UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PERFECTION PET FOODS, LLC[1] **(Visalia, CA)**

Employer

and

GENERAL TEAMSTERS, WAREHOUSEMEN, CANNERY WORKERS AND HELPERS, TULARE AND KINGS COUNTIES, CALIFORNIA, LOCAL 948[2] **Case 32-RC-106989**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Perfection Pet Foods, LLC, herein called the Employer, operates a facility in Visalia, California, where it is engaged in the business of manufacturing cat and dog foods to be sold by large retail customers. Petitioner General Teamsters, Warehousemen, Cannery Workers and Helpers, Tulare and Kings Counties, California Local 948, herein called Petitioner, filed a petition on June 11, 2013 under Section 9(c) of the National Labor Relations Act seeking to represent a unit of approximately 20 employees consisting of all full-time and regular part-time employees employed by the Employer at its Visalia, California facility, excluding all office clerical employees, guards, and supervisors as defined in the Act. At the hearing in this matter, the parties stipulated that the following bargaining unit is appropriate for the purposes of collective bargaining:

[1] The name of the Employer appears as stipulated at the hearing.
[2] The name of the Union appears as reflected on the petition, which the Union has clarified is its correct legal name.

> All full-time and regular part-time employees employed at the Employer's Visalia, California facility; excluding temporary employees employed through a temporary agency, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

As evidenced at the hearing and on brief, the sole issue before me is whether, as contended by the Employer, the election petition should be dismissed because the Employer plans to significantly expand its workforce within the next ten months, and therefore there is not currently a substantial and representative complement of unit employees working in its Visalia facility.

A hearing officer of the Board held a hearing in this matter on June 19, 2013. Petitioner and the Employer appeared at the hearing, and the parties filed post-hearing briefs with me, which I have duly considered.

I have carefully considered the evidence and the arguments presented by the parties on this issue. For the reasons set forth below, I find, contrary to the Employer, that a substantial and representative complement of employees is currently employed in the petitioned-for unit and that an immediate election is warranted.

Background

The Employer is engaged in the business of manufacturing dry pet food. The Employer was formed in January 2011, began preliminary test runs in December 2011, and began regular production on a single, highly-mechanized production line around March of 2012. The Employer is currently ramping up its business to meet increased demands from some recently-acquired large customers.

With only one exception, all production employees hired since the Employer commenced operations have been initially brought in to the Employer's facility as what the Employer terms "temp-to-hire" employees though arrangements with of one of the seven to eight temporary employment agencies, or "temp agencies," with which the Employer regularly deals (e.g., Aerotek U.S.A., Pride, Express, At Work, Select, and Denham).[3] This temp-to-hire system appears to serve as the equivalent of a probationary period for new-hires, affording the Employer the opportunity to evaluate them over a prolonged period of time prior to making the decision about whether or not to take them on as permanent employees. The temp agencies recruit employees for the Employer based on Employer requests for specific open positions at specified wage rates.[4] The Employer screens the applicants, conducts background checks on them and interviews at least some of them prior to accepting them as temp-to-hire employees. While working in temp-to-hire status, these employees are supervised, trained and evaluated by the Employer in order to determine if they are qualified to fill the positions on a permanent basis. If, after an indeterminate period of time, the Employer decides that a temp-to-hire employee is acceptable, the Employer can formally hire, or "convert," the individual into a permanent employee of the Employer.[5] Due to the high markup on the labor rate that

[3] Throughout the hearing in this matter, including in their stipulation on the appropriate bargaining unit, the parties referred to employees in such temp-to-hire status as "temporary employees." However, under the Board's well-established definition, temporary employees are hired for a limited duration with no substantial expectancy of continued employment. *Marian Medical Center*, 339 NLRB 127 (2003); *Indiana Bottled Gas Co.*, 128 NLRB 1441 fn.4 (1960). As the employees in temp-to-hire status in this case are hired with the expectation that they will be eventually converted to permanent status, they do not fall under the Board's definition of temporary employees. Therefore, in order to distinguish between the Board's definition and the actual employment status of these employees in this case, I will refer to them in this decision as temp-to-hire employees or employees in temp-to-hire status.

[4] The Employer provided copies of 32 "job requisition forms" for positions to be filled on a temp-to-hire basis which designated the starting pay, shift, education/experience/skills preferred and any specialized training required for the positions.

