

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

PRO'S CHOICE BEAUTY CARE, INC.

Employer¹

and

CLAUDIA SORTO

Petitioner

Case No. 29-RD-071757²

and

LOCAL 348-S, UNITED FOOD AND
COMMERCIAL WORKERS UNION, C.T.W.

Intervenor³

and

LOCAL 25, UNION DE TRABAJADORES DE QUALITY KING
(LOCAL 25, QUALITY KING EMPLOYEES UNION)

Party in Interest⁴

DECISION AND DIRECTION OF ELECTION

Pro's Choice Beauty Care, Inc. ("the Employer") is engaged in distributing healthcare products from its facility in Bellport, New York. A unit of employees in the

¹ The Employer's name appears as amended at the hearing.

² The instant case was initially consolidated and heard with five other related cases. Four of those cases were subsequently withdrawn (Case Nos. 29-RD-070847, 29-RC-071136, 29-RC-071694, and 29-RC-071711). The fifth case (29-RD-071754) involved the same employer involved herein, Pro's Choice Beauty Care, Inc., but involved a different unit of employees (warehouse) covered by a different collective bargaining agreement. The undersigned Acting Regional Director severed the two Pro's Choice cases and issued a separate Decision and Order in the warehouse unit case (29-RD-071754) on February 9, 2012.

³ Local 348-S's motion to intervene was granted based on its status as the incumbent recognized union representing the petitioned-for employees and based on its collective bargaining agreement covering those employees. Its name appears as amended at the hearing.

⁴ Local 25 sought to intervene in the instant Pro's Choice Beauty Care case after the hearing had closed. On the record in another related case, the Hearing Officer granted limited intervenor status to Local 25 in this case. Local 25's statuses as a labor organization and as an intervenor are discussed in detail below.

Employer's re-packing division has been represented for collective bargaining purposes by Local 348-S, United Food and Commercial Workers Union, CTW ("Local 348-S"). There is a collective bargaining agreement between the Employer and Local 348-S, effective by its terms from May 9, 2011, to May 8, 2015. On January 4, 2012, Claudia Sorto, an individual, filed a petition under Section 9(c) of the National Labor Relations Act ("the Act"), seeking to decertify Local 348-S as the re-packing unit's collective bargaining representative. As discussed below in more detail, Local 25, Quality King Employees Union ("Local 25") intervened in the proceedings.

The Employer and Local 348-S have raised a number of issues herein. First, the Employer challenges the authority of the National Labor Relations Board ("the Board") to issue decisions, alleging that the Board ceased having a valid quorum on January 3, 2012, and challenging President Obama's subsequent "recess appointment" of three Board members. Second, both the Employer and Local 348-S contend that the 2011 - 2015 collective bargaining agreement covering the unit bars an election at this time under the Board's "contract bar" doctrine.⁵ By contrast, the decertification petitioner, Ms. Sorto, contends that there was no valid collective bargaining agreement in effect. Third, the Employer and Local 348-S contend that Local 25 does not qualify as a labor organization within the meaning of Section 2(5) of the Act, and that its motion to intervene should have been denied. By contrast, Local 25 contends that it is a labor organization as defined in the Act, and that its intervention was proper.

⁵ There is no dispute that the decertification petition was not filed within the so-called "open period," 60 to 90 days before the third anniversary date of the contract. Leonard Wholesale Meats, 136 NLRB 1000 (1962); Union Carbide Corp., 190 NLRB 191, 192 (1971).

A hearing on these issues was held before Nicholas Heisick, a Hearing Officer of the Board. In support of its position that the contract exists and bars an election, the Employer called its chief operating officer, Marc Garrett, to testify. On the same issue, Local 348-S called its union representative, Eduardo Cordero, to testify. Another entity that is no longer involved in the case (Local 223, Amalgamated Industrial, Toys, Novelty and Production Workers) called a repacking employee, Noemi Hernandez, to testify. In two related cases,⁶ Local 25's president, Cesar Alarcon testified regarding Local 25's status as a labor organization.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Acting Regional Director.

