

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

<b>THE AMERICAN BOTTLING</b>	)	
<b>COMPANY INC., d/b/a DR. PEPPER</b>	)	<b>CASE NO.: 8-CA-39327</b>
<b>SNAPPLE GROUP</b>	)	
	)	
<b>Respondent</b>	)	<b>CHARGING PARTY INTERNATIONAL</b>
	)	<b>BROTHERHOOD OF TEAMSTERS,</b>
<b>and</b>	)	<b>LOCAL 293'S BRIEF IN OPPOSITION TO</b>
	)	<b>MOTION FOR RECONSIDERATION</b>
	)	
<b>Teamsters Local Union No. 293 a/w</b>	)	
<b>The International Brotherhood of</b>	)	
<b>Teamsters, et al.</b>	)	
	)	
<b>Charging Party</b>	)	
	)	

Now comes the International Brotherhood of Teamsters, Local 293, by and through undersigned counsel, and hereby respectfully submits its Brief in Opposition to the Motion for Reconsideration filed by Intervenor International Brotherhood of Teamsters, Local 348.

Respectfully submitted,

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## I. INTRODUCTION

This case, at its core, concerns the question of whether employees at the American Bottling Co, Inc. (“ABC”) will have the opportunity to freely and fairly decide for themselves whether or not they wish to collectively bargain with their employer through a representative of their own choosing. For nearly two years, the International Brotherhood of Teamsters, Local 293 (“Local 293”) has fought to ensure that this question is answered in the affirmative. Meanwhile, for that same period of time, International Brotherhood of Teamsters, Local 348 (“Local 348”) has gone to great lengths and spared no expense to advance various legal arguments as to why employees working at ABC should be denied their lawful right to self-organization.

Local 348’s latest legal machinations take the form of the Motion for Reconsideration now pending before the Board. In its Motion for Reconsideration, Local 348 argues the Board’s recent ruling in Dodge of Naperville, Inc., 357 NLRB No. 183 (2012) constitutes an extraordinary circumstance which, under Section 102.48(d)(1) of the Board’s Rules and Regulations, warrants the Board reconsidering its previous determination in this case. Specifically, Local 348 alleges that the Board’s decision in Dodge of Naperville implicitly overrules the long established precedent relied upon by the Board in issuing its Decision and Order in this matter. By way of relief, Local 348 requests that the Board reconsider itself and issue a new Decision and Order dismissing the Complaint in its entirety.

Local 348’s Motion for Reconsideration abjectly fails to demonstrate how Dodge of Naperville presents the type of extraordinary circumstance that would warrant the Board reconsidering its Decision and Order. The comprehensible legal arguments presented by the Motion instead demonstrate that Local 348’s Motion is not only improper under Section

102.48(d)(1), but also constitutes nothing more than an attempt to once again advance arguments that were previously heard and rejected. As it is unsupported by law or fact, Local 348's Motion for Reconsideration must be denied.

## **II. FACTS**

With the exception of the Board's ruling in Dodge of Naperville, the facts and circumstances cited by local 348 in its Motion for Reconsideration are exactly the same facts and circumstances that were developed, presented, and argued by the parties during the course of the ULP proceedings. Nevertheless, a brief recitation of those facts, as determined by the ALJ and adopted by the Board, is warranted.

For decades, ABC operated beverage distribution facilities in both Akron, Ohio and Maple Heights, Ohio. For decades, employees working at ABC's Maple Heights facility as delivery drivers, sales/account managers, transport drivers, and vending machine/helpers were represented by Local 293. Meanwhile, employees working at Maple Heights as warehouse workers and custodians were represented by Local 1164. Historically, employees classified as merchandiser's were not included in the bargaining unit at Maple Heights. At ABC's Akron facility, employees classified warehouse workers, drivers, vending employees, mechanics, and merchandisers were historically represented by Local 348 while sales/account managers and transport drivers were historically excluded from the unit.

