UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE AMERICAN BOTTLING COMPANY, INC.,
d/b/a DR. PEPPER SNAPPLE GROUP,
Respondent,
and Case No. 8-CA-39327

TEAMSTERS LOCAL UNION NO. 293 a/w
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, Charging Party,
and

TEAMSTERS LOCAL UNION NO. 348 a/w
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, Intervenor-Party to Contract,
and

TEAMSTERS LOCAL UNION NO. 1164 a/w
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, (Party in Interest).

BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ DECISION
ON BEHALF OF
INTERVENOR TEAMSTERS LOCAL UNION NO. 348

James F. Wallington
BAPTISTE & WILDER, P.C.
1150 Connecticut Avenue, N.W., Suite 315
Washington, DC 20036-4104
Tel: (202) 223-0723/Fax: (202) 223-9677
Email: jwallington@bapwild.com

Counsel for Intervenor
Teamsters Local Union No. 348

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Intervenor[1] Teamsters Local Union No. 348, pursuant to Section 102.46(a), (b) and (c) of the Board's Rules and Regulations, files this brief in support of exceptions to the August 12, 2011 decision[2] of Administrative Law Judge Jeffrey D. Wedekind in the above referenced case, recommending a finding of violations of Sections 8(a) (2) and (3) of the Act.

INTRODUCTION

The Act does not require the mid-term cancellation of a valid, mature collective bargaining agreement and relationship, and thereby precipitating a "question concerning representation" and an entirely new, "potential" bargaining relationship when an Employer proposes to "merge" two distribution warehouse facilities, each with different, recognized bargaining units and different represented classifications, and relocate its on-going operations to a new "consolidated" facility.

Contrary to the decision of the Administrative Law Judge, Intervenor Teamsters Local Union No. 348 submits that Board precedent and the policy of the Act requires that the Akron collective bargaining agreement survives the relocation and that the Board's "contract bar" doctrine adequately addresses all other Section 9(a) issues in this case. Consequently, the Employer's continued recognition of Teamsters Local Union No. 348 as the bargaining unit representative at the relocated facility does not support findings of Section 8(a)(2) violations, or give rise to findings of any reasonable tendency to coerce employees in the selection of their

[1] Teamsters Local Union No. 348 is an intervenor party in accordance with Sections 102.29 and 102.38 of the Board's Rules and Regulations, pursuant to the Acting Regional Director's Order Granting Intervention issued April 11, 2011 in this case.

[2] Citations to the administrative law judge decision ("ALJD") are by page and line in the following format: ALJD [page number]:[line number]. Citations to the record are by transcript page [Tr.], and numbered exhibits as: General Counsel Exhibits [GC Exh.], Respondent Exhibits [Resp. Exh.], Charging Party Exhibits [CP Exh.] and Intervenor Exhibits [Intvr. Exh.].

bargaining representative. Because the Board has held that the Act, in similar relocation situations, "logically applies" a collective-bargaining agreement in effect at the old location to the relocated facility, no violation of Section 8(a)(3) is established by giving effect to the union security clauses of the agreement. As shown by the record and the analysis herein supporting the Intervenor's Exceptions, the Complaint in this case should be dismissed.

STATEMENT OF FACTS[3]

In 2010 and for many years prior, American Bottling Company, Inc. ("hereinafter "Employer" or "ABC"), referred to in the Complaint as Dr. Pepper/Snapple Group, and its predecessor companies, operated two warehouse facilities in the greater Cleveland, Ohio/Akron, Ohio area, from which ABC engaged in the distribution, warehousing and sales of carbonated soft drinks to area retailers and on-premise accounts. (Tr. 211; Tr. 557–561)

Teamsters Local Union No. 348 has been a party to a collective bargaining agreements with American Bottling Company, Inc. and its predecessors for many years covering a bargaining unit including drivers, bulk drivers, mechanics, merchandisers, vending personnel and warehouse workers, at a facility located at 1550 Industrial Parkway, Akron, Summit County, Ohio 44310 ("Akron facility"). The Akron collective bargaining agreement between Teamsters Local 348 and Dr. Pepper Snapple Group, d.b.a., Seven-Up of Akron, the predecessor to the current Employer, American Bottling Company. Inc., has been in existence for more than thirty years. (Tr. 626; 631; GC Exh. 47) The current Local 348 – ABC collective bargaining agreement is effective by its terms from June 1, 2008 to May 31, 2012. (GC Exh. 47; GC Exh. 25; Intvr. Exh. 2; Tr. 669-670; Tr. 747-748) As of January 13, 2011, the bargaining unit

[3] This section provides the record citations and the grounds for Local 348 Exceptions Nos. 1 through 27.

represented by Local 348 at the Akron facility included fifty-seven (57) employees. (GC Exh. 35; Intvr. Exh. 1; Intvr. Exh. 8, Attachment B; Tr. 483-486)

At the Akron facility, prior to January 13, 2011, the Employer also employed several non-bargaining unit employees, primarily in supervisory or management functions. (Int. Exh. 8, Attachment A.) Among those Akron non-unit classifications were twelve (12) employees performing the function of "account manager" who maintained supervisory responsibilities over the twenty-five (25) bargaining unit employees in the Akron merchandiser classification. (Tr. 560-562; Tr. 725; Compare, Intvr. Exh. 8, Attachments A. and B.)[4]

Additionally, the Akron facility was serviced by two (2) transport drivers whose function was to operate over-the-highway tractor-trailer equipment transporting product from the ABC production facility in Columbus, Ohio to Akron on a regular basis. (Tr. 345) Because these two (2) transport driver employees were actually on the payroll of and supervised from the Employer's Columbus, Ohio production facility on and prior to January 13, 2011, they were not recognized under in the Local 348 bargaining agreement at Akron. (Tr. 345)[5]

The other ABC facility was located at 14301 Industrial Avenue, North, Maple Heights, Cuyahoga County, Ohio 44137, at which there were two separately represented bargaining units. As of January 13, 2011, Teamsters Local 293 represented sixty-one (61) employees in a bargaining unit that included drivers, sales representatives and vending personnel. (TR. 50; GC Exh. 3-4.) As of January 13, 2011, Teamsters Local 1164 represented fifteen (15) employees in a bargaining unit that included warehouse, forklift and one janitor. (TR. 169-171; GC Exh. 17, Article I, Section 1.)

[4] Local 348 Exceptions Nos. 4 and 8.

[5] Local 348 Exceptions Nos. 3 and 5.