For the reasons discussed below, I conclude that Local 25 meets the definition of a labor organization. However, I reverse the Hearing Officer's decision to grant Local 25's motion to intervene in this case after the hearing had closed. Furthermore, I also conclude that the 2011-2015 collective bargaining agreement between the Employer and Local 348-S does not bar an election at this time. I will therefore direct an election in order that employees in the re-packing unit may choose whether to continue to be represented by Local 348-S.

⁶ Alarcon testified in the hearing in Quality King Distributors, Inc. (Case Nos. 29-RD-071777 and 29-RD-071819), which was held on the same day as the second day of hearing in the two Pro's Choice Beauty cases (No. 29-RD-07154, and the instant case No. 29-RD-071757) and the first day of hearing in another related case (Perfumania Holdings, Inc., Case No. 29-RD-071824). The Hearing Officer took official notice of the transcripts of all five related cases in order to address their common issues.

FACTS

History of the case

The petitioner in this case, Claudia Sorto, initially filed a petition to decertify Local 348-S on December 21, 2011, in Case No. 29-RD-070847. In that petition, she identified the employer as “Quality King Distributors, Inc., d/b/a Pro-Choice Beauty Care, Inc.” She also identified a single unit of about 1,000 employees, and identified Local 348-S as the incumbent union representing one large unit. Shortly thereafter, on December 21, 2011, a union called Local 223 Amalgamated Industrial, Toys, Novelty and Production Workers (“Local 223”), for which Cesar Alarcon was identified as a business agent, filed a petition in Case No. 29-RC-071136, naming “Quality King Distributors, Inc.” as the employer, and also identifying Local 348-S as the representative of a 1,000-employee unit. Those two cases were consolidated and set for hearing on January 4, 2012.⁷

However, in connection with the Region’s processing of those two petitions, it appeared that there were three employing entities, with Local 348-S representing multiple smaller units, each unit having a separate collective bargaining agreement. In some instances, two units were employed by the same employing entity: (1) what the parties called the “regular” warehouse unit (whose employees receive and store merchandise, pick merchandise and load trucks), and (2) a “re-packing” unit (whose employees work in a different area of the facility, taking products out of one case, putting them in another case, sometimes shrink-wrapping them, and sometimes changing the labels).

⁷ All dates hereinafter are in 2012, unless otherwise indicated.

As a result, 10 new petitions were filed. Specifically, on January 3 and 4, Sorto filed “RD” petitions for each of the five units, and Local 223 filed corresponding “RC” petitions for the same units, as follows:⁸

<u>Employer:</u>	<u>RD Case No.</u>	<u>RC Case No.</u>
Pro’s Choice Beauty Care, Inc. [warehouse unit]	29-RD-071754	29-RC-071694
Pro’s Choice Beauty Care, Inc., Re-Packing Division	29-RD-071757	29-RC-071741
Quality King Distributors, Inc. [warehouse unit]	29-RD-071777	29-RC-071711
Quality King Distributors, Inc. Re-Packing Division	29-RD-071819	29-RC-071701
Perfumania Holdings, Inc.	29-RD-071824	29-RC-071736

Thus, on January 4, when the parties arrived for the hearing on the initial RD and RC petitions, the Region was also processing the new petitions that had just been filed the day before, or the same day. The January 4 hearing essentially ended up focusing on the two units at Pro’s Choice Beauty Care, Inc., i.e., the “regular” warehouse unit, and the re-packing unit. As described in more detail below, the Employer and Local 348-S’s witnesses testified that those two parties reached agreement on new contracts for those two units, and that the contracts have actually been applied. By contrast, Local 223’s employee-witnesses generally testified that employees never voted to ratify the contract, and that they did not even know there was a contract. (Shortly after the January 4 hearing

⁸ For some reason, the separate petitions continued to state “1,000” as the number of employees in each unit, although the real number is obviously smaller. For example, Local 348-S representative Eduardo Cordero testified that there are approximately 200 employees in the Pro’s Choice regular warehouse unit.

date, the initial RD petition and RC petition naming one large employer/unit were withdrawn.)

