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

Indianapolis, IN

EDWARD C. LEVY CO., d/b/a
THE LEVY COMPANY
Employer

and Case 25-RC-10436

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 150, AFL-CIO
Petitioner

and

NATIONAL PRODUCTION WORKERS
UNION, LOCAL 707
Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held July 22, 2008, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.[1]

[1] Upon the entire record in this proceeding, the undersigned finds:
a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. ISSUES

The International Union of Operating Engineers Local 150, (hereafter the "Petitioner" or "IUOE") sought an election within a unit comprised of all full-time and regular part-time heavy equipment operators, hot pit loader operators, loaders operators, pot haulers, crane operators, shovel operators, plant operators, maintenance personnel, maintenance helpers, truck drivers, and laborers employed by Edward C. Levy Co., d/b/a The Levy Company (hereafter the "Employer") at its Portage, Indiana facility. At the hearing, the parties stipulated that the appropriate unit is:

> All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its installation located on the premises of Mittal Steel's Burns Harbor, Indiana manufacturing complex; BUT EXCLUDING all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

The Employer contends that the petition should be dismissed for several reasons. First, the Employer contends that the election is barred by the Board's one-year certification rule. A mixed manual-mail ballot decertification election was held in Case 25-RD-1490 commencing October 27, 2006 and ending on November 6, 2006, involving the Petitioner and the same bargaining unit as described above. The Petitioner lost the election and the certification of results issued on January 24, 2008. Therefore, the Employer maintains that the Board's one-year certification bar began to run from the date of the certification of results and the petition should be dismissed because it was filed within one year after the date of the certification of results. The Petitioner argues that the Board's certification bar rule is intended to apply only in circumstances where a bargaining representative has been chosen to give the parties full opportunity to reach an agreement for a period of one year. The Petitioner asserts that, in the instant case, no bargaining representative was certified as a result of the election. Thus, Petitioner maintains that there is no certification bar since no bargaining representative was chosen and the petition should proceed to a representation election.

Second, the Employer contends that, pursuant to Section 9(c)(3) of the Act, the election is barred because a valid election has been held in the same bargaining unit within the preceding twelve-month period. According to the Employer a valid election occurred on the date that the tally of ballots was revised on January 16, 2008 or when the certification of results issued on January 24, 2008. Therefore, since the petition was filed well before the twelve-month period has elapsed, the petition should be dismissed. The Petitioner argues that the revised tally of ballots is contingent upon the original tally of ballots which stemmed from the original date of the election which began on October 27, 2006. The Petitioner asserts that the election bar determinative date is November 6, 2006, when the balloting in Case 25-RD-1490 concluded. Thus, the Petitioner maintains that there is no election bar and the petition should proceed to a representation election.

Third, the Employer contends that, on July 21, 2008, it recognized the National Production Workers Union, Local 707 (hereafter the "Intervenor) as the representative of the majority of the bargaining unit described above. The Employer maintains that, since the

Employer recognized the Intervenor, a recognition bar has been created allowing the parties to bargain for a reasonable period of time free from claims by a rival union. Thus, the petition should be dismissed. The Petitioner argues that the petition is not barred by the Employer's voluntary recognition of the Intervenor. The Petitioner asserts that the Intervenor does not represent a majority of the bargaining unit described above since the Intervenor demonstrated a showing of interest of around 32 percent. The Petitioner also asserts that the petition was filed two weeks prior to the hearing and 18 days prior to the claimed voluntary recognition of the Intervenor. Therefore, the Petitioner maintains that there is no valid recognition bar and the petition should be processed.

Fourth, the Employer contends that any election is barred by the Formal Settlement Stipulation entered into by the parties on March 13, 2008 in settlement of Cases 25-CP-211 and 25-CP-212 which alleged that the Petitioner engaged in unlawful recognitional and/or organizational picketing within twelve months of a valid election. The case is currently pending before the United States Court of Appeals for the Seventh Circuit on an Application for Enforcement of an Order of the National Labor Relations Board upon Stipulation of the Parties for Consent Judgment. The Employer contends that, pursuant to the formal settlement agreement, the Petitioner agreed to refrain from engaging in recognitional and/or organizational picketing for twelve months. Therefore, the Employer maintains that the petition should be dismissed because it would undermine the remedial effect of the formal settlement agreement. The Petitioner argues that the pending enforcement of formal settlement agreement does not bar the petition. The Petitioner asserts that the formal settlement agreement does not constitute an admission on the part of the Petitioner and the agreement contains a non-admissions clause. The Petitioner also asserts that it duly posted the Notice To Employees and Members pursuant to the formal settlement agreement. Thus, the Petitioner maintains that, even though the Petitioner is barred from picketing the Employer with a recognitional object for twelve months in the unit in which it was decertified, there is nothing prohibiting the Petitioner from seeking to represent the Employer's employees at the present time.