Also at Maple Heights, ABC employed non-bargaining unit employees in classifications that were covered under the Local 348 – ABC collective bargaining agreement at Akron. Thirty-five (35) of these Maple Heights non-unit employees were working in the classification of merchandiser. (Tr. 622-623) Two (2) mechanics assigned to Maple Heights, were performing the same job functions as the Akron bargaining unit mechanics, but were not placed in either bargaining unit at Maple Heights. (Tr. 212-216)[6]

On or about November 3, 2010, the Employer formally notified Teamsters Local Union No. 348 that it intended to relocate the entire operations of its Akron facility to 8400 Darrow Road, Twinsburg, Summit County, Ohio 44087 ("Twinsburg facility"). Teamsters Local Union No. 348 demanded bargaining regarding this mandatory subject[7]. Representatives of the Employer and Teamsters Local Union No. 348, as well as Teamsters Locals 293 and 1164, met on several dates in November, 2010, December, 2010 and January, 2011 and ultimately agreed to certain mid-term modifications of the Local 348 Akron collective bargaining agreement to address the Akron to Twinsburg relocation. (Tr. 238-248; Tr. 639-671; GC Exh. 7; Intvr. Exh. 2)[8]

During these relocation negotiations, the Employer advised that it intended to relocate thirty-six (36) previously unrepresented employees in the classifications of merchandiser and mechanic from its Maple Heights, Ohio facility to its Twinsburg, Ohio facility. (Intervenor Exhibit 1; Tr. 454-455; Tr. 671; GC Exh. 35)[9] These terms were reduced to writing and executed by Local 348 and the Employer on January 14, 2011 in an amendment to the June 1,

[6] Local 348 Exceptions Nos. 5, 6 and 10.

[7] See, Embarq Corp., 356 NLRB No. 125 (Mar. 31, 2011)(Chair Liebman concurring) and Comar, Inc., 339 NLRB 903, 913 (2003).

[8] Local 348 Exceptions Nos. 7, 8, 9, 10, 11, 12, 13, 14, 19, 21.

[9] Local 348 Exceptions Nos. 22 and 24.

2008 to May 31, 2012 collective bargaining agreement. (Intervenor Exh. 2; Tr. 669-670; Tr. 747-748)

At the January 14, 2011 negotiations session, Employer representatives stated that the permissive negotiations to amend the recognition clause of the Local 348 collective bargaining agreement would not extend to an inclusion of the "advanced sales representative" classification previously recognized between the Employer and Local 293 at Maple Heights. (Tr. 277; Tr. 724) The Employer did offer alternatives to allow those employees in the Maple Heights advanced sales representative positions to voluntarily transfer at Twinsburg to classifications within the Local 348 recognized unit, such as drivers, merchandisers and warehousemen, which was rejected by Local 293 at their meeting on January 12th. (Tr. 74-75;Tr. 662-663)[10] Because of the permissive[11] nature of an amendment to the Local 348 recognition clause that would include the "advanced sales representative" classification, and the Employer's strident opposition to such an amendment, Local 348 negotiators agreed to the amended collective bargaining agreement for the Twinsburg location without inclusion of the Maple Heights "advanced sales representative" classification[12]. (Tr. 724-725)[13]

Therefore, among the two bargaining units at Maple Heights and the Akron bargaining unit, Local 348's representation "predominates" in the amended bargaining unit at Twinsburg as

[10] Local 348 Exceptions Nos. 19, 20, 22 and 24

[11] The scope of an existing bargaining unit is a nonmandatory, permissive subject of bargaining and neither side is forced to concede or even bargain about such an issue. Raymond F. Kravis Ctr., 351 NLRB 143, 162 (2007), citing, Douds v. Longshoremen's Assn., 241 F.2d 278 (2d Cir. 1957).

[12] The exclusion of the advances sales representative classification from Maple Heights at the Twinsburg relocation, and any unilateral changes to the terms and conditions of those employees after the relocation is not alleged as a violation in the Complaint, and such theory was expressly disclaimed by Counsel for the General Counsel at trial. (GC Exh. 1(e);Tr. 348, lines 13-14; "Nowhere are we alleging that the sales representatives belonged in the unit.")

[13] Local 348 Exceptions Nos. 15, 19, 20.

a majority of the represented employees as shown in the following[14] Local 348 Brief Chart No. 1.

Akron Local 348		**Maple Heights Local 293**		**Maple Heights Local 1164**	
Drivers	17	Drivers	28	Warehouse Workers	13
Warehouse Workers	10	Transport Drivers	5	Custodian	1
Vending Employees	3	Helpers/Vending Employees	4		
Mechanics	2				
Merchandisers	25				
Total Employees	**57**	**Total Employees**	**37**	**Total Employees**	**14**

By January 17, 2011, all of the Employer's Akron facility bargaining unit operations, together with the Maple Heights operations, had been relocated to the Twinsburg facility. (Tr. 144-154; Tr. 162-165; Tr. 265-273; Tr. 328-332) During the negotiations regarding the amendment to the Local 348 agreement, the Respondent's representatives acknowledged that the classification of merchandiser was within the scope of the Local 348 recognized bargaining unit. (Tr. 459; Tr. 671)[15]

[14] Local 348 Exceptions Nos. 5, 6, 7, 8, 10.

[15] Local 348 Exceptions Nos. 7, 10, 21, 22, 23, 24.

The relevant employee complement at Twinsburg was as set out in the following[16] Local 348 Brief Chart No. 2:

	Akron Local 348		**Maple Heights Former Local 293**		**Maple Heights Former Local 1164**
17	Drivers	28	Drivers	13	Warehouse Workers
10	Warehouse Workers	5	Transport Drivers	1	Custodian
3	Vending Employees	4	Helpers/Vending Employees		
2/2[17]	Mechanics				
25/35[18]	Merchandisers				
2[19]	Transport Drivers				
96	**Total Employees**	**37**	**Total Employees**	**14**	**Total Employees**

Unrepresented in amended Akron/Twinsburg bargaining unit.
12 account manager combination – from Akron
22 sales representatives – from Maple Heights

Neither of the Employer's collective bargaining agreements with Local 293 or Local 1164 recognized the classification of merchandiser or mechanic. (GC Exh. 3; GC Exh. 17;Tr. 212-216; Tr. 522) Because these unrepresented merchandiser and mechanic employees relocated from the Maple Heights facility to the Twinsburg facility perform the same functions and duties, under the same supervision, as those merchandisers represented by Teamsters Local Union No. 348, these employees are properly included in the recognized bargaining unit represented by Teamsters Local Union No. 348[20].

