

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

BROOKS BROTHERS,

Petitioner,

-against-

LOCAL 340 AND LOCAL 25, NEW YORK AND
NEW JERSEY REGIONAL JOINT BOARD,

Respondent.

Case No. 2-UC-62745

**OPPOSITION TO RESPONDENT'S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR'S DECISION**

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I. INTRODUCTION

Brooks Brothers respectfully submits this brief in opposition to Local 340 and 25's (the "Unions") Request for Review of the Regional Director's Unit Clarification Decision. As set forth herein, the Unions' Request for Review provides no valid basis for disturbing the Regional Director's Decision. The Regional Director correctly concluded that Brooks Brothers' new store located at 1180 Madison Avenue ("1180 Madison") does not share an overwhelming community of interest with the existing Local 340 and 25 bargaining units consisting of certain other stores in New York, New Jersey and Connecticut. In the absence of a majority showing of interest – which the Unions were not able to obtain – the Regional Director properly clarified that the employees at 1180 Madison are excluded from the existing Local 340 and 25 bargaining units.

Reopening the UC determination of a Regional Director is an unusual and extreme step, limited to very specific and narrow grounds. In most instances, the Unions' Request for Review is essentially a repeat of the various arguments that were already specifically made to, and rejected by, the Regional Director. And in each ruling, as set forth herein and in detail in the Unit Clarification Decision, the Regional Director engaged in a lengthy, detailed, factually and legally accurate analysis of the facts and circumstances in this case, and arrived at the correct rulings. Although the Unions claim that the Regional Director made erroneous factual findings as she attempted to summarize a 1,499 page record, in fact, any actual or perceived error that may exist is harmless or cited out of context by the Unions, and would not change the outcome of the decision.

Similarly, the Unions' arguments regarding mistakes of law by the Regional Director have no merit. Depending on the argument, the cases cited by the Unions are either inapplicable to a unit clarification proceeding in the context of a new store opening, or inapplicable to the

facts contained in the record, or both. Finally, the Unions' arguments that the Regional Director's denial of a motion to dismiss, and subpoena rulings, are incorrect, should be rejected. The Unions' motion to dismiss argument, which essentially seeks to force the application of a facially unlawful accretion clause, is both futile and against Board precedent and policy. Similarly, there is no basis to disturb any subpoena ruling. Both the Hearing Officer and the Regional Director repeatedly found that Brooks Brothers acted in good faith and lawfully complied with its subpoena obligations at every phase of the case, notwithstanding the Unions' rolling and overbroad subpoena requests.

Ultimately, this is a case about preserving an employee's Section 7 right to choose his or her bargaining representative. When Brooks Brother informed the Unions of its intention to open two new stores in the New York area in or about February 2011, the Parties met to discuss certain logistics. Prior to opening, Brooks Brothers informed the Unions that it would recognize them as the bargaining representatives of the employees at one, or both, of the new stores, as soon as the Unions demonstrated a majority showing of interest at each location. And the record confirms that Brooks Brothers took steps to allow the Unions an opportunity to accomplish same. In fact, it recognized the Unions at one of the stores based on being presented with a majority showing. However, Brooks Brothers also informed the Unions that it could not lawfully accrete the new stores into the existing bargaining unit, absent a majority showing. To do so, would unlawfully deprive the new employees of their Section 7 rights.

The Regional Director's decision properly preserved the Section 7 rights of the employees at 1180 Madison. The Unions concede they do not have a majority of interest of the employees at 1180 Madison, and are unable to satisfy their burden of demonstrating sufficient facts to support an overwhelming community of interest between the 1180 Madison store and

bargaining unit stores sufficient to permit the usurping of those employees' Section 7 rights through the doctrine of accretion.¹ Brooks Brothers informed the Unions that this was the case prior to opening the 1180 Madison store, and after a lengthy and thorough UC hearing, including fourteen (14) days of testimony and at least sixty (60) exhibits, the Regional Director issued a detailed forty-one (41) page decision reaching the same conclusion.

Accordingly, based on the detailed decision of the Regional Director, Brooks Brothers respectfully submits that the Board should deny the Unions' Request for Review of the Regional Director's Unit Clarification Decision.