II. DECISION

The Employer has set forth several arguments which, fully discussed below, all seeking to secure the same outcome; that it be found there is a bar to processing the instant petition and the petition be dismissed. Several of the Employer's arguments seek a finding that the petition is untimely because it was filed within one year of the date of the final tally and certification of results issued in the previous Case, 25-RD-1490. Indeed these arguments seek a change in the current case law on the issues of the Board's one-year certification rule and the election bar. The evidence produced at the hearing, more fully discussed below, established that the decertification election conducted by mixed manual mail ballot in Case 25-RD-1490 started on about October 27, 2006 and concluded on November 6, 2006. The Union was not selected by a majority of employees in the unit in question. Under Board precedent, the twelve-month limitation provision of Section 9(c)(3) begins to run from the date of balloting rather than from the date of certification of results in these circumstances. Mallinckrodt Chemical Works, 84 NLRB 291 (1949). Therefore, as more fully discussed below, no bar has been established. Accordingly, an

election will be held in the following unit which constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its installation located on the premises of Mittal Steel's Burns Harbor, Indiana manufacturing complex; BUT EXCLUDING all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 114 employees for whom a history of collective bargaining exists.

III. STATEMENT OF FACTS

The parties' most recent collective-bargaining agreement expired in March 2005. In August 2005, the Petitioner called a strike when negotiations for a new agreement proved unsuccessful. Afterwards, the Employer began hiring replacement workers. Pursuant to the filing of a decertification petition in Case 25-RD-1490 on September 18, 2006, an election was conducted by mixed manual-mail ballot to determine whether the Petitioner would continue to represent the Employer's employees located at its Burns Harbor, Indiana facility for purposes of collective bargaining. The election began on or about October 27, 2006 and ended on November 6, 2006. On November 6, 2006, a tally of ballots, which was made available to the parties at the ballot count, showed the following results:

Approximate number of eligible voters	234
Number of void ballots	0
Number of votes cast for the Petitioner	0
Number of votes cast against participating labor organization	0
Number of valid votes counted	0
Number of challenged ballots	225
Number of valid votes counted plus challenged ballots	225

On November 13, 2006, the Petitioner timely filed objections to the election. Following an investigation of the issues raised by the objections and challenges, the Regional Director of Region Twenty-five issued his Report on Objections, Order Directing Hearing and Notice of Hearing on December 15, 2006. In his report, the Regional Director ordered that a hearing be conducted before a hearing officer to resolve the issues of fact and credibility raised by the objections and all of the challenged ballots. Pursuant to this order, a hearing was conducted on January 3, 4, and 5, 2007, in Michigan City, Indiana. On February 1, 2007, a Hearing Officer's Report on Challenged Ballots, Objections, and Recommendations to the Board issued regarding the objections and challenges. The Hearing Officer found that the permanent replacement workers were eligible to vote and that the Petitioner's challenge to the ballots cast by the permanent replacement workers should be overruled. The Hearing Officer also recommended that several of the Petitioner's objections be sustained, the results of the election be set aside, and a rerun election be held. The Employer and the Petitioner filed exceptions to the hearing officer's report and recommendations to the National Labor Relations Board (hereafter the

"Board"). On December 28, 2007, the Board issued its decision in Case 25-RD-1490. In its decision, the Board overruled the Hearing Officer's recommendation to conduct a rerun election. The Board also ordered that the case be remanded to Region Twenty-five to count the ballots of the permanent replacement workers only and issue a revised tally of ballots.

