

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**THE AMERICAN BOTTLING COMPANY,  
INC., D/B/A DR PEPPER SNAPPLE GROUP**

**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,  
Party to the Contract**

**and**

**TEAMSTERS LOCAL UNION NO. 1164,  
A/W THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
Party of Interest**

**ANSWERING BRIEF OF COUNSEL FOR THE  
ACTING GENERAL COUNSEL**

This matter comes before the Board as a result of the decision issued by Administrative Law Judge Jeffrey D. Wedekind on August 12, 2011 (JD-46-11).<sup>1</sup> The Intervenor, Teamsters Local Union No. 348, has filed exceptions to Judge Wedekind's finding that Respondent violated Sections 8(a)(2) and (3) of the Act. Pursuant to Section

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<sup>1</sup> ALJD, p. \_\_\_ will indicate the page in the ALJ's Decision, JD-46-11.

102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the Acting General Counsel submits this Answering Brief in response to Intervenor's exceptions and argues that the record evidence and cited case law fully support Judge Wedekind's analysis and conclusions.

## **I. Background**

Prior to the consolidation at the current Twinsburg, Ohio facility, Respondent operated two beverage distribution warehouses, one in Maple Heights, Ohio and the other in Akron, Ohio.<sup>2</sup> At the Maple Heights facility, Teamsters 1164 represented a bargaining unit of fifteen (15) warehousemen and forklift drivers, while Teamsters 293 represented a unit of thirty-five (35) drivers, twenty-two (22) sales representatives, and four (4) vending employees for a total of sixty-one (61) unit members.<sup>3</sup>

At the Akron facility, Teamsters 348 represented a unit of fifteen (15) drivers, ten (10) warehousemen, three (3) vending employees, twenty-five (25) merchandisers and seasonal employees and two (2) mechanics for a total of fifty-five (55) members.<sup>4</sup>

Excluded from the bargaining units at the Maple Heights facility were five (5) merchandiser coordinators, thirty-four (34) merchandisers, three (3) mechanics, and one (1) truck jockey for a total of 43 non-bargaining unit employees. Excluded from the Akron bargaining unit were (2) transport drivers and twelve (12) sales representatives/account managers, for a total of fourteen (14) employees.

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<sup>2</sup> "Tr" will be used to refer to the official transcript, "GC" will be used to refer to exhibits offered by Counsel for the Acting General Counsel, "R" will be used to refer to exhibits offered by the Respondent, "Intr" will be used to refer to exhibits offered by the Intervenor, Teamsters 348.

<sup>3</sup> GC Exhibit 4, Attachment A; GC Exhibit 18, Attachment C.

<sup>4</sup> Intr. Exhibit 8, Attachment B lists a total of 56 unit members, (16) of which fall into the driver classification. However, much of the testimony suggests that Local 348 had 55 unit members which included fifteen drivers: (Hearing Transcript at 26:23, 299:12, 502:10, 502:14,672:17)

On September 22, 2010, Gilbert Tecca, Area Director for the Respondent, contacted all three local unions representing employees at the affected locations to inform them that the Respondent had signed a lease for a new consolidated facility in Twinsburg, Ohio and that the relocation would occur on some future date in 2011. Before opening the Twinsburg facility, Respondent met with Teamsters 293, Teamsters 1164 and Teamsters 348 on several occasions to discuss the closing of the Maple Heights and Akron facilities and the opening of the Twinsburg facility. The most significant topic of conversation was which union(s) would represent employees at the new facility and in what unit(s). From the beginning Respondent made it clear that it would not recognize a unit that included the sales representatives. (Tr. 508: 23; 565:2-5)

On Wednesday, January 12, 2011, Respondent met with both Teamsters 348 and Teamsters 293. (Tr. 72) In this meeting, Michael Zemla, Secretary Treasurer, Teamsters 293, informed Respondent that Local 293 had a membership meeting scheduled that evening and he would ask the sales representatives at this meeting if they wanted to remain in the union. (Tr. 73-75; 316:12; 661-612)