On January 12, the undersigned Acting Regional Director issued an order consolidating the four then-pending Quality King Distributor cases, and consolidating the two then-pending Perfumania holdings cases, and setting both sets of cases for hearing on January 13. The undersigned also agreed to allow the Employer in the Pro's Choice cases to submit an offer of proof regarding a potential union-security issue at the January 13 date. Thus, a total of 10 petitions (i.e., the five RD and five RC petitions listed above) were going to be heard that day *in seriatim*. The three employing entities were represented by the same attorney, and the other parties were the same in all cases.

In the meantime, Local 223 decided that it no longer wanted to pursue its petitions in the RC cases, apparently over the objection of its agent Alarcon. Local 223's attorney appeared at the January 13 hearing for the limited purpose of requesting to withdraw the five RC petitions, but did not take a position on any issues or call any more witnesses. The Pro's Choice hearing re-opened and closed on January 13, before the Quality King Distributors hearing opened. During the Quality King Distributors hearing, Alarcon announced that he had resigned from Local 223; declared that he had just returned from the employer's Bellport facility where he formed a brand-new union, Local 25; submitted a showing of interest for Local 25; and moved to intervene in the five remaining RD cases. Given Local 25's less-than-10% showing of interest in four of the five units, the Hearing Officer granted Local 25 limited intervenor status in the two Pro's Choice cases, the Perfumania Holdings case, and the regular warehouse unit in Quality King

Distributors.⁹ Alarcon then testified (in the record in the Quality King Distributor cases) about Local 25's status as a labor organization.

Thus, record evidence in the instant case – the decertification petition in Pro's Choice Beauty Care re-packing division, Case No. 29-RD-071757 – comes from multiple sources: the January 4 hearing in the multiple cases, the January 13 hearing in the two Pro's Choice RD cases, and the January 13 hearing in the two Quality King Distributors RD cases.

The 2011 - 2015 contract

In connection with the instant Pro's Choice case, both Employer witness Marc Garrett and Local 348-S witness Eduardo Cordero testified that negotiations occurred in approximately May 2011 for the re-packing unit.

Specifically, the Employer's chief operating officer Garrett testified that he met with Local 348-S's former officer John Fazio¹⁰ in May 2011 at the Employer's Bellport facility to negotiate a contract for the re-packing employees. Garrett was represented by counsel. Garrett testified that he did not recall how many bargaining sessions took place, nor whether other union officers were involved. Both sides made proposals. Garrett said

⁹ Alarcon did not have a showing of interest in the Quality King Distributors re-packing unit, but he was given an additional 48 hours to submit the same. Local 25's intervention in that case will be addressed separately in the Decision in that case.

¹⁰ John Fazio was the former Secretary-Treasurer of Local 348-S. Both he and his father, former Local 348-S president Anthony Fazio, were later indicted on criminal charges and removed from office. On November 1, 2011, the United Food and Commercial Workers placed Local 348-S into trusteeship. See Local 348-S Ex.1. Thus, John Fazio was not available to testify regarding the contract negotiations.

that he and John Fazio later signed the 2011 – 2015 agreement entered into evidence as Employer Exhibit 3.¹¹

Local 348-S representative Cordero testified that he was aware of the 2011 contract negotiations regarding the re-packing unit, although he did not participate in them. The Employer proposed a four-year contract with only a \$100 bonus upon signing, with no guaranteed wage increases for the four years. Cordero attended a meeting with re-packing employees in late April 2011. He testified that the re-packing employees were “incensed” and voted overwhelmingly against the Employer’s proposal. However, according to Cordero, John Fazio did not want to tell the Employer that employees had rejected its offer, unless the employees voted to strike by a two-thirds margin. Cordero testified that he and fellow Local 348-S representative Jose Merced subsequently met with the re-pack employees again for another vote. Cordero characterized the second vote as a “strike vote,” explaining that a “yes” vote meant a vote to strike, whereas a “no” vote meant a vote not to strike, i.e., a vote to accept the agreement. Finally, Cordero testified that the majority of employees present voted “no,” which effectively accepted the agreement. The agreement (Er. Ex. 3) was signed by Marc Garrett for the Employer and by John Fazio for Local 348-S.