On January 16, 2008, a revised tally of ballots was issued showing the following results:

Approximate number of eligible voters	234
Number of void ballots	0
Number of votes cast for the Petitioner	6
Number of votes cast against participating labor organization	106
Number of valid votes counted	112
Number of undetermined challenged ballots	4
Number of valid votes counted plus challenged ballots	116
Number of sustained challenges	104

On January 24, 2008, a certification of results was issued certifying that a majority of the valid ballots had not been cast for any labor organization and that no labor organization was the exclusive representative of the employees in the following bargaining unit:

> All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its installation located on the premises of Mittal Steel's Burns Harbor, Indiana manufacturing complex; BUT EXCLUDING all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

On January 28, 2008, the Employer filed an unfair labor practice charge in Case 25-CP-211 with Region Twenty-five alleging that the Petitioner had been engaging in recognitional and/or organizational picketing within twelve months after being decertified as the collective-bargaining representative of production and maintenance employees at the Employer's Burns Harbor, Indiana facility. On or about February 8, 2007, the parties entered into an informal Board settlement agreement resolving the charge in Case 25-CP-211.

Even after entering into an informal settlement agreement, the Petitioner continued to picket the Employer's Burns Harbor, Indiana facility. On February 15, 2008, the Employer filed another unfair labor practice charge in Case 25-CP-212 with Region Twenty-five alleging that the Petitioner had been engaging in recognitional and/or organizational picketing within twelve months after being decertified as the collective-bargaining representative of production and maintenance employees at the Employer's Burns Harbor, Indiana facility. On March 10, 2008, Region Thirteen issued an Order Consolidating Cases, Order Setting Aside Settlement Agreements in Cases 13-CP-864 and 25-CP-211, Consolidated Complaint and Notice of Hearing. (The Petitioner had also entered into a settlement agreement with Region Thirteen to resolve allegations that it had engaged in unlawful picketing.) On March 20, 2008, Region Twenty-five, Region Thirteen, the Employer, and the Petitioner entered into a formal settlement agreement whereby the Petitioner agreed to cease and desist from engaging in unlawful picketing. Also, pursuant to the formal settlement agreement, the parties agreed that the Board

would issue a Board Order conforming to the terms of the formal settlement agreement and that a court judgment enforcing the Order would be entered. The Board issued its Order in an unpublished decision on May 20, 2008. On May 23, 2008, the Board filed an Application For Enforcement of an Order of the National Labor Relations Board Upon Stipulation of the Parties for Consent Judgment with United States Circuit Court of Appeals for the Seventh Circuit. The application is currently pending.

IV. DISCUSSION

A. One-Year Certification Rule Bar

The purpose of the Board's one-year certification rule, which was upheld by the U.S. Supreme court in Brooks v. NLRB, 348 U.S. 96 (1953), is to promote peace and stability in industrial relations. It provides that for a one-year period starting from the date of certification of representative, a union will enjoy an irrebutable presumption of continuing majority status to give the parties the opportunity to negotiate a collective-bargaining agreement free from any claims of a rival union. See, e.g., Americare-New Lexington Health Care Center, 316 NLRB 1226 (1995) (citing Brooks v. NLRB, 348 U.S. 96, 103 (1954)). Accordingly, during the certification year, the Board will not entertain a petition by another union. United Supermarkets, 287 NLRB 1996 (1987). Further, the Board has expressly affirmed the application of this practice in every instance in which a union is certified as the bargaining representative, even if it is the result of employees voting for continued representation by the union in a decertification election. Americare-New Lexington Health Care Center, supra.

The Employer argues that the petition should be dismissed because it was filed within twelve months after the Petitioner was decertified as the exclusive bargaining representative of its employees in Case 25-RD-1490. The Employer argues that since the one-year certification bar applies to cases in which a union is certified as the exclusive collective bargaining representative such a bar should also apply to cases in which a union is decertified as the exclusive collective bargaining representative in a decertification election.

In support of its position, the Employer cites Americare-New Lexington Health Care Center, supra. In Americare-Lexington Health Care Center, a decertification election was held pursuant to the filing of a decertification petition. The union won the election. After the election, the Board issued a certification of representative to the union based on the results of the election. About two months later, the employer withdrew recognition from the union. The union filed an unfair labor practice charge. The employer subsequently entered into a settlement agreement obligating it to recognize and bargain with the union. The Board expressly affirmed its long-standing practice of applying the certification year rule in instances in which the Board certifies a union after an election regardless of whether the Board has previously certified the same union's representative status for the same bargaining unit in a prior valid Board election.