On Thursday, January 13, 2011, Michael Zemla informed both Gilbert Tecca and Patrick Darrow, Secretary Treasurer of Local 348, that the sales representative wanted to remain in the union and therefore, Local 293 was not willing to walk away from representing the sales representatives and that it would do everything “legally possible to defend our group.” (Tr. 75; 317-317; 663) Indeed, Patrick Ziga, another representative of Local 348, admitted that Local 348 “would not be in good shape” if Local 348 could not reach a voluntary agreement and the company opened non-union and the parties had to go to an election. (Tr. 660:21) Moreover, Local 348 knew it “weren’t (sic) going to get a

contract if the sales reps were included in the unit.” (Tr. 724:9) Upon learning that Teamsters 293 would not give up on representing the sales representatives, Gilbert Tecca “reached out to Pat (Darrow)” and scheduled a meeting for the next day, Friday, January 14, 2011. (Tr. 577:16, 578) At this meeting, Respondent and Teamsters Local 348 entered into a collective bargaining agreement that excluded the sales representatives.

On January 17, 2011, (the day the Twinsburg facility opened), Respondent gathered its employees for orientation meetings, announced that an agreement had been reached with Teamsters 348, announced that sales representatives would no longer enjoy union representation as they were cut out of the unit, and introduced Teamster 348 representatives who proceeded to solicit union cards from Respondent’s employees.

Several days later, on January 19, 2011, Gilbert Tecca gathered the merchandiser employees to allow Teamster 348 representatives to solicit union cards from them. Tecca introduced the representatives from Teamsters 348 and remained present while they passed out union cards and membership materials. Ten days later, Respondent communicated to Teamsters 348 that as of January 24, 2011, Respondent believed that Teamsters 348 represented a majority of the bargaining unit.

On February 24, 2011, Teamsters 293 and Teamsters 1164 filed a joint representation petition in Case No. 8-RC-17064, seeking to represent all bargaining unit and non-bargaining unit members who were employed at the Maple Heights and Akron facilities. That petition is currently in blocked status pending the resolution of the instant case.

**II. Judge Wedekind Correctly Found that Respondent Acted Unlawfully By Recognizing Teamsters 348 And Entering Into A Contract With It.**

Section 9(a) of the Act establishes that the exclusive bargaining representative for a unit of employees must be selected by an uncoerced majority of those employees. Similarly Section 7 assures employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity. Thus, when an employer recognizes and negotiates a collective bargaining agreement with a union that has not achieved majority status among its employees, that employer unlawfully supports the union in violation of Section 8(a)(2) of the Act. Int'l Ladies' Garment Workers Union (Bernhard-Altmann) v. NLRB, 366 U.S. 731, 738 (1961).

In Majestic Weaving, Co., 147 NLRB 859 (1964), the Board applied these principles to find that an employer and union violated the Act by *negotiating* an agreement before the union was the majority representative, even though the execution of the contract was conditioned upon obtaining majority support from the employer's employees. In that case, the employer stated that it was willing to engage in negotiations so long as the union could show at the conclusion that it represented a majority of the unit employees. Id. at 866. The Board held that the employer unlawfully *supported* the union in violation of Section 8(a)(2) by *negotiating* a contract at a time when the union did not represent a majority of the unit of employees. Id. at 860. The Board found it immaterial that the parties had conditioned the actual signing of the contract on the union's obtaining majority support from the employees as the recognition was similar to formal recognition and thus illegal under Int'l Ladies Garment Workers, supra. Id. See also Local Lodge No. 1424 v. N.L.R.B., 362, U.S. 411, 413-414 (1960) (Holding that it is an unfair labor practice for an employer and a labor organization to enter into a collective bargaining

agreement if at the time of original *execution*, the union does not represent a majority of the employees in the unit). The Board reasoned that the union so favored is given “a marked advantage over any other in securing the adherence of employees.” *Id.* See also NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267 (1938).

Moreover, the law is clear regarding an employer’s obligation when it merges the operations of two facilities at a single new facility, each facility having been formerly represented by separate unions. In such a case, it is the duty of the employer to remain neutral with respect to which of the incumbent unions would be the collective bargaining representative at the newly merged facility and refrain from recognizing any of the unions until one demonstrates majority status. Hudson Berland Corp., 203 NLRB 421, 423 (1973). See also, Schreiber Trucking Co., Inc., 148 NLRB 697 (1964).

