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July 31, 2010

National Labor Relations Board
Executive Secretary
1099 14th Street, N.W.
Washington, D.C. 20570-0001

RE: Yonkers Raceway Corp., 2-RC-23503

Dear Sir or Madam:

I have enclosed an appeal form along with eight (8) copies of Petitioner's Request for Review and Brief on Appeal. Copies have been served on the Employer and Intervenor.

Very truly yours,



Terrence P. Dwyer

TPD/jmc

Enc.

RECEIVED

2010 AUG -2 PM 3: 26

NLRB
ORDER SECTION

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 14th Street, N.W.
Washington, D.C. 20570

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Yonkers Raceway Corp. d/b/a Empire City at Yonkers Raceway
Case Name(s).

2-RC-23503

Case No(s). (If more than one case number, include all case numbers in which appeal is taken.)

Renee P. Dwyer

(Signature)

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Reverend P. Dwyer

(Signature)

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NLRB
ORDER SECTION

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
OFFICE OF APPEALS**

-----X
Yonkers Racing Corp., d/b/a Empire City at Yonkers Raceway,

Employer

and

Law Enforcement Employees Benevolent Association,

**Region 2
Case No. 2-RC-23503**

Petitioner

and

**REQUEST FOR
REVIEW AND
BRIEF ON APPEAL**

Local 153, O.P.E.I.U.,

Intervenor

-----X

Petitioner, Law Enforcement Employees Benevolent Association (hereinafter "L.E.E.B.A.") submits this Request for Review of the July 21, 2010 Decision and Order of Celeste J. Mattina, Regional Director, Region 2, pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board. It is the position of L.E.E.B.A. that review of the Decision and Order of the Regional Director is warranted in accordance with Section 102.67(c)(1), 102.67(c)(2) and 102.67(c)(4), namely that a substantial question of law or policy is raised, the Regional Director is in error on a substantial factual issue and there are compelling reasons for reconsideration of important Board rules or policy.

FACTS OF THE CASE

The Employer is a New York corporation which sponsors live pari-mutuel harness racing and operates a casino consisting of video lottery gaming machines (*Joint Exhibit 14*).

Originating in 1899 as the Empire City Trotting Club the Employer operated exclusively as a harness racing facility until the opening of its casino in 2005 (*Joint Exhibit 14, para. 2 and Joint Exhibit 5, p. 2*). The operations of the casino are dependent upon the Employer's operation as a raceway facility (*Joint Exhibit 14, para. 8*) since New York State legislation, enacted in 2001, designated Yonkers Raceway as one of eight horse racing facilities in New York State to operate video lottery gaming machines under the licensing of the New York State Lottery Division (*see NYS Tax Law section 1617-A*). These combined operations have been referred to in New York State as "racinos." The Intervenor, Local 153, O.P.E.I.U., is the incumbent union based on prior certifications of the New York State Labor Relations Board in 1958 and 1966 (*Joint Exhibit 8, p. 2*). Local 153 is a mixed unit of guard and non-guard titles. Petitioner is a labor organization as defined in Section 2(5) of the National Labor Relations Act and is presently a recognized collective bargaining representative within the City of New York for Department of Environmental Protection police officers and through the National Labor Relations Board for special patrolmen (designated as peace officers under New York State Criminal Procedure Law section 2.10) within the City of New York employed by The Sea Gate Association. Petitioner, Law Enforcement Employees Benevolent Association represents only job titles designated as police officer, peace officer or security guard. (*Hearing Transcript p.39, lines 1-7*) The class of employees involved in the underlying representation petition are designated as special patrolmen under New York State Criminal Procedure Law section 2.10(29) and possess peace officer status. The authority they derive is by virtue of New York State Racing, Pari-Mutuel Wagering and Breeding Law Article 3, section 312. The Employer enjoys the benefits of the enhanced arrest, search and enforcement powers of these officers which they receive solely by virtue of their employment at a horse racing facility.