The typed preamble of the contract itself says that it was “made and entered into this 16th day of May, 2011.” Article XXXI regarding the contract term states that the agreement “shall go into force and effect on May 9, 2011 and shall continue in effect until May 8, 2015.” The signature page has “6/15/2011” written by hand near the signatures.

¹¹ References to the record are hereinafter abbreviated as follows: “Er. Ex. #”, “Local 348-S Ex. #”, “Local 223 Ex. #” and “Bd. Ex. #” refer to Employer exhibits, Local 348-S exhibits, Local 223 exhibits, and Board exhibits, respectively.

The contract does not contain any language requiring employees to ratify the contract as a condition precedent to the contract's validity. Article VIII of the agreement stated that employees would receive a \$100 after the agreement was signed. The contract contains no provision for wage increases, although in Article VII the Employer agreed to "review" wages each contract year. Article IX required the Employer to make increased contributions to the Local 348-S Health and Welfare Fund.

During the January 4 hearing date, Local 223 called an employee-witnesses from the re-packing unit, Noemi Hernandez, to testify (via a Spanish-English interpreter). Hernandez testified that she attended a meeting along with other re-packing employees, although she did not remember when the meeting occurred. Hernandez testified that the re-pack employees actually voted to strike; that they never voted to accept the Employer's contract proposal; that employees are still waiting to hear from Local 348-S when the strike will happen; that they were never told there was a contract; and that she had never seen Er. Ex. 3 before. Although she acknowledged receiving a \$100 bonus payment, she testified that she did not know such payment was pursuant to any contract.

Both Garrett and Cordero testified that the Employer did, in fact, pay the \$100 bonuses to re-packing employees. There is no dispute that the Employer has also made increased contributions to the Health and Welfare Fund, as required in the contract.

The union security provision

Finally, it should be noted that Article II of the 2010 - 2012 contract contains, in part, the following union security provision:

It shall be a condition of employment that all employees of the Employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing and those

who are not members on the effective date of this agreement shall, on the 31st day following the effective date of this agreement, become and remain members in good standing of the Union. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall, on the 31st day following the beginning of such employment, become and remain members in good standing of the Union. A member becomes and remains a member in good standing of the Union by the payment of the dues and initiation fees to the Union.

As noted above, the “term of the agreement” provision stated that the contract would go into effect on May 9, 2011, even though the preamble stated that the contract was “made and entered into” on May 16, 2011, and the signature page indicates that it was executed on June 15, 2011.

During the January 13 hearing date, the Employer made an offer of proof regarding the operation of the contract’s union security clause. Specifically, the Employer offered to submit evidence showing: (1) that all of the incumbent employees who were employed when the 2011-2015 contract went into effect were already union members, as required by the previous contract; (2) that the Employer hired only two new, additional employees into the re-packing unit since the contract went into effect in May 2011 (one in June 2011, and another in August 2011); (3) and that those two employees had more than 30 days to join the union. In short, the Employer offered to prove that no employees were actually deprived of the statutorily-required 30-day grace period. The Hearing Officer rejected the Employer’s offer of proof, citing Jet-Pak Corp., 231 NLRB 552 (1977), for the proposition that the Board does not consider extrinsic evidence regarding the actual operation of the contract’s union security clause when the contract itself is clear on its face.

Local 25's status

As noted above, the evidence concerning Local 25's labor organization status was elicited from the testimony of Cesar Alarcon in the two Quality King Distributors RD cases on January 13, 2012. Alarcon testified that Local 25 was created about two hours before he testified at the hearing, and that he is the president of Local 25. "A large group of employees," which included employees of the Employer, elected him to be president of Local 25.¹² Alarcon testified that he represents employees, will negotiate with employers on their behalf and concluded, "I'm a labor organization under the law." More specifically, Alarcon testified that it is his intent to handle grievances of employees and negotiate with the Employer over terms and conditions of employment of the employees. Alarcon admits that the only employee participation in Local 25 as of the date of the hearing was to elect him as president. However, Alarcon further stated that he intends to have employees participate in meetings, to authorize him to appoint other officers and to assist him in the creation of the organization's constitution and by-laws. Local 25 does not currently have an address. Local 25 does not have any collective bargaining agreements with other employers, has never negotiated on behalf of employees of any other employers and does not have a constitution or by-laws. Local 25 has not filed documents with the Department of Labor.