From the time it first began planning the consolidation, Respondent acknowledged that none of the three local unions would represent a majority of the anticipated combined workforce at the Twinsburg facility and that it would be illegal to grant recognition to any one Local union under the circumstances. (GC Ex. 5; Tr. 240) Indeed, Respondent conceded in its Talking Points memo issued to employees that one of its options was to resolve the representational issue through a three-way NLRB election. (GC Ex. 5) <sup>5</sup> Although Respondent knew that none of the Local Unions represented a majority, on January 14, 2011, and without demanding evidence to the contrary, Respondent selected Teamsters Local 348 as the exclusive bargaining representative of a unit of employees crafted by Respondent. These parties then negotiated a complete

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<sup>5</sup> In this same document, Respondent also suggested a second option of having two of the three unions disclaim interest and then recognizing the third. Without evidence that the “favored” union had achieved majority status in the interim, Counsel for the Acting General Counsel would opine that this “option” would have been unlawful.

collective bargaining agreement in violation of Section 8(a)(1) and (2) of the Act. (GC Exs. 25, 36); *See Int'l Ladies Garment Workers*, 366 U.S. 731, 738.

There is conflicting testimony by the Respondent and Teamsters 348 as to whether the terms of the collective bargaining agreement went into effect on January 17, 2011. Local 348 maintains that the agreement was in effect that day, the day the Twinsburg facility opened, while Respondent suggests that only some of the terms and conditions contained in the agreement were then in effect. (Tr. 459; 460; 513-515; 534; 625:11) However, the contract itself provides a clearly different answer to this question. First, nowhere in the parties' agreement does it state that the collective bargaining agreement is contingent upon later proof of Local 348's majority status. To the contrary, page forty (40) of the agreement reads:

“This agreement shall be in full force and effective from *January 14, 2011*(emphasis added), and shall remain in effect until May 31, 2012.”

It was signed by Respondent and Local 348 on January 14, 2011. (GC Ex.25) Further, Respondent admits that it was not until some time after January 24, 2011, that it determined that Local 348 had the support of a majority of employees in the unit Respondent deemed acceptable.<sup>6</sup> (GC Ex. 1-(h), 36, Tr. 534:18) So, whether the contract was effective on January 14 or 17<sup>th</sup>, Respondent nonetheless violated Section 8(a)(2) of the Act when it provided unlawful assistance and support by negotiating and putting into effect a complete collective bargaining agreement at a time when Local 348 did not have majority support. *See Int'l Ladies Garment Workers, supra, Majestic Weaving, supra*

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<sup>6</sup> As aptly noted by Judge Wedekind, there is nothing in the contract indicating that the Respondent's recognition of Local 348 was conditioned on it obtaining majority support. Nor is there any provision stating that the contract itself was only tentative or would not become effective until Local 348 obtained majority status. On the contrary, the contract unambiguously and unconditionally granted recognition to Local 348 and provided that its terms were effective immediately. (ALJD, p. 14)

and Local Lodge, *supra*.

### **III. Respondent's Theory Under Dana Corporation is not Supported by the Record**

In addition to Intervenor's argument that Local 348's collective bargaining agreement survives the relocation, Intervenor argues alternatively that Respondent's theory under Dana Corp., 356 NLRB No. 49 (2010) is supported by the record. While Judge Wedekind did not address these arguments in light of his finding that the contract was not tentative or conditional, as discussed above, Counsel for the Acting General Counsel alternatively argues that even if the January 14 contract was tentative or conditional, the Respondent's conduct nevertheless violated Section 8(a)(2) of the Act. (ALJD p. 16, fn. 22)

Although the Board in Dana recognizes that the Act permits limited forms of cooperation between employers and minority or unrecognized unions, it confirms that an employer crosses the line between cooperation and support and violates Section 8(a)(2) when it recognizes a minority union as the exclusive bargaining representative of its employees. Dana, slip op. at 4-5. In Dana, the Board considered whether a "Letter of Agreement" (LOA) between a then minority union and employer violated 8(b)(1)(A) and 8(a)(2) of the Act, respectively, and concluded that the agreement was lawful. The LOA in that case created a *framework* for *future* collective bargaining that would apply if and when the employer recognized the union based on a showing of majority support. The LOA set forth certain "principles that would inform future bargaining on particular topics," such as a four-year minimum duration in any contract, mandatory overtime, and flexible compensation. It also provided that the parties would submit issues unresolved after six months of bargaining to a neutral for interest arbitration. The Board held that

nothing in the agreement “affected the employees' existing *terms and conditions* of employment or obligated [the employer] to alter them,” and that any potential future effect on employees would require *substantial negotiations* following recognition pursuant to the terms of the agreement. Thus, there was nothing in the agreement that would lead employees to believe that recognition of the union was a forgone conclusion or that rejecting the union was futile. Thus, in Dana, the language merely sets forth the ground rule for negotiations to apply if and when the union obtained majority status.