[5] As the parties stipulated to exclude these temp-to-hire employees from the appropriate bargaining unit in this case, the issue of the relationship between the Employer and the various temporary agencies with

the temp agencies receive, there is a minimum number of days – usually 90 -- for which the temp-to-hire employees must work for the Employer through the temporary agencies before the agencies will release them to be hired as permanent employees of the Employer. Thus, if the Employer wants to convert a temp-to-hire employee to permanent status prior to the 90 day minimum, the Employer must pay a penalty or "buy out" the employee from his or her contract. Although the Employer points out that the average length of time that it has taken a temp-to-hire employee to be converted to permanent employee status is 116 days, there is apparently no limit to the amount of time that an employee can remain in temp-to-hire status and there is wide variation in the amount of time an individual has spent in such status prior to being hired by the Employer as a permanent employee. Of the 19 current permanent employees at the Employer, seven were converted to permanent status prior to the 90 day minimum, but the amount of time the remaining eleven permanent employees spent in temp-to-hire status ranged from 111 to 251 days, with a median of 153 days, or close to five months.

According to the Employer, one of the factors involved in determining how long a temp-to-hire employee remains in such status is that it may take longer to evaluate a temp-to-hire employee for a higher level position requiring more skill, so temp-to-hire employees in higher level positions may not be converted to permanent employees as

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which it contracts for temp-to-hire employees was not litigated at the hearing. It would appear that, if it had been litigated, the Employer and the various temporary agencies would constitute joint employers of the temp-to-hire employees, with the temporary agencies being the supplier employers and the Employer being the user employer. Under the Board's analysis in *Oakwood Care Center*, 343 NLRB 659 (2004), since the temp-to-hire employees would be considered employees of joint employers that are separate and distinct from the Employer, their inclusion in a single bargaining unit along with the Employer's permanent employees would require consent between the Employer and the various temporary agency supplier employers -- a consent that is not present in this case. However, because the Employer apparently supervises and controls the day-to-day working conditions of the temp-to-hire employees, they are not only employees of the temporary agencies, therefore it is appropriate to refer to them using the descriptive term of temp-to-hire employees rather than as temporary employees or employees of temporary agencies.

soon as employees in less-skilled positions such as that of general labor. This is somewhat substantiated by the fact that, according to the records submitted by the Employer, at the time of the June 19 hearing, the temp-to-hire employees filling Batching Coordinator and Dryer Room Operator positions, which appear to be among the more skilled positions at the Employer, had been in temp-to-hire status in those positions for roughly four and five months, respectively. However, the temp-to-hire employee filling the general labor position in the Employer's Bulk Receiving department, which is apparently one of the lowest-skilled positions at the Employer, had also been in that position for over six months. In addition, two of the permanent employees filling the machine operator positions of Dryer Room Operator and Extruder Operator, which are again among the higher-skilled positions at the Employer, were converted to permanent positions after 178 and 233 days, respectively. Thus, according to the Employer, the amount of time that an employee remains in temp-to-hire status prior to being converted to permanent status is based on "individual accountability" and there is no understanding as to when a temp-to-hire employee will transition to permanent employee status. The Employer introduced no evidence as to the past percentages of temporary agency employees who have or have not been hired by the Employer and converted to permanent status, or any historically-based estimates of current or future temp-to-hire employees who likely will or will not be converted to permanent status. Nor did the Employer offer any evidence regarding the attrition rate among either the permanent or temp-to-hire employees.

The Employer's temp-to-hire and permanent employees work side-by-side throughout all of its highly-mechanized production process. The Employer's production

is currently organized into five departments with some degree of cross-over. In the Bulk Receiving/Batching department, the dry ingredients or materials used to produce the product are received and prepared into batches using a computerized formulation system. At the time of the hearing, there were six positions in this department: three Batching Coordinators, who run the computerized batching system, two Material Handlers, who supply the dry materials using a first in/first out system for ingredients, and one General Labor employee who cleans up and provides general assistance.

The second department at the Employer is Extrusion. Since around March of 2012, the Employer has been operating one extrusion production line to produce all of its product. The Extruder is a large piece of equipment that extrudes the mixture of ingredients through various-shaped dies and cuts it to create the proper kibble shapes, then cooks and cools the kibble. At the time of the hearing, the extruder line was operating during a day and swing shift, with four Extruder Operators, all of whom are permanent employees, who operate the extruders, including preparing the ingredients and formulas and monitoring the tooling, densities and moisture levels in the product. It appears from testimony that there is also a position of a Material Handler in the Extrusion department although this position is not currently filled.[6] Unlike the material handler in Batching, the material handler in Extrusion works with wet ingredients including chilled meat slurs and numerous other liquid ingredients that are pumped into a vat and monitored through flow meters.