[16] Local 348 Exceptions Nos. 5, 6, 7, 8, 10.

[17] Two (2) mechanics from Maple Heights.

[18] Thirty-five (35) merchandisers from Maple Heights.

[19] Two (2) transport drivers reassigned from Columbus.

[20] Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB 872, 873-874 (2001).

Because these new merchandiser and mechanics employees from Maple Heights were within the classifications of the existing Local 348 bargaining unit[21], it was appropriate for Local 348 representatives to meet with the new merchandiser employees on January 19, 2011 at the Employer's Twinsburg facility during a meeting called for all the merchandiser employees relocating from both Akron and Maple Heights to Twinsburg. (Tr. 679; Tr. 683-684; GC Exh. 34)[22]

Additionally, the Employer relocated two (2) employees working as transport drivers to Twinsburg. Because of their community of interest with the existing unit, the Employer and Teamsters Local Union No. 348 agreed to amend the recognition clause of their agreement to include these two transport drivers as part of the relocated Teamsters Local Union No. 348 bargaining unit. (Tr. 345) Therefore, the number of bargaining unit employees represented by Teamsters Local Union No. 348 covered by the collective bargaining agreement with The American Bottling Company at the relocated Twinsburg facility was, at least, ninety-five (96) employees. (Tr. 669-671; Intvr. Exh. 1)[23]

On or about January 17, 2011, the Employer closed its operations at its Maple Heights facility and transferred to its Twinsburg facility thirty-seven (37) employees in the classifications of delivery drivers, vending employees and transport drivers, formerly represented by Teamsters Local Union No. 293. Teamsters Local Union No. 293 had disclaimed continued bargaining representation of these employees under an existing collective bargaining agreement at Twinsburg and has consented to the Employer's cancellation of a collective bargaining

[21] At one point the ALJ erroneously describes the merchandiser employees at Akron as "unrepresented", (ALJD at 5:14).

[22] Local 348 Exceptions Nos. 21, 22, 23, 24.

[23] Local 348 Exceptions Nos. 1, 5, 6, 7, 21, 22, 23, 24.

agreement previously covering these employees at the Maple Heights facility[24]. Upon relocation and assignment at the Twinsburg facility, these thirty-seven (37) employees were properly covered by bargaining unit classifications recognized as represented by Teamsters Local Union No. 348[25].

On or about January 17, 2011, the Employer closed its operations at its Maple Heights facility and transferred to its Twinsburg facility fourteen (14) warehousemen employees, formerly represented by Teamsters Local Union No. 1164. Teamsters Local Union No. 1164 had disclaimed continued bargaining representation of these employees under an existing collective bargaining agreement at Twinsburg and had consented to the Employer's cancellation of a collective bargaining agreement previously covering these employees at the Maple Heights facility[26]. Upon relocation and assignment at the Twinsburg facility, these fourteen (14) employees were properly covered by bargaining unit classifications recognized as represented by Teamsters Local Union No. 348[27].

The collective bargaining agreement between the Employer and Local 348 (General Counsel Exhibit 25; General Counsel Exhibit 47) contains the following language, under Article XIV, Transfer of Company Title or Interest:

> "This agreement shall be binding upon the parties hereto, their successors, administrators, executors, and assigns. In the event an entire operation, or portion thereof, or rights only, are sold, leased, transferred or taken over by an outside third party, by sale, transfer, lease, assignment, receivership or bankruptcy proceedings, such operation or use of such rights shall continue to be subject to the terms and conditions of this Agreement, for the life thereof. **Whenever an operation is closed and the work is transferred to or absorbed by another unionized operation, the affected employees will be entitled to follow their**

[24] See, GC Exhibit 12 and GC Exhibit 52, describing withdrawal of Section 8(a)(5) charges.

[25] Local 348 Exceptions Nos. 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 26, 27.

[26] See, GC Exhibit 52, describing withdrawal of Section 8(a)(5) charges.

[27] Local 348 Exceptions Nos. 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 26, 27.

> **work and their seniority shall be dovetailed at the new operation.** Disagreements between Unions shall be resolved through the Union's mechanism and in accordance with the International Constitution…."(emphasis supplied)

This clause did not exist in the collective bargaining agreements between the Employer and Local 293 or Local 1164. (Compare GC Exh. 3 and GC Exh. 17) Local 348 representatives were consistent in its negotiations with the Employer that this clause required continued application of the Local 348 collective bargaining agreement at the relocated facility at Twinsburg. (Tr. 424-428; Tr. 665-667)[28]

This clause practically directed the negotiators, both the Union representatives (Locals 348, 293 and 1164) and the Employer representatives, in the successive draft proposed amendments to the Local 348 – Akron Seven-Up collective bargaining agreement, combining the wages and working conditions for those employees who "followed their work" to Twinsburg. (GC Exh. 6; Tr. 645-649; GC Exh. 7; Tr. 655-657;Tr. 668-670; Intvr. Exh. 2 at Article VIII, Insurance, Article XXIV, Warehouse, Full Service Drivers, Vending and Mechanics, Article XXV, Distribution Department, Article XXVI, Merchandisers, Article XXVI, Wages).

The amended collective bargaining agreement applicable at the Twinsburg facility, which is the collective bargaining agreement between American Bottling Co., Inc. and Teamsters Local Union No. 348 for the term June 1, 2008 to May 31, 2012, amended effective January 14, 2011 (GC Exh. 25; Intvr. Exh. 2), is an agreement setting the substantial wages, benefits and terms and conditions of the recognized bargaining unit. (Tr. 622-633; Tr. 668-671)

QUESTIONS INVOLVED AND TO BE ARGUED

I. Whether under Harte & Co., 278 NLRB 947, 955 (1986) and the Board's policies in related "relocation" cases, Local 348's collective bargaining agreement survives the relocation to Twinsburg, Ohio because the operations at the new facility are substantially the same as those at

[28] Local 348 Exceptions Nos. 10, 21, 22, 23, 25.

Akron and the Akron bargaining unit transferees constitute a substantial percentage -- approximately 40 percent or more -- of the Twinsburg facility employee complement when the employee transfer process was substantially completed. Intervenor Local 348 answers in the affirmative.

