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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

GENERAL TEAMSTERS, WAREHOUSEMEN, CANNERY WORKERS AND HELPERS, TULARE AND KINGS COUNTIES, CALIFORNIA, LOCAL 948 Petitioner, and PERFECTION PET FOODS, LLC, Employer.	No. 32-RC-106989 **RESPONSE TO REQUEST FOR REVIEW**

In filing its request for review, the Employer has waived any *Noel Canning* objection to the Board's consideration of the request for review.

Attached as Exhibit A is the brief filed by the Union in support of the Regional Director's decision.

The request for review should be immediately denied.

The Employer manufactures pet food. It has been manufacturing pet food in its facility since about January 2011. It is now in the process of expanding its production of pet food, but the basic nature of the Employer's business and the skills required of its workforce remain the same.

The Regional Director properly found that the Employer's projected expansion plans are too remote and speculative to deny current employees their right to an election. The Employer's unfilled job postings of December 2012, its indefinite plans for a third extrusion line, and its widely varying rates of permanently hiring temp-to-hire employees all point to the high degree of speculation involved in its plans for expanding its workforce. As the Regional Director concluded, the Employer has failed to show that the 19 permanent employees constitute less than 30 percent of the permanent employee complement. The current workforce is a substantial and representative complement, and there is no reason to further stall an election.

The Employer also has employees occupying virtually all of the actual job classifications. The fact that the Employer might change the formulations of some pet food does not affect the fact that the basic nature of the business is not changing in any respect. As it increases its production capacity, the Employer will simply be hiring additional persons over a period of time. The skills required and tasks performed by these new hires will be the same as those currently employed at the facility. Although the Employer plans to add material handlers in different departments and specialized biscuit line operators eventually, the truth is that these new position titles do not accurately reflect the creation of new job classifications in terms of skills. Nothing in the production process is fundamentally changing, and aside from the addition of electricians, no new classifications have been created. Finally, as the Regional Director points out, the Employer has already filled many of these "classifications" it projects with temp-to-hire employees. These "classifications" should be considered filled for purposes of determining the representativeness of the current complement because the work required of these positions is already occurring on a daily basis at the Visalia facility. The Employer should not be permitted to use temp-to-hire positions as a way of evading its obligations under the Act. And it should not be able to invent a list of duplicate and illusory classifications in order to indefinitely postpone its workers' right to an election.

As reflected in the Regional Director's decision, there is a substantial and representative complement at this time and the decision to increase the unit over the next year does not affect the employees' right as founded by the Regional Director to choose their representative now.

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Accordingly, this request for review should be denied and the election should be held immediately.

Dated: July 31, 2013

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/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On July 31, 2013, I served the following documents in the manner described below:

RESPONSE TO REQUEST FOR REVIEW

(BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 31, 2013, at Alameda, California.

/s/ *Joanna Son*
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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

PERFECTION PET FOODS, Employer, and GENERAL TEAMSTERS, WAREHOUSEMEN, CANNERY WORKERS AND HELPERS, TULARE AND KINGS COUNTIES, CALIFORNIA, LOCAL 948, Petitioner.	Case No. 32-RC-106989 **PETITIONER'S POST-HEARING BRIEF**

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I. INTRODUCTION

Perfection Pet Foods, Inc. ("PPF") is a dry pet food manufacturer established in Visalia, California in early 2011. Since March of 2012, PPF's facility has had one fully operational production line. Excluding supervisors, guards, clerical staff, and temporary employees, PPF currently employees nineteen (19) people.

On June 11, 2013, the General Teamsters, Warehousemen, Cannery Workers and Helpers, Tulare and Kings Counties, California, Local 948 ("Local 948") properly filed an RC petition with the NLRB to represent "all full time and regular part time employees" working for the employer. (See JX 1.) In response, PPF has claimed that the petition is premature because the workforce is expected to expand and the "current employees are not performing all of the projected job classifications." Essentially, PPF asserts that the RC petition should be dismissed "until such time that the workforce is complete."