As stated in the history of the case, *supra*, Alarcon returned to the Regional office on January 13 with a showing of interest, after the record in the Pro's Choice cases had

¹² Until about two hours before his testimony, Alarcon was an employee of Local 223, involved in the organizing effort of employees working for the Employer, Pro's Choice Beauty Care, Inc., Pro's Choice Beauty Care, Inc. Re-Packing Division, Quality King Distributors, Inc. and Quality King Distributors, Inc. Re-Packing Division. Alarcon initially testified that he was the president of Local 25 for 2 hours, but later indicated that he was elected about 1 hour before his testimony. Local 25 does not have any other officers.

closed, but while the hearing for the Quality King Distributors cases was proceeding. During the latter hearing, Alarcon submitted a less-than-10% showing of interest in the instant Pro's Choice re-packing unit. The Hearing Officer granted limited intervenor status herein on that basis.

DISCUSSION

The Board's composition

There is no dispute that when the term of former Member Craig Becker expired on January 3, 2012, only two Board members remained (Chairman Mark G. Pearce and Brian Hayes). In New Process Steel v. NLRB, 130 S.Ct. 2635 (2010), the United States Supreme Court held that the Board has no authority to act without at least three members.

On January 4, 2012, President Obama appointed three current Board members (Sharon Block, Terence F. Flynn and Richard Griffin) to the Board. The Employer asserts that the Board lacks authority to decide cases at this time because these three Presidential nominations were made during the pro forma session of Congress and, therefore, that the appointments were not constitutionally-valid "recess appointments."

The Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). Accordingly, I presume the validity of the Board members' appointments, and my own continuing authority as the Board's delegate in this matter. The undersigned Acting Regional Director will therefore proceed to decide the specific issues raised in the instant representation case.

Local 25's labor organization status

The Employer and Local 348-S contend that Local 25 is not a labor organization within the meaning of Section 2(5) of the Act. The RD Petitioner took no position on the status of Local 25.¹³

Section 2(5) of the Act defines a "labor organization" as:

[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

This statutory definition of a labor organization has been interpreted broadly. *See, e.g., Electromation, Inc.*, 309 NLRB 990, 993-4 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). In order to be a "labor organization," the Act requires that (1) employees participate in the organization; and (2) the organization exists, in whole or in part, for the purpose of "dealing with" employers concerning wages, hours, and other terms and conditions of employment. *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-52 (1962).¹⁴ The Board has stated that the intent of the organization, and not what it actually performs, is critical in ascertaining labor organization status, regardless of the progress of the organization's development. *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1160 (1980); *Armco, Inc.*, 271 NLRB 350 (1984). Structural formalities, such as a constitution and by-laws or filing documents with the Department of Labor, are not

¹³ The record is silent as to the RD Petitioner's response when asked whether she agreed that Local 25 was a labor organization within the meaning of Act. However, the RD Petitioner stated her agreement with the Hearing Officer's ruling to grant Local 25 limited intervenor status.

¹⁴ The term "dealing with" in Section 2(5) of the Act has been interpreted to extend beyond simply "bargaining with" an employer. *N.L.R.B. v. Cabot Carbon Company*, 360 U.S. 203, 210-212 (1959).

required to find labor organization status within the meaning of Section 2(5) of the Act. See e.g., *Yale New Haven Hospital Police Benevolent Association*, 309 NLRB 363 (1992). Indeed, in *Advance Industrial Security, Inc.*, 225 NLRB 151 (1976), although the purposes of the petitioner had not yet come to fruition, it participated in no representational activities and lacked structural formality, the Board found labor organization status inasmuch as the petitioner indicated it intended to perform collective bargaining activities and to become formally structured if certified to represent employees in an appropriate unit.¹⁵ Similarly, in *American Automobile Association, Wisconsin Division*, 242 NLRB 722 (1979), the Board found a petitioner, which was newly formed, was a labor organization within the meaning of the Act inasmuch as its members met, elected officers and evidenced an intent to bargain with the employer over their wages, hours and other terms and conditions of employment.

