

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).

**MOTION FOR RECONSIDERATION AND MEMORANDUM ON BEHALF OF
INTERVENOR TEAMSTERS LOCAL UNION NO. 348**

Intervenor¹ Teamsters Local Union No. 348, pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files this motion for reconsideration of the order of the Board reported in 357 NLRB No. 167, dated December 29, 2011 and served by the United States mail deposited by the Executive Secretary on January 5, 2012, affirming the rulings, findings and conclusions in the August 12, 2011 decision² of Administrative Law Judge Jeffrey D. Wedekind

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.].

finding of violations of Sections 8(a) (2) and (3) of the Act by Respondent American Bottling Company.

Intervenor respectfully submits that the Board's majority decision in Dodge of Naperville, Inc., 357 NLRB No. 183 (January 3, 2012) has impacted this Board's relocation and consolidation policies in such a manner so as to implicitly overrule relocation and consolidation cases such as Nott Co., 345 NLRB 396, 400-401 (2005) and Martin Marietta Refractories Co., 270 NLRB 821, 822 (1984). Where the analysis would arguably apply to precedent as Metropolitan Teletronics Corp., 279 NLRB 957, 960 (1986) and Harte & Co., 278 NLRB 947, 955 (1986), the Board majority's ruling in Dodge of Naperville, Inc., may be seen as precedent providing for the continuation of collective bargaining agreements and preventing Employer's from unilaterally declaring a "QCR" during business relocations and consolidations. Therefore Intervenor's postdecisional motion in the above-referenced Case 08-CA-039327 presents "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

In Dodge of Naperville the Board majority found that the respondent Employer violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, repudiating the collective-bargaining agreement with the Union, and unilaterally changing the terms and conditions of employment of bargaining-unit mechanics upon the closure of one of its auto dealerships as a result of the Chrysler Motors Bankruptcy, and its offer to hire unit mechanics from the closed facility at its surviving, but nonunion, dealership. In finding the withdrawal of recognition unlawful, the Board majority in Dodge of Naperville found that the respondent Employer could not lawfully withdraw recognition from the Union upon the merger of the smaller group of represented mechanics from the closed facility with the larger group of unrepresented mechanics

at the new facility without having bargained over the effects of the closure. The majority found that the effects bargaining obligation included bargaining over the terms and conditions of employment of the relocated employees at the new facility. Because the respondent Employer failed to engage in effects bargaining, it could not rely on its changes to employment terms in arguing that, because of the merger, the unit lost its distinct identity as a unit appropriate for bargaining. The majority also imposed a bargaining order. 357 NLRB No. 183, slip opinion 2 and 3.

The dissent of member Hayes in Dodge of Naperville stated that the Board majority's bargaining order requiring continued recognition of the Union as to the Naperville mechanics "would contradict established unit principles by requiring the Respondent to bargain in a fractured unit that includes some but not all of the mechanics" and that rationale of the Board majority "contradicts established principles governing bargaining obligations under the Act and cannot be reconciled with existing precedent." 357 NLRB No. 183, slip opinion 5 and 6.

Member Liebman in her dissent in Nott Co., 345 NLRB at 402, explained "the confusion" caused by the Board's earlier decisions in this important area of the law:

"Inevitably perhaps, over the course of nearly 70 years, the Board's decisions have sometimes collided with each other. Layer upon layer of doctrines interpreting the Act have evolved, with in-consistencies sometimes emerging and often unexplained. There is likely no area of the law more snarled than that defining an employer's continuing duty to maintain an established bargaining relationship after some business transaction occurs. Different rules may be applied depending on what the transaction is called, with distinctions supported by little real analysis. Given our volatile business climate, the opportunities for clashing doctrines are rife. Compounding the difficulty is the underlying statutory tension between the Act's basic purpose of stabilizing labor relations (as announced by the 1935 enactment) and its sometimes competing purpose of preserving employee free choice (as announced by the 1947 Taft-Hartley amendments)."

Intervenor Teamsters Local Union No. 348 has always contended in this Case 08-CA-039327 that the Act does not require the mid-term cancellation of a valid, mature collective bargaining agreement³ 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. Intervenor Teamsters Local Union No. 348 submits that Board precedent and the policy of the Act requires that the Akron collective bargaining agreement survived the relocation and that the Board’s “contract bar” doctrine adequately addresses all other Section 9(a) issues in this case.