The NLRB does not require that a workforce be "complete" before a representation election can be held. Such a requirement would indefinitely stall, and in many cases altogether prevent, a bargaining unit from selecting a representative and engaging in collective bargaining. Instead, the NLRB has consistently held that so long as the present employee complement is "representative and substantial of the unit workforce to be employed in the near future," the workers' fundamental right to choose a representative for the purposes of collective bargaining should not be interfered with. (*See In Re Yellowstone Int'l Mailing, Inc.*, 332 NLRB 386 (2000)).

Here, PPF's speculative and remote plans for expansion should not prevent employees from having an election. The current employee complement is both substantial and representative of PPF's projected workforce with respect to its size and job classifications. Virtually all of the distinct and separate job classifications at PPF are presently filled. And a great number of the anticipated hires are uncertain. Basically, the employer's predicted growth will not "fundamentally alter the unit's community of interest." (*See NLRB v. Office Depot, Inc.*, 28 F. App'x 579, 582 (7th Cir. 2002)). Accordingly, an election should be directed immediately.

Finally, PPF's use of temporary employees ("temps") is subject to manipulation. The Board's decision in *H.S. Care, LLC (Oakwood Care Center),* 343 NLRB 659 (2004) holds that

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outside temps should not be included in a bargaining unit with regular employees. But here PPF has used temps as a more stable part of its workforce than in most other cases. If the present temps were included in the bargaining unit, there would be no question about the complement. But because PPF can employ temps while asserting plans to directly hire for the same positions, it is able to manipulate the bargaining unit and the complement size by employing a separate, provisional workforce. The use of temporary workers without any definite hire dates makes PPF's expansion plans particularly speculative.

II. STATEMENT OF FACTS

Established in January 2011, PPF has been fully operational at its facility in Visalia, CA since March 2012. This self-described "start-up" pet food manufacturer currently employees nineteen (19) full-time and regular part-time workers and seventeen (17) temporary employees at its manufacturing, packaging, and distribution facility.

On June 11, 2013, after collecting authorization cards from enough of the current 19 employees to constitute a showing of interest, Local 948 petitioned the NLRB for recognition as the bargaining representative for all full time and regular part time employees at the PPF facility. (See Ex 1.) In a letter to the assigned hearing officer five days later, PPF challenged Local 948's representation petition on the grounds that the petition was premature due to the company's projected workforce expansion. According to PPF's Vice President of Operations Mike Gagne ("Gagne"), the company anticipates reaching what it call its "full complement" by April 2014, at which time it hopes to have its third line equipment – which presently has not even been purchased – fully installed and operational. It is at this roughly estimated future date, nearly one year from now, that PPF would have its workers petition for representation. At that time, PPF predicts it will have 99 employees in the bargaining unit along with 13 new bargaining unit job classifications (instead of the current ten (10)). However, most, if not all, of these projected job classifications are no different that classifications already in place. And it is uncertain when, if ever, the 80 new projected positions will be filled with regular, non-temporary employees.

At hearing, PPF explained that it is currently installing equipment at its Visalia facility to begin operating a second extrusion line. The second line, which was 80 percent installed at the

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time of hearing, is expected to be fully operational by mid- to late-July 2013. According to PPF's plans for workforce expansion laid out in Employer Exhibits 1 & 2 ("ER 1" and "ER 2"), the company posted twenty-three (23) openings online for "temp-to-hire" positions on May 22, 2013[1] and another seven (7) positions on June 4, 2013.[2] (ER 1.) These new employees, once hired, will essentially be performing duties identical to those of current employees – batching, processing, packaging, and distributing the dry pet food – but they will perform these tasks on PPF's new line when it is completed.

PPF explained that it planned to recruit temporary employees through its usual temp agencies to fill the available positions. These new temporary employee hires, like the temporary employees currently placed at PPF, would not be bargaining unit members unless and until they are hired directly by PPF.

In ER 1, PPF also lists five (5) positions it intends to post on September 1, 2013. These include a batching lead, an extruder lead, and a biscuit lead, a biscuit line operator, and an electrician. (See ER 1.) Again, the employer expects that these positions will be filled through its temp-to-hire process, and any temporary employee will not be part of the bargaining unit. Currently, the extruder operators are operating the biscuit line's testing phase as biscuit production requires many of the same skills and training as the extrusion process.

