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

In the Matter of:

YONKERS RACING CORP.,

Employer,

Case No. 2-RC-23503

and

LAW ENFORCEMENT EMPLOYERS BENEVOLENT ASSOCIATION,

Petitioner,

and

LOCAL 153—OPEIU,

Intervenor.

OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

BLEAKLEY PLATT & SCHMIDT, LLP

By: Joseph DeGiuseppe, Jr.
Attorneys for Employer
One North Lexington Avenue
White Plains, New York 10601
(914) 949-2700
(914) 683-6956 (fax)
jdegiuseppe@bpslaw.com

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STATEMENT OF YONKERS RACING CORP. IN OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

Preliminary Statement

Pursuant to Section 102.67(e) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), the Employer, Yonkers Racing Corp. d/b/a Empire City at Yonkers Raceway ("YRC" or "Employer"), through its attorneys Bleakley Platt & Schmidt, LLP, hereby submits its Statement in Opposition to the Request For Review filed by the Petitioner Law Enforcement Employers Benevolent Association ("LEEBA" or "Petitioner") of the July 21, 2010 Decision and Order ("Order") of the Regional Director of Region 2 of the NLRB ("Regional Director") dismissing the representation petition filed by LEEBA on June 14, 2010 with Region 2 ("RC Petition") pursuant to the Board's longstanding "contract bar" doctrine and the inapplicability of the doctrine of "equitable tolling" to the facts of this proceeding.

As demonstrated by the following, the Employer respectfully submits that there is no basis for granting the Petitioner's Request For Review in that the Region Director's Order is fully in accordance with longstanding NLRB precedent, there are no errors in fact, substantial or otherwise (as the parties are essentially in agreement as to all of the material facts in this proceeding), and there are no compelling reasons for reconsidering either the Board's "contract bar" or "equitable tolling" doctrines as presented by the facts of this case.

STATEMENT OF FACTS

The following is a summary of the material facts relevant to the Board's review of the Petitioner's Request for Review of the Order.

YRC is a New York corporation which sponsors live pari-mutuel harness racing and operates the Casino doing business as Empire City at Yonkers Raceway ("Casino"). From 1972 to 2005, YRC maintained live harness racing and sponsored other events on the Employer's premises. The harness racing operations known as "Yonkers Raceway" ("Raceway"), are regulated by the NYS Racing and Wagering Board. (Jt. Ex. 14, ¶¶ 1, 4, 7).

The Intervenor, Local 153, Office and Professional Employees International Union AFL-CIO ("Local 153"), currently represents all regular full-time and regular part-time Special Police Officers, Peace Officers, Security Officers, Sergeants and Lieutenants employed by YRC (the "Guard Unit"). The Employer and YRC have maintained a collective bargaining relationship for over 50 years and are parties to a collective bargaining agreement ("CBA") for the three-year

period from September 1, 2009 to August 31, 2012. (Tr. at 14, lines 8 to 13; Tr. at 15, lines 20 to 23; Jt. Ex. 10).[1]

In 2001, New York State enacted legislation authorizing video lottery gaming machines ("slot machines") at eight specific horse racing facilities, including YRC, to be regulated by the NYS Lottery Division. In October 2006, YRC implemented its "soft opening" of its state-of-the-art Casino and entertainment facility which features world-class harness racing, fine dining, and New York State lottery slot machines, among other entertainment. The Casino currently houses 5,300 slot machines. (Tr. at 21, lines 6 to 13; Jt. Ex. 14, ¶¶ 8, 14, 15).

YRC and Local 153 have maintained a collective bargaining relationship since the 1950s. (Tr. at 15, lines 20 to 23). The prior CBA between YRC and Local 153 expired by its terms on September 1, 2009 ("Predecessor CBA") (Tr. at 16, lines 16 to 19; Jt. Ex. 8). LEEBA admittedly was aware as early as April 2009 that the CBA would expire on September 1, 2009, when it filed the SERB Petition and was advised by SERB that this Petition could not be processed until the 60-90 day "open" period prior to the September 1st expiration date (Tr. at 40, lines 1 to 13, 20 to 21; Tr. at 50, lines 1 to 6; Tr. at 55, lines 7 to 22).