Unlike the agreement<sup>7</sup> executed by Local 348 and the Employer, the Dana agreement did not contain an exclusive representation provision, expressly prohibited Dana from recognizing the union without a showing of majority support, did not affect the employee's existing terms and conditions of employment, and required substantial *future* collective bargaining. Dana Corp., at slip op. at 5-9. Furthermore, the Dana agreement was reached at arm's length in a context free of unfair labor practices. Id. The facts in the present case are significantly different.

First, it is undisputed that the collective bargaining agreement entered into between Respondent and Local 348 contained an exclusive representation provision (GC Ex. 25 at pg. 2) Moreover, the agreement did not contain language prohibiting Respondent from recognizing Local 348 without a showing of majority support. As Tecca acknowledged, the agreement contained numerous terms and conditions of employment effective immediately, and required no future negotiations or collective bargaining. (Tr. 228 “Is there any language missing from the document signed on January 14, 2011 that was needed to make it final? Not to my knowledge”; 331 “Outside

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<sup>7</sup> GC Ex. 25- *Local 348 Collective Bargaining Agreement*

of showing us cards- correct”) Accordingly, Respondent’s agreement with Teamsters 348 failed to stay within the Dana boundaries and violated Section 8(a)(2) of the Act.

Even if, for the sake of argument, it were determined that Respondent’ contract with Teamsters 348 was truly conditioned on that union’s subsequent lawful achievement of majority status, the outcome of this case would not change. First, Counsel for the Acting General Counsel would again refer to the cases cited earlier for the proposition that parties may not lawfully negotiate an entire contract (even a “conditional” one) prior to the union’s attainment of majority status. This is the teaching of Dana as well. More significantly, the Respondent in this case went further than merely negotiating a complete agreement, conditional or not. It then held captive audience meetings with its employees on January 17 and 19 where it presented them with a classic fait accompli; announcing that Teamsters 348 was their collective bargaining representative, that it had negotiated a contract with that union and detailed some of the significant terms of that agreement. It is no wonder that following this introduction, employees were more than willing to sign authorization cards for Teamsters 348 as they were given no real choice.

Perhaps an argument could be imagined that a truly conditional agreement, followed by Teamsters 348 achieving majority status in a non-coercive manner, would provide the Respondent with a defense to the allegations of Section 8(a)(2) conduct. Unfortunately for Respondent, the facts do not support any such claim.

**IV. Judge Wedekind Correctly Found that Under the Rule of *Metropolitan Teletronics*, the Act Prohibits the Respondent in the Instant Circumstances from Continuing to Recognize Local 348.**

Judge Wedekind correctly found that under the rule of Metropolitan Teletronics, 279 NLRB 957 (1986), the Act prohibits the Respondent in the instant circumstances

from continuing to recognize Local 348. Further, contrary to Intervenor's exceptions Hudson Berlind Corp., 203 NLRB 421, 423 (1973), controls, not Harte & Co., 278 NLRB 947 (1986). Accordingly, Intervenor's exception under the contract bar rule is without merit.

Intervenor disputes that the relocation of employees from the Maple Heights and Akron facilities to the Twinsburg facility created a question concerning representation. In support of its argument, Intervenor directs the Board to the decisions in Harte & Co., Inc., 278 NLRB 947 (1986), Rock Bottom Stores, 312 NLRB 400 (1993), Comar, Inc., 339 NLRB 903 (2003) and Westwood Import Co., Inc., 251 NLRB 1213 (1980) as permitting Local 348's collective bargaining agreement to be applied at the Twinsburg facility. Under this theory, Intervenor argues that the employer has not violated Section 8(a)(2) of the Act because it has merely complied with Article XIV of Local 348's prior collective bargaining agreement which mandates that the Local 348 contract "follow the work."<sup>8</sup> Indeed, Intervenor submits that this section of the parties' collective bargaining agreement coincides with Article 12, Section 11, of the International Brotherhood of Teamsters Constitution sanctioning amendments to Collective Bargaining Agreements where there has been a merger or transfer of membership during the term of the collective bargaining agreement. (Int. Ex. 10; Tr. 633) Counsel for the Acting General Counsel strongly disputes the validity of these claims.

