

**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 in Interest**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT TEAMSTERS LOCAL 348'S
MOTION FOR RECONSIDERATION**

Counsel for the Acting General Counsel submits the following response in Opposition to the Intervenor Teamsters Local 348's Motion for Reconsideration of the Board's Decision and Order in this matter reported at 357 NLRB No. 167, dated December 29, 2011.

INTRODUCTION AND BACKGROUND

Teamsters Local 293 filed the above-captioned unfair labor practice charge against the Respondent alleging violations of Sections 8(a)(1), (2) and (3) of the Act. Trial was held on this matter and on August 12, 2011, Administrative Law Judge Jeffrey Wedekind issued his decision finding violations of Section 8(a)(1), (2) and (3) of the Act. The Judge found, inter alia, that Respondent violated the Act by, 1) granting recognition and signing a collective bargaining agreement with Teamsters Local 348 (Intervenor or Local 348) at a time when that Union had not established that a majority of employees in the purported unit supported it; 2) granting Local 348 access to employees for the purpose of soliciting membership/dues check-off forms; and, 3) deducting union dues from employees' paychecks. The Board considered the decision and record in light of the exceptions and briefs and affirmed the Administrative Law Judge with respect to these violations.

On February 2, 2012, pursuant to 29 C.F.R. §102.48(d)(1)¹, Local 348 filed a motion with the Board for reconsideration. In its motion, Intervenor argues that reconsideration is warranted based on the Board's decision in Dodge of Naperville, Inc., 357 NLRB No. 183 (January 3, 2012). According to the Intervenor, Dodge of Naperville "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., 346 NLRB 396, 400-401 (2005) and Martin Marietta Refractories, Co., 270 NLRB 821, 822 (1984)." According to the Intervenor, the decision in Dodge of Naperville "may be seen as precedent providing for the continuation of collective bargaining agreements and

¹ Intervenor erroneously filed its motion pursuant to Section 102.46(d)(1).

preventing Employer's [sic] from unilaterally declaring a QCR during business relocations and consolidations." The Intervenor submits that its interpretation of Dodge of Naperville presents "extraordinary circumstances" warranting reconsideration under the Board's Rules and Regulations.

In effect, Local 348 argues that Dodge of Naperville , which issued several days after the Board's decision in the instant case and was decided by the same panel of Board Members (Pearce, Becker and Hayes), is inconsistent with the instant Board decision and warrants its reversal. That Board decision, however, is not inconsistent with the ruling in the instant case. Although both cases factually involve a business relocation/consolidation, that is the only similarity between them. Rather, the holdings set forth by the Board in these cases speak to vastly different issues. The Intervenor's motion is therefore without merit and should be denied.

ARGUMENT

I. Standard of Review

A party may move for reconsideration because of "extraordinary circumstances." 29 C.F.R. §102.48(d)(1). In this instance, Local 348 claims that extraordinary circumstances were created when the Board, only days after it decided the instant case, issued an inconsistent decision in Dodge of Naperville. It would be extraordinary if these decisions contradict each other but they do not. Rather, Local 348 has merely seized on Dodge of Naperville in order to re-argue a position that was previously presented to and denied by the Administrative Law Judge and the Board: that Local 348's contract survived the relocation because of contract bar principles. As explained below, that argument still lacks merit.

II. Intervenor's Misplaced Reliance on Dodge of Naperville

The instant case involved a consolidation of two workplaces into one new one and the consequent housing under one roof of three previously separate bargaining units all of which had been represented by different unions. The primary legal issue turns on whether the Employer violated Section 8(a)(2) of the Act by picking a favored union, Local 348, to represent all of the employees at a time when that Union had not established majority support. Under such circumstances, 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).

Dodge of Naperville, however, was primarily an 8(a)(5) case that had nothing to do with an unlawful recognition of a minority union. Rather, it dealt with the unlawful withdrawal of recognition from a union that represented mechanics who were moved to a different facility where the existing group of mechanics was not represented by a union. The Board held that since the employer there had not met its obligation to engage in effects bargaining over the relocation, it was not privileged to withdraw recognition or implement unilateral changes in the wages and working conditions of the represented mechanics. Thus, both the facts and allegations in Dodge of Naperville were significantly different from the instant case.

In the instant case, the Board and Judge Wedekind correctly found that under the rule of Metropolitan Teletronics, 279 NLRB 957 (1986), the Act prohibits the Respondent from continuing to recognize Local 348. The Board in Metropolitan

Teletronics, citing Boston Gas Co., 235 NLRB 1354, 1355 (1978) and Martin Marietta Refractories Co., 270 NLRB 821, 822 (1984), stated 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. 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 Berling Corp., 203 NLRB 421, 423 (1973). *See also*, Schreiber Trucking Co., Inc., 148 NLRB 697 (1964).