II. Whether under Metropolitan Teletronics Corp., 279 NLRB 957, 960 (1986) and the Board's related "merger" or "consolidation" cases, Local 348's collective bargaining agreement survives the relocation to Twinsburg, Ohio because the operations at the new facility are substantially the same as those at Akron and the recognized Local 348 bargaining unit constitutes such a large proportion of the combined work force that there is no reason to question the continued majority status of Local 348 as the bargaining representative. Intervenor Local 348 answers in the affirmative.

III. Whether the Respondent-Employer's theory under Dana Corporation, 356 NLRB No. 49 (Dec. 6, 2010), that continued recognition and bargaining with Local 348 for the Twinsburg facility is lawful is also supported by this record. Intervenor Local 348 answers in the affirmative.

ARGUMENT

The Supreme Court in Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 (1996) confirms the Board's policy under the Act affording unions a conclusive presumption of majority status during the term of a collective-bargaining agreement. Id. at 785-786. The presumption is not based on any certainty that the union's numerical majority support among unit employees will continue during the contract term. The policy is grounded in the statutory goal of stabilizing collective-bargaining relationships. Id. During the term of the agreement, the conclusive presumption precludes an employer's withdrawal of recognition or other challenge to the union's

majority status--even in the face of evidence showing a loss of actual, numerical majority support--with limited exceptions for unusual circumstances. Id. at 786 fn. 3. The conclusive-presumption principle is based on the Board's contract-bar doctrine. Id. at 786.

Under the contract bar doctrine "[t]he Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective-bargaining agreement of reasonable duration." Hexton Furniture Co., 111 NLRB 342, 344 (1955). The purpose of the contract bar doctrine is to achieve "a finer balance between the oftentimes conflicting policy considerations of fostering stability in labor relations while assuring conditions conducive to the exercise of free choice by employees." Deluxe Metal Furniture Co., 121 NLRB 995, 997 (1958). Therefore, "unit employees may exercise their Section 7 right to choose or reject union representation at predictable intervals between contracts. Free choice is thus not denied, but merely delayed." Nott Co., 345 NLRB 396, 402 (2005) (dissenting opinion by member Liebman, addressing employer's duty to maintain established bargaining relationship after various business transactions).

There are exceptions to the contract-bar rule for significantly unusual, "changed circumstances"[29] during the contract term. General Extrusion Co., 121 NLRB 1165, 1167 (1958). However, "a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character

[29] Changed circumstances for purposes of the contract bar rule are (1) a dramatic increase in personnel and job classifications (defined as a "substantial increase in personnel," i.e., where less than "30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed," and less than "50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed") or (2) a massive change in the nature of the employer's business such that it can be viewed as a completely different operation. General Extrusion, above, 121 NLRB at 1167.

of the jobs and the functions of the employees in the contract unit, does not remove a contract as a bar." Id. at 1167-1168.

Because a union enjoys an irrebuttable presumption of majority status during the contract term, a rival representation or decertification petition may be filed during the "window" period, which is more than 60 days but less than 90 days before the expiration date of the existing contract of 3 years' duration or less. Auciello Iron Works, 317 NLRB 364 (1995), enforced, NLRB v. Auciello Iron Works, 60 F.3d 24 (1st Cir. 1995), affirmed, Auciello Iron Works v. NLRB, 517 U.S. 781 (1996). Since contracts of unreasonable duration are treated as if they were limited to a reasonable period (3 years), a rival petition may be filed during the thirty day window period within 60 days prior to the third anniversary date rather than the expiration date designated in the contract. Union Carbide Corp., 190 NLRB 191, 192 (1971).

Where the amended collective bargaining agreement between the Employer and Teamsters Local 348 (Intvr. Exh. 2) at the relocated Twinsburg facility stated a contract term of June 1, 2008 to May 31, 2012, the "employee rights" for any valid representation claim at Twinsburg matured as early as the month of March, 2011. No valid, timely petition for certification of representative was filed in this bargaining unit[30].

In this regard, the General Counsel's theory in this case and the ALJ's recommended findings and conclusions are contrary to the policies of the Act as explained in Lamons Gasket, 357 NLRB No. 72 (2011), and UGL-UNICCO Serv. Co., 357 NLRB No. 76 (2011), explaining that analogous "bar" doctrines are well established in labor law, based on the principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." Franks Bros. Co. v. NLRB,

[30] The petition in Case 8-RC-17064 is, in fact, prematurely filed on February 24, 2011 and seeks representation in a unit that includes additional classifications not contained in the contract. (ALJD at 12: footnote 20; GC Exh. 53).

321 U.S. 702, 705 (1944). These bar doctrines promote a primary goal of the National Labor Relations Act by stabilizing labor-management relationships and so promoting collective bargaining, without interfering with the freedom of employees to periodically select a new representative or reject representation. UGL-UNICCO Serv. Co., supra.

In this case, the General Counsel's theory is overbroad and the ALJ's decision is similarly based on an inappropriate application of Board law. This Board should sustain the Intervenor's Exceptions and dismiss the Complaint.

I. The Twinsburg relocation did not create a question concerning representation[31].

The Board has held that an existing and effective collective bargaining agreement will remain in effect following relocation, provided operations and equipment remain substantially the same at the new location, and a substantial percentage (approximately 40 percent or more) of the employees at the old plant transfer to the new location. See, Harte & Co., 278 NLRB 947, 955 (1986); Rock Bottom Stores, Inc., 312 NLRB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995); Westwood Import Co., 251 NLRB 1213, 1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); See, Nott Co., 345 NLRB 396, 402 (2005) (dissenting opinion by Member Liebman). Such relocation of substantially the same operations and equipment occurred in this case.

The issue in Harte was whether a union and an employer in a plant relocation violated the rights of the new plant employees when the parties agreed voluntarily to extend the old plant's current bargaining agreement to the employees at the new plant. The Board held:

> In relocation cases such as this one, our task is to distinguish situations where the new facility is basically the same operation, simply removed to a new site, from those where the new facility is some-how a different operation from the original. In the former case, a collective-bargaining agreement in effect at the old location is logically applied at the new one. In the latter, the old agreement has no place at the new facility. Given the complexity of modern business transactions, the

[31] This section and the leading Argument section provides the record citations and the grounds for Local 348 Exceptions Nos. 1 and 27 through 68.

> determination of exactly what relationship the new plant bears to the old is not always easy to make. Nonetheless, we have developed standards in our contract-bar and failure-to-bargain cases to determine when there is a sufficient continuity of operations to justify applying an existing agreement to a new location. These cases hold that an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage -- approximately 40 percent or more -- of the new plant employee complement. Westwood Import Co., 251 NLRB 1213, 1214 1980), enfd. 681 F.2d 664 (9th Cir. 1982); General Extrusion Co., 121 NLRB; 1165, 1167-1168 (1968). See also Marine Optical, 255 NLRB 1241, 1245 (1981), enfd 871 F.2d 11 (1st Cir. 1982).

