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.

ANSWERING BRIEF IN RESPONSE TO INTERVENOR TEAMSTERS LOCAL UNION NO. 348'S EXCEPTIONS AND SUPPORTING BRIEF ON BEHALF OF CHARGING PARTY TEAMSTERS LOCAL UNION NO. 293

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, now comes Charging Party, International Brotherhood of Teamsters, Local Union No. 293, by and through counsel, and hereby respectfully submits its Answering Brief in Response to Intervenor Teamsters Local Union No. 348's Exceptions and Supporting Brief.

Respectfully submitted,

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INTRODUCTION

By its exceptions,[1] Teamsters Local Union No. 348, a/w the International Brotherhood of Teamsters (hereinafter "Local 348" or "Intervenor") seeks to have the National Labor Relations Board (hereinafter "the Board") disregard the well-founded factual and legal findings of Administrative Law Judge Jeffrey D. Wedekind's (hereinafter "ALJ") decision. (Hereinafter "ALJD.")[2][3][4] In doing so, Local 348 seeks a determination that The American Bottling Company, Inc., d/b/a Dr. Pepper Snapple Group (hereinafter "Respondent") did not violate Sections 8(a)(2) and (3) of the National Labor Relations Act. (Hereinafter "the Act.") Teamsters Local Union No. 293, a/w the International Brotherhood of Teamsters (hereinafter "Local 293" or "the Union") asserts that Local 348's exceptions are without merit and should be denied. Rather, the ALJD should be upheld in order to promote employee self-determination during the collective bargaining process, the foundational policy of the Act.

STATEMENT OF FACTS

Local 293 adopts the Statement of Facts set forth in the Union's Post-Hearing Brief.[5]

[1] Citations to Local 348's brief ("348B") to the exceptions are by page, in the following format: 348B [page number].
[2] Citations to the ALJD are by page and line, in the following format: ALJD [page number]:[line number].
[3] Citations to the record are by transcript page, in the following format: TR [page number].
[4] Numbered exhibits are by page, in the following format: General Counsel – GC [page number].
[5] Citations to the Post-Hearing Brief ("PHB") are by page, in the following format: PHB [page number].

ARGUMENT: RESPONSE TO INTERVENOR TEAMSTERS LOCAL UNION NO. 348'S EXCEPTIONS

I. Response to: "The Twinsburg Relocation Did Not Create a Question Concerning Representation" – Exceptions 1, and 27 through 68.

The Twinsburg Relocation did in fact create a question concerning representation. (Hereinafter "QCR.") Local 293 asserts that Local 348's reliance on *Harte & Co.*, 278 NLRB 947 (1986), is misplaced. Intervenor's Brief in Support of Exceptions completely lacks a response to the ALJ's well-taken argument that *Harte* is inapplicable. This is so because 1) *Harte & Co.* dealt with an employer who closed only one facility and relocated employees that were represented by only one union; and 2) the ALJ correctly stated that *Metropolitan Teletronics*, 279 NLRB 957 (1986), is controlling because it dealt with an employer merging of two separately represented workforces into one workforce at a consolidated location. (ALJD 17:27 – 18:17.) Indeed, Respondent unilaterally decided to consolidate its two workforces at Maple Heights and Akron into one workforce at Twinsburg. (PHB 5; TR 55-67, 100-02, 175.) Furthermore, Board precedent that has chosen to rely on *Harte* has done so with explicit recognition that the relocation analysis should only be applied to a "gradual plant relocation involving new hires or other non-transferred workers . . . " *Leach Corp. v. NLRB*, 54 F.3d 802, 805 (D.C. Cir. 1995). The instant facts demonstrate that Respondent's facility consolidation was not gradual – rather, the Akron and Maple Heights facilities remained open until January 14, 2011, and the consolidated Twinsburg facility opened on January 17, 2011. (PHB 11, 14; GC 42; TR 144-54, 162-65, 265-73, 328-32.) Furthermore, there is no evidence of any intent by Respondent to make new hires or bring in other non-transferred workers, but only an intent to transfer the existing workers at the Akron and Maple Heights sites. (PHB 12; GC 42.) This only

serves to show that Local 348's relocation arguments under *Harte & Co*. lack merit, and the ALJ correctly disregarded them in his analysis.