On April 27, 2009 Petitioner filed a representation petition with a thirty-percent showing of interest with the NYS Employment Relations Board. The petition was held by SERB Labor Relations Examiner Regina Shields until early June 2009 when she submitted the petition for filing. (*Hearing Transcript p. 40, lines 1-5*) Petitioner's representation petition with SERB was timely and within the jurisdiction of SERB at the time of filing (*see eg., Joint Exhibits 1 and 2*). The class of employees sought to be represented by Petitioner were those employees at Yonkers Raceway employed as peace officers, sergeants and lieutenants. Subsequent to Petitioner L.E.E.B.A.'s filing of the representation petition the Employer filed for a jurisdictional

clarification between SERB and the Board ostensibly based on the 2005 shift to partial casino operations. There had not been any prior filing by the Employer relative to SERB jurisdiction over the class of Yonkers Raceway employees represented by Local 153 and sought to be represented by Petitioner.

On August 27, 2009 the jurisdictional issue was submitted to a hearing officer appointed by SERB. The designated hearing officer was SERB Executive Staff member Edward Stahr. During the same time frame of the Employer raising the jurisdictional issue Local 153 filed four unfair labor practice charges against the Employer with SERB which were held in abeyance pending resolution of the jurisdictional issue (*Joint Exhibit 5, p. 2*). On October 26, 2009 SERB filed a petition for an advisory petition with NLRB seeking advice as to whether NLRB would assert jurisdiction over the class of employees at the center of the dispute (*Joint Exhibit 4*). Thereafter, on May 24, 2010, in an opinion, the Board did in fact assert jurisdiction (*Joint Exhibit 7*). On June 14, 2010 Petitioner filed a representation petition with the Board. A hearing on the matter was subsequently scheduled for July 1, 2010 at the Region 2 offices of the Board at 26 Federal Plaza, New York, New York. Testimony was taken from Daniel Mara, Esq., in-house counsel to Yonkers Racing Corp., and Kenneth N. Wynder, Jr., president of L.E.E.B.A..

The July 21, 2010 Decision and Order of the Regional Director failed to take into account Petitioner's "equitable tolling" argument and relied solely on the contract-bar doctrine in denying Petitioner's filed representation petition. The Decision and Order did not acknowledge the fact that the time for Petitioner to file a petition with the Board had passed when the jurisdictional issue was raised at the New York State Employment Relations Board (hereinafter "S.E.R.B.") and that there was an open question as to representation when the subsequent contract relied upon as a bar to Petitioner's representation petition filed with S.E.R.B. was entered into by the Employer and Intervenor.

ISSUES ON APPEAL

1. The Regional Director's finding that Petitioner failed to exercise reasonable diligence is not supported by the record or the facts of the case.

The first issue on appeal is intimately connected to Petitioner's second issue on appeal relative to the equitable tolling argument since the Regional Director's finding that Petitioner failed to exercise reasonable diligence led her to foreclose any consideration of the effect of

equitable tolling on Petitioner's argument. Too much reliance is given in the Regional Director's opinion on Petitioner's supposed knowledge after the September 30, 2009 SERB hearing officer report as to the likelihood that the Board may assert jurisdiction. The potential for the Board to assert jurisdiction did not divest SERB of the present jurisdiction it retained in the matter nor was it a foregone conclusion at that point that jurisdiction would be asserted by SERB. Petitioner had relied on a separate interpretation it maintained as to the effect of the decisions in Prairie Meadows Racetrack and Casino, 324 NLRB 550 (1997) and Delaware Racing Association, 325 NLRB 156 (1997). Petitioner relied on the Board decision in Pinkerton's National Detective Agency, Inc. and Yonkers Uniformed Guards and Protective Association, Local 1, 114 NLRB 1363 (1955) as distinguishing the present matter from that in either Prairie Meadows or Delaware Racing Association. Pinkerton was a representation case subject to the special New York laws regulating racetrack employees. Id. at 1364; see also, Harry M. Stevens, 169 NLRB 806 (1968). The Board therein denied asserting jurisdiction over those employees it deemed to be "the subject of special laws...for the regulation of employment at race tracks" and of which the "employees have been very closely integrated and virtually included in an industry over which the Board, as a matter of policy, does not assert jurisdiction." Id. at 1364. The Board in Pinkerton specifically cited the Pari-Mutuel Revenue Law of 1940, Chapter 254 in footnote 4 of its decision as the particular instance of state regulation over the race track industry. This chapter of laws was the forerunner of Articles 2 (Thoroughbred Racing and Breeding) and 3 (Harness Racing and Breeding) of the Racing, Pari-Mutuel and Breeding Law of New York as revised. Further, what was cited in the Pinkerton decision as Board policy in 1955 became part of NLRB Rules and Regulations in 1973 with the enactment of Section 103.3 which specifically excluded raceway operations from its jurisdictional reach.