Additionally, Harte states that in a relocation case, the appropriate point in time for measuring whether a substantial percentage of the new work force is composed of transferees from the old location is on the date that the employers "relocation process" and the associated "employee" transfer process "was" substantially completed" and not necessarily when the new plant becomes "fully operational". Harte & Co., 278 NLRB at 949-950 and cases cited therein[32].

The application of the amended Local 348 collective bargaining agreement to the relocated operations at Twinsburg complies with the Board policies established in RCA Del Caribe, Inc., 262 NLRB 963, 964-65 and n. 12 (1982)("Under this rule, an employer will not violate Section 8(a)(2) by post petition negotiations or execution of a contract with an incumbent, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union"). Contract bar rules apply[33]. See, Nott Co., supra, 345 NLRB at 406.

The primary goal in this proceeding is to protect the Section 7 rights of the bargaining unit employees at the Respondent's Twinsburg, Ohio facility to bargain collectively for the

[32] See also Rock Bottom Stores, Inc., 312 NLRB 400, 402 (1993).

[33] "This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice. It should be clear that our new rule does not have the effect of insulating incumbent unions from a legitimate outside challenge. As before, a timely filed petition will put an incumbent to the test of demonstrating that it still is the majority choice for exclusive bargaining representative", RCA Del Caribe, Inc., 262 NLRB at 966.

purpose of negotiating the terms and conditions of their employment. Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785-786 (1996)(a labor organization is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement grounded in the policy goal of stabilizing collective-bargaining relationships). An incumbent union enjoys a continuing presumption of majority status, which is irrebuttable during a union's first year following certification or the first 3 years of a collective-bargaining agreement. SFO Good-Nite Inn, LLC, 357 NLRB No. 16 (July 19, 2011), at slip opinion page 5, citing Auciello Iron Works, Inc. v. NLRB, 517 U.S. at 785-787, and NLRB v. Curtin-Matheson Scientific, Inc., 494 U.S. 775, 778, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990). See also, Levitz Furniture Co. of the Pacific, 333 NLRB 717, 723 (2001).

The decision of the ALJ makes an erroneous calculation of the "approximately 40 percent rule" described in Harte and related cases. (ALJD at 17:42-46)[34] The ALJ found that that "only 38.7 percent (57 of 147) of the employees in the negotiated unit … had previously been represented at Akron."[35] Aside from an erroneous determination that "38.7 percent" is not "approximately 40 percent"[36] as allowed in Harte, the ALJ refuses to recognize that those employees transferring from Maple Heights in the merchandiser and mechanic classifications were properly within the existing Local 348 CBA recognition clause and must be included in the

[34] Local 348 Exceptions Nos. 1, 5, 6, 7, 28 to 31, 36 to 39.

[35] The record shows that 144 employees in the recognized unit began work at the relocated Twinsburg facility. The spreadsheet entered in the record as Intervenor Exhibit 1 was used by the parties during the January 14, 2011 negotiations to identify those employees bargaining unit transferring, their seniority dates and classifications and their rates of pay. (Tr.670) Although there were 145 employee names and information on the spreadsheet, it was confirmed that one driver on the list (either Troy Wojciechowski or Willie May) left employment and did not begin work at Twinsburg, (Tr. 377; Tr. 453), thereby reducing the number of transferred employees to 144.

[36] When the 57 transferees relocated from Akron became part of the initial Twinsburg complement of 144, the percentage is calculated to 0.39583, or under the method of upward rounding of the number: 40%.

calculation of Local 348's complement because "there is a sufficient continuity of operations to justify applying an existing agreement to a new location". Harte & Co., 278 NLRB at 955.

This is the correct application under Harte "where the new facility is basically the same operation, simply removed to a new site" and "a collective-bargaining agreement in effect at the old location is logically applied at the new one". Id. The Local 348 collective bargaining agreement is "logically applied" at Twinsburg to include the previously unrepresented merchandiser and mechanics employees from Maple Heights because the record here confirms that these employees perform the exact same duties as covered by the recognized bargaining unit description. Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB 872, 873-874 (2001). In Tree of Life/Gourmet Award Foods, id at 873, the Board held that it was "axiomatic" that when an established bargaining unit definition expressly encompasses new employees, the Board's certification of the unit, or the parties' agreement regarding the unit's composition, mandates their inclusion.

Former Board Chair Liebman found such contract bar analysis to be "appropriate" in her dissenting opinion in Nott Co., 345 NLRB at 404, where certain "Metro employees" were previously unrepresented but performed the exact same work as employees within expressly recognized unit classifications, stating:

> "As a matter of law, the Union was entitled to a conclusive presumption of majority status through the term of its contract with the Respondent. Under the applicable contract-bar principles, the increase in the size of the bargaining unit was not substantial enough to create an exception to the conclusive presumption. **The original Nott employees represented by the Union constituted 50 percent of the overall unit once the Metro employees were added.** In addition, there was absolutely no change in the nature of the Respondent's operation or in the functions of the employees in the overall unit. Thus, there were no 'changed circumstances' that would negate the conclusive presumption." (emphasis supplied)

Therefore, applying these principles to the Twinsburg relocation, particularly with the inclusion of the previously unrepresented mechanic and merchandiser employees under the Local 348 – Employer collective bargaining agreement recognition clause, Local 348 was entitled to a conclusive presumption of majority status through the term of the June 1, 2008 to May 31, 2012 collective bargaining agreement.

Under Harte & Co., supra, the Local 348 collective bargaining agreement is "logically applied" at Twinsburg and there can be no question concerning representation ("QCR") validly raised on, or prior to, January 17, 2011 in the recognized unit, no violation of Section 8(a)(2) of the Act for the Employer to recognize and bargain with Local 348 and no other representative at Twinsburg[37], and the application of the Local 348 – ABC collective bargaining agreement's union security clause with regard to authorized deductions of dues and fees does not violate Section 8(a)(3) of the Act. The Complaint should be dismissed.

II. The relocation of operations and equipment remaining substantially the same to Twinsburg did not create a question concerning representation[38].