Despite the Employer's contentions, there is a notable difference between the facts in Americare-New Lexington Health Care Center and the instant case. In the instant case, the evidence demonstrates that a decertification election in Case 25-RD-1490 was conducted by mixed manual mail ballot starting on October 27, 2006 and ending on November 6, 2006.

Unlike the facts in Americare-New Lexington Health Care Center, the Petitioner in the instance case lost the election and a certification of results issued on January 24, 2008. Thus, neither the Petitioner nor any other labor organization was certified as the exclusive bargaining representative of the Employer's employees. The Board's one year certification rule is aimed at affording the employer and union full opportunity for the newly established or re-established bargaining relationship to stabilize and arrive at a collective bargaining agreement within the certification year. Therefore, it is clear that the one-year certification rule would not apply in this instance since no exclusive bargaining representative was selected in Case 25-RD-1490. Thus, the one-year certification rule is inapplicable in this case and the petition will be processed.

B. Election Bar

Section 9(c)(3) of the Act prohibits the holding of an election in any bargaining unit or subdivision within which a valid election was held during the preceding 12-month period of time. In Mallinckrodt Chemical Works, 84 NLRB 291 (1949), the Board held that the twelve-month period of time for purposes of barring the holding of another election in the same bargaining unit or subdivision runs from the date of balloting rather than from the date of certification of results. See also Fruitvale Canning Company, 85 NLRB 684 (1949); Kolcast Industries, 117 NLRB 418 (1957). Furthermore, the Board has held that, where balloting takes more than one day, an election is not considered held until balloting has been completed. Alaska Salmon Industry, 90 NLRB 168, 170 (1950).

In an argument closely related to its argument that the one-year certification rule should bar the processing of the instant petition, the Employer again argues that the petition should be dismissed because it was filed less than one year after the revised tally of ballots issued on January 16, 2008, and the certification of results issued on January 24, 2008. In this its second argument, the Employer urges that the one-year period for purposes of establishing an election bar must be measured from the date of the issuance of the revised tally of ballots after the challenged ballots were opened and counted or the date the certification of results issued. The Employer argues that the election bar should not run from the date of balloting because the Petitioner lost a decertification election rather than an initial representation election. Additionally, the Employer argues that the Board should interpret the term "valid election" in Section 9(c)(3) in the same manner that the term is interpreted in Section 8(b)(7)(B) of the Act and that such an interpretation would further the Act's policy of promoting industrial peace and stability. Both arguments are rejected as described below.

1. Decertification Election vs. Initial Representation Election

The Employer argues that an election bar does not run from the date of balloting in the context of a decertification election. The Employer asserts that, when a union loses a representation election, there is no change in the status quo. In a decertification election, however when a union loses there is a change in the status quo. Therefore, the Employer argues that in decertification elections the election bar runs from the date of the results of the election as opposed to the date of balloting. The Employer contends that because of the delay between the balloting and the Board's final resolution of the post election challenges and objections, the Petitioner continued to enjoy the benefits of its status as the employees' bargaining

representative, despite the fact that it ultimately lost the election. The Employer further asserts that the employees are entitled to a "year of peace" which can only be established by using the certification date as the time in which the twelve month period under Section 9(c)(3) begins to run. The Employer cites no case which stands for this proposition. Rather, the Employer argues that Mallinckrodt and its progeny, Victor Chemical Works, 85 NLRB 495 (1949); and Fruitvale Canning Co., 85 NLRB 684 (1949); and Vickers, Inc., 124 NLRB 1051 (1959) only govern the election bar in the context of initial representation elections, not decertification elections. While each of these cases arose in the context of an initial representation election, there is no indication in the cases that anything other than the date of balloting should be used to determine an election bar in decertification elections.

