.A. Foster Trenching was "at the point where I was going to shut that business down." Tr. 23. Around that period of time, McGolrick met Pedro Alfonso, the

managing partner of Dynamic Concepts, Inc. the corporate owner of the Employer DCI UIS. In February 2013, McGolrick agreed to sell “some of the vehicles, some of the equipment, and some of the tools and materials” to Dynamic Concepts, Inc. Tr. 24.

McGolrick testified that, on May 28, 2013, D.A. Foster held a meeting at a hotel in Prince George’s County, Maryland, to “introduce them [the employees] to Pedro and to let them know that, you know, that I was going out of business.” Tr. 27. McGolrick recalled that, at the conclusion of the meeting, Anthony Frederick from Local 657 presented authorization cards to Pedro. These were cards of “people who were signing up for the Labor Union.” Tr. 28. After counting the cards, McGolrick testified that, “Pedro shook hands with Anthony. Basically, he said that’s congratulations. You guys have got the majority, and congratulations and they shook hands on it.” Tr. 29.

Regarding the number of construction employees employed by D.A. Foster Trenching, McGolrick testified that their were about 30-32 laborers, 12 operators, and five foremen, for a total of 49. Tr. 45-46. The remaining D.A. Foster Trenching employees were outside of these classifications. Tr. 46. These workers operated in twelve four-man crews, which produces a similar census of 48 workers. Tr. 46.

The next witness to testify at the hearing was Orlando Bonilla, Business Manager of the Baltimore-Washington Construction & Public Employees Laborers’ District Council. Bonilla testified as Business Manager of the District Council, he negotiated collective bargaining agreements on Local 657’s behalf. Bonilla testified that Laborers’ Local 657 had a collective bargaining agreement with D.A. Foster Trenching. Tr. 51. When the agreement with D.A. Foster Trenching was due to expire, Bonilla attempted to schedule a meeting with D.A. Foster’s representatives to negotiate a new agreement. Tr. 51. At that time, D.A. Foster informed Bonilla

that D.A. Foster Trenching was going out of business and selling its assets to another company. Tr. 51. D.A. Foster arranged for a meeting in April 2013 between Bonilla and the representatives of the new company. Tr. 52. The new employer, DCI-UIS expressed an interested in continuing a relationship with the LIUNA and negotiating a new contract. Tr. 52. Sometime during his discussions with DCI-UIS, the Company expressed its desire to have one agreement with one union, rather than two as D.A. Foster Trenching did. Tr. 54. Bonilla and LIUNA agreed negotiate a single agreement covering all of DCI-UIS's employees. Tr. 54.

During their meeting in April and May 2013, DCI-UIS and LIUNA also discussed a voluntary recognition arrangement between them. Tr. 56. The parties agreed that if LIUNA obtained a majority of employees to sign authorization cards, the Employer would voluntarily recognize Local 657 as the exclusive representative. Tr. 56.

The collective bargaining agreement, which was a construction pre-hire agreement, was finalized and signed by the employer and the union on May 28, 2013. Tr. 55-56; *see also*, Intervenor's Ex. 1. The agreement covered all employees of DCI-UIS, except clericals, supervisors, and others excluded under the Act. Tr. 56.

On May 28, 2013, pursuant to the voluntary recognition arrangement to which DCI-UIS and Local 657 agreed, Bonilla sent DCI-UIS a formal written request for 9(a) recognition. Tr. 58-59; *see also* Intervenor's Ex. 2. Bonilla sent the letter in anticipation that Local 657 representatives would obtain authorization cards from a majority of the workforce at a meeting held that evening. Tr. 59. Bonilla testified that he felt confident that LIUNA would obtain majority support from the workforce because LIUNA already represented a majority of D.A. Foster Trenching's workforce among the laborer and pipefitter classifications, and the Union had represented them for a long time. Tr. 59. Although Bonilla did not attend the meeting held on

May 28, 2013, he heard from Anthony Frederick that, in fact, LIUNA obtained support from a majority of the workers after the meeting. Tr. 59. Local 657 and DCI-UIS signed a formal recognition agreement, which was admitted as Intervenor's Exhibit 4.