In late 2010, ABC announced that it was closing both the Akron facility and the Maple Heights facility and consolidating those two operations into a single facility located in Twinsburg, Ohio. Local 293 represented a total of fifty-nine (59) employees that would be relocated from Maple Heights to Twinsburg in the following classifications: drivers (28); sales/account managers (22); transport drivers (5); and vending machine/helpers (4). Local 1164

represented a total of fourteen (14) employees that would be transferred from Maple Heights to Twinsburg including warehouse workers (13) and custodian (1). ABC also included Maple Height's thirty- five (35) non-union merchandisers and two (2) non-union mechanics in the Twinsburg consolidation. Meanwhile, fifty-seven (57) Local 348 members working at Akron as warehouse workers (10), drivers (17), vending employees (3), mechanics (2), and merchandisers (25), were also being moved to the new facility as were Akron's unrepresented sales/account managers (12) and transport drivers (2).

At the time the announcement was made, ABC insisted that it would not honor three different contracts or recognize three different local unions at the Twinsburg facility. Instead, ABC insisted that it would have only contract with one local union and requested that the three affected local unions determine which of their number would represent the bargaining unit at Twinsburg.

In November of 2010, ABC met with all three affected unions and advised them that none of the three local unions represented a majority of the anticipated workforce at Twinsburg and that it would be illegal for ABC to recognize any single union. ABC indicated that absent an NLRB sponsored election or an agreement among the three locals as to who would represent the employees at Twinsburg; it would open the Twinsburg facility as a non-union shop. ABC further advised the unions that any voluntary recognition and subsequent contract negotiations between the parties regarding the Twinsburg facility was contingent upon the local union reaching an agreement as to the scope of the Twinsburg bargaining unit. Specifically, ABC insisted that the bargaining unit at Twinsburg must include all drivers, warehouse workers, and merchandisers (even the unrepresented merchandisers from Maple Heights), but exclude all sales/account managers (even those represented by Local 293 at Maple Heights).

All three local unions initially refused to concede to ABC's demands regarding the exclusion of sales/account managers from the proposed Twinsburg bargaining unit. However, as the consolidation date loomed, Local 348 surreptitiously broke ranks from its sister local unions and, on January 14, 2011, signed an agreement with ABC. Under this putative agreement, Local 348 was ostensibly recognized as the exclusive bargaining agent for "for delivery drivers, warehouseman, vending, mechanics, merchandisers, equipment move operators, service technicians, transport drivers, and seasonal employees." Meanwhile, account managers – including those from Maple Heights that were represented by Local 293 – were conspicuously absent from the bargaining unit contained within the parties' purported agreement while all merchandisers - including those that were previously unrepresented in Maple Heights – were included. At the time this contract was entered into, both Local 348 and ABC were aware that Local 348 did not represent a majority of bargaining unit employees. Shortly thereafter, Local 293 filed a series of unfair labor practice charges and representational petitions with the Board.

A formal complaint was subsequently issued by the Regional Director and the matter was subsequently heard by an ALJ who rendered a decision finding that ABC violated Section 8(a)(2) and (3) of the Act by "granting recognition to, and entering into a contract with, Local 348 as the exclusive collective-bargaining representative of the employees \*\*\* at its new Twinsburg facility on January 14, and by thereafter granting Local 348 access and permission to solicit membership/dues-check-off forms from the employees." The ALJ further found that by deducting Local 348 dues from employees \*\*\* pursuant to the union-security provisions of the January 14 contract, the Respondent has also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2), (3), and (1) and Section 2(6) and (7) of the Act." Exceptions to the ALJ's ruling were filed with Board. After considering the decision and

record in light of the filed exceptions, the Board subsequently affirmed the ALJ's rulings, finding, and conclusions. Local 348 has now filed the instant Motion for Reconsideration.

### III. LAW & ANALYSIS

After the Board renders its decision and order, a party to the proceeding before the Board may, “*because of extraordinary circumstances*, move for reconsideration, rehearing or reopening of the record . . .” Sec. 102.48(d)(1) (emphasis added). A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. *Id.* Extraordinary circumstances exist, for the purpose of the rule, “only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time.” *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653-654 (6th Dist. 1977). For example, extraordinary circumstances may exist where the Board has “acted sua sponte” preventing a party “from presenting its arguments against the remedy to the Board” before it has acted. *Id.* The rule is designed for cases “in which the Board surprises a party with matters which were not fully presented and litigated before the Board.” *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247, 261 (4th Cir. 1981). Conversely, the Board will find an absence of extraordinary circumstances where the party moving for reconsideration urges the Board to merely rely on the same cases that it utilized in its prior brief to the Board. *Texas Dental Assn.*, 354 NLRB No. 107, \*1 (2009).