There are another six (6) potential bargaining unit positions currently posted and not filled. Since December 22, 2012, PPF has been seeking maintenance mechanics. Six months after the initial job posting, it appears that PPF has only found two temporary employees for this position – one employed for 59 days and one employed for 8 days at the time of hearing. Six

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[1] Curiously, the dates provided on the job requisition forms marked as ER 5 do not correspond with the dates listed in ER 1. ER 1 states that 23 jobs, including material handlers, dryer operators, distribution technicians, and others, were posted on May 22, 2013. However, the job requisition forms have completion dates of June 4 and June 10 and tracking dates of June 11, showing that as of that date, the jobs were posted online. In short, it is not clear from the evidence provided when these positions were actually posted, why none of them were filled nearly one-month after the May 22 posting date at hearing June 19, and why the employer is posting online in the first place when it ultimately does almost all of its hiring through temp agencies anyway.

[2] At hearing, it was also noted that there is no creation date provided on either ER 1 or ER 2. When asked to give dates as to when these documents were created and last updated the VP of Operations, Mike Gagne, said sometime in the "last few weeks." It is unclear how current and accurate this information is.

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positions remain vacant after six (6) months of seeking applicants. When asked why these positions remain unfilled, Gagne described the company's difficulty in attracting qualified candidates to the position.

PPF also claims that it will post another twenty-two (22) positions on December 1, 2013 to prepare for its third pet food extrusion line. These anticipated positions are not unique. This group of future hires, which will once again start as temporary employees, will perform identical tasks to the current workforce while staffing the projected third line. At this point, however, these future hires are uncertain. The third line equipment has not been fully paid for, and the total cost, delivery date, and installation all remain unsettled. PPF has only stated that it expects that the third line will be operational three (3) to four (4) months after an anticipated mid-November delivery.

On or about February 15, 2013, Extru-Tech, Inc., an extrusion systems manufacturer, provided PPF with a quote for six pieces of extrusion equipment. (See ER3, p. 2.) This quote, which totaled $1.91 million for the six devices, was valid for a period of sixty (60) days from the quote date of February 15, according to its terms. (Id.) However, according to the documents PPF provides, none of the quoted items were ordered within this window. What is included in the documents that PPF provided at hearing is a separate Extru-Tech invoice dated June 12, 2013 – the day after Local 948 filed its RC petition –for a $100,000 hold fee for a production slot for two pieces of equipment to be delivered in mid-November. (*Id.* at 1.) The invoice leaves the total value, prices, part numbers, and terms of payment all marked as "To Be Determined." (*Id.*) The document does not indicate whether or not Extru-Tech received payment of the deposit from PPF. (*Id.*)

PPF initially hired all but one of its current employees in the proposed bargaining unit as temporary employees through different temp agencies. The company plans to continue this hiring practice during its period of expansion. According to PPF's calculations, the average time that temporary employees remained temporary before being hired or fired was 116 days. (ER 4.) The range is quite large. One employee was hired in 7 days, while others were not hired until as many as 251 days. (Id.)

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As of the hearing date, the current temporary employees had been working an average of 57 days at PPF, ranging from 163 days to 8 days. These temporary employees also currently occupy seven of the 13 new job titles that PPF has included in its staffing projections, including at least one employee who has been employed as a general laborer far beyond the 116-day average.

III. ARGUMENT

The nineteen (19) workers currently employed by PPF have a strong interest in holding a speedy election free of unreasonable delays and encumbrances (*See NLRB v. Gissel Packing Co.* 395 U.S. 575, 610-11 (1969)). Under section 7 of the NLRA, these workers have the right to be represented by a representative of their choosing for the purposes of collective bargaining. A labor organization can petition the Board for recognition as the exclusive bargaining agent, as the Local 948 did here, and unless the employer voluntarily recognizes the union or is ordered to bargain, the bargaining unit employees then have the right to an election to decide the question of representation.

