

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

PARAMOUNT PETROLEUM/ALON USA PROPERTY, INC.,

Employer

and

Case No. 31-RC-087091

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 12,

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

The International Union of Operating Engineers, Local 12 (“Petitioner”) filed a petition under Section 9(c) of the National Labor Relations Act, as amended (“Act”), seeking to represent a unit of operator, maintenance, lab and pipeline employees employed by Paramount Petroleum/ALON USA Property, Inc. (“Employer”) at its facility in Bakersfield, California (“Bakersfield facility”). A hearing was held before a hearing officer of the National Labor Relations Board (“Board”).

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

1. **HEARING OFFICER RULINGS:** The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. **JURISDICTION:** The parties stipulated that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board. Within the past 12 months, a representative period, the Employer, incorporated in California with an office and place of business in Bakersfield, California, has been engaged in the production of petroleum products. In conducting its operations during the past 12 months, the Employer purchased and received at its Bakersfield, California, facility goods valued in excess of \$50,000 directly from points outside the state of California.

3. **LABOR ORGANIZATION:** The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and claims to represent certain employees of the Employer. The Employer declines to recognize the Petitioner.

4. **QUESTION AFFECTING COMMERCE:** No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **APPROPRIATE UNIT:** The parties stipulated and I find that the following employees of the Employer constitute an appropriate unit within the meaning of Section 9(b) of the Act:

INCLUDED: All employees of the Employer in the Refinery.

EXCLUDED: All other non-Refinery employees, including sales employees, office and clerical employees, employees engaged in technical work (except lab technicians and maintenance employees), professional employees, and guards and supervisors as defined in the National Labor Relations Act, as amended.

6. **ISSUES:** The issues presented are:

- (1) Whether the petition should be dismissed because the present work complement is not substantial and representative of the ultimate complement to be employed in the near future, and because the reduction is a result of a fundamental change in the nature of the Employer's business operations.
- (2) Whether laid off employees should be allowed to vote if an election is directed.

The Employer contends that there is definitive evidence of a contracting unit to show that the present work complement is not substantial and representative of the ultimate complement to be employed in the near future. The Employer further contends that there is definite evidence that the contracting unit is the result of a fundamental

change in the nature of the Employer's business. Based upon its contentions, the Employer argues that it would not serve the purpose of the Act to direct an election at the Bakersfield facility and accordingly requests dismissal of the petition.

The Petitioner argues to the contrary that the contraction of the unit is not certain and imminent, and also that the contraction is not permanent because the employees being laid off have a reasonable expectation of being recalled in the foreseeable future. The Petitioner further contends that the Employer has failed to sufficiently demonstrate that a fundamental change in its business operations has occurred. Thus, the Petitioner argues that the employees must be given the opportunity to decide whether they wish to be represented by the Petitioner.

For the reasons set forth below, I conclude that it would not be consistent with the provisions and policies of the Act to direct an immediate election. Accordingly, the petition should be dismissed.

To provide a context for my discussion of these issues, I will first provide a brief procedural history. Then, I will provide an overview of the operations at the Employer's Bakersfield facility. Finally, I will present in detail the facts and analysis that support my conclusion.

I. BRIEF PROCEDURAL HISTORY

On August 13, 2012, the Petitioner petitioned the Region for recognition pursuant to Section 9(c) of the Act. That same day, the Regional Director issued a Notice of Representation Hearing. On August 14, 2012, the Regional Director postponed the hearing indefinitely due to the pendency of an Article XX proceeding. On January 10, 2013, the Regional Director issued an Order Resetting Hearing, rescheduling the hearing for January 22, 2013.