The General Counsel's theory in this case is erroneously premised on the assertion that a question concerning representation, "QCR", was created at the opening of the Twinsburg facility. As shown in the record, no QCR existed with regard to the relocation of operations at Twinsburg as of January 14, 2011, or even any time after that date, because the operation at Twinsburg continued operations and equipment remaining substantially the same as Akron at the new location and there were no valid challenging claims for recognition in the bargaining unit

[37] The Supreme Court has stated one of the foundational policies of the National Labor Relations Act as being the Employer's obligation to recognize and deal with the lawful representative of a bargaining unit which logically imposes "the negative duty to treat with no other." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937).

[38] This section provides the record citations and the grounds for Local 348 Exceptions Nos.1 through 27 and 31 through 68.

recognized between Respondent and Local 348 in the collective bargaining agreement as amended on January 14th.

The ALJ's decision, ALJD at 17:27-37, relied on the Board's reference to "merger" type representation cases in Metropolitan Teletronics Corp., 279 NLRB 957, 960 (1986) (which in fact resulted the dismissal of a Section 8(a)(2) allegation of a complaint), stating:

> When an employer merges two separately represented work forces the employer may not choose between the competing representational claims, unless one of the merged groups constitutes such a large proportion of the combined work force that there is no reason to question the continued majority status of that group's bargaining representative. Boston Gas Co., 235 NLRB 1343, 1355 (1978); Martin Marietta Refractories Co., 270 NLRB 821, 822 (1984).

In Metropolitan Teletronics Corp., *supra* the Board found that the respondent **did not** violate the Act when it recognized one of two unions which represented at least 63 percent of the merged work force on the recognition date at the time when normal production had commenced, and the work force, who were performing jobs and functions that were substantially the same as those at the two former plants, and therefore constituted a substantial representative complement of employees[39]. As shown here, those facts are nearly identical to the Twinsburg relocation. Local 348 was the recognized representative of more than a majority of the employees in the recognized collective bargaining agreement classifications, as compared with the combined members of Local 293 and Local 1164 in the unit recognized at Twinsburg, (Chart 1, above: 57 Akron to 51 Maple Heights) and once the unrepresented classifications are properly acknowledged, Local 348's representation predominates under the ALJ's employee complement calculations, (Chart 2, above: 96 out of 147, or sixty-five (65) percent).

[39] In Metropolitan Teletronics, supra at 960, the Board did not find the cases cited by Counsel for the General Counsel here, such as, Hudson Berlind Corporation, 203 NLRB 421, 422 (1973), *enf'd*, 494 F.2d 1200 (2nd Cir. 1974), *cert. denied* 419 U.S. 892 (1974), controlling.

These essentially undisputed facts distinguish the analysis in Martin Marietta Co., supra, citing Boston Gas Co., supra, where the Board found that when an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation. As noted by then member Liebman in her dissent in Nott Co., 345 NLRB at 407, the accretion policy doesn't apply to the unit inclusion of the unrepresented Maple Heights merchandisers and mechanics here because, "it is indisputable that these new employees' terms and conditions of employment would be covered by the parties' agreement", citing, Tree of Life/Gourmet Award Foods[40], 336 NLRB 872, 873 (2001); Meyer's Cafe & Konditorei, 282 NLRB 1 fn. 1 (1986).

There was no reason for ABC to question the continued majority status of Local 348 as bargaining representative of the Twinsburg bargaining unit because Local 348 contract's recognition clause covers the previously unrepresented classifications so as to make it the "sufficiently predominant" representative to remove the question concerning overall representation. Other recent "merger" cases do not change this analysis.

A close review of the Board's cases addressing similar points confirms that the operational changes undertaken by Respondent in the relocation of its distribution center to Twinsburg in this case did not create a QCR. In F.H.E. Services, Inc., 338 NLRB 1095 (2003), the Board adopted a recommended order and dismissed a complaint alleging violations of Section 8(a)(2) and (3) of the Act, where the initial allegation was that an Employer continued

[40] Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB 872, 873-874 (2001). In Gourmet Award Foods, the Board held that it was "axiomatic" that when an established bargaining unit definition expressly encompasses new employees, the Board's certification of the unit, or the parties' agreement regarding the unit's composition, mandates their inclusion. Id. at 873.

recognition and a collective bargaining agreement with one labor organization that it previously recognized prior to what the Board described there as a "consolidation". Id at 1095. When the Respondent recognized one of the labor organizations at the new facility, the Board found that the Respondent was primarily engaged in the building and construction work within the meaning of Section 8(f) to recognize any labor organization, "even absent a showing of majority status", citing Central Illinois Construction, 335 NLRB No. 59 (2001). F.H.E. Services, Inc., 338 NLRB at 1095-1096.

The Board in F.H.E. Services, Inc., Id., at 1096, described the holding in the case of National Carloading Corp., 167 NLRB 801 (1967) and stated that "the creation of a new operation and a new unit typically raises a question concerning representation between the unions representing the formerly separate bargaining units, especially when neither group of affected employees is sufficiently predominate to determine the exclusive bargaining representative." Nonetheless, the Board's decision in F.H.E. Services supports dismissal of the instant complaint because the "consolidation" there turned on the Respondent's creation of an entirely new operation that performed new construction work rather than repair work that had previously been performed at a location that had been represented under a Section 9(a) contract[41]. See, F.H.E. Services, Inc., 338 NLRB at 1098-1099 (ALJ Edelman's recommended findings adopted by the Board).

Therefore, the relevant holding in F.H.E. is that in order to extinguish a valid and existing collective bargaining agreement and relationship as the result of a transfer of operations to a new location, an Employer's resulting "consolidation" must create "a new operation and a new unit",

[41] In F.H.E., the charging party labor organization made no bargaining demand at the new location and made no claims that its CBA transferred to the new location. Id., 338 NLRB at 1095.

Id. at 1096 citing National Carloading Corp., 167 NLRB 801 (1967). The facts and holdings in National Carloading Corp., id., also support dismissal of the instant complaint.

The Board in F.H.E. Services, 338 NLRB at 1095, summarized the facts in National Carloading Corp., 167 NLRB 801 (1967), involving a petition for certification of representative (RC case), explaining:

> "[T] he Board held that moving the Halsted Street employees to the 47th Street facility was more than relocation. Id. at 802. Rather, noting that the employees worked side by side, had similar job classifications, used the same equipment, and performed similar functions, **the Board determined that the consolidation resulted in a totally new operation at the 47th Street terminal**. Id. The Board further noted that neither group of affected employees was sufficiently predominant to remove any real question as to the overall choice of representative. Id. Thus, an election was necessary to resolve the conflicting representational claims". (emphasis supplied)

In order to determine what the Board described as a "totally new operation" in the National Carloading case one is required to review not only that decision, but also, Panda Terminals, Inc., 161 NLRB 1215 (1966), another representation case involving a different bargaining unit classification affected by the same transfer of operations to a single location.