NLRB elections are a mechanism in place to encourage and protect workers' fundamental right to collective bargaining. Hence, the election process should not be unnecessarily interfered with or delayed. And yet, that is exactly what PPF is attempting do in this case. Claiming that it is contesting the appropriateness of the representation petition in order to prevent future workers from being disfranchised, PPF has cleverly veiled its actual objective of indefinitely postponing the election until support for the union crumbles. PPF is hoping to defeat the union effort through a war of attrition. The Board should recognize PPF's concerns for what they really are: a narrative crafted to stay union-free.

The record demonstrates that PPF's expansion plan is speculative. Although the second line is in the process of being installed, the employer's predicted operational date at the end of July is not certain. Moreover, the employees PPF expects to hire will not necessarily become part of the bargaining unit in the near future. According to PPF's plans, it will in most cases hire temporary employees before hiring directly for a position. PPF can offer an estimate of how many workers it will need to operate the second line once installed, but any projection about how many of these employees will become regular PPF employees in the near future is highly speculative.

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PPF's plans to add the third line and add eighty (80) new non-temporary employees by April 2014 is much too indefinite to justify dismissing the petition and delaying an election. Even if the expansion plan was less remote and approximate, the record shows that a substantial and representative complement of workers for purposes of holding an election currently exists at PPF. Contrary to the employer's calculations, at least 30 percent of the worker complement anticipated in the near future is currently employed, and more than 50 percent of the job classifications currently exist. The projected positions will not change the character of the community of interest of workers as the employees at the facility will continue to perform the necessary tasks for manufacturing, packaging, and shipping dry pet foods. PPF may be adding new production lines, but the work will remain substantively the same. Future employees' interests will be adequately represented in an immediate election. The only group that runs the risk of being disfranchised is the group of current employees who are eagerly awaiting the opportunity to select a representative.

The employer seems to think that its status as a "start-up" business puts it in some unique position where it should not have to entertain a representation election for its employees. The union-free period that PPF is seeking is in no way supported by the statute. The workers' fundamental right to choose their bargaining representative through an election would be inalterably harmed if such a delay were tolerated.

In order to dismiss a representation petition because of an expanding unit, the Board has stated that the "employer's predicted expansion plans [must] establish with a reasonable degree of certainty that in the near future the existing unit will not be representative or appropriate." (*Bekaert Steel Wire Corp.,* 189 NLRB 561, 562 (1971).) PPF falls far short of meeting this burden. Accordingly, the Regional Director should direct an election for all full-time and regular part-time employees at Perfection Pet Foods immediately.

A. PERFECTION PET FOOD'S PLANS FOR EXPANSION ARE TOO SPECULATIVE AND INDEFINITE TO WARRANT DELAYING THE ELECTION OR DISMISSING THE PETITION

While it is not disputed that PPF is in the process of expanding and that it expects to soon begin full production on its biscuit line and its second extrusion line, the hiring projection

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numbers that PPF has supplied are too indefinite and remote to justify dismissing the representation petition. The Board will not dismiss an election petition for expansion plans that are too speculative or remote. In a long line of decisions, the Board has clarified what it considers to be too speculative. The employee complement is measured against the unit workforce to be employed in the "near future." *Yellowstone Int'l Mailing,* 332 NLRB 386 (2000). The Board has found that delaying an election for one year or more after the petition is filed is too long. (*Bekaert.,* 189 NLRB at 562 (1971).) It has also refused to dismiss petitions when the completion dates for expansion are uncertain. (*Id*.) Ultimately, the employer has a high burden to show that the expansion is certain and that the expansion will make the current complement unrepresentative of the ultimate predicted workforce.

In *Bekaert Steel Wire Corp*, the Board ruled that the employer's plan to expand its workforce was too uncertain and remote. While the Bekaert had immediate plans to make modest changes to the workforce operating it "bead wire" production line, it also offered plans for a contemplated expansion to begin a "fine wire" production line. According to the employer's estimates, the addition of the new line along with the expansion of the current line would ultimately lead to a ten-fold workforce expansion. The employer estimated that the new plant, which would house the fine wire line, could be operational as early as July 1971 – approximately nine (9) months after the hearing date. The Board found that the plan was too uncertain, and the possible date for a sizable complement almost one year later was too remote. It held that delaying the election for current employees because of an expansion plan "that far in the future" "would not effectuate the policies of the Act."