II. OVERVIEW OF OPERATIONS

As stated above, the Employer is engaged in the production of petroleum products. The Employer owns and operates a number of facilities in various states, including California, which are involved in the Employer's petroleum production operations. The primary function of the Employer's Bakersfield facility was to refine

vacuum gas oil.¹ The vacuum gas oil refined at the Bakersfield facility was one of a number of byproducts of the Employer's crude oil refining operations at its refinery in Paramount, California ("Paramount facility").² The Employer loaded the vacuum gas oil produced at the Paramount facility into trucks, transported it to the Bakersfield facility, unloaded the vacuum gas oil, and put it into tanks where it would then become the raw material for a piece of equipment called a hydrocracker, the function of which was to refine the vacuum gas oil.

In addition to refining vacuum gas oil at the Bakersfield facility, the Employer is also engaged in a terminaling operation, whereby the Employer leases the use of its crude oil storage tanks to a third-party company. According to testimony provided by William Winters, the Employer's Vice President of Human Resources and Community Affairs, four or five of the petitioned-for bargaining unit employees are involved in the terminaling operation at the Bakersfield facility.

Refining of vacuum gas oil at the Employer's Bakersfield facility is dependent upon vacuum gas oil being produced as a byproduct of crude oil refining at the Paramount facility. In other words, if the Employer does not refine crude oil at its Paramount facility, there is no vacuum gas oil for the Employer to refine at its Bakersfield facility.

Winters testified that due to unfavorable market conditions including high crude oil prices, a depressed housing market and a weak asphalt market, the Employer has permanently ceased refining crude oil at the Paramount facility. Consequently, refining of vacuum gas oil at the Bakersfield facility has also ceased. According to Winters, vacuum gas oil refining operations at the Bakersfield facility ended in mid to late November 2012.

II. RELEVANT FACTS

¹ Vacuum gas oil, a byproduct of crude oil refining operations, is hydrocarbon-based oil which the Employer processed further into diesel fuel and other components that can be used to make gasoline.

² Some of the other byproducts of the crude oil refining operations at the Paramount facility include asphalt, heavier fuel oils, and a heavy, charcoal-type product known as coke. According to the Employer's Vice President of Human Resources and Community Affairs William Winters, the processing of coke, known as coke-cutting, is a very dirty and dusty process with a much higher degree of physical injury to employees than vacuum gas oil processing.

On August 13, 2012, the date upon which the Petition was filed, a total of 73 employees in four classifications (i.e., operators, maintenance, lab and pipeline) comprised the petition-for bargaining unit. Around that same time, in the late summer of 2012, the Employer's management began contemplating the possibility of shutting down crude oil refining operations at the Paramount facility due to economic pressures.

In or about October 2012, Ed Juno, the Employer's former Vice President of West Coast Refining,³ held at least two meetings at the Employer's facility during which employees were informed that the Employer was permanently shutting down the Paramount facility. Approximately 15 to 20 employees attended each of these meetings. According to testimony provided by Petitioner witnesses Kevin Cable and Theresa McCarthy, Juno also announced during these meetings⁴ that the Bakersfield facility would be shutting down, but only temporarily.

Cable and McCarthy both testified that Juno also stated that the Employer was in the process of seeking permits to build a railway line that would allow the Employer to transport crude oil from North Dakota to the Bakersfield facility. By doing this, Juno explained that the Employer would refine the crude oil at the Bakersfield facility, producing vacuum gas oil, which would also be refined at the Bakersfield facility.

Cable further testified that Juno announced at the meeting that Bakersfield facility employees would be performing turnaround work⁵ in preparation for crude oil processing and no employees would be laid off. McCarthy testified that during the meeting which she attended, one of the other employees asked if the Bakersfield facility was going to shut down. According to McCarthy, Juno replied that profit margins were good at that moment and the Employer would continue to operate the Bakersfield facility until profit margins began to decrease.

³ The Employer's current Vice President of West Coast Refining is Glenn Clausen.

⁴ Cable and McCarthy attended different meetings.