The third department at the Employer's facility is called Packaging and Shipping. This department includes a Dryer Room, in which the dryer equipment is operated by two

[6] The Employer's witness testified that the Employer has a material handler position in the Extrusion department but later clarified that this position is not currently filled. One of the documents submitted by the Employer indicates that there is currently a material handler position in the Extrusion department.

Dryer Room Operators, one of whom was a permanent employee and one of whom was a temp-to-hire at the time of the hearing. In the Packaging Area, there are two Packaging Lead positions,[7] three Packaging Operators, who operate packaging equipment that puts the product into the bags, and four Packaging Stackers, who stack bags of product onto pallets. All of these Packaging employees are permanent except for one packaging stacker for the small line who was a temp-to-hire employee at the time of the hearing. In the Warehouse, the Warehouse Lead oversees one of the two shifts of "distribution technicians" or distribution techs, who are forklift drivers who load the trucks. At the time of the hearing, the Warehouse Lead was a temp-to-hire, but three of the four distribution techs were permanent employees and only one was a temp-to-hire. Three additional job classifications in this department are filled by temp-to-hire employees: a Shipping Coordinator, who deals with trucking outfits regarding pick-up and deliveries and customers regarding orders, an Inventory Control Specialist, who is responsible for inventory controls, including keeping track of pallets, inventories, and product on the floor, and a warehouse cleanup position.

In the Employer's Maintenance Department, two Maintenance Mechanics, both of whom were temp-to-hire employees at the time of the hearing, are responsible for making repairs and doing preventative maintenance on all of the facility's equipment. The Employer has been trying to fill six additional maintenance mechanic positions since they were posted with the temp agencies in December of 2012.

[7] Only one of the Packaging Lead positions was filled at the time of the hearing. However, the Employer submitted a Job Requisition Form dated June 4, 2013, indicating that the Packaging Department needed to replace a Packaging Lead who had left. According to the Employer's practice as described previously, when this second Packaging Lead position is filled, it will be filled by a temp-to-hire employee.

The Employer's Food Safety department consists of Sanitation and Quality Assurance. Sanitation is responsible for the sanitation of equipment during "clean breaks" when production is shut down and the lines are completely sanitized in order to resume production. In Sanitation, the Sanitation Lead is a permanent employee, but the two Sanitation Technicians are temp-to-hire employees. In Quality Assurance (QA), where the personnel are required to have knowledge of food science, there is a lead, two technicians and an Assistant Quality Assurance Technician. The QA lead and the two QA technicians are permanent, but the assistant QA tech is a temp-to-hire employee.[8]

Thus, as of the June 19, 2013 hearing date in this case, permanent employees filled 19 of the established job positions at the Employer's facility and temp-to-hire employees filled 17 of them.

In terms of the managerial and supervisorial hierarchy at the Employer, the Vice President of Operations, who testified for the Employer at the hearing, is in charge of all of the Employer's operations. There is also a Vice President of Sales, two Production Supervisors (also called shift supervisors), an Inventory Formulations Manager, a Food Safety/Quality Assurance Manager, and a Warehouse Manager.[9]

According to the Employer, it is in the process of rapidly expanding its production capacity, with its current single extruder line operating at only 5% of the plant's eventual total capacity after all planned expansions have been completed. A second extrusion

[8] The three permanent Quality Assurance employees were converted to permanent status prior to the 90 day limit, with the Lead and the first QA tech being converted in February of 2013 after 34 and 39 days in temp-to-hire status, respectively, and the second QA tech being converted in May, 2013, after 82 days.

[9] At the hearing, the parties stipulated that these managers are excluded from the bargaining unit as statutory supervisors possessing Section 2(11) indicia. They also stipulated that the current leads at the Employer, including the Warehouse Lead, Quality Assurance Lead, and Sanitation Lead, do not possess Section 2(11) supervisory indicia. Thus, the Packaging Lead, Quality Assurance Lead and Sanitation Lead would be included in the bargaining unit, but the individual currently occupying the Warehouse Lead position would not be, because he is still a temp-to-hire employee.

production line has been approximately 80% installed and is expected to be operational by mid to late July 2013. As the Employer begins ramping up production on its two extrusion lines, it anticipates production to increase from its current level of 80 tons per week to 1000 tons per week by the end of July, 2013.