On or about April 27, 2009, LEEBA filed a Petition for Certification with the New York State Employment Relations Board .(the "SERB Petition") for the same bargaining unit covered by the RC Petition.). Local 971/550 NSOBA also was a party to the SERB representation proceeding for the Guard Unit. (Jt. Ex. 1). On or about July 15, 2009, SERB advised the parties that it would be conducting a hearing on the jurisdictional issue raised by YRC and whether that

[1] References to "Tr." are to pages in the transcript of the hearing held on July 1, 2010, before James M Moreau, Hearing Officer, at 26 Federal Plaza, New York, New York; references to "Jt Ex." are to the Joint Exhibits introduced into the record at this hearing; and references to "NLRB Ex." are to exhibits admitted into the record as the Board's exhibits.

issue was resolved by the NLRB decisions in *Prairie Meadows Racetrack & Casino*, 324 N.L.R.B. 550 (1997) and *Delaware Racing Ass'n*, 325 N.L.R.B. 156 (1997). (Jt. Ex. 3).

On August 27, 2009, a SERB hearing was held before Edward P. Stahr, Hearing Officer, concerning the whether the NLRB now had jurisdiction over YRC's combined casino/harness racing operations based on the decisions in *Prairie Meadows* and *Delaware Racing*. (Jt. Exs. 6-7). Evidence concerning Region 2's prior exercise of jurisdiction in 2007 and 2008 over YRC new "racino" operations (*i.e.*, a combination of casino and harness racing operations) in Case Nos. 2-RC-23217, 2-CA-38830 and 2-CA-39096 were admittedly made part of the SERB jurisdictional hearing record and LEEBA understood that this evidence was being introduced at the SERB hearing to establish that Region 2 of the NLRB had already exercised jurisdiction over YRC's new "racino" operations. (Tr. at 52, lines 1 to 5; Jt. Exs. 11-13).

On September 30, 2009, Mr. Stahr issued a Hearing Officer Report containing his Findings of Fact and recommended that SERB certify the record and submit his findings to the NLRB for an advisory opinion as to whether the NLRB would decline to assert jurisdiction over YRC's operations. (Jt. Ex. 5). On October 21, 2009, SERB adopted the Hearing Officer's Findings of Fact and accepted his recommendation to certify the record and submit his findings to the NLRB for an advisory opinion on the jurisdictional issue. (Jt. Ex. 6). On October 26, 2009, SERB transmitted the certified record to the NLRB for an advisory opinion as to "whether the NLRB will assert jurisdiction over this dispute under the facts presented by the parties." (Jt. Ex. 4).

On or about December 15, 2009, YRC and Local 153 executed a new CBA for the three-year period from September 1, 2009 to August 31, 2012 , which had been ratified in "late September" 2009 by the unit employees. (Tr. at 14, lines 8 to 25; Tr. at 15, lines 1 to 8; Jt. Ex.

9).

On May 24, 2010, the NLRB issued an Advisory Opinion stating that the "Employer's operation is primarily a casino and the racetrack exception is not applicable." The NLRB concluded that "the Employer's operation has sufficient impact on commerce that the Board would not decline to assert discretionary jurisdiction over it." 355 N.L.R.B. No. 35, at p. 3 (May 24, 2010) (footnote omitted) (Jt. Ex. 7).[2]

On June 14, 2010, LEEBA filed the instant RC Petition seeking to become the exclusive bargaining representative for the employees who are members of the Guard Unit (NLRB Ex. 1). The parties in this proceeding have stipulated to the appropriateness of the Guard Unit, among other things. (NLRB Ex. 2).

ARGUMENT

POINT I

THE REGIONAL DIRECTOR'S FINDINGS THAT "EQUITABLE TOLLING" IS NOT WARRANTED UNDER THE FACTS OF THIS PROCEEDING ARE FULLY SUPPORTED BY RELEVANT NLRB PRECEDENT

The Petitioner's first two purported grounds for finding that its Request For Review is warranted concern the Regional Director's finding that the NLRB's doctrine of "equitable tolling" is not applicable to the facts of this proceeding.