The third witness was Anthony W. Frederick, Business Manager of Local 657 and Secretary-Treasurer of the Baltimore-Washington Construction & Public Employees Laborers' District Council. Frederick testified as to what occurred at the meeting with D.A. Foster employees on May 28, 2013. Frederick testified that the employer and the Union had a previously arranged understanding that if Local 657 obtained authorization cards from a majority of employees, then DCI-UIS would recognize Local 657 as the exclusive representative. Tr. 75. Frederick testified that at the meeting held on May 28, 2013 Local 657 obtained authorization cards from over thirty employees. Tr. 75. At the time, Frederick understood that there were between 45-50 construction employees. Tr. 75. After counting the cards, Alfonso and Frederick "shook hands and said we have the bulk of the employees." Tr. 75.

After shaking hands, Alfonso told Frederick that he intended to sign the formal recognition and 9(a) conversion agreement that Bonilla provided, but he wanted to make some minor changes to the text of the agreement to properly reflect the employer's name and other details. Tr. 76. Alfonso and Frederick signed the formal recognition and conversion agreement on May 30, 2013 after Alfonso changed the company's name on the document. Tr. 80. Notwithstanding the date on which the agreement was formally signed, Frederick clearly testified that DCI-UIS extended recognition to Local 657 as the exclusive representative on May 28, 2013. Tr. 79. Frederick understood that Alfonso recognized Local 657 on May 28, 2013 because the parties previously had agreed that the Employer would extend recognition as soon as the requisite number of cards were obtained. Tr. 86.

The fourth witness was Roland Augustus Freeland. Freeland is the President of Local 657 and a Business Agent of the Union. Tr. 94. Freeland was present at the meeting on May 28, 2013 and actually performed a count of the authorization cards obtained by Local 657. Tr. 94. Freeland testified that Local 657 collected between 30 and 40 cards. Tr. 94.

The fifth witness was Pedro Alfonso, the managing partner of DCI-UIS. Alfonso confirmed that DCI-UIS has 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. Tr. 101. Alfonso also confirmed that he recognized Local 657 on May 28, 2013, upon being informed that Local 657 has collected authorization cards from a majority of the employees who had signed on to be employees of DCI-UIS. Tr. 102, 115. 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. Tr. 105. Alfonso also testified that the reason the agreement was not signed the following day, May 29, 2013, was that he had an all day meeting as a Board member of the DC Housing Authority. Tr. 106. When questioned by opposing counsel about whether the language of the recognition agreement meant that May 30, 2013 was the earliest date upon which DCI-UIS extended recognition to Local 657, Alfonso responded that that the agreement "memorialized what had already been agreed to." Tr. 117.

Consistent with Alfonso's testimony that the recognition agreement did not preclude the extension of recognition on a earlier date, Alfonso testified that in fact an additional recognition agreement was signed on June 14, 2013, after additional employees had signed recognition cards. Tr. 119-20. The June 14 MOA was 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. See Pet. Ex. 1. The June 14 MOA reflected that the Intervenor continued to represent a majority of the Employer's workforce. *Id.*

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. Pet. Ex. 3.

REGIONAL DIRECTOR'S DECISION AND ORDER

In his Decision and Order, the Regional Director ruled that Local 77's 8(f) agreement with D.A. Foster Trenching constituted a sufficient showing of interest to forestall application of the recognition bar under the authority of *Smith's Food & Drug Centers*, 320 NLRB 844 (1996) and *Stockton Roofing Co.*, 304 NLRB 699 (1991). Decision & Order at 7. However, the Regional Director found that the contract bar applied due to the existence of a 9(a) agreement in place as of June 14, 2013 with respect to the petitioned-for unit, thereby pre-dating the petition by a month. Decision and Order at 8. The Regional Director ruled that the exception to the recognition bar established by *Smith's Food & Drug Center* did not apply to the contract bar, citing *Hamilton Park Health Care Center*, 298 NLRB 608 (1990). Decision & Order at 8. Because his finding with respect to the June 14 MOA was dispositive, the Regional Director found that he did not have to decide whether a 9(a) agreement was in place prior to June 14, 2013. Decision & Order at 8.