In Victor Chemical Works, 85 NLRB 495 (1949), the Board held that a reasonable construction of Section 9(c)(3) is that a second election shall not be conducted within twelve months from the date of the earlier election with respect to the same unit of employees, despite the fact that the final results leading to the petition being dismissed occurred over four months after the election was held. Since more than one year had elapsed since the date of balloting, the Board denied the employer's motion to dismiss the petition. In Fruitvale Canning Co., 85 NLRB 684 (1949), an election was conducted on September 3, 1948. The sole union on the ballot lost the election and the final results were certified by the Board on December 30, 1948. The Board affirmed that the twelve-month limitation provision in Section 9(c)(3) begins to run from the date of balloting. In issuing its direction of election prior to September 3, 1949, the Board further held that Section 9(c)(3) only precludes the holding of an election within one year after the last valid election. The section does not affect the Board's discretion to issue a direction of election within one year after the last valid election. In Vickers, Inc., 124 NLRB 1051 (1959), the Board determined that while it will allow petitions to be filed prior to the end of the twelve month period following balloting of an earlier election as long as the election is held after the expiration of the twelve month period, such petitions would no longer be entertained if filed more than 60 days prior to the anniversary date as prescribed in Section 9(c)(3).

In the instant case, the evidence demonstrates that a decertification election was conducted starting on October 27, 2006 in Case 25-RD-1490. The balloting concluded on November 6, 2006. Pursuant to the election, as in each of the cases described above, no bargaining representative was selected. Since the balloting was completed on November 6, 2006, the twelve-month time period for purposes of barring the holding of another election bar in the same bargaining unit or subdivision runs from the date of the completion of balloting, which was November 6, 2006, and not from the date of the final determination of results as discussed above. Thus, the time which will have elapsed since the balloting date of November 6, 2006 is well past the twelve-month period of time established by Section 9(c)(3) of the Act. Therefore, there is no election bar and the petition should be processed.

2. "Valid Election" Under Section 9(c)(3)

The Employer argues that, pursuant to the Board's case law interpreting Section 8(b)(7)(B) of the Act, the petition should be dismissed since the petition was filed within twelve months after issuance of the certification of results on January 24, 2008. The Employer asserts that Section 8(b)(7)(B) provides a twelve–month period of time free from picketing for a

proscribed objective following a valid election. The Employer also asserts that Section 9(c)(3) of the Act provides that "no election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." The Employer further asserts that the term "valid election" in Section 8(b)(7)(B) and Section 9(c)(3) must be interpreted in a consistent manner. Additionally, the Employer asserts that the twelve-month periods outlined in both provisions are identical. Therefore, the Employer's position is that a valid election in the instant case occurred on the date that the certification of results issued on January 24, 2008, thus no election should be directed until at least January 24, 2009. In support of its position, the Employer relied on Retail Store Employees' Union Local No. 692 (Irvins, Inc.), 134 NLRB 686 (1961).

The purpose of Section 8(b)(7)(B) of the Act is to provide a twelve-month period free from picketing for recognitional or organizational purposes following a valid election in which no union has been selected as the exclusive bargaining representative. Retail Store Employees' Union Local No. 692 (Irvins, Inc.), supra. The Board has held that, in 8(b)(7)(B) cases, a valid election will be deemed to have been conducted on the date in which the certification of results has issued. Id. The Board has also held that no violation of 8(b)(7)(B) can be established until the certification of results has issued. Id. The Board's selection of the date of the certification of results for determining a violation of Section 8(b)(7)(B) rests on the notion that a final determination of a valid election cannot be established until the time for all challenges and objections has expired and/or been disposed of, or until it has been determined that a runoff election is not required. Id.

In Retail Store Employees' Union Local No. 692 (Irvins, Inc.), the union engaged in picketing for recognitional purposes from May 31, 1960 to October 3, 1960. On June 13, 1960, the union filed a representation petition. On August 18, 1960, an election was held in which the union lost and the certification of results issued on August 26, 1960. The Board found that the union had engaged in unlawful picketing in violation of Section 8(b)(7)(B). The Board also held that, specifically for the purposes of finding a violation of Section 8(b)(7)(B), the determinative date would be the date of the certification of results, thus it was only that picketing after August 26, 1960 which was unlawful. The Board also held that the remedy for a violation of Section 8(b)(7)(B) would require a cessation of all recognitional/organizational picketing for a period of twelve-months from the date the union terminated its picketing activities. In fashioning this remedy, the Board drew an analogy between the congressional purpose of Section 8(b)(7)(B) and the 1947 amendment of the Act adding Section 9(c)(3). The Board noted that Section 9(c)(3) of the Act is concerned with the principle of stability and repose vis-à-vis employees after they have voted in an election. The Board determined that Section 8(b)(7)(B) of the Act extended the principle of stability for the benefit and protection of the employer where a union engaged in proscribed picketing such that the remedy should provide a twelve-month period free from proscribed picketing from the date such picketing ceased. Id. at 691.