First, the contract clause in question, dealing with closures and third party transfers, would not apply to this situation. At best, this language may obligate the Employer to provide transferred employees with dove-tailed seniority, but nothing more. More importantly, such contract provisions and the Teamsters Constitution (even if they

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<sup>8</sup> GC Exhibit 47

apply in the manner argued by the Intervenor) do not supersede the provisions of the Act. For example, the Board has long refused to accept a literal application of “after acquired facility” clauses in contracts that provide for granting of recognition without a showing of majority status at the newly acquired operation. Instead, the Board “reads into” after-acquired facility clauses a requirement that majority status must be achieved by the union before the clause becomes operable, even though no such requirement is provided for by the language of the clause itself. Kroger, 219 NLRB 388 (1975). So, the contract provisions pointed to by the Intervenor provide no cover for the Respondent’s actions.

Likewise, any reliance on Harte & Co., Rock Bottom Stores, Westwood Imports and Comar, Inc., is misplaced. Each of these cases involved an employer who moved an existing group of represented employees to work in a new location and hired new employees (who had not previously been represented by any union) to supplement its existing workforce. Indeed, the Board has recognized that merging *two represented groups*, as in the instant matter, presents different issues and requires a different analysis than the Westwood Imports scenario. See Metropolitan Teletronics Corp., 279 NLRB 957 (1986). The Board in Metropolitan states that when an employer merges two separately represented work forces the employer may not choose between competing unions, 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, citing Boston Gas Co., 235 NLRB 1354, 1355 (1978) and Martin Marietta Refractories Co., 270 NLRB 821, 822 (1984). In such a case, it is the duty of the employer to remain neutral with respect to which of the incumbent unions would be the collective bargaining representative at the newly merged facility and

refrain from recognizing any of the unions until one demonstrates majority status. Hudson Berlind Corp., 203 NLRB 421, 423 (1973). *See also*, Schreiber Trucking Co., Inc., 148 NLRB 697 (1964).

In National Carloading, Corp., 167 NLRB 801, 802 (1967), the Board rejected arguments that a merger of separate employee groups performing similar work did not create a question concerning representation (QCR) but instead raised an accretion issue. There the Board held that where neither group of affected employees is sufficiently predominant to remove any real question as to the overall choice of a representative, disruption to industrial peace will be eliminated only if the conflicting representation claims are resolved through the processes of a Board-conducted election. F.H.E., 338 NLRB 1095,1096 (2003) affirmed the continued viability of National Carloading. However, since F.H.E. was a construction company subject to Section 8(f) of the Act, the Board did not find a violation of Section 8(a)(1) and (2) when the employer recognized a minority union to represent the newly created unit. Since the Respondent here is not engaged in the construction industry, Section 8(f) does not apply. To the contrary, as found by the Board in Hudson Berlind Corp., 203 NLRB 421 (1973), where an Employer merges the operations of two warehouses, each warehouse having been formerly represented by separate unions, and thereafter combines the workforces at the new facility, it is the duty of the Employer to remain neutral with respect to which of the two incumbent unions would be the collective bargaining representative at the newly merged facility.

Notwithstanding, Intervenor argues that Local 348 was the predominant representative of a majority of the employees at Twinsburg and therefore, under

Metropolitan Teletronics, Corp., Respondent did not violate the Act when it recognized Local 348. Contrary to Intervenor’s exceptions, the facts support Judge Wedekind’s finding that there is clearly a reason to question Local 348’s majority status at the Twinsburg facility as of January 14, 2011. (ALJD, p. 17) First of all, the Twinsburg workforce is made of up employees who were represented by three different unions under three separate collective bargaining agreements. As noted by Judge Wedekind, a substantial number of unrepresented employees at both of the closed facilities also transferred to the new facility. (ALJD, p. 17) Indeed, this situation is distinguishable from Metropolitan Teletronics, Inc., since no former bargaining unit classification was subsequently removed from the unit post merger in that case. Even if the Board’s decision in Metropolitan Teletronics, Inc., is broadly interpreted to allow the removal of a former bargaining unit classification of employees from that unit post merger (here, sales representatives), there is still reason to question Local 348’s majority status at Twinsburg as of January 14, 2011. As noted by Judge Wedekind, only 38.7 percent of the employees in the newly negotiated unit had previously been represented by Local 348 at Akron. (ALJD, p. 17) Of the remaining employees in the new unit, 25 percent were represented by Local 293 at Maple Heights and 9.5 percent were represented by Local 1164 at Maple Heights. Indeed, 26.5 percent of the employees in the newly negotiated unit were unrepresented at Akron or Maple Heights. Thus, Local 348 did not represent “such a large proportion of the combined workforce” as required by Metropolitan Teletronics, Inc.<sup>9</sup>. *Id.* at 960

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<sup>9</sup> In Metropolitan Teletronics Inc., *supra*, the Board found that the respondent did not violate the Act when it recognized on of two unions which represented at least 63% of the workforce.