II. ARGUMENT

A. STANDARD OF REVIEW

The Unions have failed to present any grounds for disturbing the Regional Director's Unit Clarification Decision. Granting a Request for Review is an exceptional remedy, only granted where a compelling reason exists, such as a significant error of law or fact which would alter the outcome of the decision. *See Metropolitan Opera Assn., Inc.*, 327 NLRB 740 (1999) (denying request for review where party "failed to present 'compelling reasons' for granting review" (citing Board's Rules and Regulations. Sec. 102.67(c)). Section 102.67(c) of the Board's Rules and Regulations provides only four narrow reasons for granting review of a UC decision:

¹ The Unions' Request for Review resorts to trying to identify any connection between the stores, such as a single visual employee among the larger group retail and stock employees. Brooks Brothers has always conceded that as with any international retail chain, all of Brooks Brothers' stores share some similarities, which was recognized by the Regional Director. However, regarding the items that matter for establishing an overwhelming community of interest for purposes of accretion – a doctrine disfavored by the Board because it deprives employees of their Section 7 rights – the Unions' arguments fall far short. A single employee, or one isolated occurrence, even in the light most favorable to the Unions, do not come close to the high bar necessary to establish the types of employee interchange and common day-to-day supervision which are the most significant aspects of the accretion analysis.

(1) That a substantial question of law or policy is raised because of the absence of, or departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(c).

In this case, the Unions argue three of the four grounds - mistake of law; mistake of fact; and error in denying a motion to dismiss the UC petition and in denying certain items related to the Unions' subpoenas. As set forth herein, the Regional Director's decision and rulings are well supported by the facts on the record and applicable law. Thus, there is no compelling reason for the Board to grant the Unions' Request for Review

B. THE REGIONAL DIRECTOR DID NOT MAKE ANY MISTAKE OF LAW

The Regional Director properly applied well-established Board law in this case. The law in question pertains to permissible practices in connection with the opening of a new store. Specifically, the Unions challenge the weight that the Regional Director attributed to temporary employee transfers during the initial start-up period of the new store for purposes of accretion. They also challenge the purported timeframe from which the Regional Director was supposed to consider the circumstances at 1180 Madison, also for accretion purposes. In both instances, the Regional Director applied the correct legal standard to her analysis.

1. The Regional Director Properly Afforded Little Weight to Temporary Transfers that Occurred During the Initial Start-up Period.

The Regional Director properly rejected the Unions' argument that the initial flurry of activity during a new store opening should be given weight for purposes of accretion and did not

depart from Board precedent. (RFR at 8).² Board law is clear: when assessing accretion, temporary transfers during the initial operation of a new store does not constitute interchange of employees for purposes of finding accretion. *See Super Value Stores, Inc.*, 283 NLRB 134 (1987) (holding that there was insufficient interchange to warrant accretion where employer temporarily transferred unit employees to a new store during its initial operation).³ Here, the Regional Director found that “there is no evidence that any employee transferred between Union stores and the 1180 Madison store, [except for] the temporary placement of unit employees on a part-time basis at 1180 Madison during its first few weeks of operation.” (RDD at 33).⁴ In that context, the Regional Director properly concluded that the factor of employee interchange – one of the most significant factors in the accretion analysis – weighed against accretion. This holding was clearly supported by the record evidence and there is no basis to overturn same.

Recognizing the clear authority in this area, the Unions now attempt to get around it by arguing that it is somehow irrelevant – that the Regional Director committed a mistake of law because a “demand for recognition” was allegedly made, and *Gould, Inc., Electronical*

² “RFR” refers to the Unions’ Request for Review of the Regional Director’s Decision in this matter.

³ See also *Renzetti’s Market, Inc.*, 238 NLRB 174, 176 n.8 (1978) (“[E]mployee interchange . . . involving the opening of another store [is] not entitled to much weight in determining the scope of the appropriate unit.”); *Ohio Valley Supermarkets, Inc.*, 269 NLRB 353, 354 (1984) (“[I]nterchange has almost exclusively involved the opening of new stores and promotions, and thus is not entitled to much weight in determining the scope of the unit.”); *Food Fair Stores, Inc.*, 204 NLRB 75, 76 (1973) (holding amount of interchange insignificant where it “appear[ed] to be due in part to . . . recent opening.”); *Meijer, Inc, dba Meijer’s Thrifty Acres*, 222 NLRB 18, 25 (1976) (holding no accretion where “after the initial flurry of personnel moves necessary to launch a new store, there has been but little interchange between the [new] store employees and those at *Meijer’s* other stores.” (Emphasis in original)); *General Instrument Corporation, Amtote Systems Div.*, 262 NLRB 1178, 1183(1982) (holding that bargaining unit employees working at new facilities “during the start-up operations at both facilities [did] not constitute evidence of an interchange of employees.”); *Pilot Freight Carriers, Inc.*, 208 NLRB 853, 858 (1974) (“[T]he few instances of temporary transfer to [the new terminals] when [the employer] first opened its terminals do not establish a practice of interchange.”).