ARGUMENT

I. The Petition is Barred by the Contract Bar, and No Established Exception Applies.

Under the Board's contract bar rule, "a union's continuing majority status is not generally subject to challenge during the term of an existing collective-bargaining agreement"

Westwood Import Co., Inc., 251 NLRB 1213, 1222 (1980) (citing *General Cable Corp.*, 139

NLRB 1123 (1962); *Hexton Furniture Co.*, 111 NLRB 342, 343-344 (1955); *Pioneer Inn Associates v. N.L.R.B.*, 578 F.2d 835, 838-839 (9th Cir. 1978)). The Board will not ordinarily entertain a challenge to an incumbent union's majority status during the terms of an agreement of 3 years' duration or less, unless the challenge is made during an "open period" of 60 to 90 days prior to the expiration date of the agreement. *Id.* The purpose of the contract bar is "to promote industrial stability between contractual parties and to afford employees a reasonable opportunity to change or eliminate their bargaining representative." *East Manufacturing Corporation*, 242 NLRB 5, 6 (1979). "Bargaining relationship stability is no less a concern for management than it is for labor organizations. Each party has substantial investments in the bargaining process and their investments deserve, where practicable, both deference and protection." *Id.*

In the construction industry, it is well-settled that "after an agreement [is] converted from 8(f) to 9(a), the agreement serve[s] to bar any election petitions filed after conversion, but during the contract term." *J & R Tile*, 291 NLRB 1034, 1036 (1988). In order to establish that a conversion occurred, a union must show "express demand for, and an employer's voluntary grant of recognition to the Union as the bargaining representative, based on a contemporaneous showing of support by a majority of employees in the, appropriate unit, e.g., a valid card majority." *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); and *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988).

Here, there is no question that the *Deklewa* steps all were met well before Local 77 filed its petition. Local 657, through Bonilla's May 28 email, served an express written demand for exclusive recognition. A contemporaneous showing of majority support was offered and provided at the meeting held on May 28, 2013, and the Employer extended recognition voluntarily the same day. That recognition was put in writing on May 30 and again on June 14,

2013. The signing of the § 9(a) agreement therefore preceded the petition by at least a month.

Consequently, the contract bar applies, and the petition should be dismissed.

A. The Regional Director’s Finding That a 9(a) Agreement Existed as of June 14 Is Supported by the All the Evidence and No Evidence Contradicts this Finding.

Local 77’s attack on the Regional Director’s finding of a 9(a) agreement on June 14 lacks any foundation in the record evidence. Local 77 does not cite evidence to support this attack. Instead, it cites attorney argument – attorney objections at the hearing and the quantity of references in legal briefs to the June 14 MOA – to attack the Regional Director’s finding. Local 77 does not and cannot cite any authority to support its unconventional attack on the Regional Director’s finding of fact. Tabulating the quantity of references to an exhibit in an attorney argument simply is not a proper method for challenging a finding of fact. It is clear from its spurious methodology that Local 77’s attack lacks merit.¹

In truth, the Regional Director’s finding of fact is fully supported by witness testimony, (Tr. 119-20), and by the June 14 MOA itself. *See* Pet. Ex. 1. The June 14 MOA clearly states that it “transforms [the CBA] between [the Employer and Intervenor] to a collective bargaining agreement under Section 9(a) of the Act rather than Section 8(f)” Pet. Ex. 1. As the testimony from Alfonso indicated, (Tr. 119-20), the June 14 MOA had been signed by the parties out of an abundance of caution in the event that some legal vulnerability attended the May 30

¹ Local 77 falsely asserts that Local 657’s brief to the Region omitted reference to the June 14 MOA. Local 657 plainly acknowledged the June 14 MOA its brief. *See Int. Post-Hearing Brief* at 6. But Local 657 simply did not dwell on the June 14 MOA because it did not agree that the prior MOA was invalid due to being signed before the commencement of normal operations. The recognition was extended after the employer hired a substantial contingent of employees and roughly simultaneously with DCI UIS’s commencement of operations. Without deciding the issue, the Regional Director found that this concern regarding the commencement of operations was significant, thereby making the June 14 MOA material.

MOA. Its meaning and the intent of the parties is amply explained in the document's text, and its context was explained in testimony.