Around the first week in June, the Employer posted with the temporary agencies requests for many additional employees to fill anticipated positions to be created as a result of the operation of its second extrusion production line.[10] Although the extrusion line is apparently run by only one operator and one material handler on any one shift, there are related positions to be filled in the other departments. Thus, in addition to posting positions for a new extruder operator and two material handlers (for both the day and swing shifts), the Employer posted positions for first and second shift material handlers and laborers in the Batching Department, for two more dryer room operators (one for each shift) and for an additional packaging operator and packaging stacker. In anticipation of the rapid increase in product to be shipped, the Employer also posted positions for a first shift Warehouse Lead,[11] and for nine additional first and second shift distribution techs/forklift drivers. The Employer expects to have the necessary trained personnel to have a third shift beginning in September or October 2013, so in early June the Employer also posted positions for four additional distribution techs for this third shift.[12] In addition, the Employer is in the midst of a large physical expansion of its

[10] The Employer's witness also testified that he thought these positions were posted on the Employer's website but clarified that the Employer intends to fill all of the positions through the temp-to-hire process with the temp agencies.

[11] Although the record fails to explain whether the current temp-to-hire employee in the warehouse lead position works on the day or night shift, and why the Employer would not already have a warehouse lead position on the other shift, the Employer submitted a job requisition form indicating that it was posting an additional day shift warehouse lead position on June 10.

[12] Until there are enough new distribution techs trained to be able to start a third shift, the Employer intends to handle the increased volume of production by running two 12-hour warehouse shifts.

warehouse, with the first phase to be finished at the end of July 2013, the second phase to be finished at the end of August 2013 and a third expansion eventually planned for January 2014. In total, around the first and second weeks in June, the Employer posted approximately 30 new openings to be filled through the temp-to-hire process in order to realize its plans for expansion in July through October of 2013.

The Employer also has plans to begin operation of a dry, dog biscuit line. While the record is unclear regarding the current operational status of this new biscuit line, it appears that the Employer has already purchased and installed at least some of the equipment necessary for it because it has run samples on it. According to the Employer, the biscuit line requires a different type of batching system than the extrusion lines, molds the product through a rotary motor rather than an extruder, has a 150 foot long oven and has significantly longer drying time and dryers. However, the Employer used an extruder operator to operate the rotary molder to run the samples for its biscuit line because he was familiar with the process of forming product. The Employer plans to post the positions of Biscuit Lead and Biscuit Line Operator around September 1, 2013, and the new biscuit line is expected to be somewhat operational in September and fully operational by December 2013. There is no explanation on the record as to why the Employer would require a lead for a line that has only one operator on it.

In anticipation of the increased production that it expects to have, the Employer also plans to post three other positions around September 1, 2013. Two of these positions are leads: one in Batching and one in Extrusion. The Batching lead would be responsible for maintaining the computer systems in the Batching Department, making sure that the product formulations are up-to-date, and making sure that the first in/first out system for

ingredients is being properly tracked. To do this, the batching lead would have to be familiar with the employer's computer system, so the position would typically be filled by elevating someone from the batching coordinator position. According to the Employer, the Extruder lead position will be needed because, by the time there are three extruders running, the management of the work flow will become more complex because the facility could be running three different products simultaneously. The Extruder lead would be in charge of the extrusion operation, and would be basically an experienced Extruder Operator who would be able to respond to issues the other operators might have with their equipment.

The Employer also intends to post the new position of Electrician around September 1. According to the Employer, the electrician would troubleshoot electrical issues that the Employer has on equipment and also do the installation of new electrical requirements as dictated by the needs of the business.

The Employer also claims that it plans to have a third extrusion production line operational by March or April of 2014. The Employer produced what it characterized as a preliminary contract for the purchase of equipment for this third extruder line. The first part of this preliminary contract consists of a June 12, 2013 invoice indicating that the Employer has placed a "hold fee" of $100,000 for a "Production Slot with Mid November Delivery," but the prices of the equipment on the invoice are "to be determined" (TBD). The second part of the preliminary contract consists of a February 15, 2013 proposal from the extruder supplier describing in detail the extrusion equipment necessary to install a second extrusion line, and quoting a price of $1,910,000. This February proposal states that its prices and specifications are valid for a period of 60 days

from the quote date. The Employer explains that it has taken time to be able to obtain the financing for this additional equipment. There are also other additional pieces of equipment that the Employer will need in order to operate this third line that it had not yet ordered as of the June 19, 2013 date of the hearing in this case.