⁵ Winters defined turnaround work, or "turnarounds" as they are commonly referred, as maintenance that is done on all of the refining equipment in preparation for extended operating periods lasting 14 to 15 months. Winters testified that turnarounds are a "major investment" which require a "significant amount of money." In defining turnarounds, Winters also explained that there are other times when the Employer will shut down the refinery for short periods of time to do minor maintenance, but the Employer does not plan to make a major investment and run the refining equipment for an extended period of time. According to Winters, these short shutdown maintenance periods are not considered turnarounds.

With regard to the turnaround work, Cable testified that some turnaround work began sometime after the meeting with Juno. Cable also testified, however, that the turnaround work ended prior to its completion in early December 2012, leaving some of the work required for a turnaround unfinished. McCarthy testified that on two occasions following the October 2012 meeting, she overheard Scott Reimer, a maintenance planner for the Employer, and Mark Dennis, the manager of the engineering department at the Bakersfield facility, state that the Employer was “hopeful” about its turnaround plans.

With regard to the railway line, Winters testified that the Employer has submitted a permit application that would allow the Employer to transport crude oil into Bakersfield by rail. Winters also testified, however, that the permit review process is expected to last 11 to 14 months and there is no guarantee that the permits will be granted. Winters also stated that the permit to build the rail line is but one of many permits that must be applied for and granted in order to begin work on any potential crude oil operation.

Winters further testified that even if the permits are granted, the Employer has not yet decided whether it will move forward with the crude oil project. According to Winters, the Employer does not yet know whether it will be able to afford the crude oil project or whether the crude oil project will require the Employer to obtain a partner to help alleviate operating costs.

Winters also testified that there are a number of economics involved with the price of crude oil that make any future plans regarding crude oil refining at the Bakersfield facility entirely speculative. According to Winters, even if the permits are granted and a rail line is constructed, the Employer does not yet know whether it would refine the crude oil or simply act as a crude terminal and sell the crude oil that is transported into Bakersfield.

Winters reiterated numerous times that all of these potential plans are mere speculation. According to Winters, the only action currently being taken by the Employer is the provision of information necessary to support the rail permitting process.

On November 29, 2012, Winters sent an e-mail to all employees working at the Bakersfield facility. Attached to the e-mail was an announcement (“Announcement”) from Paul Eisman, the Employer’s Chief Executive Officer (“CEO”), and Glenn Clausen, Juno’s successor in the position of the Employer’s Vice President of West Coast

Refining. The Announcement was addressed to all employees at the Paramount and Bakersfield facilities and the Employer's facility in Long Beach, California ("Long Beach facility").

In this Announcement, the employees were informed that the Employer's west coast refining operations were being discontinued "until such time as we can make needed modifications to our business plan and to the refineries." The Announcement also stated that the Employer was "planning to complete several projects that may allow us to resume much of our operations in the near future." Nevertheless, the Announcement informed employees that due to economic conditions, the Employer had decided to lay off employees at the Bakersfield and Paramount facilities. The Announcement stated that 62 employees were projected to be laid off at the Bakersfield facility.

Additionally, the Announcement alerted employees that they would receive a notice pursuant to the federal Worker Adjustment Retraining and Notification Act ("WARN Act"). The Announcement further stated that "[i]n an abundance of caution, and to comply with the law," the WARN notice would be sent to substantially all employees. The Announcement noted, however, that not all employees would be laid off "as there will be some continuing operations and other staffing needs at each facility."

The Announcement also informed employees that those who were laid off as a result of this reduction in force would be eligible for the Employer's severance package, subject to certain conditions. Details of the severance package were attached to the Announcement. According to Winters, the severance package offered to employees as a result of this reduction in force was the same severance package that the Employer offered employees following layoffs at the Paramount facility in late 2010, early 2011, late 2011, and layoffs at the Paramount and Bakersfield facilities in early 2012.

Furthermore, the Announcement stated, "[a]s has been previously reported, we *hope* [emphasis added] to resume operations and increase staffing at the Bakersfield refinery in the third or fourth quarter of 2013." The Announcement also stated that the Employer was exploring other short term alternatives that may reduce the number of layoffs. The Announcement also assuaged employees that while the Employer "cannot guarantee the number of future available jobs," the Employer's goal was to "restructure

and reinvest in the West Coast operations so that we may provide sustainable jobs and opportunities for more employees.”