The Employer's reliance on the above case to find that a Board-conducted election cannot be held during the same twelve-month period of time mandated by Section 8(b)(7)(B) is misplaced. The Board gave no indication in its decision that for purposes of Section 9(c)(3) the determinative date in barring an election is the date of certification of results. To the contrary, the Board indicated that "in 8(b)(7)(B) cases the decisive date for purposes of ascertaining when

there has been a valid election conducted under Section 9(c) of the Act is the date on which a certification of bargaining representative, or a certification of results is issued in a Board-conducted election." Id.. at 689. The Employer has cited no case which stands for the proposition that a Board-conducted election cannot be held during the twelve-month period of time used to determine a violation of Section 8(b)(7)(B). As discussed above, the Board has held and continues to hold that the twelve-month period of time for purposes of barring the holding of another election in the same bargaining unit or subdivision runs from the date of balloting rather than from the date of certification of results. Mallinckrodt Chemical Works, supra; Kolcast Industries, supra. While it may not be determined that the election was indeed a "valid election" until a later date, it is clear that the date used to determine whether an election is barred by Section 9(c)(3) is the date of balloting. To find otherwise would be contrary to current Board precedent.

The Employer further argues that in the instant case, to use the date the certification of results issued as the determinative date for the election bar will promote industrial peace and stability. The Board has specifically rejected the argument that an employer is entitled to a twelve-month "cooling off" period from the date of a final board determination of a previous election. See R.L.Polk & Company, 123 NLRB 1171 (1959).

C. Recognition Bar

The Board recently modified its recognition-bar doctrine in Dana Corporation, 351 NLRB No. 28 (2007). In that case, the Board held that there would be no bar to an election following a grant of voluntary recognition unless: (1) the affected unit of employees received adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days and (2) 45 days pass from the date of notice without the filing of a validly-supported petition.

The Employer argues that, on July 21, 2008, it received a letter from the Intervenor claiming to hold a majority of authorization cards signed by employees at the Employer's Burns Harbor, Indiana facility. The Employer asserts that it recognized the Intervenor on that day. The Employer's position is that the petition should be dismissed because Employer voluntarily recognized the Intervenor and the parties have not had a reasonable amount of time to explore a bargaining relationship as required by the Board's holding in Keller Plastics Eastern, Inc., 157 NLRB 583 (1966) and Lee Lumber and Bldg. Material Corp., 322 NLRB 175, 179 (1996).

In the instant case, the evidence demonstrates that the petition was filed on July 7, 2008, two weeks prior to the Employer's voluntary recognition of the Intervenor. In rival union initial organizing situations a voluntary good-faith recognition will not bar a petition by a competing union if the petitioner demonstrates a 30-percent showing of interest that predates the recognition. Smith's Food and Drug Centers, 320 NLRB 844 (1996). It has been administratively determined that the petition in the instant proceeding is supported by at least a 30 percent showing of interest, therefore an election is warranted to in order to guarantee employees an opportunity to express their desires in a secret ballot election. Also, the evidence demonstrates that the Employer's letter acknowledging the recognition demand conditioned the grant of recognition upon confirmation of the Intervenor's majority status. At the hearing, the

Intervenor produced authorization cards in excess of 10 percent of the unit to establish its status as a fully participating intervenor. However, Edgar Roman, a representative of the Intervenor, stated on the record that he only had authorization cards for 32 percent of the unit. Since there is insufficient evidence demonstrating that the Intervenor possessed majority status at the time of recognition, the grant of recognition by the Employer would not bar an election.

Additionally, even though the Employer voluntarily recognized the Intervenor on July 21, 2008, there is no evidence demonstrating whether the employees in the unit were sufficiently notified of the voluntary recognition per the Board's decision in Dana Corporation, supra. Even assuming that the employees in the unit received adequate notice of the voluntary recognition, the 45-day window period established by the Board in Dana Corporation has not elapsed. The Board has held that both the notice and window-period requirements must be met for a voluntary recognition to bar an election. Id. Therefore, there is no recognition bar and the petition will be processed.