1. Overview of the Board's "Equitable Tolling" Doctrine

For purposes of tolling the six-month limitations period of Section 10(b) of the National Labor Relations, Act, 29 U.S.C. § 160(b), the Board consistently has applied the equitable tolling doctrine set forth in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). Under that doctrine, if a

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[2] In *Yonkers Raceway, Inc.*, 196 N.L.R.B. 373 (1972), the NLRB declined to reverse pre-existing Board

party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . .'" *Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444 (1993)(citation omitted).[3]

The *Holmberg* doctrine, as applied by the NLRB, "has three critical requirements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All three elements must be met to warrant the tolling of a statute of limitations." *Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. at 444-45. The NLRB has also applied the equitable tolling doctrine in ULP proceedings to issues arising under the time periods set forth in the NLRB's Rules and Regulations. *See Ducane Heating Corp.*, 273 N.L.R.B. 1389, 1390-92 (1985), *enfd. mem.*, 785 F.2d 3104 (4th Cir. 1986) (fraudulent concealment of operative facts).

In ULP cases involving a discretionary jurisdictional issue between the NLRB and the Michigan Employment Relations Commission ("MERC"), the Board stated that the doctrine of equitable tolling, even if applicable in these cases, would have required the exercise of "reasonable diligence" on the part of the charging party to excuse an otherwise untimely ULP filing under Section 10(b). *Alternative Services Inc.*, 344 NLRB 824 (2005); *Adult Residential Care Inc.,* 344 NLRB 826 (2005). In *Alternative Services*, the union had timely filed ULP

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policy to assert jurisdiction over the Employer's harness racing operations

[3]There appears to be a dearth of precedent as to whether the NLRB would apply the doctrine of equitable tolling to the applicable limitations periods for representation proceedings. The NLRB has applied the doctrine of comity to State representation elections (and refusal to bargain ULPs based thereon) conducted prior to the Board's decision not to refuse to assert jurisdiction over a particular industry for which the Board had previously not exercised jurisdiction. *See Alternative Services Inc.*, 344 N.L.R.B. 824 (2005).

charges under Michigan law in February 2004, but "in the "exercise of reasonable diligence" should have known by no later than March 31, 1997 that, due to the enactment of certain Michigan legislation exempting adult residential care workers from being classified as State employees, MERC "clearly lacked jurisdiction" over group home providers as of that date and that the union's ULP charges before MERC would be dismissed. 344 N.L.R.B. at 825.[4]

The fact that the union in *Alternative Services* did not receive actual notice from MERC that it no longer had jurisdiction over the ULP charges was not found to be a sufficient reason to invoke the doctrine of equitable tolling (even if the doctrine were applicable to the facts of this case). The NLRB therefore held in *Alternative Services* that the doctrine of equitable tolling would not have excused the union's failure to file its ULP "charges with the Board in a timely manner thereafter." 344 N.L.R.B. at 825. The NLRB reached the same conclusion in *Adult Residential Care* based on an essentially identical set of facts and circumstances. 344 N.L.R.B. at 827.

2. The Order is Fully Supported by the Facts of this Proceeding

As made clear by the foregoing, it is clear that the NLRB's doctrine of equitable tolling is not applicable to the facts of this proceeding as there are no allegations of "fraudulent concealment" of "material facts," two of the three essential elements in an equitable tolling

[4] After the ULP charges had been timely filed with MERC, the Board, on July 28, 1995, issued its decision in *Management Training Corp*, 317 NLRB 1355 (1995), reversing prior NLRB precedent on the assertion of its discretionary jurisdictional standard over private employers (such as the group residence involved in *Alternative Services*) receiving government funding. However, the Board in *Management Training* did not address whether it would retroactively apply its new jurisdictional standard. 344 N.L.R.B. at 824. In rendering its *Alternative Service* decision, the Board stated: "We need not decide whether the Charging Party should have known at an even earlier date that MERC clearly lacked jurisdiction. Arguably, that date is July 28, 1995, when the Board decided *Management Training Corp.*" 344 N.L R.B. at 825 n. 5.