Here, the un rebutted evidence shows that a group of employees met and elected Cesar Alarcon to be the president of Local 25. Additionally, Alarcon testified that he intends to handle grievances of employees and negotiate with the Employer over the employees' terms and conditions of employment. Thus, the evidence shows that employees participate in Local 25, and that Local 25 exists for the purpose of dealing with the Employer concerning statutory subjects, although such purposes have not yet come to fruition. Accordingly, I find that Local 25 is a labor organization under Section

¹⁵ The Board cited *Comet Rice Mills Division Early California Industries*, 195 NLRB 671, 674 (1972) (where an employee became the president of an organization which envisioned participation of employees and existed for statutory purposes, the organization was found to be a labor organization within the meaning of Section 2(5) although its purposes never came to fruition) and *Butler Manufacturing Co.*, 167 NLRB 308 (1967) (where a newly formed union, which was not yet representing employees but admitted employees to membership and was formed for the purpose of representing the employees, was found by the Board to be a labor organization within the meaning of Section 2(5) of the Act).

2(5) of the Act. See e.g. *Advance Industrial Security, Inc.*, *supra*; *Comet Rice Mills Division Early California Industries*, *supra*.¹⁶

I am not persuaded by the argument that there is insufficient evidence that Local 25 is an organization in which employees participate, inasmuch as I find that the group action of employees electing Alarcon as the president of Local 25 satisfies the employee participation requirement of Section 2(5) of the Act.¹⁷ Moreover, with regard to Alarcon's reference to himself ("I") as being a labor organization, I note that the Board has stated that the definition of labor organization in the Act is broad enough to include an individual representative. *Legal Services for the Elderly Poor*, 236 NLRB 485 (1978).

Local 25's intervention

In certain circumstances, the Board allows a union to intervene in a representation case after the hearing has closed. For example, a union who had a representative interest at the time of the hearing but who, for some reason, did not receive notice of the hearing, may be allowed to intervene after the hearing. *The United Boat Service Corp.*, 55 NLRB 671 (1944). However, intervention is allowed in such case only if the showing of interest existed at the time of the hearing. *Gary Steel Products Corp.*, 127 NLRB 1170 fn. 3 (1960)(intervention denied where authorization cards post-dated the hearing). *See also*

¹⁶ See also *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354 (1972) (where a petitioner existed for statutory purposes, although those purposes did not yet come to fruition and employees participated in its organization and subsequent activities, although the latter had been limited by the organization's lack of representation rights, the Board found labor organization status.)

¹⁷ See e.g., *The Grand Union Company*, 123 NLRB 1665 (1959) (where the Board stated that the group action of employees in selecting and authorizing an individual representative satisfied the employee participation required by Section 2(5) of the Act). The United States Court of Appeals for the District of Columbia denied enforcement of this case in *Schultz v. NLRB*, 284 F.2d 254 (D.C. Cir. 1960); however it was cited with approval by the Board in *Legal Services for the Elderly Poor*, 236 NLRB 485 (1978).

Transcontinental Bus System, 119 NLRB 1840 fn. 3 (1958); and NLRB Representation Casehandling Manual Sections 11026.2(a) and (b).

As the above recitation of the facts indicates, Local 25 did not exist and did not possess any evidence of representation interest at the time of the hearing in the instant Pro's Choice Beauty Care case. It was not until after the Pro's Choice hearing closed that Cesar Alarcon went to the employers' Bellport facility and obtained signatures from employees indicating their interest in representation by the newly-formed "Local 25." In such circumstances, I do not believe the Board would permit intervention. Otherwise, any union that wanted to intervene in a representation case after the hearing closed could simply rename itself, *solicit a showing of interest after the hearing closed*, and then submit the showing. Such permission would cause delays and an unacceptable lack of finality in the Agency's representation proceedings. As the Board stated in United Boat, *supra*: "Expeditious investigation and certification of representatives is essential to the proper administration of the Act." Id., 55 NLRB 675 (internal citation omitted). The Board in that case emphasized the importance of "rigid adherence to the principles governing intervention after hearing" and "uniform" application of the principles to all unions. Id. at 676.