Lastly, the Announcement thanked employees for their service and commitment and directed employees to address their questions and concerns to Winters, whose e-mail address was provided.

Also attached to Winters’ November 29 e-mail was a copy of the WARN notice addressed to all employees located at the Bakersfield facility. The WARN notice stated, among other things, that the purpose of the notice was to inform employees that the Employer will lay off approximately 60 employees at the Bakersfield facility. The WARN notice stated further that these employees would be separated from the Employer during the 14-day period beginning on January 28, 2013 and ending on February 10, 2013. Furthermore, the WARN notice stated that the “layoff is *expected to be permanent* [emphasis added] and there will be no bumping rights.”

With regard to the past layoffs, Cable testified that from May 2012 to November 2012, there was a shutdown period at the Bakersfield facility. Cable and McCarthy both testified that the Bakersfield facility operated seasonally and brief periods of shutdown were not uncommon. According to Winters, however, none of the employees laid off at the Bakersfield facility from May to November 2012 were bargaining unit members. Neither Cable nor McCarthy were laid off during the May to November 2012 shutdown of the Bakersfield facility. Winters also testified that unlike the current reduction in force, the Employer did not send WARN notices to employees in anticipation of the previous layoffs at the Paramount and Bakersfield facilities.

On December 10, 2012, Winters sent an e-mail to all Bakersfield employees answering common questions he heard from employees regarding the pending layoffs. Prior to answering any questions in the e-mail, Winters reminded employees that no final decisions had yet been made.

One of the questions addressed by Winters read, “For people who are laid off, what is the possibility that they will be rehired when the plant starts back up in the fourth quarter of 2013?” Winters answered that although the Employer could not make any promises to any employee specifically, “it is generally both practical and good business to rehire former employees if they wish to work for the company.” In responding to an

employee's question regarding the effect of signing a termination agreement as required by the severance package, Winters stated that signing the termination agreement "does not prevent the company from rehiring former employees if the company chooses."

On December 13, 2012, Winters sent a letter to 48 employees confirming their separation from the Employer.⁶ The letter confirmed that each recipient was one of the employees selected for layoff as announced in the November 29 WARN notice. The letter also stated the layoff is expected to be permanent and there will be no bumping rights. Winters testified that by this time all of the short-term alternatives the Employer hoped would minimize the need for layoffs had been found to be impractical or unviable.

On December 26, 2012, Ernesto Flores, the Employer's Human Resources/Community Affairs Administrator sent an e-mail to all Bakersfield employees whom had been selected for layoff. The e-mail notified these employees that there were informational, transitional meetings scheduled for January 2, 2013 and January 9, 2013. The purpose of these meetings was to prepare employees for their impending layoffs.

During these meetings, representatives from state and local employment agencies attended the meetings and provided the employees with information about the transitional services provided by these agencies. Winters also attended the meetings and explained the severance package and benefits offered by the Employer. Winters also testified that during these meetings he reiterated that there were no guarantees of employment and that the Employer's short-term opportunities were not coming to fruition.

Since announcing the layoffs, 5 employees have requested to be laid off early so that they may take positions with other companies. The Employer granted all of these requests. Four of these employee requests for early layoff were implemented prior to the date of the hearing. The final request was scheduled to be implemented on January 31, 2013.

With regard to implementing the remaining layoffs, the Employer plans to complete them in two phases: approximately 43 employees on February 4, 2013 and approximately 3 employees on February 20, 2013. In addition to the employees that were selected for layoff, Winters testified that 5 proposed bargaining unit members will be transferred to positions that fall outside the proposed bargaining unit on or before

⁶ Another letter to the same effect was sent to three additional employees on January 8, 2013.