request. Even if this doctrine were applicable, there is no basis to apply the doctrine here as LEEBA had more than ample notice and opportunity to file a representation petition with the Board during both the "open" period in June 2009 and the contract expiration period from September 2, 2009 to December 14, 2009 but admittedly did not. (Tr. at 50, lines 20 to 25, Tr. at 51, lines 1 to 25, Tr. at 52, lines 1 to 5). In fact, LEEBA could not offer any valid excuse for not filing the RC Petition with the NLRB prior to June 14, 2010 other than its mistaken belief that SERB still had jurisdiction over YRC (Tr. at 56, lines 19 to 25, Tr. at 57, lines 1 to 22) in spite of contrary 1997 Board precedent which had been brought to its attention by SERB in a "Notice of Hearing" dated July 15, 2009 and which was admittedly reviewed with its attorney. (Tr. at 52, lines 11 to 25, Tr. at 53, lines 1 to 25, Tr. at 54, lines 1 to 21; Jt. Ex. 3 *citing Prairie Meadows Racetrack & Casino*, 324 N.L.R.B. 550 (1997) and *Delaware Racing Ass'n*, 325 N.L.R.B. 156 (1997)).

Like the union in *Alternative Services*, had LEEBA exercised "reasonable diligence" it should have known that the Employer's new "racino" operations fell squarely within the jurisdictional analysis set forth by the Board in *Prairie Meadows* and *Delaware Racing Ass'n* and that it did not need to wait almost nine months from October 26, 2009 (Jt. Ex. 4) to May 24, 2010 (Jt. Ex. 7) to receive any type of formal notice that the Board would not decline to assert jurisdiction over YRC.

Moreover, the fact that only a week before the September 1, 2009 expiration date of the Predecessor CBA LEEBA had admittedly received at the August 27, 2009 SERB jurisdictional hearing copies of several 2007-2008 NLRB proceedings (Jt. Exs. 11-13) in which Region 2 had asserted jurisdiction over YRC's new "racino" operations (Tr. at 50, lines 20 to 25, Tr. at 51, lines 1 to 25, Tr. at 52, lines 1 to 5) further confirms that LEEBA has not in any respect used

"reasonable diligence" in protecting its own rights and interests which would warrant the application of the doctrine of equitable tolling to the facts of this case. As made clear in *Alternative Services*, a party's ignorance of the law or of applicable Board policy, as LEEBA has demonstrated in this case (Tr. at 56, lines 19 to 25, Tr. at 57, lines 1 to 22, Tr. at 58, lines 1 to 18), is not a valid basis for applying the doctrine of equitable tolling.

POINT II

THE REGIONAL DIRECTOR WAS CORRECT IN HER FINDING THAT THE BOARD'S "CONTRACT BAR" DOCTRINE WARRANTS THE DISMISSAL OF THE RC PETITION

LEEBA's final basis for seeking review of the Order is that the Regional Director "gave no weight to the representation filed with SERB and instead relied exclusively on the contract bar doctrine and the allegedly untimely filing under Board policy." This argument fails for the following reasons.

First, and foremost, unlike the "comity" cases cited by LEEBA in Paragraph 3 of the Issues on Appeal section of its Request For Review Brief, SERB in this proceeding made clear that it would not exercise jurisdiction over YRC's "racino" operations without an advisory opinion by the NLRB that the Board would not exercise jurisdiction over YRC's newly expanded operations. Accordingly, there are no SERB findings or representation proceedings in this case for the NLRB to apply the doctrine of comity. To the contrary, SERB specifically deferred to the NLRB on the issue of jurisdiction in this proceeding.