The Employer claims that it plans to hire an additional 22 employees associated with the introduction of the third extrusion line, including a new batching coordinator, two extruder operators, two material handlers (one for batching and one for extrusion), a general laborer, two dryer room operators, two packaging operators, two packaging stackers, four distribution techs, two maintenance mechanics, another electrician, and three more sanitation techs. According to the Employer, these 22 positions will be posted on or about December 1, 2013, even though the earliest that the third extrusion line would be operational would be March of 2014. The Employer claims that the new line will be at full expected operational capacity by April 2014.[13]

ANALYSIS

The parties have stipulated to the appropriateness of a facility-wide bargaining unit excluding the usual exclusions and the temp-to-hire employees provided through temporary agencies. However, the Employer contends that the petition should be dismissed as premature because it argues that the facility is not yet in full operation and the bargaining unit is expanding. The Board's test for determining whether it is appropriate to conduct an election in an expanding unit is whether the present

[13] The Employer has plans to operate a fourth extrusion line at some time in the future, but has not purchased any equipment towards those plans. It also offered evidence at the hearing that at least one unspecified customer has requested that the Employer eventually produce a new kind of expanded soft moist product, but as of this time any plans to do so are in the initial formulation stage and entirely speculative.

complement of employees is substantial and representative of the ultimate complement to be employed in the near future. See *Celotex Corp.*, 180 NLRB 62 (1970); *Frolic Footwear, Inc.*, 180 NLRB 188 (1969); *Witteman Steel Mills*, 253 NLRB 320 (1981. In determining whether there is a substantial and representative complement, the Board utilizes a case-by-case approach in order to ensure that current employees are not "deprived of the right to select or reject a bargaining representative simply because the employer plans an expansion in the near future," while also ensuring that it does not "impose a bargaining representative on a number of employees hired in the immediate future based upon the vote of a few currently employed individuals." *Toto Industries (Atlanta)*, 323 NLRB 645 (1997). Thus, although not rigidly applied, the Board has generally found an existing complement of employees substantial and representative when at least 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Shares, Inc.*, 343 NLRB 455 n. 2 (2004); *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000).[14] The Board considers such factors as the size of the present work force, the size of the employee complement eligible to vote, the size of the expected ultimate employee complement, the time expected to elapse before a full work force is present, the time and size of projected interim hiring increases before reaching a full complement, the number of job classifications requiring different skills that are currently filled and that are expected to be filled when the ultimate complement is reached, and the nature of the industry. *Toto Industries (Atlanta)*, 323 NLRB 645 (1997). An employer contending that an election is

[14] The Board does not require that the respective 30% and 50% thresholds be exceeded by any particular margin. See *General Cable Corporation*, 173 NLRB 251 (1968) (directing immediate election where at time of hearing employees constituting 31 % of contemplated work force were employed in 50% of planned job classifications).

inappropriate because a bargaining unit is expanding or contracting in the foreseeable future must present evidence that is more than speculative. See *Canterbury of Puerto Rico*, 225 NLRB 309 (1976); *West Penn Hat and Cap Corporation*, 165 NLRB 543 (1967).

Usually, it would be expected that the expansion of production by an employer would result in a corresponding increase in the bargaining unit. However, in this case, due to the Employer's extensive use of temp-to-hire employees and their exclusion from the stipulated bargaining unit, it is necessary to examine both the expansion of the Employer's operation and whether this expansion will result in an expansion of the bargaining unit made up of only permanent employees. Thus, an analysis of the Employer's position regarding an expanding bargaining unit necessitates a reasonable projection as to how many permanent employees will be working for the Employer as of the time relevant for such a projection. However, the evidence is inconclusive on that point due to the Employer's utilization of temp-to-hire employees for what is the equivalent of a probationary period, only some of whom are eventually converted to permanent status. Thus, a projection of the Employer's future permanent workforce requires a determination as to how many of the current temp-to-hire employees, as well as those the Employer plans to utilize in the future, will have been converted to permanent status during the time appropriate for determining a representative complement. Here, for the reasons discussed below, I find that the Employer has not met its burden of presenting evidence sufficient to establish that the agreed-upon bargaining unit is expanding to such an extent as to warrant the finding that there is not currently a

substantial complement of employees in a representative number of the existing job classifications.

As a starting point in my analysis, I find it inappropriate to include as part of the eventual employee complement the 22 positions associated with the creation of the third extrusion production line that the Employer will not be posting until December 1, 2013. In so finding, I note that, as acknowledged by the Employer, the operations that would be staffed by persons hired pursuant to the December 1, 2013, postings will not be fully up and running until around April of 2014. Moreover, these positions initially will be filled with temp-to-hire employees who may or may not ultimately be hired by the Employer into permanent positions. I note that, although the conversion of temp-to-hire employees to permanent employee status may take an average of 116 days from the employees' date of initial employment as temp-to-hire employees, there is no established practice for when such a conversion may take place, and it has often taken much longer than this somewhat skewed average. In these circumstances, I find that the anticipated future installation of the third extrusion line and its resulting increase in employment of permanent employees in the agreed-upon bargaining unit is simply too remote in time to be considered in determining the substantiality of the present workforce. See *Laurel Associates, Inc., d/b/a Jersey Shore Nursing and Rehabilitation Center*, 325 NLRB 603, 604 (1998) (rejecting employer's assertions as to its complement at full capacity 12 months from the hearing date); *Bekeart Steel Wire Corp.*, 189 NLRB 561, 562 (1971) (rejecting employer's claim that petition was premature when it was anticipated to take a year to hire half of the projected full complement); *General Cable Corporation*, 173 NLRB 251 (1968) (with hearing date in June 1968, Board focused on expansion plans in