February 5, 2013. Therefore, including the 5 employees that have already found employment elsewhere, the Employer's planned reductions will reduce the proposed bargaining unit by 56 members, leaving only 17 employees in the proposed bargaining unit in three of the four classifications; no employees will remain in the "pipeline" classification following the layoffs.⁷

III. LEGAL ANALYSIS

In the Board's seminal decision on cases involving expanding or contracting units, *Douglas Motors Corp.*, it was held that when there is definitive evidence of an expanding or contracting unit, in order for an immediate election to be warranted, "the present work complement must be substantial and representative of the ultimate complement as projected both as to the number of employees and the number and kind of classifications." 128 NLRB 307, 308 (1960). Generally, an existing work complement of employees is substantial and representative when approximately 30 percent or more of the eventual complement is employed in 50 percent or more of the anticipated job classifications. *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1256 (2001); *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000), citing *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994).

Furthermore, a mere reduction in the number of employees is insufficient to warrant dismissal of the petition; the Board will also consider whether the reduction is a consequence of a "fundamental change in the nature of the Employer's business operations." *MJM Studios*, 336 NLRB at 1256, citing *Douglas Motors*, 128 NLRB at 308. A fundamental change in the Employer's business operations is evidenced by the Employer shifting to a different type of business or eliminating aspects of its current business. *MJM Studios*, 336 NLRB at 1256.

The present work complement of employees is determined by the number of employees in the proposed bargaining unit on the date of the hearing. See, e.g., *Douglas Motors*, 128 NLRB at 308 (present complement determined as of the date of the hearing in contracting unit case); *Celotex Corp.*, 180 NLRB 62, 63 (1969) (same); *Plum Creek*

⁷ Prior to the reductions, only one employee worked in the pipeline classification.

Lumber, Inc., 214 NLRB 619 (1974) (same). Compare *Witteman Steel Mills, Inc.*, 253 NLRB 320, 320 (1980) (in expanding unit case, Board used present complement of employees determined by the number of projected bargaining unit members employed as of the date of the Director's decision). However, if an employee who has been laid off, or is expected to be laid off in the near future, has a reasonable expectancy of recall, that employee is eligible to vote in the pending election and is therefore included in the ultimate work complement. *MJM Studios.*, 336 NLRB at 1256 . To have a reasonable expectancy of recall, there must be objective evidence in support of a temporary layoff. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991); *Sierra Lingerie Co.*, 191 NLRB 844, 845 (1971). In determining whether laid-off employees have a reasonable expectancy of recall, the Board evaluates "objective factors" which include "the employer's past experience, the employer's future plans, the circumstances of the layoff, and what the employee[s] w[ere] told about the likelihood of recall." *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983).

A. There is definitive evidence of a contracting unit caused by a fundamental change in the nature of the Employer's business operations.

In the instant case, the work complement consisted of 69 employees on the date of the hearing. Four of the petitioned-for members were voluntarily laid off prior to the date of the hearing because they obtained employment with another company. It is undisputed that the Employer plans to significantly reduce the size of its work force at the Bakersfield facility by the end of February 2013. The chief dispute between the parties is whether these layoffs are permanent. Leaving that issue aside for the moment and assuming that the layoffs are permanent, it appears in the present situation that by the end of February 2013 the size of the work force that would comprise the bargaining unit will have been reduced to 17 employees – only 25 percent of the employee complement at the time of the hearing. The job classifications, however, will have only been reduced from 4 classifications to 3 classifications, or in other words, 75 percent of the job classifications in existence at the time of the hearing.

In *Douglas Motors*, the Board dismissed the petition when the ultimate complement was projected to be reduced to 25 percent of that employed at the time of the

hearing, and the number of job classifications were projected to be reduced from 16 to a single general classification. 128 NLRB at 308. In the instant case, however, while only 25 percent of the present employee complement will remain at the end of February 2013, 75 percent of the job classifications will remain. Thus, these percentages tend to work against each other: the 25 percent complement cuts toward dismissal while the 75 percent remainder of job classifications favors an election being ordered.