Moreover, the explanation for why Local 657 focused on the May 28 oral recognition and the May 30 MOA is simple: Local 657 was arguing for application of the recognition bar in addition to the contract bar. In the absence of any argument that gave the June 14 MOA separate significance, the June 14 MOA appeared cumulative. In his Decision and Order, however, Regional Director expressed concern about the validity of the May 28 and May 30 recognitions based upon Board authority invalidating employer recognition given before the employer begins normal operations. *See, e.g. Elmhurst Care Ctr.*, 345 NLRB 1176, 1177 (2005). This concern gave independent legal significance to the June 14 MOA. There is nothing baffling, therefore, about the meaning of the June 14 MOA.

B. Local 77 Fails to Articulate A Compelling Case for Overturning *Hamilton Park Health Care Center*.

Given that the facts clearly establish the existence of a 9(a) agreement in place at the petitioned-for unit, Local 77's election was barred unless an exception to the contract bar doctrine applies. No existing Board authority, however, provides any exception under which the contract bar does not apply. If the contract bar is deemed inapplicable, it will only be through establishing new law.

Local 77 reliance on *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844 (1996) and *American National Can, Inc.*, 321 NLRB 1164 (1996), is misplaced for the reason cited by the Regional Director: The Board previously ruled that the doctrine at issue in those cases, i.e., the rule announced in *Rollins Transportation System*, 296 NLRB 793 (1989), applied only to the recognition bar but not to the contract bar. *See* Decision and Order at 8 (citing *Hamilton Park*

Health Care Center, 298 NLRB 608 (1990)). The Board's holding in *Hamilton Park Health Care Center* could not be clearer:

[T]he Board's recent decision in *Rollins Transportation System*, 296 NLRB 793 (1989), applies only to recognition bar cases. It is well established that a valid contract executed prior to the filing of an election petition will bar the petition. *Rollins*, in which a Board majority held that recognition would not serve as a bar to an election if it was entered into at a time when there was another union actively organizing the employees in question, by its very language is limited to and was intended to apply only to recognition bar situations, not to contract bar. Consequently, since in the instant case it is undisputed that the Employer and the Intervenor executed a valid collective-bargaining agreement covering the petitioned-for employees before the instant petition was filed, *Rollins* is not applicable.

Hamilton Park Health Care Center, 298 NLRB at 608 (internal citation omitted).

Local 77's only response to this clearly applicable authority is to argue that in *American National Can* the Board *sub silentio* overruled *Hamilton Park Health Care Center*. This argument holds no water. To begin, our legal system disfavors the overruling of authority *sub silentio* or by implication for the obvious reason that it undermines the rule of law by providing poor guidance to the affected public. *See U.S. v. Rodriguez*, 311 F.3d 435, 439 (1st Cir. 2002) ("implied overrulings are disfavored in the law"); *U.S. v. Sterling*, 283 F.3d 216, 219 (4th Cir. 2002) (same); *see also Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*"). The aversion of overrulings *sub silentio* is reason enough to reject Local 77's argument.

In addition, Local 77 must invent facts even to suggest that *American National Can* is relevant to the contract bar. *American National Can* does not actually contain any discussion of the contract bar. Indeed, the Board's opinion does not directly state whether the collective bargaining agreement in that case was executed before or after the petition was filed, which would determine whether the contract bar doctrine applied. The decision also contains no

suggestion that any of the parties bothered to raise the contract bar. Given all of this silence regarding the contract bar, it would be highly unusual if the contract bar actually had been relevant and applicable in that case. It is even more unbelievable to suggest that the Board intended to overrule a recent precedent and craft an entirely new exception to the contract bar without so much as writing a word about what it was up to. To put it mildly, Local 77 is grasping at straws.

The more plausible reading of *American National Can* is that the contract bar was inapplicable because the petition was filed *before* the collective bargaining agreement was signed. *Am. Nat'l Can*, 321 NLRB at 1164 (Board's explicit observation that the recognition occurred "prior to the filing of the instant petition," coupled with its failure to make a similar observation with respect to the signing of the agreement indicates that the signing of the agreement did not precede the filing of the petition). It has always been the case that the contract bar does not apply if a petition predates the signing of the agreement. *See, e.g., General Dry Batteries*, 29 NLRB 1017, 1020 (1941) ("The Board has held repeatedly, however, that an exclusive recognition contract is no bar to an election if it has been executed ... after a rival union has filed a petition for an investigation and certification of representatives.").