D. Settlement Bar

Finally, the Employer argues that the petition should be dismissed because enforcement proceedings are pending regarding the Petitioner's alleged unlawful picketing and to process the petition would undermine the Board's remedial order. The Employer argues that the Petitioner engaged in unlawful picketing in violation of Section 8(b)(7)(B) of the Act. As described above, the Employer filed unfair labor practices with Regions Thirteen and Twenty-five. The Petitioner subsequently entered into a formal settlement agreement in which the Petitioner agreed that it would cease and desist from picketing the Employer for recognitional/organizational purposes for a period of one year. Subsequent to the approval by the Board of the Formal Settlement Stipulation, the Board filed an Application for Enforcement of an Order of the National Labor Relations Board upon Stipulation of the Parties for Consent Judgment with United States Circuit Court of Appeals for the Seventh Circuit. This application is currently pending.

In support of its position, the Employer relies on Douglas-Randall, Inc., 320 NLRB 431 (1995). In Douglas-Randall, Inc., a decertification petition was held in abeyance as a result of a pending unfair labor practice charge and complaint alleging in part that employer unlawfully refused to recognize and bargain with the union. The parties subsequently entered into a settlement agreement whereby the employer agreed that it would not fail to recognize and bargain with the union. Afterwards, the petition was dismissed. The Board held that an employer's agreement to settle outstanding charges and complaints by recognizing and bargaining with the union will require final dismissal of a decertification petition or other petitions challenging the union's majority status filed subsequent to the onset of the alleged unlawful conduct. The Employer argues that, as in Douglas Randall, the Petitioner's agreement to cease and desist picketing the Employer would be rendered "illusory" if the petition is allowed to proceed. The Employer contends that if the Petitioner is certified in an election held pursuant to the instant petition it would then be free to reinstitute such picketing, thereby undermining the Union's agreement to cease picketing pursuant to the Formal Settlement Stipulation.

Initially, it is noted that Douglas Randall, unlike the instant case, involved 8(a)(5) unfair labor practices which were resolved by a settlement agreement containing a bargaining

provision, which could impact whether there is a question concerning representation. In addition, the Board recently overruled Douglas Randall, in Truserv Corporation, 349 NLRB No. 23 (January 31, 2007) and held that in situations involving concurrent 8(a)(5) unfair labor practices and decertification petitions, the decertification petition can be processed and an election can be held after the unfair labor practice case has been settled and the completion of the remedial period associated with the settlement of the charges. In so ruling, the Board did note that a return to this handling of decertification procedures would not render settlement agreements "illusory", and that having agreed to bargain the employer has a duty to honor such an agreement regardless of the processing of a decertification petition. Id. at p. 5-6. Such is also the case in the instant proceeding, the Petitioner must honor its agreement to cease unlawful picketing for recognitional purposes during the processing of the petition. Should the Petitioner be certified as the employees' collective bargaining representative such picketing would not be unlawful under Section 8(b)(7)(B).

In addition, there is no proscription in either the Formal Settlement Stipulation or in Section 8(b)(7)(B) against the Petitioner filing a petition and seeking an election in which employees can exercise their free choice regarding union representation. Any prohibition in either the Formal Settlement Stipulation or Section 8(b)(7)(B) involves coercive picketing activities. Furthermore, the Petitioner duly posted the Notice to Employees and Members shortly after entering into the formal settlement agreement in March 2008. Additionally, there is no case law which stands for the proposition that a petition cannot be entertained during the pendency of an application for enforcement of a Board order. Therefore, there is no settlement bar and the petition will be processed.

V. CONCLUSION

Accordingly, based upon the evidence described above, it is concluded that there are no bars which prevent the processing of the petition and the Petitioner may proceed to an election in the unit stipulated to by the parties.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 150, AFL-CIO, the National Production Workers Union, Local 707, or no representative. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been

permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the undersigned to assist in determining an adequate showing of interest. In turn, the list shall be made available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577 **on or before August 29, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlrb.gov,[2] by mail, or by facsimile

[2] To file the list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also

transmission at (317)226-5103. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **September 5, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlrb.gov,[3] but may not be filed by facsimile.

SIGNED at Indianapolis, Indiana, this 22nd day of August 2008.

Rik Lineback
Regional Director
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1577

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located under "E-Gov" on the Board's web site, www.nlrb.gov.

[3] Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.