Yet in the instant case, just as in *Douglas Motors*, there is sufficient evidence that the planned reductions in work force are the result of a fundamental change in the nature of the Employer's business operations. In *Douglas Motors*, the Board found that a fundamental change in the nature of the employer's business operations occurred when it was demonstrated that the manufacturing aspect of the employer's business operation would be eliminated, leaving its operations "confined solely to distribution, warehousing, and certain limited experimental functions." 128 NLRB at 308.

It is undisputed that the primary function of the Bakersfield facility was refining vacuum gas oil it received from the Paramount facility. It is also undisputed that the Employer announced unequivocally in October 2012 and in subsequent communications to employees that the Employer was permanently shutting down crude oil refining operations at the Paramount facility. Without vacuum gas oil being produced as a byproduct from the Paramount operations, the Bakersfield facility no longer has any vacuum gas oil to refine. Thus, it is undeniable that an aspect of the Employer's current business has been eliminated.

The Petitioner, in arguing that the proposed layoffs are temporary and not permanent, contends that operations are expected to resume by the third or fourth quarter of 2013 as evidenced by the Employer's plans to construct a rail line to bring crude oil to Bakersfield. Leaving the speculative nature of these plans aside, this argument cuts against the Petitioner and supports the Employer's position since such plans would entail the Employer embarking on a different type of business operation, namely the refining or terminaling of crude oil, not vacuum gas oil. Should the Employer decide to abandon its operation of vacuum gas oil processing in order to refine crude oil at the Bakersfield facility, the Employer would be required to modify its operation of the Bakersfield facility to accommodate crude oil refining byproducts such as asphalt and coke,

something the Employer has never done at the Bakersfield facility. Furthermore, as Winters testified, the processing of coke is a dirty, dusty and dangerous process which the Employer has never conducted at the Bakersfield facility. Such a change would suggest a fundamental change in the nature of the Employer's business operation.

B. The employees selected for layoff do not have a reasonable expectancy of recall and should not be included in the ultimate employee complement for purposes of the "substantial and representative" analysis.

For the employees selected for layoff to be eligible to vote (and therefore be included in the ultimate employee complement), there must be objective evidence supporting a reasonable expectancy of recall in the near future. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991); *Sierra Lingerie Co.*, 191 NLRB 844, 845 (1971). Objective evidence which the Board considers in determining whether laid-off employees have a reasonable expectancy of recall include "the employer's past experience, the employer's future plans, the circumstances of the layoff, and what the employee[s] w[ere] told about the likelihood of recall." *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983). While Petitioner contends that there is such evidence in the record, for the reasons set forth below, I find that the objective evidence does not establish that these employees have a reasonable expectancy of returning to work in the near future.

As it relates to the employer's future plans and what employees were told about the likelihood of recall, the Petitioner emphasizes three points. First, the Petitioner relies on statements made by Juno during the October 2012 meeting that the Employer would begin transporting crude oil to the Bakersfield facility and that no employees would be laid off. Assuming for the sake of argument that Juno was accurately describing the Employer's plans during the October 2012 meeting, the subsequent communications from Winters, Eisman and Clausen to employees on November 29, 2012, along with the separation confirmation letters sent to employees on December 13, 2012 and January 8, 2013, clearly indicated that the Employer's current and future plans were not what Juno had portrayed. It is also worth noting that at some point between the October 2012 meeting and the letter from Eisman and Clausen to employees on November 29, 2012,

Juno had been replaced by Clausen as the Employer's Vice President of West Coast Refining.⁸

Second, the Petitioner points to language in the November 29, 2012 letter to employees from CEO Eisman and Vice President of West Coast Refining Clausen in which the Employer expressed its *hope* to resume operations and increase staffing as evidence that the layoffs are temporary. The Petitioner also contends that the hope expressed by Reimer and Dennis with regard to the turnaround work is further evidence of the temporary nature of the layoffs.