Accordingly, since Local 25 did not possess evidence of employees' interest at the time of the hearing in the Pro's Choice cases, its motion to intervene after the hearing closed should have been denied. I hereby reverse the Hearing Officer's ruling in this regard.

Contract bar issue

In establishing the contract bar doctrine, the Board has attempted to strike a balance between preserving employees' right to freely choose their representative, and preserving some stability in the parties' collective bargaining relationship. This doctrine provides that when the contracting parties have executed a collective-bargaining agreement, they are entitled to a reasonable period of stability in their relationship without interruption. General Cable Corp., 139 NLRB 1123 (1962).

Employees who are covered by an existing contract of up to three years duration, but who wish to change or eliminate their bargaining representative, must wait until the specified "open period" to file their petition. Specifically, for non-healthcare employers, the petition must be filed between 60 and 90 days before the expiration date of the contract of up to three years duration. Leonard Wholesale Meats, 136 NLRB 1000 (1962).¹⁸ The Board then gives an incumbent union and employer a 60-day "insulated period" during which they may try to negotiate and execute a new contract, without the disrupting effect of rival petitions or decertification petitions. Any petitions filed within the insulated period are dismissed.

Nevertheless, in order for a contract to bar an election, it must conform to certain standards. *See generally* Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958); Seton Medical Center, 317 NLRB 87 (1995). For example, the Board has held that a contract containing a union security clause which is clearly unlawful on its face does not bar an election. Paragon Products Corp., 134 NLRB 662 (1962); Electrical Workers Local 444 (Paramax Systems), 311 NLRB 1031 (1993). As the Board explained in

Paragon Products, *supra*, 134 NLRB at 663, any postponement of employees' rights to select their representative is justified *only* where a valid contract fosters labor stability. By contrast, a contract that is itself in conflict with the policies of the Act, e.g., by containing an unlawful union security clause, "must be subordinated to employees' freedom of choice." Id.

A proviso of Section 8(a)(3) of the Act allows an employer and union to require employees to become union members as a condition of employment, as long as the employees have a grace period of at least 30 days ("on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later"). A contract which, on its face, clearly and unambiguously gives incumbent employees at least 30 days from its effective date to become union members may bar an election, even if the contract was not executed until later. Jet-Pak Corporation, 231 NLRB 552 (1977). By contrast, a contract which, on its face, fails to give the required 30-day grace period does not bar an election. Standard Molding Corp., 137 NLRB 1515 (1962).

Furthermore, a contract which requires union members to ratify the contract as a condition precedent to its validity, and which is actually ratified before the filing of any petition, may bar an election. However, under this rule, prior ratification by the membership is required for contract bar purposes only when it is an *express* condition precedent in the contract itself. Appalachian Shale, *supra*, 121 NLRB at 1162-1163;

18 For contracts whose duration exceeds three years, the open period starts 90 days before the third anniversary date. Union Carbide Corp., 190 NLRB 191, 192 (1971).

United Health Care Services, 326 NLRB 1379 (1998); Aramark Sports & Entertainment Services, 327 NLRB 447, fn. 4 (1998).

In the instant case, the evidence indicates that Pro's Choice Beauty Care, Inc. and Local 348-S indeed entered into a contract for the re-packing unit, which was introduced into evidence as Employer Exhibit 3. There seems to be no dispute that employees took a vote in approximately April or May 2011; that the Employer and Local 348-S executed the contract; and that some contract provisions went into effect thereafter. In Cordero's testimony, he characterized the vote as a "strike" vote, meaning that the majority's "no" vote that day was a vote not to strike, i.e., a vote to accept the proposed contract. By contrast, the employee-witness called by Local 223 testified that employees voted to reject the proposal and to strike. It is entirely possible that employees may have misunderstood the nature of the vote (i.e., that a "no" vote meant voting against the Employer's proposal) due to language or other issues. But we need not engage in such speculation. For, as noted in cases above, a contract which employees have not ratified bars an election *only if* the ratification is a condition precedent stated in the contract itself. The parties' 2011-2015 contract for the re-packing unit contains no such provision and does not lose its bar quality on that basis.