Additionally, *Harte & Co*. is distinguishable because the Board's holding was based on the presence of five additional factors that are absent in the instant case. These five factors are: 1) The Board found that the employer was acting in good faith, despite its tardiness in relocation; 2) The tardiness in relocation was appropriate given the circumstances and complexity of the employer's business; 3) The employer's acquisition of the relocation facility was dependent upon closing its old facility; 4) *There was only one union that claimed to represent the employees at the relocation facility*; and 5) The Board's reliance on industrial stability as a favored national labor policy was based on the real risk of 260 jobs. *Harte & Co.*, 278 NLRB at 950.

The instant record contains no presence of these factors. No tardiness issues were at play, there was no significant risk of job loss if Respondent did not apply the CBA it had with Local 348 at the Akron site to the Twinsburg site, there were no contingency issues between the old Akron and Maple Heights sites and the new Twinsburg site, and most importantly, where two unions (Locals 293 and 348) claimed to represent the Twinsburg unit, Respondent had no good faith belief that Local 348 had authority to represent the Twinsburg unit, contrary to its contentions. (PHB 21.) Respondent was aware that as early as November 16, 2010 up through January 17, 2011 (the date at which the Twinsburg consolidated facility opened), Local 348 lacked majority support among the bargaining unit proposed for the Twinsburg facility. (PHB 7, 12; TR 48-53, 238-240, 259-61, 304.) Given this fact, it is impossible and implausible to find that Respondent had any belief, let alone one held in good faith, that Local 348 had the authority to represent the Twinsburg unit. Moreover, because nothing in the NLRA's statutory language prescribes scienter as an element of an unfair labor practice, *Int'l Ladies Garment Workers'*

Union v. NLRB, 366 U.S. 731, 739 (1961), "[i]t follows that prohibited conduct cannot be excused by a showing of good faith." *Id.*

Thus, while is it obvious that *Harte & Co*. is inapposite to the instant facts, even assuming arguendo that its principles apply, Local 348's presentation of the facts in its Supporting Brief do not withstand scrutiny. Intervenor's assertion that it commanded a majority of the workers at the Twinsburg location (348B 7) is based on a deceptive interpretation of Board law. Intervenor claims that under its recognition clause it has in the CBA with Respondent, the merchandisers and mechanics who were formally unrepresented at the Maple Heights facility (where the Local 293 members worked prior to the relocation) would be included via that clause into the Local 348 unit. (348B 7, 17.) Its only justification for this conclusion is the reliance on the "axiomatic" principle in *Tree of Life*, 336 NLRB 872 (2001), that it explained thusly: "[W]hen 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." (348B 17.) Yet, Local 348 is simply misstating the law. Rather, the Board in *Tree of Life* stated that "when an established bargaining unit expressly encompasses employees in a specific classification, *new employees hired* into that classification are included in the unit." 336 NLRB at 873. The merchandisers and mechanics formerly working at the Maple Heights facility *were not new employees hired* into the classification included in Local 348's unit. (PHB 7-8; GC 35; TR 483-87.) Therefore, contrary to Local 348's assertion (348B 7), it did not have 96 represented workers, but only 57. Out of the total proposed unit at Twinsburg – which constituted 147 workers – this comes out to 38.7 percent, clearly not the 40 percent threshold of represented employees transferred to a new facility, as required by *Harte & Co.*, 278 NLRB at 955, nor 65 percent figure that Intervenor claims in order to invoke that case. (348B 7.)

Local 348 then attempts to bolster its position by invoking the contract bar doctrine, see *Hexton Furniture Co.*, 111 NLRB 342 (1955); *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), and citing Board precedent, see *RCA del Caribe*, 262 NLRB 963 (1982), that favors industrial stability under circumstances where a non-incumbent union is challenging an incumbent union. (348B 12, 15.) Yet this position is wholly dependent upon Local 348's factual conclusions in which it claims to represent a majority of workers at the Twinsburg facility, which based on the abovementioned analysis, are clearly erroneous. This results in a QCR, as found by the ALJ, which directly contradicts the conclusion that Local 348 is the incumbent union. As a result, the entire line of contract bar doctrine and incumbent union Board precedent upon which Local 348 relies on is without force.

Therefore, based on the ALJD, the Board would be well within its jurisdiction to question Local 348's allegation as a majority representative, thus raising a QCR and violations of Sections 8(a)(2) and (3), respectively.

II. Response to: "The Relocation to Twinsburg of Operations and Equipment Remaining Substantially the Same Did Not Create a Question Concerning Representation" – Exceptions 1 through 27, and 31 through 68.