The primary factor in National Carloading (involving clerical employees) and Panda Terminals (involving dockworkers) related to the purchase by the employer, "National", of separately operated freight companies and the consolidation of operations at a new facility in the Chicago area. See, National Carloading Corp., 167 NLRB at 801-802. The party in these representation cases claiming a contract bar at the 47th Street Terminal was the Railway Clerks-BRC, who asserted that a nation-wide, mixed classification, multi-location contract with the employer, National, applied at the 47th Street Terminal and that the subsequent transfers of employees from other locations should be accreted to that multi-location unit. Id., at 801. However, the Board expressly found that even though the Railway Clerks-BRC were the

certified Section 9(a) representative of the National employees in a multi-location, "mixed classification" bargaining unit, the specific 47th Street Terminal dockworker employees at issue in a prior representation case were not previously covered by the National-Railway Clerks/BRC multi-location certification and contract, but rather were separately represented under a Railway Labor Act collective bargaining agreement between the Santa Fe Railroad and the Railway Clerks/BRC. See, National Carloading Corp., 167 NLRB at 802, fn. 13 and 14.

Therefore, when the Board in National Carloading describes a "totally new operation" at the 47th Street Terminal, it is refusing to recognize the Railway Clerks/BRC "mixed-classification" contract bar claim on the basis that the 47th Street Terminal clerical employees now were involved in a completely different bargaining relationship than under the National multi-location certification and contract[42]. Essentially deciding on community of interest factors that the 47th Street Terminal clerical employees could not be covered by the "mixed classification" contract, the Board in National Carloading Corp., 167 NLRB at 802, when it states "that legitimate management action merging categories of employees historically represented by different labor organizations into a single operation in which these employees will work side by side, in similar job classifications and performing like functions" is describing the establishment of a new clerical operation distinguished from the former "mixed" clerical and dockworker function at the 47th Street Terminal. It is these circumstances to which the Board found that "statutory policies will not be effectuated if, through application of ordinary principles of accretion, a bargaining agent is imposed on either segment [i.e., clericals and dockworkers] of

[42] "Nevertheless, **the Board concluded in Panda, that the clerical employees at 47th Street did not properly belong in the same bargaining unit as the dockworkers.** To find, therefore, as urged by BRC, that the transferred clerical employees have accreted to the bargaining unit represented by it, i.e., the nationwide mixed unit, composed of dock and clerical workers in which BRC was certified, would be contrary to that decision". (emphasis supplied).

the newly integrated operation". National Carloading Corp., 167 NLRB at 802, (bracketing supplied)[43].

With regard to the Twinsburg relocation at issue in the present case, no similar adverse community of interest factors are present. The record confirms that the Employer services the same customers using the same operations as utilized at Akron. There is no "totally new operation" at Twinsburg that would require voiding of the transfer of the Local 348 bargaining agreement from Akron to Twinsburg. Because Local 348 remained the lawful collective bargaining representative of the bargaining unit employees at Twinsburg, no violation of Section 8(a)(2) can be shown simply because of the presence of Local 348 representatives on the Twinsburg property on January 17th and January 19th and their activities in speaking with bargaining unit employees and the collection of membership and check-off authorization forms.

III. Respondent's theory under Dana Corporation is also supported by the record[44].

The Respondent-Employer's theory under Dana Corporation, 356 NLRB No. 49 (Dec. 6, 2010), that continued recognition and bargaining with Local 348 for the Twinsburg facility is lawful is also supported by this record. There is no doubt that the Employer had a continuing obligation under Article XIV of the Local 348 contract to recognize and bargain with Local 348 regarding the terms and conditions at Twinsburg where the contract provides that "[w]henever an operation is closed and the work is transferred to or absorbed by another unionized operation, the

[43] Compare, ABF Freight System, Inc., 325 NLRB 546 (1998)(" Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, failing and refusing since about April 18, 1996, to apply the terms of the parties' April 1, 1994 to March 31, 1998 collective-bargaining agreement to all office clerical employees following the Respondent's transfer and relocation/consolidation of operations from its Linden and East Brunswick, New Jersey terminals to its Avenel, New Jersey terminal, effective April 1 and 15, 1996, respectively.")

[44] This section provides the record citations and the grounds for Local 348 Exceptions Nos. 27 through 30 and 49 through 68.

affected employees will be entitled to follow their work and their seniority shall be dovetailed at the new operation", (General Counsel Exhibit 25; General Counsel Exhibit 47;)

On January 6, 2011, Teamsters Locals 1164 and 293 each issued virtually identical letters to Teamsters Joint Council No. 41 asserting that 1164 and 293 were dropping their claims of jurisdiction to represent the workers at Twinsburg. On January 11, 2011, Teamsters Joint Council 41 sent a letter to the Local Unions stating that the jurisdictional dispute regarding representation of the employees at Twinsburg had been resolved by virtue of the January 6 letters from the Locals. The "demand" letter Local 293 sent to the Employer on January 14, 2011 (GC Exh. 50)[45] acknowledges the continued existence of the Local 348 contract and only demands that the Employer recognize Local 293 as representative of members of Local 293 from Maple Heights.

Respondent's negotiators relied upon these statements, the internal disputes resolution provisions of Article XIV[46], together with Respondent's prior meetings with Local 293 and Local 348 representatives where Local 348 was presented in a joint union proposal as being the recognized representative for the Twinsburg unit (Tr. 644, lines 18 to 23; G.C. Exhibit 6), in order to complete the negotiations for an agreement on January 14, 2011[47].

As shown in the record and described above, as of January 14, 2011 Local 348 was the designated representative of fifty-seven (57) bargaining unit employees of the Employer at its

[45] Local 348 Exceptions 40, 41, 42, 43.

[46] "Disagreements between Unions shall be resolved through the Union's mechanism and in accordance with the International Constitution", Article XIV, Transfer of Company Title or Interest, [General Counsel Exhibit 25; General Counsel Exhibit 47].

[47] An employer is required to bargain over the effects of the relocation of unit work and that obligation includes bargaining over the relocated workers' wages, work locations, schedules, carryover of seniority and other terms and conditions of employment at the new facility, as well as over the conditions of the transfer. Comar, Inc., 339 NLRB 903, 913 (2003).

