UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANIELS SHARPSMART, INC.
Employer

and Case No. 02-RC-118836

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 813
Petitioner

DECISION AND DIRECTION OF ELECTION

Daniels Sharpsmart, Inc. ("the Employer") operates a waste transfer station in Bronx, New York. On December 12, 2013, International Brotherhood of Teamsters, Local 813 ("the Petitioner") filed a petition seeking to represent all regular full-time and part-time drivers, driver techs, in-house techs, lead operators, plant, maintenance and warehouse production employees, dock workers, transfer station employees, and plant clericals employed by the Employer at its 1281 Viele Avenue, Bronx, New York facility.

On January 14, 2014, the Employer filed a motion to dismiss the petition. In support of its motion, the Employer contends that the petition is barred by the certification of results that issued in a prior election. On January 15, 2014, the Petitioner filed an opposition to the Employer's motion to dismiss.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act ("the Act"), a hearing was held before a Hearing Officer of the National Labor Relations Board ("the Board") on January 16, 2014.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding I find that: [1]

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a Delaware corporation engaged in the operation of a waste transfer station, with an office and place of business at 1282 Viele Avenue, Bronx, New York. Annually, in the course and conduct of its business operations, the Employer derives gross revenue in excess of $50,000, from commercial customers directly engaged in interstate commerce. Accordingly, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

[1] The parties waived their rights to appear before the Hearing Officer and to file briefs. They agreed to a stipulated record that includes the Employer's motion to dismiss and the Petitioner's opposition thereto.

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

4. 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.

In its motion to dismiss, the Employer urges the Board to dismiss the instant petition as premature because less than twelve months have elapsed since the certification of results issued. As background, the Petitioner previously filed a petition seeking the identical unit and the Board conducted an election on November 15, 2012. The certification of results issued on March 12, 2013. The Employer contends that both Board law and Supreme Court precedent hold that the election bar runs from the date of issuance of a certification – irrespective of whether the election resulted in a certification of representative or a certification of results - *not* from the date of the balloting. In that regard, the Employer argues that it should be free from the expense and burden of another union campaign for an entire year after the certification of results. Further, the Employer argues that the instant petition must be dismissed because the election bar unfairly benefits the Petitioner. The Employer claims that the failure to bar an election for twelve months after certification that the Union lost, is a "results driven" and unfair application of the same principle. Namely, that an election takes a toll on both sides and parties must have a time free from the Union campaign process.

To the contrary, the Petitioner asserts that the instant petition was timely filed. It distinguishes between the election bar set forth in Section 9(c)(3) of the Act, and the Board's "certification year" bar. The latter has been applied, the Petitioner contends, in order to give a newly certified labor union a reasonable period within which to negotiate a collective-bargaining agreement without interference from other unions or unit discontent. The Petitioner claims that no reasoned policy consideration exists to begin counting the statutory twelve month period from the certification of results.

I have considered the arguments presented by the parties. The Employer's motion to dismiss is denied, for the reasons discussed below. Essentially, the Employer confuses the statutory mandate prohibiting more than one election a year, with the Board's certification year rule.

Section 9(c)(3) of the Act provides, in relevant part, that:

> No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

For years prior to the passage of the Taft-Hartley Act in 1947, and specifically Section 9(c)(3) as set forth above, the Board barred petitions for an election for generally one year after the certification of a bargaining representative. *The Hydraulic Press Brick Co.*, 47 NLRB 286, 288 (1943) ("As a general rule, the Board will not proceed with an investigation as to representation where there exists a valid certification less than

a year old, of an active labor organization of clearly established identity"); *Kimberly-Clark Corp.*, 61 NLRB 90 (1945).

The Board did not, however, bar election petitions filed within a year of an election at which no bargaining representative had been certified. As an example, in *Miami Shipbuilding Corp.*, 59 NLRB 1101 (1944), the Board conducted four elections in a single bargaining unit in just under a year and-a-half. A mere seventeen days after the unit employees initially voted for no representation, the Board directed a second election. The petitioning union again proved unsuccessful. The Board directed a third election nine months later. Again, the petitioning union lost. The Board directed a fourth election only eight months thereafter. It was this short spacing of elections that Congress sought to address with the enactment of Section 9(c)(3). "Congress was mindful that, once employees had chosen a union, they could not vote to revoke its authority and refrain from union activities, while if they voted against having a union in the first place, the union could begin at once to agitate for a new election." *Brooks v. NLRB*, 348 U.S. 96, 100 (1954).