To the extent that the Board’s majority decision in Dodge of Naperville, Inc., 357 NLRB No. 183 (January 3, 2012) begins to clarify this area of Board law and policy, the principles of that decision should be applied in the reconsideration by the new Board members of the record and result in this Case 08-CA-39327. Consequently, the Respondent American Bottling Company’s continued recognition of Teamsters Local Union No. 348 as the bargaining unit representative at the relocated Twinsburg, Ohio facility would 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 bargaining representative. Because the Board in light of the majority opinion in Dodge of Naperville, Inc., has held that the Act, in similar relocation situations, “logically applies” a collective-bargaining agreement or bargaining relationship that would lead to a collective bargaining agreement in effect at the old location to the relocated facility, no violation

³ See, November 3, 2011 decision by the U.S. District Court for the Northern District of Ohio granting the Acting General Counsel’s petition for a 10(j) injunction in Calatrello v. American Bottling Co., No. 5:11CV992 (N.D. Ohio 2011) , Document 31, PageID #: 1876, footnote 1, (“ The Court recognizes that such an injunction may lead to the unintended result that all three union’s previously represented employees will have no representation.”)

of Section 8(a)(3) is established in case 08-CA-039327 by giving effect to the union security clauses of the amended Local 348 agreement. As shown by the record and the analysis herein supporting the Intervenor's Exceptions, on reconsideration in light of the majority opinion in Dodge of Naperville, Inc., the Complaint in this case should be dismissed.

STATEMENT OF FACTS SUPPORTING RECONSIDERATION⁴

In 2010 and for many years prior, American Bottling Company, Inc. ("Employer" or "ABC"), 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 Akron, Summit County, Ohio ("Akron facility"). The Akron collective bargaining agreement 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 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

⁴ This section provides the record citations and the grounds for Local 348 Exceptions Nos. 1 through 27.

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.)⁵

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)⁶

The other ABC facility was located at Maple Heights, Cuyahoga County, Ohio, 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) and 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.) 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)⁷

⁵ Local 348 Exceptions Nos. 4 and 8.

⁶ Local 348 Exceptions Nos. 3 and 5.

⁷ Local 348 Exceptions Nos. 5, 6 and 10.

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 Twinsburg, Summit County, Ohio (“Twinsburg facility”). Teamsters Local Union No. 348 demanded bargaining regarding this mandatory subject⁸. 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)⁹

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)¹⁰ 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, 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

⁸ See, Embarq Corp., 356 NLRB No. 125 (Mar. 31, 2011)(Chair Liebman concurring) and Comar, Inc., 339 NLRB 903, 913 (2003).

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

¹⁰ Local 348 Exceptions Nos. 22 and 24.

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)¹¹ Because of the permissive¹² 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” classification¹³. (Tr. 724-725)¹⁴

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 shown in the following¹⁵ 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

¹¹ Local 348 Exceptions Nos. 19, 20, 22 and 24

¹² 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).

¹³ The exclusion of the advanced 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.”)

¹⁴ Local 348 Exceptions Nos. 15, 19, 20.

¹⁵ Local 348 Exceptions Nos. 5, 6, 7, 8, 10.

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)¹⁶

The relevant employee complement at Twinsburg was as set out in the following¹⁷ 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 ¹⁸	Mechanics				
25/35 ¹⁹	Merchandisers				
2 ²⁰	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

¹⁶ Local 348 Exceptions Nos. 7, 10, 21, 22, 23, 24.

¹⁷ Local 348 Exceptions Nos. 5, 6, 7, 8, 10.

¹⁸ Two (2) mechanics from Maple Heights.

¹⁹ Thirty-five (35) merchandisers from Maple Heights.

²⁰ Two (2) transport drivers reassigned from Columbus.

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. 348²¹.

Because these new merchandiser and mechanics employees from Maple Heights were within the classifications of the existing Local 348 bargaining unit²², 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)²³

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

²¹ Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB 872, 873-874 (2001).