Akron facility in the classifications of delivery drivers, warehousemen, vending, mechanics, merchandisers and seasonal employees who relocated to their jobs at the Employer's Twinsburg facility. (Tr. 406; G.C. Exhibit 35). Under the analysis presented by Intervenor Local 348 herein, the Employer's representatives unnecessarily sought confirmation that the anticipated relocation of thirty-six (36) previously unrepresented employees in the classifications of merchandiser and mechanic from the Maple Heights, Ohio facility to the Twinsburg, Ohio facility would authorize Local 348 as representative[48].

The record reveals that on January 14, 2011, the Respondent sought a written Memorandum of Understanding from all three Local Unions acknowledging a "conditional" recognition of Local 348 at the Twinsburg location. Local 348 representatives rejected that proposal on the grounds that Local 348 was the valid, authorized representative of the employees in the recognized bargaining unit being transferred to Twinsburg. (See, Testimony of Local 348 President Patrick J. Ziga, Tr. 673-675)[49]

Local 348 representatives met with relocated Twinsburg employees on January 17th and January 19th to discuss the collective bargaining agreement applicable at Twinsburg and to obtain Teamsters membership transfer authorizations from Local 293 and Local 1164 members and union security authorizations for some of the transferred employees in the merchandiser, mechanic and transport driver classifications. (See, Testimony of Local 348 President Patrick J. Ziga, Tr. 399 – 406; 674 - 685.) These documents were forwarded to Respondent for authorized payroll deduction purposes. (Tr. 678 – 684). On January 24, 2011, Respondent recognized receipt of these check-off authorization cards.

[48] See, Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB at 873-874.

[49] Local 348 Exceptions 22, 23.

As explained in Dana Corporation, 356 NLRB No. 49 (Dec. 6, 2010), the Board's enforcement of Section 8(a)(2) of the Act does not prohibit an employer to voluntarily recognize a union that has demonstrated majority support by means other than an election, including authorization cards signed by a majority of the unit employees. Terracon, Inc., 339 NLRB 221, 225 (2003). Each case is reviewed on its facts. See, Dana Corporation, 356 NLRB No. 49, at slip opinion pages 36, 37 and 38, distinguishing International Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann), 366 U.S. 731, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961) and Majestic Weaving Co., 147 NLRB 859 (1964), enf. denied 355 F.2d 854 (2d Cir. 1966).

The facts as presented in this record confirm that no violation of Section 8(a)(2) or (3) of the Act by Respondent occurred as a matter of law. Because the Local 348 collective bargaining agreement properly transferred to Twinsburg upon the relocation of operations, under either the Harte, *supra*, "substantial complement" analysis or the "predominant representative" analysis of Metropolitan Teletronics Corp., *supra*, there has been a demonstration of uncoerced "majority support by means other than an election". Dana Corporation, id. The Board's policies under Kroger Co., 219 NLRB 388 (1975) and related cases recognize that the provisions of Article XIV of the Local 348 contract may be applied in the facts of this case because this clause constituted a "contractual commitment[] by the Employer to forgo its right to resort to the use of the Board's election process in determining the Union's representation status in these new" locations, and Local 348's "proof" of majority support at the relocated Twinsburg facility is shown under the "substantial complement" analysis or the "predominant representative" analysis described above. Id. at 389.

In this regard, the ALJ's determination that the Employer's conduct crossed the line of unlawful assistance in Garner/Morrison, LLC, 356 NLRB No. 163, slip op. at 7 (2011), is based

on an erroneous factual and legal conclusion regarding Local 348's continued "conclusive presumption of majority status" during the term of the June 1, 2008 to May 31, 2012 collective-bargaining agreement at Twinsburg. Consequently, the General Counsel's assertion, not supported by the record, that the Employer's conduct "would reasonable tend to coerce employees in selection of their bargaining representative" cannot be sustained. The ALJ's decision (ALJD at 19: footnote 26) concedes that the facts of the cases cited in support of findings of the coercive tendency of the Employer's continued recognition of Local 348 representatives at Twinsburg do not involve identical circumstances[50].

Therefore, the amended collective bargaining agreement between the Employer and Local 348 was lawful and not void as a violation of Section 8(a)(2) of the Act and the employee-authorized deductions of dues and fees under the union security clauses of that collective bargaining agreement did not result in a violation of Section 8(a)(3) of the Act. Consequently, the Intervenor's Exceptions Nos. 49 through 68 should be sustained because the policies of the Act described above, mandate dismissal of the Complaint in its entirety.

[50] See, e.g., Safety Carrier, Inc., 306 NLRB 960, 962-63 (1992)(Employer's President travels to the workplace and gives supervisors union authorization cards to distribute to employees.)

CONCLUSION

For the foregoing reasons and authority, Intervenor Teamsters Local Union No. 348 respectfully submits that the Complaint in this case should be dismissed in its entirety.

Dated this 9th day of September, 2011.

Respectfully submitted,

/s/ *James F. Wallington*
James F. Wallington (D.C. Bar # 437309)
BAPTISTE & WILDER, P.C.
1150 Connecticut Avenue, N.W., Suite 315
Washington, DC 20036-4104
Tel: (202) 223-0723/Fax: (202) 223-9677
Email: jwallington@bapwild.com

Certificate of Service

I hereby certify that on this 9th day of September, 2011, I electronically filed the foregoing paper in Case 3-CA-39327 with the Executive Secretary for the National Labor Relations Board using the Board's E-File system, and served copies by email and UPS NEXT DAY DELIVERY addressed to the representatives of the parties in this matter as follows:

Counsel for the General Counsel:
Sharlee Cendrosky, Esq. and Iva Y. Choe, Esq.
National Labor Relations Board, Region 8
1240 East 9th Street, Room 1695
Cleveland, OH 44199-2086
Email: sharlee.cendrosky@nlrb.gov
Email: iva.choe@nlrb.gov

Counsel for Respondent:
Timothy C. Kamin, Esq. and Robert J. Bartel, Esq.
Krukowski & Costello
1243 N. 10th Street, Suite 250
Milwaukee, WI 53205
Email: rjb@kclegal.com
Email: tck@kclegal.com

Counsel for Teamsters Local Union No. 293 and Teamsters Local Union No. 1164:
Timothy R. Fadel, Esq.
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, OH 44115
Email: wfblaw@wfblaw.com
Email: tfadel@wfblaw.com

/s/ James F. Wallington