Local 348's first claim that the ALJ's reliance on *Metropolitan Teletronics* is incorrect (348B 19) is itself erroneous because it is solely based on its improper numerical determination in which it claimed that it represented a majority of the workforce of the Twinsburg location, per the analysis in Section I. In referring to the threshold level required for the Board not to question the majority status of a Union claiming to be a workforce's sole bargaining representative at a consolidated factory, three examples are illustrative: *Metropolitan Teletronics* uses the phrase "large proportion," 279 NLRB at 960, *Martin Marietta Co.* uses the phrase "sufficiently predominant," 270 NLRB 821, 822 (1984), and *Boston Gas Co.* uses the phrase "majority status

of the predominant Union." 235 NLRB 1354, 1355 (1978). The commonsense meaning of these otherwise unelaborated synonymic phrases should be understood as the classic definition of "majority," which is "[a] number that is more than half of a total . . . " Black's Law Dictionary (9 Ed.Rev. 2009). Local 348's representation of only 38.7 percent of the consolidated workforce at the Twinsburg facility does not constitute a majority.

Local 348's second claim that Board law further demonstrates that Respondent's relocation to the Twinsburg facility did not create a QCR (348B 20) is fallacious because the Board precedent which Intervenor relies on in making this claim in fact supports the finding of a QCR. While Intervenor is correct in stating that the relevant holding in *FHE Services*, 338 NLRB 1095 (2003) is that a workforce consolidation that extinguishes a valid and existing collective bargaining agreement must involve a "new operation and a new unit," (348B 21-22) its conclusion that the instant facts do not support a finding of a new operation and a new unit is blatantly false. When *FHE Services* relied on *National Carloading Corp*., 167 NLRB 801 (1967) and *Panda Terminals*, 161 NLRB 1215 (1966) to arrive at its specific holding, these three cases clearly and simply described what constitutes a "new operation and a new unit" for workers who were previously in separate units at their old work sites: 1) a material increase in the size of the workforce at the new location; 2) a shared facility; 3) shared job tasks; and 4) a workforce that is under control by a unified management system. *Panda Terminals*, 161 NLRB at 1223 (citing *N.J. Natural Gas Co.*, 101 NLRB 251, 252 (1952); *FHE Services*, 338 NLRB at 1096; *National Carloading Corp.*, 167 NLRB at 802. Local 348's contention that Respondent serviced the same employers at its consolidated location as it did in its Akron location is of no significance in this analysis. (348B 24.) Rather, the instant facts support a finding of a consolidation that begs a QCR: 1) there was more than a doubling in size in the workforce at the Twinsburg location

(including both union and nonunion workers), as compared to the Akron and Maple Heights Location (Twinsburg: 130; Akron: 57; and Maple Heights: 73) (PHB 7-8, 18; ALJD 4:5 – 5:16; GC 35; TR 483-87) ; 2) all of the workers at the Akron and Maple Heights locations share the Twinsburg workplace as those old locations were closed down (PHB 6; TR 100-05); 3) all of the workers at the Twinsburg location have shared job tasks they previously had in their former units (PHB 7-8; ALJD 4:5 – 5:16; GC 35; TR 483-87); and 4) there is no evidence in the record that Respondent would not be the sole and unified manager of the Twinsburg location. *National Carloading Corp.* also strongly suggested that when additionally "neither group of affected employees is sufficiently predominant" in the consolidated workplace, then it will not remove any real question as to the overall choice of a representative." 167 NLRB at 802. The facts on record strongly demonstrate that neither group of employees from the Akron and Maple Heights facilities are sufficiently predominant, and therefore, a "real question" as to the choice of representative still remains.

Therefore, based on the ALJD, the Board would be well within its jurisdiction to question Local 348's allegation as a majority representative, thus raising a QCR and violations of Sections 8(a)(2) and (3), respectively.

III. Response to: "Respondent's Theory Under *Dana Corporation* Is Also Supported by the Record" – Exceptions 27 through 30 and 49 through 68.

