UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

PRO'S CHOICE BEAUTY CARE, INC., Employer,	:	
and	:	
CLAUDIA SORTO, Petitioner,	:	29-RD-071757
and	:	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 348-S, CTW, Incumbent Union,	:	
and	:	
LOCAL 25, UNION DE TRABAJADORES DE QUALITY KING, Intervenor.	:	

INCUMBENT UNION'S REQUEST FOR REVIEW
OF DECISION AND DIRECTION OF ELECTION

Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, Local 348-S, United Food and Commercial Workers, CTW, CLC ("Incumbent Union") requests review of the Decision herein.[1] There is substantial question of Board law and policy in that Acting Regional Director David Pollack ("ARD") has departed from officially reported Board precedent with regard to what constitutes a "labor organization" as defined in Section 2(5) of the Act.

[1] A copy of the Decision and Direction of Election is attached hereto and marked as Exhibit "A".

The Facts Relevant to This Request for Review

Incumbent Union's request to review concerns the ARD's improper conclusion that Intervenor Local 25, Union de Trabajadores de Quality King ("Local 25") is a labor organization as defined in Section 2(5).

The hearing in this case reopened and closed on January 13, 2012. Immediately following the close of the record in this case, the hearing opened in the related case of *In the Matter of Quality King Distributors, Inc.*, Case Nos. 29-RD-071777, 29-RD-071819, 29-RC-071711 and 29_RC-071701) ("*Quality King*"). All citations to "Tr.__" refer to the transcript in that related case.

According to its alleged "president" Cesar Alarcon, Local 25 was formed two hours before Alarcon appeared at the *Quality King* hearing on the afternoon of January 13, 2012. Tr. 17. Local 25 represents no employees other than those it purports to represent at the various Quality King companies, which includes the Employer in this case. Local 25 has never negotiated on behalf of any employees with any employer and does not have collective bargaining agreements with any employer. Tr. 17. Local 25 has no constitution, bylaws, or officers other than Alarcon. The only evidence of employee participation was Alarcon's testimony that he held one election among a few employees, which was for the sole purpose of electing him president of Local 25. The election was held off-site in Belleport, NY, near one of the Employer's two consolidated facilities on Long Island. Tr. 24. No election was held at the second consolidated facility in Ronkonkoma, NY. Tr. 24-25. Alacaron refused to state how many employees voted in the alleged election, Tr. 19, and who those employees were. Alarcon claimed that employees from all companies and units under the Quality King umbrella voted in the election. Tr. 23. Alarcon failed to explain how, in the space of two hours, he was able to: drive from Brooklyn to Belleport, NY a distance of 66 miles; make arrangements for employees

from the various Belleport units to be released by the Employer to attend an off-site election; arrange for the release of employees at the Ronkonoma facility from work and arrange their 15 mile transportation from Ronkonoma to Belleport; hold an election for union office; and drive the 66 miles back to Brooklyn. This, we submit, was physically impossible.

Further, there is no evidence that workers employed by Quality King companies decided to band together in order to participate in this or the related proceedings (or for any other Section 7 purpose). There is no evidence that employees designated Local 25 as their representative for any purpose. The only evidence of employee involvement is Individual Petitioner Claudia Sorto's filing of her petition. Even if Alarcon's testimony is to be credited, the election he described was not for the purpose of employees voting whether they would act together with regard to their employer; nor was it for the purpose of designating Local 25 to represent them. Instead, that election was held by Alarcon- not the workers themselves - for the sole purpose of electing him president of his purported "Local 25".

Up until two hours before the supposed creation of Local 25, Alarcon had been an employee of since-withdrawn Intervenor Local 223, Amalgamated Industrial, Toys, Novelty and Production Workers. He was the key Local 223 contact with employees of the various Quality King companies. The record shows that there is no distinction between Alarcon, the individual, who had just resigned his Local 223 employment, and Local 25 as embodied by and acting solely through Alarcon, its sole officer.

Finally, there is no record evidence that Local 25 has engaged in any activities of a labor organization, i.e., it held no meetings among employees, had no grievance meetings with any employer, held no negotiations. Tr. 15-28. Alarcon admitted that, apart from the claimed officer election, there has been no employee participation in Local 25. Employee participation is

purely hypothetical; it is only as Alarcon's claimed "intention" to have such activity at an unspecified time in the future. Tr. 27-28.

ARGUMENT

As a Matter of Fact and Law, The ARD Erred in Finding Local 25 to be a Labor Organization

Under Board law, a labor organization must meet two requirements: it must be an organization in which employees participate, and it must exist for the purpose of dealing with employers concerning terms and conditions of employment. *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-852 (1962). Local 25 does not meet these requirements.

The record evidence shows that Local 25 is a creation of Alcaron himself, not a creation of Quality King employees coming together to engage in Section 7 concerted activity. At the time Local 223 withdrew its petitions on January 13, Alcaron was the Local 223 organizer assigned to the Quality King units. Throughout the first day of hearing in this case, January 4, and at the reopened hearing in this case on January 13, Alarcon was present as a Local 223 representative. Alarcon testified that, in the two hours between the time Local 223 withdrew its petitions and the reopened hearing in this case closed, he resigned from Local 223 and made the 132 mile round trip from Brooklyn to Belleport for the purpose of holding an election designating himself Local 25 president.