After the passage of the Taft-Hartley Act and the addition of Section 9(c)(3), the Board continued to apply the certification year bar. The Board, in *Centr-O-Cast*, 100 NLRB 1507 (1952), explained that:

> "It is a basic principle in Board law that...a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. A Board certification has thus been held to identify the statutory bargaining agent with certainty and finality, free from challenge as to its majority status, for a period of one year, absent unusual circumstances.
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> This minimum period during which the employer, upon proper request, is obligated under the Act to bargain in good faith with the certified union is, we reaffirm, fair and reasonable."

Long ago, the Board rejected the characterization of its certification bar policy as "unfair." The Board, in *Aluminum Co. of America, Newark Works*, 57 NLRB 913, 915 fn. 3 (1944), held that the policy is not designed to confer upon the certified union a right or privilege; instead, the purpose is to stabilize conditions surrounding collective bargaining. It is axiomatic that a certification bar policy is not needed when a union loses an election, as no bargaining follows an election at which a union proves unsuccessful. In other words, when no bargaining will follow an election, there is no need to extend the election bar. The Board has yet to hold differently.

Moreover, it is well-established that the election bar runs from the date of balloting, not the date of the certification of results. *Mallinckrodt Chemical Works*, 84 NLRB 291, 292 (1949) (Rejecting the contention that the election bar runs from the date of the Board's final determination of the results of an election, and holding that the "more

reasonable construction" of Section 9(c)(3) is that the bar runs from the date of balloting); *Kolcast Industries, Inc.*, 117 NLRB 418 (1957); *Retail Store Employees' Union, Local No. 692*, 134 NLRB 686 fn. 5 (1961) ("Under the long-established interpretation of Section 9(c)(3), the Board holds that the 'twelve-month' limitation runs from the date of balloting and not from the date of certification of results *where no union was selected as bargaining representative*." [Emphasis in original.]).

Finally, in arguing for dismissal of the instant petition, the Employer cites to *Brooks v. NLRB*, *supra*. But that case is inapposite because it concerned the application of the certification year bar. There, only a week after a Board-conducted election at which the petitioning union was elected, a majority of the unit employees notified the union and employer of their wish not to be represented by the union after all. Based on this notification, the employer refused to negotiate with the union. The Board, upheld by the Ninth Circuit and the Supreme Court, found the employer to be in violation of the Section 8(a)(5) duty to bargain. In making this determination, it reasoned that the employer could not base a refusal to bargain on a disclaimer of interest submitted prior to the expiration of the certification bar. As the Supreme Court reasoned, "to allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." 348 U.S. at 103.

Here, in contrast, the certification year bar does not apply. No bargaining representative was elected in the prior election. There is no threat here of erosion of the duty to bargain. In the present context, it is the election bar in Section 9(c)(3) that applies. And as stated above, that bar begins to run on the date of the balloting (November 15, 2012), not the date of the Board's certification of election results (March 12, 2013).

In conclusion, based on the record evidence that the instant petition was filed more than one year following the prior election and on current Board law, I am denying the Employer's motion to dismiss and directing an election in the stipulated unit.

5. The parties stipulated that the following unit is appropriate within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time and part-time drivers, driver techs, in-house techs, lead operators, plant, maintenance and warehouse production employees, dock workers, transfer station employees, and plant clericals employed at the Employer's facility located at 1281 Viele Avenue, Bronx, New York.
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> EXCLUDED: All other employees, including office clericals and guards, and professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of

election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit described above.

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 twelve 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. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than twelve months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **International Brotherhood of Teamsters, Local 813** or by **no** labor organization.

NOTICE OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

To insure that all eligible voters 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 Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within seven days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 2's office, 26 Federal Plaza, Room 3614, New York, New York, 10278, on or before **February 12, 2014**. No extension of time to file this list shall be

granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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 NW, Washington, DC, 20570. This request must be received by the Board in Washington by **February 19. 2014.**

In the Regional Office's initial correspondence the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may not be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for e-filing can also be found on the National Labor Relations Board website at www.nlrb.gov. On the home page of the website, select the E-Gov[2] tab and click on E-Filing. Then select the NLRB office for which you wish to e-file your documents. Detailed e-filing instructions explaining how to file the documents electronically will be displayed.

DATED at New York, New York this 5th day of February, 2014.

Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

[2] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for e-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website.