In Dodge of Naperville, the respondent withdrew recognition from the union on the grounds that the union lost majority status due to a merger that occurred between 2 groups of mechanics. The Board found that the 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 first bargained over the effects of the closure. The Board held that in light of the long history of representation of the *represented* group of mechanics and the Respondent's failure to bargain over the effects of the Naperville shutdown and relocation, the Respondent failed to show compelling circumstances permitting it to unilaterally end its bargaining relationship with the Union midterm of the existing collective bargaining agreement.

The instant case is distinguishable for the following reasons. First, there is no issue of effects bargaining in the instant case nor any other issue related to the closing of

the two old facilities and the opening of the new one. Secondly, there is no claim or evidence here that the three previous bargaining units maintained separate identities after the consolidation. As noted throughout Judge Wedekind's decision, the Respondent and Local 348 acted as though and the evidence established that the old units no longer existed. Given that the Respondent implemented its consolidation in a lawful manner that dissolved the former bargaining units, there is no basis for Local 348's argument that its previous collective bargaining agreement survived the transition. If that argument were taken to its logical extension, then the labor contracts of the other two unions also survived the consolidation. The question here, however, was not one of contract bar as argued by Local 348 but whether the Respondent should have recognized it as the representative of all the employees when it did not have majority support.

The Intervenor's argument that Dodge of Naperville permits Teamsters Local 348's contract to be applied at the Twinsburg facility is no different than the cases cited by the Intervenor² in its previous briefs and rejected by the Administrative Law Judge and the Board, as 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. Moreover, Intervenor also fails to recognize that applying his interpretation of Dodge of Naperville to the instant case would result in Respondent not being permitted to unilaterally end its bargaining relationship with **any of the three unions** (Local 293, Local 1164 and Local 348) as prior to the relocation of Respondent's employees from the Maple Heights and Akron facilities to the new facility in Twinsburg, Ohio, **three** separate

² Harte & Co., 278 NLRB 947 (1986); Rock Bottom Stores, 312 NLRB 400 (1993) and Westwood Imports Co., Inc., 251 NLRB 1213 (1980).

midterm collective bargaining agreements were in effect. This is why the Board has long recognized that merging two *represented* groups presents different issues and requires a different analysis than the Harte & Co., and Westwood Imports scenarios. See Metropolitan Teletronics Corp., 279 NLRB 957 (1986).

Equally frivolous is Intervenor's claim that the Administrative Law Judge made an erroneous calculation of the "approximately 40 percent rule" described in Harte & Co. Foremost, Intervenor asks the Board to recognize that the former non-union merchandiser and mechanic employees transferring from the Maple Heights facility should be included in the calculation of Local 348's compliment "because there is sufficient continuity of operations to justify applying an existing agreement to the new location." However, the same argument could likewise be made to include the former non-union sales representatives³ from the Akron facility in the calculations of Local 293's compliment of employees because under the Intervenor's logic, there is sufficient continuity of operations to justify applying Local 293's agreement to the new location as well. Assuming that is the case, both Local 293 and Local 348 would each arguably satisfy the 40 percent rule set forth in Harte & Co. Simply put, none of the three unions had a clear majority⁴ at the new Twinsburg facility. The Administrative Law Judge did not err in finding that, Harte & Co does not control under these circumstances, where two facilities are closed and employees of both facilities who were represented by three separate unions, were merged at a new facility where a substantial number of unrepresented employees at both of the closed facilities also transferred to the new facility.

³ See footnote 4 of the ALJD "A preponderance of the credible evidence indicates that advanced sales representatives and account managers are essentially the same position."

⁴ See pg. 3 of the ALJD, Local 348 had 57 unit members, Local 293 had 59 unit members and Local 1164 had 14 unit members.

III Conclusion

In light of the foregoing, the Intervenor has failed to identify any extraordinary circumstances warranting reconsideration. Counsel for the Acting General Counsel respectfully requests that the Intervenor's Motion for Reconsideration of the Board's Decision and Order be dismissed in its entirety.

Respectfully submitted,

/s/ Sharlee Cendrosky

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CERTIFICATE OF SERVICE

Copies of the foregoing Brief of Counsel for the Acting General Counsel were sent to the following individuals by electronic mail on February 23, 2012:

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