But the question of whether the agreement in *American National Can* was signed before or after the petition does not really need to be answered. It suffices to note that the Board's decision in *American National Can* does not address the contract bar at all. Consequently, any implication that the decision might have for the contract bar does not even rise to the level of *dicta*. The only valid reading of *American National Can*, therefore, is simply to accept the obvious and admit that the decision contains no authority on the contract bar.

Furthermore, the only case to imply an exception to the contract bar from an exception to the recognition bar is the now-discredited *Dana Corp.* 351 NLRB 434, 435 (2007).

(“Modifications of the recognition bar cannot be fully effective without also addressing the election-bar status of contracts executed within the 45-day notice period, or contracts executed without employees having been given the newly-required notice of voluntary recognition. Consequently, we make parallel modifications to current contract-bar rules as well, such that a collective-bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless notice of recognition has been given and 45 days have passed without a valid petition being filed.”). The mistake of *Dana Corp.* was to give too little weight to the Act’s interest in promoting stable bargaining relationships. The Board should not repeat that mistake by following *Dana*’s faulty logic.

Enforcing the contract bar under extant NLRB law, rather than creating a new exception out of whole cloth, is the better outcome here. A new exception is unnecessary because existing protections in the law are adequate. Had Local 77 filed its petition prior to June 14, 2013, the Regional Director would have conducted the election. Requiring that rival unions act quickly to file petitions is fair and already is incorporated into the NLRA’s rules governing rival union situations. Furthermore, if after working under the current CBA operators find that they prefer individual craft representation, they can take up that cause when the open period arrives.

This outcome advances the purposes of the Act by promoting the stability of a voluntary collective bargaining relationship, while relying on the established limits of the contract bar to achieve the proper balance with respect to honoring the rights of dissident employees.

II. The Recognition of Local 657 Was Extended Correctly Under NLRB Rules Governing Rival Union Situations.

The NLRB has a comprehensive set of rules for dealing with rival union situations, and the DCI-UIS's recognition of Local 657 complied with all of them. The present NLRB regime on rival unions begins with *Bruckner Nursing Home*, 262 N.L.R.B. 955, 957 (1982), and *RCA del Caribe, Inc.*, 262 N.L.R.B. 963, 965 (1982). In these cases, the Board threw out the old-rule of *Mid-West Piping*, 63 N.L.R.B. 1060 (1945), which previously made it an unfair labor practice for an employer to continue negotiating with an incumbent union after a rival union filed a petition for an election. In its place, the Board announced the following rules: First, in a rival union situation, the employer was free to recognize and sign an agreement with a union who presented evidence of a non-coerced, unassisted majority of employees, and that recognition would not be deemed to violate the Act as long as it preceded the filing of a petition by a rival union. *Bruckner Nursing Home*, 262 NLRB at 957 (“[W]e will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board. However, once notified of a valid petition, an employer must refrain from recognizing any of the rival unions.”). Second, an employer who recognized a union prior to the filing of a rival petition was free to continue negotiating and entering a collective bargaining agreement with the previously recognized union even after a rival petition was filed. *See RCA del Caribe*, 262 N.L.R.B. at 965.

Under the modern regime, therefore, an employer's voluntary recognition of one union among rivals will be legitimate if that recognition precedes the filing of any rival petitions. Here, that requirement is easily met. The Regional Director found that recognition was extended on June 14, 2013. The Petition was not filed until over a month later on July 16, 2013. DCI-UIS's

recognition of Local 657, therefore, fully complied with the NLRB's rules for legitimate recognition in a rival union situation.

By contrast, had Local 77 filed its petition prior to June 14, 2013, DCI UIS would have been precluded under *Bruckner Nursing Home* from entering into the June 14, 2013 MOA. This shows that the current legal framework provides reasonable protections for long-standing, incumbent unions – protections that Local 77 could have invoked had it acted with more alacrity. Local 77's gripe is not with the current legal framework, therefore, but with its own failure to act quickly. That is not a problem for this Board to solve.

CONCLUSION

Based upon the foregoing, the request for review should be denied.

September 3, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing POST-HEARING BRIEF was served on the parties identified below by Electronic & First Class Mail:

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