As noted above, Article XXXI of the contract stated that it would go into effect on May 9, 2011, even though its preamble stated that the contract was "made and entered into" on May 16, 2011.¹⁹ Thus, on its face, the contract was retroactively effective by

¹⁹ The Board has held when a contract states it was "made and entered into" on the effective date of the contract, that it was not made effective "retroactively," even when the contract's face shows that it was signed later. Four Seasons Solar Products Corp., 332 NLRB 67 (2000). Thus, for purposes of the instant case, we assume that the contract was "made and entered into" on May 16, 2011, as the contract itself says, even though the signature page shows a "6/15/11" signing date.

seven days. The contract's union security provisions require incumbent employees who are not already union members to become union members "on the 31st day following the effective date of this agreement." Under these provisions, any incumbent employees who were not already union members as of May 16th (when the parties "entered into" the contract) would have 31 days from the May 9th "effective date" to become union members, i.e., only 24 days. These provisions, on their face, fail to give the 30-day grace period required by the Section 8(a)(3) proviso. I therefore find that they are unlawful on their face, and prevent the contract from serving as a bar. Standard Molding, *supra*.²⁰ Furthermore, I find that the Hearing Officer correctly rejected the Employer's proffered evidence regarding the parties' application of the contract, since the Board does not consider "extrinsic evidence" in this context. Jet-Pak Corp., *supra*.

In sum, based on all the foregoing, I conclude that 2011-2015 collective bargaining agreement between the Employer and Local 348-S does not bar an election among the petitioned-for employees at this time. I will therefore direct an election in the appropriate unit of re-packing employees.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. As noted above, I have overruled the Hearing Officer's granting of intervention to Local 25 in this case. All of the Hearing Officer's other rulings are free from prejudicial error and hereby are affirmed.

²⁰ In its post-hearing brief, the Employer argues that Standard Molding is bad law, and that this case might provide a "proper vehicle" for the Board to reconsider its holding. However, the Region has no authority to disregard the legal precedent as it exists now.

2. The record indicates that Pro's Choice Beauty Care, Inc., is a domestic corporation, with its principal office and place of business located at 35 Sawgrass Drive, Number 4, Bellport, New York. The parties stipulated that the Employer is engaged in distributing healthcare products. During the past year, which period represents its annual operations generally, the Employer purchased and received at its Bellport, New York facility, goods and supplies valued in excess of \$50,000 directly from points located outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I hereby find, that Local 348-S is labor organization as defined in Section 2(5) of the Act. It claims to represent certain employees of the Employer. As discussed *supra*, I have also found that Local 25 is a labor organization as defined in the Act, but I have denied its intervention in the instant case.

4. As discussed above, I have found that Local 348-S's collective bargaining agreement covering the petitioned-for employees does not bar an election at this time. A question concerning commerce exists concerning the representation of those employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I hereby find, that the following unit of Pro's Choice Beauty Care, Inc.'s employees (as described in the parties' contract) is an appropriate unit for purposes of collective bargaining:

All employees exclusively employed in the Re-Packaging Division, excluding part-time employees regularly scheduled to work 25 hours or less per week, executives, supervisors, guards, clerical and sales employees as defined in the Labor-Management Relations Act as amended, all other employees not employed in the Re-Packaging Division inclusive of H.B.A., Grocery, Fragrance, Rx, Pro-Hair Pickers and Packers, and Truck Drivers.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by Local 348-S, United Food and Commercial Workers Union, CTW. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **February 17, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this

list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nrlb.gov,²¹ by mail, or by facsimile transmission at (718) 330-7579. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least three (3) working days prior to 12:01 of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

²¹ To file the eligibility list electronically, go to www.nrlb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 24, 2012**. The request may be filed electronically through the Agency's website, www.nlr.gov,²² but may **not** be filed by facsimile.

Dated: February 10, 2012.



David Pollack
Acting Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

²² To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, click on the NLRB Case Number, and follow the detailed instructions.