Secondly, the Regional Director correctly applied the NLRB's longstanding contract bar doctrine as articulated in *National Sugar Refining Co.*, 10 N.L.R.B. 1410, 1415 (1939), and subsequently extended in *General Cable Corp.*, 139 N.L.R.B. 1123, 1127-28 (1962), where the Board increased the contract bar period from one to three years. "The contract-bar doctrine is but

another instance of the Board's striking an accommodation among three competing interests: the freedom of an employer and a union to enter into a collective-bargaining relationship, the stability of bargaining relations once established, and employee freedom of choice -- all of which underlie the Act's ultimate goal of fostering industrial peace." *Corporation De Servicios Legales*, 289 NLRB 612, 613-14 (1988). "Thus, for a limited period of time, employee choice as to union representation is subordinated to the goal of fostering the stability which can come about through a freely established bargaining contract." Id. at 614.

Here, the record clearly indicates the existence of both a longstanding and stable bargaining relationship between YRC and Local 153 which has lasted for over 50 years and a current three-year CBA which was reached as the result of good-faith negotiations warranting the application of the Board's contract bar doctrine to the facts of this proceeding, as the Regional Director correctly found in the Order. (Tr. at 14, lines 8 to 13; Tr. at 15, lines 20 to 23; Jt. Ex. 10). In this regard, the record herein confirms that (i) the Employer and Local 153 were parties to the Predecessor CBA for the period from September 1, 2006 to September 1, 2009 (Jt. Ex. 8); (ii) Local 153 on or about June 24, 2009 notified YRC that it wanted to engage in collective bargaining for a successor agreement and that the appropriate mediation services had been notified (Tr. at 17, lines 2 to 14; Jt. Ex. 9); (iii) the parties thereafter engaged in extensive negotiations from June 2009 to September 2009 for a new agreement meeting at least 15 times (Tr. at 14, lines 1 to 4; Tr. at 17, lines 12 to 24); (iv) the parties reached a new agreement in September 2009 as the result of these negotiations (Tr. at 14, lines 3 to 7; Tr. at 15, line 1); (v) the terms and conditions of the new CBA were ratified by Local 153 membership in late September 2009 (Tr. at 15, lines 2 to 7); and (vi) the terms and conditions of the new CBA were finalized and incorporated into a single document which was signed by the parties on December

15, 2009. (Tr. at 14, lines 14 to 22; Jt. Ex. 10).

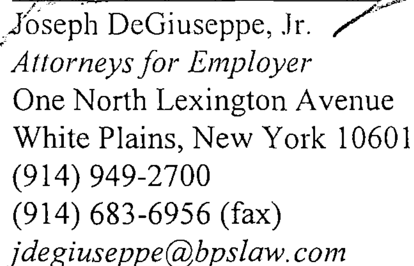
Accordingly, the Regional Director properly found that LEEBA's filing of the SERB Petition did not provide a basis for applying the equitable tolling doctrine exception to the NLRB's "contract bar" doctrine.

CONCLUSION

Based on the foregoing, the Employer respectfully requests that the Petitioner's Request For Review of the Order be denied in all respects.

Dated: White Plains, New York
August 12, 2010

BLEAKLEY PLATT & SCHMIDT, LLP

By: 

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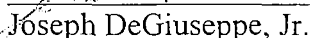
CERTIFICATION OF SERVICE

The undersigned hereby certifies and confirms that a true and correct copy of the Statement of Yonkers Racing Corp. in Opposition To Petitioner's Request For Review has been mailed via UPS, overnight delivery, postage pre-paid, in a sealed envelope on August 12, 2010 to Celeste J. Mattina, Regional Director, Region 2 of the National Labor Relations Board, 26 Federal Plaza, Room 3614, New York, NY 10278-0104 and to counsel of record for the Petitioner and the Intervenor at their respective addresses listed below:

Bruce Leder, Esq.
Cohen, Leder, Montalbano & Grossman, LLC
1700 Galloping Hill Road
Kenilworth, NJ 07033
unionleder@yahoo.com
Attorney for Intervernor

Terrence P. Dwyer, Esq.
The Law Office of Terrence P. Dwyer
222 Church Street, P.O. Box 1996
Poughkeepsie, NY 12601
tpdlaw@aol.com
Attorney for Petitioner



Joseph DeGiuseppe, Jr.

AUG 13 2010