Similarly, in *Gerlach Meat Co*., the Board found that the employer's anticipated expansion almost two years from hearing date was "too remote and speculative to form a basis for denying present employees an opportunity to select a bargaining representative." (192 NLRB 559 (1971).) The employer was expanding its product line to include cooked and prepared foods in addition to the fresh meats it produced for hotels and restaurants. This entailed an expansion of the facility and the workforce. But the employer was attempting to measure the needed employee complement based on its projections for the end of 1972 after the facility and workforce

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expansions were complete. The Board rejected this measure in favor of the more realistic date of December 31, 1971, nine (9) months after hearing.

In *Frolic Footwear, Inc.*, the Board provided another method for measuring the definiteness of a contemplated expansion plan. In this case, the company was planning to expand one of its facilities to be a complete, self-contained shoe manufacturing operation like its other plants. In order to do this, it needed to add a number of departments and employees. Although the Board found the petition was timely because the current employee complement was representative and substantial, the Board did acknowledge that the employer's expansion plans were definite. "The definiteness of this expansion schedule is evidenced by the fact that all machines required for the department's work (with the exception of three ordered but not yet delivered) were on the plant premises on the hearing date." (*Frolic Footwear, Inc.,* 180 NLRB 188, 189 (1969).) The Board found that the machinery's physical presence on the premises properly demonstrated that the employer had committed to its plan for expansion.

At PPF, the contemplated third-line expansion is too speculative and remote to justify denying present members of the proposed bargaining unit the opportunity to select their representative. Unlike *Frolic Footwear*, none of the six necessary machines are currently on the premises. (See ER 3.) In fact, it is not even clear whether any of the machines have been purchased. PPF has only provided a June 12, 2013 invoice for a down payment on a production slot for two pieces of equipment. Many sections of this invoice read "To Be Determined" and nowhere does it indicate that the required payment had been received. The approximate delivery according to the invoice would be sometime in mid-November of this year. After delivery, whenever that might actually occur, Gange estimated that it would take three to four months to get the machinery installed and operational. Thus, PPF expects its "full complement" by April 2014. But with so many approximations that could be subject to significant changes and with no concrete evidence showing that the third line will positively go forward, this part of the expansion plan is simply too speculative. PPF has not established with a reasonable degree of certainty that the 22 third-line hires will actually be hired. Accordingly, the Regional Director should follow the Board's decisions in *Gerlach* and *Bekaert* and find that the April 2014 projection is too

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speculative. Instead, the current workforce – or at least a more realistic estimate, including only positions that will definitely be filled with direct hires in the near future – should be used for measuring the complement.

B. THE CURRENT EMPLOYEE COMPLEMENT IS REPRESENTATIVE AND SUBSTANTIAL FOR PURPOSES OF DIRECTING AN IMMEDIATE ELECTION

The Board has dealt with the issue of employee complements in the context of an expanding bargaining unit many times before. As a result, the Board has developed a clear and simple rule for determining whether or not a current employee complement is "representative and substantial" enough for an election to be appropriate. "It is well settled that the Board will direct an immediate election, notwithstanding an employer's plan to expand its workforce, when the employer's current complement of employees is 'substantial and representative' of the unit workforce to be employed in the near future." (*Yellowstone Int'l Mailing,* 332 NLRB 386 (2000); *see also Endicott Johnson De Puerto Rico, Inc.,* 172 NLRB 1676, 1677 (1968).) "In general, the Board finds an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications." (*Id.*) In the present case, both figures were met at the time of hearing. With a few corrections to ER 1 and ER 2 explained below, it is clear that the current employee complement meets the Board's test. Therefore, the Regional Director should immediately direct an election.