Local 348's claim that Respondent's Theory under *Dana Corp.*, 356 NLRB No. 49 (2010) is supported by the record (348B 24) is without merit, both in law and in fact. Intervenor's assertion that under *Dana Corp.*, Respondent should continue to be lawfully recognized and bargained with (ibid.), is erroneous because Local 348 claims that its legal conclusions under *Harte & Co.* and *Metropolitan Teletronics Corp*. demonstrate that the transfer of the Local 348 collective bargaining agreement constitutes a demonstration of uncoerced

"majority support by means other than an election," *Dana Corp.*, 356 NLRB at 10. However, Intervenor's analysis of *Harte & Co.* and *Metropolitan Teletronics Corp.* are based on incorrect applications of law to fact, as demonstrated in Sections I and II. Therefore, its justification for relying on *Dana Corp.* has no force. Furthermore, Local 348's assertion that Article XIV of its contract with Respondent constitutes 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" (348B 27, citing *Kroger Co.*, 219 NLRB 388, 389 (1975)) is unpersuasive because the Board also stated in *Kroger Co.* that such clauses are "read to require recognition upon proof of majority status by a union." *Kroger Co.*, 219 NLRB at 389. Such proof is clearly absent from the record.

Furthermore, the agreement entered into by Respondent and Local 348 is factually distinguishable in a significant way from *Dana Corp*. In *Dana Corp.*, the lawful prerecognition agreement (hereinafter "LOA") "did no more than create a framework for future collective bargaining," 356 NLRB at 8, and refrained from including an exclusive-representation provision. The LOA at issue in *Dana Corp*. also contained an express statement of employer neutrality (*Id.* at 3). Moreover, the LOA

> was reached at arm's length, in a context free from unfair labor practices. It disclaimed any recognition of the union as exclusive bargaining representative, and it created, on its face, a lawful mechanism for determining if and when the union had achieved majority support . . . [it] had no immediate effect on employees' terms and conditions of employment, and even its potential future effect was both limited and contingent on substantial future negotiations.

Id. at 11. Unlike the LOA in *Dana Corp*., the agreement at issue in the instant case is a full and complete collective bargaining agreement. In addition to lacking an express statement of employer neutrality, the agreement reached by Respondent and Local 348 specifically recognized Local 348 as the duly authorized and exclusive bargaining representative for the

Twinsburg unit. (PHB 14; TR 267, 328-31.) Moreover, unlike the LOA in *Dana Corp*., the agreement reached between Local 348 and Respondent did have an immediate effect on employees' terms and conditions of employment. Indeed, as early as January 17, 2010, Respondent began enforcing the terms of its agreement with Local 348 by informing those salespersons that were members of Local 293 that they were no longer part of the bargaining unit and would work at Twinsburg without any representation. (Ibid.) And unlike the situation in *Dana Corp*., the agreement reached in this case was consummated during a time when multiple unions were asserting a right to represent the same employees. Accordingly, Intervenor's claims that *Dana Corp.* shows that Respondent committed no violations under Section 8(a)(2) and (3) is without support. Accordingly, Respondent's argument that the agreement it reached with Local 348 constituted lawful prerecognition negotiations (ALJD 14:36-39) is completely without merit. Rather, the record plainly establishes that the agreement entered into by the parties in the instant case constitutes a full and complete collective bargaining agreement that was effective immediately upon its execution.

CONCLUSION

This case requires the Board to strike a balance "between the *implicit* statutory policy of stability in bargaining relationships and the *express* Section 7 rights of employees both to choose their own bargaining representative or to refrain from collective bargaining altogether." *Nott Co*., 345 NLRB 396, 402 (2005). (Emphasis added.) Under Section 7 of the Act, employees are provided with "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives *of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities." Section 7. (Emphasis

added.) "This core provision guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Circ. 2001) (citing *Newport News Shipbuilding & Dry Dock Co.*, 233 NLRB 1443, 1452 (1977)). While public policy embraces the harmony wrought by honoring, so long as practicable, existing labor agreements, "[e]mployee self-determination in the collective bargaining process is perhaps the most fundamental promise of the National Labor Relations Act." *Ibid*. Thus, when these two policies meet, the former must give way to the latter and employee free choice must be honored.

Accordingly, Local 348's exceptions are without merit and should be denied by the Board. Therefore, Charging Party Local 293 respectfully requests that the Board affirms the ALJ's Decision.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Answering Brief in Response to Intervenor Teamsters Local Union No. 348's Exceptions and Supporting Brief on Behalf of Charging Party Teamsters Local Union No. 293* was electronically filed in Case 8-CA-39327 with the Executive Secretary for the National Labor Relations Board using the Board's E-File system, and served by U.S. mail, with sufficient postage, this 22nd day of September, 2011, on the following:

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