Throughout his testimony on intervention, Alarcon repeatedly referred to himself, not the employees of the Quality King companies, as constituting Local 25. ("…as a 1 percent Intervenor, **I** would [] have the ability to be on the ballot". Tr. 9; "**I** meet the criteria of a labor organization". Tr. 18; "That has nothing to do with **me** being a labor organization". Tr. 19; "**I'm** a labor organization". Tr. 25) (emphasis added).

Second, there is no record evidence to support the ARD's finding that Local 25 is an organization in which employees participate, as required by Section 2(5). The only evidence of employee involvement was Alarcon's testimony that he held an election among a group of workers near the Belleport facility for the purpose of electing himself president of Local 25. Tr. 28. Alarcon's claim that employees from the two Quality King units voted in that election is not credible. Those employees work in Ronkonkoma. It would not be humanly possible, in the two hours before the *Quality King* hearing opened, for Alarcon to travel 71 miles from Brooklyn to Ronkonoma, to persuade the employer to release Quality King employees from work, for those employees to travel to from Ronkonoma to Belleport, for an election to be held, and for Alarcon to travel 66 miles back to Brooklyn. Simply put, Alarcon could not have sought participation in the election from the two units in Ronkonkama. This is supported by the fact that Alarcon failed to produce at the hearing in the *Quality King* repack unit a showing sufficient to permit even limited intervenor status, i.e., a single signature. Moreover, the record reflects that Alarcon's showing in the January 13 *Quality King* hearing consisted of signatures on a piece of paper, not authorization cards.

There is no credible evidence to support the ARD's finding that employees had authorized Alarcon as Local 25 to represent them. On the contrary, since Alarcon had been the organizer of Local 223 up until two hours earlier, it is most likely that employees still viewed him in that capacity. The record demonstrates that Local 25 is a creation of Alarcon and not of the workers. Alarcon could not identify even one specific instance of his "labor organization" performing any task on behalf of or in the interest of the workers; the only activity was an election to designate himself as president of his Local 25. Tr. 19-20, 28. Moreover, all of Alarcon's testimony regarding the purpose of the organization reflected his - not the workers' -

goals for the future. Further, there is no evidence that employees knew - much less, shared - Alarcon's goals.

To our knowledge, no Board decision has found labor organization status under such circumstances. While there is no requirement that an organization exist for a specific period of time before it can qualify as a labor organization, in all cases - unlike here- there is an indication that a period of time passed during which employees participated and planned their activities. See e.g., *Armco, Inc*., 271 NLRB 350, 350 (1984) (employees met, resolved to form organization to act as representative regarding terms and conditions of employment, selected a name, continued to organize, employees aware that head of organizing drive planned to seek recognition); *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1159-1160 (1980) (25 employees participated in election of representatives, elected three representatives to present grievances); *M. K. Morse Co.*, 302 NLRB 924, 927 (1991) (organization formed to represent employees in bargaining, published numerous pamphlets regarding terms and conditions of employment, regularly distributed pamphlets to employees, held well-attended employee meetings, sent out notices regarding selection of officers, elected officers); *Betances Health Unit*, 283 NLRB 369, 374 (1987) (evidence that employees participated in the organization, issued two sets of demands to employer); *St. Anthony's Hosp.*, 292 NLRB 1304, 1305 (1989) (employee committee that discussed various subjects with management regarding working conditions found to be a labor organization); *Sahara Datsun, Inc. v. NLRB*, 811 F.2d 1317, 1320 (9th Cir. 1987) (Regional Director found that entity was labor organization, where it had been in existence for approximately 2 years, was established by several individuals, held three or four meetings between 1982 and 1984, existed in part to deal with grievances and working conditions); *Bridgeport Fittings, Inc.* v. NLRB, 877 F.2d 180, 189 (2d Cir. 1989) (employees participated in

organization, held meetings for employees and collected voluntary contributions, made requests to employer to bargain, consistently appeared in its own name during representation proceeding).

In sum, there is neither record evidence nor legal authority to support the ARD's finding that Local 25 is an organization in which employees knowingly participated in during the two hours of its existence and that it is a Section 2(5) labor organization.

CONCLUSION

For the foregoing reasons, the Board should grant review of the Acting Regional Director's Decision and Direction of Election.

Dated: New York, New York
February 24, 2012

Respectfully submitted,

By: */s/ Patricia McConnell*

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Post-Hearing Brief of Local 348-S UFCW, CTW to be filed electronically via the NLRB's e-filing system. I further certify that on February 24, 2012, I caused copies of the Post Hearing Brief to be served by e-mail upon:

James G. Paulsen
Regional Director
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Steve Goodman
Counsel for Employer
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Mark Torres
Counsel for Local 25
mt@marktorreslaw.com

and a copy to be served via UPS Next Day Air upon:

Claudia Sorto
Petitioner
36 Irving Street
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February 24, 2012

/s/ Patricia McConnell
Patricia McConnell

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