1. <u>More than 30 percent of the eventual employee complement under the employer's plan is currently employed</u>

Based on its expansion projections, the employer estimates that the current employee complement will only be only about 19 percent of the total workforce by April 2014. However, this estimate fails with even the slightest degree of scrutiny. First, leaving aside issues concerning the difficulties of calculating temporary employees, the current employees almost certainly constitute more than thirty percent of the projected workforce that can reasonably be expected to be hired in the near future. As explained above, the 22 positions expected after the delivery of the third line equipment are too remote and speculative to be included in the calculation for the purposes of directing an immediate election. Furthermore, the six maintenance positions, which

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have been posted since December of 2012 and yet remain vacant due to difficulty attracting qualified candidates, should also be excluded as there is no telling when such candidates will emerge if they have not after 6 months. Current employees should not have to wait on the arrival of the possibly non-existent maintenance mechanic who has eluded PPF and its seven or more temp agencies thus far. Additionally, there is no way of knowing how long it will take PPF to find temps for the five positions it plans to post in September, nor is there a way of knowing how long PPF will wait to directly hire regular employees for these positions. These projected hires are too speculative to delay an election. Finally, at hearing, the employer argued that a number of lead positions were supervisors and thus were not part of the bargaining unit. Several of the currently filled lead positions were left in the unit for now, but, ultimately, the status of several of the anticipated lead positions was left unresolved. Accepting, for the sake of argument, that all of PPF's other hiring predictions are, in fact, definite plans, the current employee complement still meets the 30 percent mark mentioned in Board precedent.[3]

The employer's use of temporary employees adds further indefiniteness regarding expansion of the bargaining unit. Temporary employee cannot be counted as part of the bargaining unit, and as of yet the employer has no definite plans to hire any of its current or future temps. PPF plans to continue its practice of using temporary employees with the possibility of hiring them directly at some point in the future. Under *Oakwood Care*, these temps will not be considered part of the regular employees' bargaining unit unless and until they are hired as regular PPF employees. Because of this hiring practice, PPF's estimate for reaching its "full complement" by April of 2014 is highly speculative as there is no way of exactly measuring when or if it will replace temps with new hires. The use of temps is also subject to manipulation by PPF. All PPF has provided is an average for how many days it has taken for them to hire past temps. There is no way of measuring PPF's actual intention of directly hiring temps as regular employees. So in addition to not knowing how long it will take from the posting date to fill the

[3] 19 current unit employees / 63 projected total = 30.158 percent. The 63 employee projected total was determined by subtracting the 6 maintenance positions, the 22 third line positions, the 5 positions that will not be posted until September, and the 2 warehouse lead positions and packaging lead in question from PPF's 99 employee prediction.

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anticipated positions, PPF also provides no method for accurately determining how long these positions will be filled by temporary employees instead of bargaining unit members.

Moreover, at least three of the current temps have been at PPF much longer than the average 116-day temp-to-hire period. Based on PPF's typical hiring practices, it is quite likely that these temps will be brought into the unit by the time an election is held.

2. <u>More than 50 percent of the projected job classifications are currently filled</u>

In the next several months, PPF claims it will be adding thirteen new bargaining unit job classifications to the ten that already exist. However, when inspected closely, it becomes apparent that a number of these classifications are not actually distinct in terms of the skills required and the tasks performed. After mislabeled classifications and duplicates are removed from PPF's list, it is clear that virtually all of the projected job classifications are currently filled.

The Board evaluates new job classifications in expansion cases in terms of the skills that are to be employed. (*Endicott Johnson De Puerto Rico, Inc.*, 172 NLRB 1676, 1677 (1968).) In *Frolic Footwear*, the Board found that the employer mislabeled many of its projected "job classifications." (*Frolic Footwear, Inc.,* 180 NLRB 188, 189 (1969).) The Board held:

> The "job classifications" listed and counted by the Employer for each of its seven functional departments are more properly referred to as job descriptions for they seem to describe distinct operations in the assembly of shoes rather than separate and distinct job classifications in terms of types of skills possessed by employees. In addition, only a cursory study of the Employer's overall classification list indicates that certain similar and, in some instances, apparently identical jobs occur and are counted more than once.

(*Id.*)

Here PPF has similarly mislabeled many of its anticipated positions as distinct job classifications when they actually will be exercising many of the same skills. For instance, PPF designates two separate material handler classifications – one in extrusion and one in batching, a currently filled position. All material handlers, however, will be performing essentially the same task – identifying and gathering ingredients for the company's different formulas. Thus, there

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should only be one material handler classification and it is not a new classification for the bargaining unit.