As mentioned above, these officers enjoy enhanced powers of arrest, search and detention by virtue of state legislation based on their employ at a race facility. These are state authorized powers not available to security guards and which inure to the benefit of the Employer. (Hearing Transcript p. 34 l. 2-24) The Board in Pinkerton, cited above, recognized the unique nature of these special policemen under New York law and their intimate involvement with the racing industry. The Board continued to follow its reasoning in Yonkers Raceway and Security Guards and Watchmen, 196 NLRB 373 (1972) when it denied jurisdiction over a section 9(c) petition. Similarly the Board, in Universal Security Consultants and Local 542, Intl. Union of Op. Eng.,

203 NLRB 1195 (1973), declined to assert jurisdiction over a unit of security guards and watchmen employed at Pocono Downs harness and flat racing track. The Board in Universal Security held that it would not effectuate the policies of the National Labor Relations Act to assert jurisdiction over the guards at Pocono Downs since they were involved in horse racing. Yet the Board had asserted jurisdiction over other employee groups at Pocono Downs and other race tracks that were not so intimately connected with the racing end of the operations. In his testimony upon cross-examination Mr. Wynder, president of Petitioner union, stated that he was familiar with Prairie Meadows and Delaware Racing Association, had read both decisions and discussed these cases and other issues with counsel. (*Hearing Transcript p. 53 l. 2-23*) Mr. Wynder stated that every situation is different and can be judged differently and he proceeded with the agency which, based on his investigation, had jurisdiction over the unit of employees he was seeking to represent. (*Hearing Transcript p.57 l. 12 to p. 58 l. 6*) Mr. Wynder was certainly no less diligent than Local 153 was when it filed its unfair labor practice petitions with SERB in June 2009 or the Employer when it argued in a separate 2007 Board proceeding that SERB had jurisdiction over raceway operations.

This case not analogous to that encountered in Alternative Services, Inc., 344 NLRB 824 (2005) and its companion case, Adult Residential Care and American Federation State, County and Municipal Employees, AFL-CIO, 344 NLRB 826 (2005), which the Regional Director argues applies to an inexcusable ignorance on Petitioner's part. Alternative Services and Adult Residential Care dealt with state preemption of jurisdiction due to a statutory change. There was a change on March 31, 1997 to the Michigan Public Employee Relations Act. The Michigan Employee Relations Commission dismissed the charging party's unfair labor practice petition on November 10, 1997. The charging party did not file a petition with NLRB until February 24, 1998, an eleven month delay. The Board in both cases did not toll the time period because of a lack of "reasonable diligence" on the part of the charging party. In reaching its decisions the Board noted that "it has never held – nor has it previously been asked to decide – whether this doctrine of equitable tolling applies to a situation, as here, where a charging party excusably does not know of the existence of a cause of action before the Board and timely files charges in a non-Board state forum which, at the time of filing, had competent jurisdiction over the matter." The Board then goes on to assume for the sake of argument that the doctrine of equitable tolling did apply but asserts that the delay in the Charging Party's filing with the Board was a failure of

reasonable diligence. These cases involve unfair labor practice charges which take into account different sets of employee rights. The present case involves a representation petition and goes to the core of the National Labor Relations Act section 7 involving employee free choice of their bargaining representative. There was no comparable failure on Petitioner's part to exercise reasonable diligence since there was no obvious assertion of jurisdiction of the Board at the time. Petitioner filed promptly when NLRB asserted jurisdiction in its May 24, 2010 decision. New York State did not preempt Board authority in this area and the power and authority of SERB remained in full force and effect. The only legislation relevant in this matter is New York State Tax Law Article 34, section 1617-A, which in 2001 provided for eight race tracks to maintain video slot machines and raise revenue for public education within the state. Nothing in that legislation preempted the authority of SERB over the unit of employees at the raceway employed as special patrolmen under New York law nor provided any notice as to any preemption issues.

2. The Regional Director erred in not considering the Petitioner's equitable tolling argument and applying the doctrine to validate the representation petition filed by Petitioner.