August and September 1968 rather than on expected full complement by February 1969). I note, as well, that the operations for which those 22 positions would be posted are dependent on the Employer's purchase of both equipment that it has not yet purchased and equipment on which it has placed only an approximate 5% deposit or hold fee. In sum, I find the Employer's projected hiring plans for early 2014 to be too remote in time and speculative to be considered in determining the substantiality of the present workforce in this case. See *Witteman Steel Mills, Inc.*, 253 NLRB 320 (1980) (expansion too indefinite and speculative where dependent upon purchase of new equipment and construction of new building). Even if I were to include the 22 additional positions to be posted as of December 1, 2013, there would, for the reasons discussed below, be an insufficient basis in the record for determining how many of the temp-to-hire employees hired at that time would eventually achieve permanent status, as would be necessary for inclusion in the bargaining unit, and when such status would be achieved.

Consequently, in determining the eventual employee complement, I will focus on the 19 current permanent employees, the 17 current temp-to-hire employees, the 36 currently-posted positions for additional temp-to-hire employees (six of which were posted in December, 2012, and 30 of which were posted in June, 2013), and on the five temp-to-hire positions to be posted as of September 1, 2013, but not on the 22 temp-to-hire positions expected to be posted on December 1, 2013. In so focusing, I begin by noting that, as the parties have agreed to exclude temp-to-hire employees from the bargaining unit in this case, in order for the 19 current permanent employees to constitute less than 30 percent of the eventual complement of permanent employees that the Employer intends to hire before December, the eventual complement of such employees

would have to be at least 64 permanent employees.[15] However, in order for the complement to reach 64 permanent employees by that time, all 19 current permanent employees would have to remain employed, all 17 current temp-to-hire employees would have to be converted by the Employer into permanent positions,[16] and at least 28 of the 41 positions that are either currently posted or will be posted on September 1 would have to be occupied by permanent employees who have been converted from their initial temp-to-hire status. That calls for too high a degree of speculation, particularly given that the current composition of the Employer's workforce is approximately equally divided between the Employer's permanent employees and the temp-to-hire employees and given, as well, the lack of an evidentiary basis for finding that at least 68 per cent (28 out of 41) of the temp-to-hire employees will eventually be hired by the Employer into permanent positions, much less the assurance that such individuals will achieve such status within a particular time period. Adding to the uncertainty is the Employer's failure to produce evidence of attrition rates among either the permanent or the temporary agency employees.[17]

My conclusion as to the speculativeness of the Employer's future workforce composition is reinforced by the fact that as of the June 19, 2013, hearing date in this case, the Employer had not succeeded in locating temp-to-hire employees to staff any of

[15] Nineteen employees out of a complement of 63 employees would constitute 30.2% whereas 19 employees out of a complement of 64 employees would constitute 29.7%.

[16] The difficulty with assuming that all 17 current temp-to-hire employees will be hired into permanent positions is readily illustrated by the fact that two such individuals have been working as temp-to-hire employees since January and February 2013 without having been hired by the Employer as permanent employees before the June 19 hearing in this case.

[17] Although the records introduced by the Employer do not indicate what percentage of temp-to-hire employees saw their employment end at some point prior to the June 19 hearing date, the Employer's records indicate that there was a wide variation over time in the ratio between permanent and temp-to-hire employees at the facility. The ratio ranged from nearly 1:2 in October 2012 (five permanent employees to nine temp-to-hire employees), to nearly 3:1 in March 2013 (16 permanent employees to six temp-to-hire employees), before finally settling at close to 1:1 ratio (19 permanents to 17 temp-to-hire) as of the June 19 hearing date.

the six maintenance mechanic positions that have been posted and available since December 22, 2012. The Employer's admission that it is currently seeking to terminate temp-to-hire employees who are not working out only further supports the conclusion that it would be unduly speculative to presume what portion of the current temp-to-hire employees will ultimately be converted to permanent status by the Employer.[18]