The biscuit line lead, the extruder lead, the biscuit line operator, and the extruder operator are another set of duplicative job classifications. At hearing, Gagne explained that the skills used by employees on the biscuit line and the extruder lines are very similar. In fact, the biscuit line is currently being run by extruder operators in preparation for its July full operation date. The extruder and biscuit leads and the extruder and biscuit operators are not separate and distinct job classifications in terms of skills. And these three projected positions should actually be boiled down to one new lead classification, if anything.

It is also unclear whether the batching lead and batching coordinator are distinct and separate classifications. PPF's description of the batching lead position it plans to hire (likely from the batching coordinator position) is notably similar to that of the current batching coordinator. It appears that the new position will require many of the same skills as the current one, but the tasks will instead be split between two employees rather than one.

Finally, since seven of the projected job classifications are currently filled by temporary employees – at least one of whom has greatly exceeded the average 116-day temp-to-hire period – it is likely that the job classification will be part of the bargaining unit in the very near future and quite possibly by the time an election is held.

Ultimately, PPF's list of new job titles does not create separate and distinct job classifications. The workers at this plant are involved in manufacturing, packaging, and shipping dry pet food. Whether a worker is involved in making dry pet food for cats or dogs, little dogs or big dogs, or putting it in boxes or bags is of no consequence. The skills involved are basically the same. Hence, the actual distinct job classifications at PPF are virtually all filled by the current workforce.

3. <u>The employer's contemplated expansion would not fundamentally alter the bargaining unit's community of interest</u>

The addition of new production lines will not change the work that is being done at PPF and it will not fundamentally change the bargaining unit's community of interest. The proposed

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bargaining unit at PPF, including all full-time and regular part time employees and excluding supervisors, temps, clericals, and guards, shares a community of interest in that they are all part of the employer's dry pet food manufacturing operation and they all are similarly situated in terms of wages, hours, and working conditions. The contemplated expansion will not alter these things in common between the proposed bargaining unit employees. The current employees likely have similar if not identical collective bargaining concerns to future hires, and thus the current employee complement will be able to adequately represent the interests of the unit. PPF's proposed changes will not fundamentally alter these collective interests. (*See N.L.R.B. v. Office Depot, Inc.,* 28 F. App'x 579, 582 (7th Cir. 2002).)

C. BY THE TIME THAT THE ELECTION IS DIRECTED, THE NECESSARY EMPLOYEE COMPLEMENT WILL BE SATISFIED EVEN ACCORDING TO THE EMPLOYER'S CALCULATIONS

The Board has consistently held that the employee complement is not necessarily measured from the hearing date but at the date that the Board makes a decision. (*Celotex Corp.* 180 NLRB 62 (1969).) By that time the complement may be significantly more representative and substantial than at the time of hearing. *Id.* In such situations, the Board has found that a present employee complement is sufficient for purposes of directing an immediate election "regardless of the size of the employee complement on the date of the hearing." (*Am. Type Founders Co., Inc.*, 173 NLRB 707 (1968).) This is important, here, as PPF currently has 17 temporary employees awaiting entry into the bargaining unit, 36 current open positions that could be hired or converted from temp to unit employee at anytime (in some cases in as few as 7 days), and has employees that it is currently training to fill new positions (Augustin Benitez, possible batching lead). In other words, many of the projected classifications and new positions that were not filled at hearing are likely to be filled by the time the Regional Director issues a decision.

IV. CONCLUSION

For the foregoing reasons, Local 948's representation petition should be accepted and the Regional Director should immediately direct an election for the current full-time and regular part-time employees at Perfection Pet Foods's facility in Visalia, CA. PPF's attempt to indefinitely stall the election is nothing more but a thinly veiled effort to smash the union effort. The Regional

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Director should recognize this attempt at curtailing the current employees' section 7 rights and should respond accordingly.

Dated: June 26, 2013

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On June 26, 2013, I served the following documents in the manner described below:

PETITIONER'S POST-HEARING BRIEF

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:
National Labor Relations Board, Region 32
1301 Clay Street, Room 300N
Oakland, CA 94612-5211
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 26, 2013 at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

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