V. **Judge Wedekind correctly found that neither Local 293 nor 1164 Disclaimed Interest**

In its exceptions, Intervenor argues that both Local 293 and Local 1164 had disclaimed continued bargaining representation and had consented to the Employer's cancellation of collective bargaining agreements that previously covered the employees at the Maple Heights facility. (Int. Exc. p.9) However, as found by Judge Wedekind, at no time did either Local 293 or Local 116 disclaim interest. (ALJD, p. 18)

Intervenor suggests that a series of jurisdictional letters sent by Teamsters Local 293 to the Teamsters Joint Council #41 indicating that Teamsters Local 293 was: 1) withdrawing its request to empanel the Joint Council, and, 2) Local 293 and Local 1164's later withdrawal of Section 8(a)(5) charges, are actions that establish that both Local 293 and Local 1164 disclaimed a continuing bargaining relationship and consented to the Employer's cancellation of their respective collective bargaining agreements. (GC Exs. 12, 25; Intv. Ex. 9; R Ex. 2; TR. 525,531-532, 544-546, 577)

First, any dispute between Teamster local unions regarding whose "jurisdiction" covered Respondent's new Twinsburg facility is a red-herring and has no bearing on whether Respondent unlawfully recognized and provided assistance to Local 348 in violation of Section 8(a)(2) of the Act. This case is not about whether the Respondent selected the "correct" union under provisions of the Teamsters Constitution outlining jurisdiction. Under the circumstances present in this matter, Respondent had a duty to remain neutral with respect to which union, if any, Respondent's *employees* might choose as their collective bargaining representative.<sup>10</sup> The Teamsters were free to decide internally which local would be granted permission to *attempt* to organize this new

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<sup>10</sup> Hudson Berland Corp and Schreiber Trucking Co., Inc., *supra*

facility. Respondent, however, may not recognize and sign a contract with that “chosen” local until an uncoerced majority of its employees selected it to represent them.

Although there is some suggestion by Respondent that it believed that the jurisdictional correspondence between Teamsters Joint Counsel Local 41 and Teamsters 293 and Teamsters 1164, indicated that Teamsters 348 was in a position to enter into a contract with Respondent, the facts do not support such a claim. Indeed, Respondent admitted that the jurisdictional dispute did not resolve the issue as to whether Local 348 and Respondent could enter into a valid collective bargaining agreement. (Tr. 544) And, it is evident that neither Local 293 nor Local 1164 ever disclaimed interest. (R. Ex. 2; Tr. 79:13, 182:13; 242; 306:16; 527-530; 543; 544:6; 578). Assuming *arguendo* there had been a disclaimer, this does not mean Respondent received a free pass to decide which union would represent its employees going forward. There is no “disclaimer” exception to the holdings in Hudson Berlind and National Car. Disclaimer or not, the merger and consolidation at Twinsburg meant that the employees, not their employer, would lawfully determine if they were going to be represented by a union, and if so, which one.

Finally, in the circumstances at issue, Local 293 and Local 1164’s withdrawal of their 8(a)(5) charges does not mean that the parties consented to the Employer’s cancellation of their respective collective bargaining agreements. (Int. Exc. p. 9)

## **VI Conclusion**

Judge Wedekind correctly concluded that Respondent violated Sections 8(a)(2) and (3) of the Act. Thus, Counsel for the Acting General Counsel respectfully requests that the Board deny Intervenor’s exceptions. Thus, Counsel for the Acting General Counsel submits that Judge Wedekind’s recommended Order should be adopted and

include the additional remedies that Counsel for the Acting General Counsel sought in its exceptions.

Dated at Cleveland, Ohio, this 22<sup>nd</sup> day of September 2011.

/s/ Sharlee Cendrosky

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Copies of the foregoing Brief of Counsel for the Acting General Counsel were sent to the following individuals by electronic mail on September 22, 2011:

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