Having concluded that the Employer has failed to demonstrate that its 19 permanent employees will constitute less than 30% of its permanent employee complement as of October 2013, I turn to the second prong of the "substantial and representative complement" test, namely, whether the current employee complement is employed in at least 50 per cent of the anticipated job classifications. As regards that prong, as set forth in more detail in the Facts section above, as of the June 19, 2013 hearing date, there were at least 11 current classifications occupied by permanent employees. (These classifications are Batching Coordinator, Material Handler (Batching), Extruder Operator, Dryer Room Operator, Packaging Lead, Packaging Operator, Packaging Stacker, Distribution Tech, Quality Assurance Lead, Quality Assurance Technician, and Sanitation Lead.) The record also reflects that there were an additional eight classifications that were occupied by temp-to-hire employees as of the hearing date. (These additional classifications are General Labor, Shipping Coordinator,

[18] The Employer asserts in its brief that if one assumes 116 days on average until a temp-to-hire employee is converted to permanent status, all temp-to-hire employees who work out will become permanent by September 2013. However, the Employer's records reflect that employees have waited as long as 119, 126, 147, 152, 153, 154, 159, 161, 178 and 233 days before converting to permanent status, and, as noted, not all temp-to-hire employees remain employed until achieving permanent status, thus necessitating the hiring of new temp-to-hire employees to replace them.

Inventory Control Specialist, Warehouse Lead, Warehouse Cleanup, Maintenance Mechanic, Assistant QA Technician, and Sanitation Technician.)[19]

Although these classifications are not presently occupied by permanent employees, I find that they nonetheless should be included in ascertaining what job classifications currently exist. In that regard, the Employer offered no evidence or suggestion that it intends to eliminate any or all of these classifications in the event that the temp-to-hire employees currently occupying these positions are ultimately not converted to permanent status. To the contrary, the record reflects that if the current temp-to-hire employee occupants of these positions become permanent employees, they will continue to occupy these positions. As such, I find that it would be inaccurate to conclude that these additional eight classifications do not presently exist simply because they are currently occupied by temp-to-hire employees rather than permanent employees. They are not new classifications that will be created as a result of the Employer's expansion plans. Rather, they are existing classifications that are part of the Employer's current production process even though they are filled at this time by temp-to-hire employees. Indeed, the Employer, in arguing that a substantial and representative complement of permanent employees has not yet been realized, appears to assume that

[19] Employer Exhibit 2 (Perfection Pet Foods Staffing Projection), on which the Employer relies for purposes of establishing the appropriate number of job classifications, appears to include certain inaccuracies. For example, it reflects that as of the hearing date, the Employer employed a person in the material handler (extrusion) position but no individual in the material handler (batching) position. Contrary to this exhibit, the testimony at hearing indicated the converse, that the Employer employed an individual in the material handler (batching) position but no individual in the material handler (extrusion) position. Further, while the parties stipulated that the sanitation lead position did not possess indicia of supervisory authority within the meaning of Section 2(11) of the Act and would consequently be eligible to vote in any election, Employer Exhibit 2 incorrectly fails to show sanitation lead as a classification eligible to vote in both the "Job Classifications Eligible to Vote" column and the "Total Job Classifications Eligible to Vote at Plant Capacity" column. Consequently, even assuming arguendo that the remainder of Employer Exhibit 2 is correct, the number at the bottom in the category "Job Classifications Eligible to Vote" should be 11 rather than 10 and the number at the bottom in the category "Total Job Classifications Eligible to Vote at Plant Capacity" should be 24 rather than 23. Accordingly, I will utilize these corrected numbers in my calculations herein.

these eight positions will eventually be filled by permanent employees. Accordingly, even assuming, as the Employer contends, that there will be a total of 24 job classifications in place as of October 2013, 19 of these job classifications currently exist, which clearly exceeds the applicable 50 per cent threshold.

As additional support for this conclusion, I note that, contrary to the apparent position of the Employer, the inclusion or exclusion of a particular classification from the bargaining unit is not dependent on whether the current occupant of that position is a permanent employee or a temp-to-hire employee. If I were to adopt the Employer's position, the appropriate unit in this case would be forever changing as classifications are added into the unit every time a temp-to-hire employee is converted to permanent status, and classifications are dropped from the unit every time a current permanent employee leaves the Employer's employ and is replaced by a new temp-to-hire employee. The stipulated appropriate bargaining unit is facility-wide except for the usual exclusions and the exclusion of "temporary" or temp-to-hire employees, who the parties have agreed are ineligible to vote, but who, nonetheless, constitute an integral part of the Employer's production process. Thus, the bargaining unit includes all current job classifications, whether or not the individuals presently filling those positions are eligible to vote.