The facts of the present case are such that the Petitioner has displayed reasonable diligence during the "open period" for filing under SERB guidelines which merited a consideration of its equitable tolling argument. Petitioner, when made aware there was a question as to jurisdiction, was outside the "open period" under NLRB rules but maintained a reasonable belief that the jurisdiction was properly vested in SERB. (*Hearing Transcript p. 49, l. 19 – p. 50, l. 22, p. 53, l. 19 – p. 54, l. 21*) The reasonableness of Petitioner's belief was bolstered through the testimony of Daniel Mara, Esq., in-house counsel to the Employer, when he testified that as counsel, among his duties was the handling of all unfair labor practice charges filed by the union and that these unfair labor practice charges were handled before SERB. (*Hearing Transcript p. 27, l. 23--p. 28, l.9*) It was further bolstered by the fact that the Intervenor, Local 153 filed its unfair labor practice charges in June 2009 with SERB. (*See Joint Exhibit 2 and Joint Exhibit 5, p. 2*) Both the Employer and the Intervenor argued that the decisions in Prairie Meadows and Delaware Racing Association provided notice of Board jurisdiction and a basis for denying Petitioner's equitable tolling claim. It is disingenuous to rely on the jurisdictional authority of SERB for its filings but somehow suggest Petitioner was remiss

in not filing a representation petition with NLRB when in fact it did not have nor assert jurisdiction over the unit of employees. Board jurisdiction was not as clearly evident as the Regional Director held and any filing by Petitioner prior to the Board's May 24, 2010 decision in Yonkers Racing Corp., 355 NLRB 35 (2010) would have been speculative at best and subject to dismissal for want of jurisdiction. Additionally, it is of note that the Employer, in its appearance before SERB hearing officer Edward Stahr submitted a Proposed Stipulation of Facts in which the Employer indicated it had in a prior NLRB proceeding submitted argument that SERB had jurisdiction over raceway operations. (*Joint Exhibit 14, para. 29*) This was affirmed at the July 1 Region 2 hearing in the present matter by the testimony of Daniel Mara, Esq. and a stipulation on the record by Employer's counsel. (*Hearing Transcript p. 32, l. 5-11*) The previous 1997 Board decisions in Prairie Meadows and Delaware Racing Association certainly did not in 2007 lead the Employer to believe that the Board had jurisdiction over its operations. Since the Board considers representation issues on a case by case basis and had not yet asserted any jurisdiction over the disputed unit of employees, the Petitioner was on solid legal ground in deferring to the actual jurisdiction of SERB at the time of its filing. Prior Board involvement with a union of engineers employed by Yonkers Raceway (*Joint Exhibit 11*), stipulated election agreements (*Joint Exhibit 12*) and certified Board election results over a union of electricians employed at Yonkers Raceway (*Joint Exhibit 13*) do not provide any of the alleged notice to Petitioner that the Board would assert jurisdiction over a unit of peace officers, sergeants and lieutenants so designated with authority derived specifically from state Racing and Wagering law. These factors should have been considered by the Regional Director in the Decision and Order and addressed but were not; as a result the equitable tolling argument was summarily dispensed with.

3. A contract-bar will not apply where there is a timely filed question concerning representation, which the Regional Director failed to recognize in her Decision and Order.

There have been a number of prior Board decisions which have recognized the effect of State Labor Board determinations in representation and unfair labor practice issues.¹ This comity

¹ See eg., Fort Tryon Nursing Home, 223 NLRB 769 (1976) ("[W]e will, as a matter of informed decision, extend comity where to do so conforms with our duty to effectuate the purposes and policies of the Act."); see also, St. Joseph's Hospital, 221 NLRB 1253 (1975), Summer's Living Systems, 332 NLRB 275 (2000), Local 32B-32J SEIU, 1993 NLRB LEXIS 1136 (1993).