In this matter, Local 348 has failed to demonstrate that extraordinary circumstances exist which would warrant the Board reconsidering its previous decision and order. Indeed, the entire basis for Local 348's Motion - the Board's recent decision in Dodge of Naperville – does not suffice as an extraordinary circumstance under Sec. 102.48(d)(1). Rather, Local 348 citation to

the Board's decision in Dodge of Naperville is nothing more than a pretext for regurgitating the same legal arguments that it previously presented to the Board. Moreover, the dichotomy between the basis of Board's decision in Dodge of Naperville and the basis of the Board's decision in this case is so great as to make the two cases nearly incomparable. As such, Local 348's Motion should be denied in its entirety.

The facts and circumstances surrounding the Board's decision in Dodge of Naperville are relatively straightforward. In that case, the board was confronted with a situation wherein an employer unilaterally decided to close a car dealership that employed union mechanics and rehire those same union mechanics into a larger non-union dealership located in nearby Naperville, Illinois. At the time the announcement was made, the employer informed the union employees at the union shop slated to be closed that the Naperville dealership was a "nonunion" shop and that it would always remain so. The employer then withdrew recognition from the Union and refused to engage in any negotiations with the union regarding the closure of the union dealership or the rehiring of union employees at the Naperville dealership.

In determining whether the employer violated Section 8(a)(5) the Act by unlawfully withdrawing recognition from the union, the Board in Dodge of Naperville framed the issue as whether the unit remained an appropriate unit for bargaining in light of changed circumstances. In making that determination, the Board noted that it would "not consider the effects of the [employer's] unlawful, unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct." With this premise in kind, the Board found that the obligation to bargain over the effects of closing the union dealership carried with it a concomitant obligation to bargain over the transfer of union employees from that dealership to the non-union dealership. The Board

found that the employer's failure to engage in effects bargaining and its unlawful unilateral changes "tainted" the withdrawal of recognition and made it impossible for the Board to determine whether the unit of employees at Naperville remained an appropriate unit for bargaining purposes. Accordingly, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union regarding the transfer of employees to Naperville and by unlawfully withdrawing recognition from the union.

The salient facts and legal issues presented by the Dodge of Naperville case are clearly distinguishable from those in the present matter. In terms of the relevant facts, Dodge of Naperville addressed a situation where a smaller union facility was unilaterally merged with a larger non-union facility. The present case, however, involved an entirely different factual scenario wherein two separate facilities that were each represented by different unions were merged into a new facility. In Dodge of Naperville the facts examined by the Board in determining whether a violation of the Act occurred concerned the employer's unilateral decision to consolidate their facilities and its subsequent refusal to bargain with or recognize the union after the unilateral determination was made. Conversely, in the present case, there is no question or allegation regarding whether ABC refused to negotiate with or recognize the affected unions. Rather, the relevant facts addressed by both the ALJ and the Board in this case concerned whether ABC unlawfully recognized and supported Local 348 without any evidence of majority support. As such, the Board's decision in Dodge of Naperville is inapposite in comparison with the present matter.

Local 348 attempts to gloss over the factual dichotomy between the Board's decision in the present case and the Board's decision in Dodge of Naperville by falsely asserting that Dodge of Naperville "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.” This is a patent misrepresentation of the Board’s actual ruling in Dodge of Naperville. Indeed, as previously stated, the Board’s ruling in Dodge of Naperville simply states that an employer that refuses to engage in effects bargaining with a union and instead imposes unlawful unilateral changes taints any subsequent withdrawal of recognition from that union thus making it impossible to determine whether continued recognition is appropriate. It does not address or otherwise touch upon situations where an employer unlawfully recognizes or assists a Union. Given this fact, the Dodge of Naperville decision is completely inapposite to the issues presented in the case at hand and cannot be said to function as the type of extraordinary circumstances necessary to invoke the Board’s reconsideration under Sec. 102.48(d)(1). Local 348’s arguments to the contrary are pure speculation based upon intentional misrepresentations of fact and law.

#### **IV. CONCLUSION**

For all the forgoing reasons, Local 293 respectfully requests that the Board deny Local 348’s Motion for Reconsideration.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was filed electronically on February 17, 2012. Additionally, a copy hereof was served by U.S. Mail postage pre-paid to:

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