²² The ALJ's initial erroneous description of the merchandiser employees at Akron as "unrepresented", (ALJD at 5:14), was subject to an errata filed September 13, 2011 by the ALJ after transfer to the Board and the filing of Exceptions. The Errata confirmed that the record showed that it was the Maple Heights merchandiser classification of employees who were unrepresented. See, 357 NLRB No. 167 at slip opinion page 2. The Summary of NLRB Decisions for Week of January 3-6, 2012 summarizing this case yet erroneously explains that, after the move to Twinsburg, Local 348 agents solicited authorization cards "*from a group of merchandiser employees who had been represented by Local 293 at Maple Heights.*" See, <http://www.nlr.gov/weeklysummary/summary-nlr-decisions-week-january-3-6-2012>. While it is understood that "[t]he Weekly Summary is provided for informational purposes only and is not intended to substitute for the opinions of the NLRB", this points out another example for the need for more clarity in finding which are the material facts in this currently "confusing" area of law.

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

American Bottling Company at the relocated Twinsburg facility was, at least, ninety-five (96) employees. (Tr. 669-671; Intvr. Exh. 1)²⁴

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. 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. 348²⁵. 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. 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. 348²⁶.

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: “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 work and their seniority shall be dovetailed at the new operation.” 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

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

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

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

collective bargaining agreement at the relocated facility at Twinsburg. (Tr. 424-428; Tr. 665-667)²⁷

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)²⁸.

ARGUMENT IN SUPPORT FOR RECONSIDERATION

The Supreme Court in Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 (1996) confirms the Act’s conclusive presumption of a representative’s majority status during the term of a collective-bargaining agreement. *Id.* at 785-786. Not based on any certainty that the union’s numerical majority support among unit employees will continue during the contract term, but rather 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 principle is based on the Board’s contract-bar doctrine. *Id.* at 786²⁹.

²⁷ Local 348 Exceptions Nos. 10, 21, 22, 23, 25.

²⁸ 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).

²⁹ 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”³⁰ 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 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.

I. The Twinsburg relocation did not create a question concerning representation³¹.

The Board’s majority decision in Dodge of Naperville, Inc., 357 NLRB No. 183 (January 3, 2012) stands for the proposition that lawful effects bargaining will lead the parties to an effective collective bargaining agreement after the “relocation and consolidation” no matter the relative sizes of the groups of employees coming together. The decision in Dodge of Naperville holds that relocations, transfers and mergers do not cause a QCR if any effects’ bargaining is available. This holding is consistent with Board policy 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

³⁰ 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.

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.

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.

In Harte the Board held:

Given the complexity of modern business transactions, the 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 therein³².

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

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

solely on the fact that a petition has been filed by an outside union”). Contract bar rules apply³³. See, Nott Co., supra, 345 NLRB at 406.

The decision of the ALJ, as affirmed by the Board, 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 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

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.

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%.

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 Twinsburg³⁷, 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 majority opinion in Dodge of Naperville, Inc., confirms this analysis. The Complaint should be dismissed.

II. The relocation of operations and equipment remaining substantially the same to Twinsburg did not create a question concerning representation³⁸.

The ALJ’s decision, as affirmed by the Board in its initial decision in this case, 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,

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.

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 employees³⁹. 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).

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 Foods⁴⁰, 336 NLRB 872, 873 (2001); Meyer's Cafe & Konditorei, 282 NLRB 1 fn. 1 (1986).

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 Berland Corporation, 203 NLRB 421, 422 (1973), *enf'd*, 494 F.2d 1200 (2nd Cir. 1974), *cert. denied* 419 U.S. 892 (1974), controlling.

⁴⁰ In 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

In light of Dodge of Naperville, Inc., 357 NLRB No. 183 (January 3, 2012), cases such as Martin Marietta Co., supra, and Boston Gas Co., supra, should, if incapable of being distinguished, be overruled where effects bargaining may lead to a CBA that properly continues the bargaining relationship. Other recent “merger” cases do not change this analysis.⁴¹ Local 348 was presented in a joint union proposal in effects bargaining with the Respondent Employer as 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, 2011⁴².

As shown in the record and described above, as of January 14, 2011 Local 348 was the designated representative of at least fifty-seven (57) bargaining unit employees of the Employer at its 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 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 the majority representative⁴³.

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.

⁴¹ 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.”)

⁴² 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).

⁴³ See, Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB at 873-874.

CONCLUSION

For the foregoing reasons and authority, Intervenor Teamsters Local Union No. 348 respectfully submits that the Board should reconsider its decision in 357 NLRB No. 167 and issue an Order to dismiss the Complaint in this case in its entirety.

Dated this 2nd day of February, 2012. Respectfully submitted,

/s/ James F. Wallington
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Certificate of Service

I hereby certify that on this 2d day of February, 2012, 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:

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