is an appropriate and equitable response when there is jurisdictional overlap or change. The Regional Director gave no weight to the representation petition filed with SERB and instead relied exclusively on the contract-bar doctrine and the allegedly untimely filing under Board rules. The Regional Director's Decision and Order overlooked the continued viability of the Petitioner's filed signature cards indicating a thirty percent showing of interest among active employees for a representation election and Board preference that questions concerning representation be resolved through Board election. *Dana Corp.*, 351 NLRB 434 (2007). In fact the Board has held that voluntary recognition is a "far less reliable indicator of actual employee preference" than a Board conducted secret ballot election. *Id.* Intervenor's status is as a voluntarily recognized bargaining representative. When there has been raised a timely question concerning representation the stability and peace between employer and union effected by the contract-bar are subordinate to the employees' wishes as to representation. *See eg., Tru Serv Corp.*, 349 NLRB 2251 (2007). The Petitioner was timely with its representation petition before SERB and the effect of that filing should carry over to the matter presented to the Board. SERB's open period for filing, in fact, mirror those of the Board. If anything, there was at least concurrent jurisdiction between SERB and the Board prior to the May 24, 2010 Board decision in *Yonkers Racing Corp.* Board policy has been to recognize representation findings made by other government agencies which conform to due process standards and Board policy. *See eg., Brookhaven Memorial Hospital*, 214 NLRB 933 (1974). SERB recognized Petitioner's timely representation petition as creating a question concerning representation and sent out notices accordingly. The subsequent jurisdictional was raised by the Employer after the SERB notices were sent out. The Board's contract-bar doctrine is discretionary. A petition filed before the execution date of a contract that is otherwise timely will not be barred by a subsequently entered contract. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). Further, such a subsequently entered contract would be null and void if the challenging union in a representation election was victorious. *City Markets, Inc.*, 273 NLRB 469 (1984), citing *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) and *Dresser Industries*, 264 NLRB 1088 (1982).

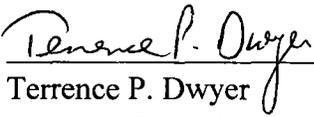
The SERB representation petition timely filed by Petitioner created a question concerning representation which was still in effect when the contract between the Employer and Intervenor was formally entered into in December 2009. Thus, there was no contract-bar to be applied.

CONCLUSION

Petitioner respectfully alleges that the Decision and Order of the Regional Director was in error and requests that the Office of Appeals conduct a review and reverse the Regional Director's Decision and Order. Petitioner requests that the contract-bar be found to be inapplicable in the present case and that a representation election be held pursuant to Board rules.

Dated: Poughkeepsie, New York
July 30, 2010

Respectfully submitted,


Terrence P. Dwyer
Attorney for Petitioner, L.E.E.B.A.
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TO:

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
 } ss.:
COUNTY OF DUTCHESS }

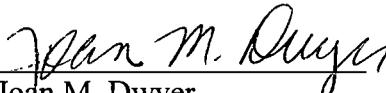
I, Joan M. Dwyer, being duly sworn, deposes and says:

1. I am not a party to the action, am over 18 years of age and reside at 3 East Ricky Lane, Poughkeepsie, NY 12601.

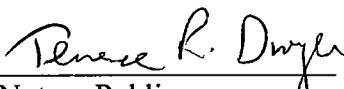
2. On July 31, 2010 I served the within APPEAL FORM and REQUEST FOR REVIEW AND BRIEF ON APPEAL by depositing a copy in the U.S. Mail to each of the following persons or their agents at the last known address set forth after each name below:

Joseph DeGiuseppe, Jr. Esq.
Bleakley, Platt & Schmidt, LLP
Attorney for Employer
Yonkers Racing Corp.
One North Lexington Avenue
White Plains, New York 10601

Bruce Leder, Esq.
Cohen, Leder, Montalbano & Grossman, LLC
Attorney for Intervenor
Local 153 O.P.E.I.U.
1700 Galloping Hills Road
Kenilworth, New Jersey 07033


Joan M. Dwyer

Sworn to before me this
31st day of July 2010.


Notary Public

Terrence P. Dwyer
Notary Public State of New York
Qualified in Dutchess County
My Commission Expires 07/20/12
No. 4995186

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
OFFICE OF APPEALS**

X-----X

Yonkers Racing Corp., d/b/a Empire City at Yonkers Raceway,

Employer

and

Law Enforcement Employees Benevolent Association,

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**REQUEST FOR
REVIEW AND
BRIEF ON APPEAL**

Local 153, O.P.E.I.U.,

Intervenor

X-----X

Region 2 Case No. 2-RC-23503

REQUEST FOR REVIEW AND BRIEF ON APPEAL

THE LAW OFFICE OF TERRENCE P. DWYER

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