In any event, in assessing anticipated future job classifications, the Board looks to whether the projected additional jobs merely involve distinct operations rather than separate and distinct job classifications in terms of types of skills required of the employees. If no significantly different functions are to be fulfilled or no significantly different skills are required, the Board will find the "substantial and representative complement" test satisfied. See *Frolic Footwear*, 180 NLRB 188 (1970). Here, the

Employer's planned expansion is essentially an increase in its existing production capacity and many of the anticipated new job classifications do not differ significantly in terms of function and skill requirements from positions that are currently held by permanent employees. Thus, the current material handler position in the Batching department does not appear to differ significantly from the future material handler position in Extrusion.[20] The future Batching and Extruder Lead positions are expected to be filled by an experienced Batching Coordinator and an experienced Extruder Operator. The future Biscuit Line Operator and Biscuit Lead will run a large computerized production line that is merely a different type of operation (a rotary molder instead of an extruder), but requires essentially the same types of skills as the current extruder line. Indeed, the Employer had one of the current extruder operators run the biscuit line in order to produce samples. See *Endicott Johnson de Puerto Rico, Inc.*, 172 NLRB 1676, 1677 (1968), wherein the Board directed an immediate election where employees were working in less than 50 % of the planned job classifications because the employer's numerous nominally different future job classifications did not describe separate and distinct job classifications in terms of types of skills possessed by employees. See also *Cuello Industries, Inc. d/b/a Scroll Casual*, 278 NLRB 10, 15 (1986) (Board considers whether additional jobs merely involve distinct operations rather than separate and distinct job classifications in terms of types of skills required of the employees). The only anticipated new job classification that truly involves new and distinct types of skills is that of Electrician. Thus, even accepting the Employer's argument that the positions currently filled by temp-to-hire employees should not be considered to make up part of

[20] According to the Employer, the material handler positions in Batching and Extrusion differ because one involves handling dry ingredients and the other involves wet ingredients. There is no indication that the two positions require different types of skills or fulfill significantly different functions.

the present complement of employees, subtracting these five purportedly new job classifications that do not, in fact, involve different types of skills than the current job classifications, results in, at most, 19 separate job classifications, of which 11 are currently filled by permanent employees. Thus, the 11 classifications currently filled by permanent employees constitute 50 per cent or more of the total anticipated job classifications.

In sum, I find that the current complement of 19 permanent employees in the stipulated appropriate bargaining unit is substantial and representative of the bargaining unit employees that can reasonably be projected to be employed by the Employer in the near future based upon the Employer's non-speculative expansion plans. Accordingly, I find the Employer's arguments for dismissal of the petition unconvincing, and I am therefore directing an immediate election.[21]

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

[21] I note that it is possible that some of the employees who were in temp-to-hire status at the time of the hearing may have been converted to permanent status in the intervening weeks between the date of the hearing and the close of the payroll period immediately preceding the issuance of this Decision. If this has happened, these employees will be eligible to vote in the election. However, I cannot extend the eligibility date past the issuance of this Decision in order to allow other potential permanent employees to participate in the election. *K-P Hydraulics Company*, 219 NLRB 138 (1975).

3. The Petitioner claims to represent certain employees of the Employer, and a 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.

4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Employer at its Visalia, California facility excluding all "temporary" (temp-to-hire) employees employed through a temporary agency, office clerical employees, guards, and supervisors as defined in the Act.[22]

There are approximately 19 employees in the unit.

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 or not they wish to be represented for purposes of collective-bargaining by General Teamsters, Warehousemen, Cannery Workers and Helpers, Tulare and Kings Counties, California Local 948. 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.

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

[22] I have modified the bargaining unit description to clarify that, in agreeing to stipulate to the appropriateness of this unit, the parties' use of the "temporary" was not intended to apply the Board definition of this term, but to refer to the "temp-to-hire" employees employed through the various temporary agencies.

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 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 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.

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 the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or before **July 19, 2013.** 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.nlrb.gov**,[23] by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this 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 **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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 a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper

[23] To file the eligibility list electronically, go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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.

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., EDT on **July 26, 2013.** This request may be filed electronically through E-Gov on the Agency's web site, www.nlrb.gov,[24] but may not be filed by facsimile.

Dated: July 12, 2013

/s/ William A. Baudler
William A. Baudler, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

[24] To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located on the Agency's website, www.nlrb.gov.