While there is no reason to doubt that the Employer may have been, or even currently remains, hopeful about its future prospects, the *subjective* desires of the Employer are at odds with the *objective* evidence which indicates that the layoffs are permanent. The November 29, 2012 WARN notice sent to employees and the December 13, 2012 and January 8, 2013 confirmation of separation of letters sent to affected employees all clearly stated that the layoffs are expected to be permanent. To the extent that the Employer's communications to employees have been conflicting, the Employer's most recent communications and actions, which have included transitional meetings attended by state and local employment agencies, have made it abundantly clear that the Employer currently expects the layoffs to be permanent.

Third, the Petitioner argues that the December 10, 2012 e-mail from Winters to Bakersfield employees shows that the layoffs are expected to be temporary. In this e-mail, Winters explains that it is both "practical and good business" to rehire former employees and that the Employer intends "to continue this practice...." Winters also explains in the e-mail that the termination agreement contained in the severance package "does not prevent the company from rehiring former employees if the company chooses."

Nevertheless, nothing in this e-mail contradicts the Employer's previous and subsequent declarations that the layoffs are expected to be permanent. Winters simply attempted to alleviate the concern of affected employees by assuring them that if the Employer is able to increase staffing at some point in the future, it is likely that the Employer will seek to rehire former employees. This is not, however, evidence that the

⁸ Although not specifically stated on the record, the Petitioner asserts in its Post Hearing Brief that Juno no longer works for the Employer.

Employer will continue operations at the Bakersfield facility or that the planned layoffs will be temporary.

In consideration of the Employer's past experience and the circumstances surrounding the layoffs, the Petitioner contends that the Employer's operations are seasonal and temporary shutdowns often occur. Thus, the Petitioner argues that the current shutdown is not permanent, but is rather the Employer's normal course of operation.

Although the Employer admits that there have been layoffs in the past, it has also demonstrated that none of the prior layoffs have compared to the size and scope of the current layoffs. Winters testified that none of the employees laid off in the most recent Bakersfield shutdown were bargaining unit members. Winters also testified that the current layoffs are the biggest the Employer has ever had to implement. Additionally, Winters testified that WARN notices were not sent to employees prior to the previous layoffs.

Furthermore, there is no evidence that prior to any of the past temporary shutdowns, the Employer announced to employees that one of its refineries would be permanently shutdown. In the current situation, however, the Employer specifically announced that the Paramount facility would be shut down permanently. With the primary function of the Bakersfield facility being wholly dependent upon operation of the Paramount facility, this strongly demonstrates the permanence of the planned layoffs.

In light of the substantial objective evidence demonstrating the planned layoffs are permanent, there can be no reasonable expectancy of recall. Therefore, the employees who are laid off would not be eligible to vote if an election were directed. Thus, these employees should not be included in the ultimate employee complement for purposes of the "substantial and representative" analysis.

Because the present work complement is not substantial and representative of the ultimate work complement, the planned reductions in work force are the result of a fundamental change in the nature of the Employer's business, and the Employer's planned layoffs are expected to be permanent, I conclude that the petition should be dismissed.

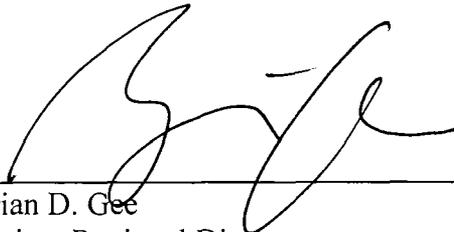
IV. ORDER

IT IS HEREBY ORDERED that the petition in this matter is dismissed.

V. 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. This request must be received by the Board in Washington by **April 5, 2013**. The request may be filed electronically through the Board's website, www.nlr.gov, but may not be filed by facsimile.

DATED at Los Angeles, California this 22nd day of March, 2013.



Brian D. Gee
Acting, Regional Director
National Labor Relations Board
Region 31