⁴ “RDD” refers to the Regional Director’s Decision on Unit Clarification Petition in this matter.

Components Div., 263 NLRB 442, 446 (1982) (“*Gould*”) requires the Regional Director to assess recognition from the moment of the demand, even if it happens to be in the middle of a new store opening. The Unions argument – essentially an attempted end around established precedent – has no merit for a number of reasons.

As an initial matter, the Unions’ argument does not match the record. The Unions concede in their brief that no date for an alleged demand of recognition was established in the record, although they try to postulate that it must have happened at some point during the initial period, possibly before the store even opened. (RFR at 6, 39-40; Tr. 1417-18, 1424).⁵ This is non-sensical. The Unions cannot establish that a demand was made simply because they claim they made it. If such a demand was, in fact, made, the Unions had plenty of opportunities to establish the demand date during the many days of hearing. They never did. Thus, even assuming that it had some applicability (which it does not) based on the record, the Regional Director could not apply the principle of law advocated by the Unions, as a date certain for recognition could not be determined on this record, and determining accretion from such an uncertain date is not feasible.

Furthermore, even if a purported demand for recognition occurred during the start-up period, it would still be inappropriate to consider the related temporary personnel decisions as proof of an accretion. In fact, *Gould* and its progeny specifically reject conducting an accretion analysis at the inception of a newly acquired facility and support the Regional Director’s conclusion that an accretion analysis can only consider facts at a point in time **after** a representative complement exists. (RDD at 35 n.11).

In *Gould*, the Board evaluated accretion based on the facts as they existed at the date of

⁵ “Tr.” refers to the hearing transcript in this matter.

the union's demand for recognition, which was a full six (6) months after an employer acquired a new facility, because "to hold that an accretion existed at the inception of the [new facility] would result in denying to the . . . employees their statutory right to select their own bargaining representative." 263 NLRB at 446. The *Gould* Board rejected determining accretion at the inception of the new facility as premature due to the absence of a representative complement. 263 NLRB at 446 n.25, 451-452. Thus, contrary to the Unions' claim, *Gould* actually supports the Regional Director's conclusion that accretion is analyzed after the representative complement of employees and managers are set at a new store. It certainly does not support a finding that it should be considered at some hypothetical time before that complement is in place.

Accordingly, the Regional Director did not commit any mistake of law by declining to assess the state of Brooks Brothers' 1180 Madison store during its opening moments (when a theoretical demand for recognition was made), rather appropriately waiting until the representative complement of management and employees were in place.

2. The Regional Director Correctly Distinguished Additional Cases Cited By the Unions.

As for the cases the Unions cite in addition to *Gould* to support their argument regarding the appropriate period to evaluate when assessing accretion,⁶ they are all distinguishable. The Unions argue that the Regional Director departed from Board precedent by concluding that these cases, which arose in the ULP context, are not dispositive because ULP and UC cases should be decided differently. (RFR at 5). However, the Regional Director did not err, and did not distinguish these cases solely because ULP cases are non-binding to UC cases – she distinguished them on the facts. (RDD at 35 n.11).

⁶ *Brooklyn Hosp. Ctr.*, 309 NLRB 1163 (1992) ("*Brooklyn Hospital*"); *Ready Mix USA, Inc.*, 340 NLRB 946 (2003) ("*Ready Mix*"); and *Progressive Serv. Die Co.*, 323 NLRB 183 (1997) ("*Progressive*").

The Regional Director correctly distinguished *Brooklyn Hospital* because the *Brooklyn Hospital* Board “considered whether the employer violated Section 8(a)(2) of the Act by recognizing unions and applying their contracts at one hospital to previously unrepresented employees of another hospital.” (RDD at 35 n.11). In addition, the Board affirmed the ALJ’s decision to evaluate the accretion analysis based not on the facts as they existed at the time the union’s demand of recognition (309 NLRB at 1168 (union demanded recognition in 1982)), but rather at the time the employer recognized the union - **6 years later** (309 NLRB 1182 (analyzing accretion on the facts as they existed on date the employer recognized the union, November 14, 1988)). Further, the ALJ “noted that [the case was] not the typical accretion situation, where new employees are immediately added to an existing unit as a result of a . . . purchase of a new business.” 309 NLRB at 1184.

Next, the Regional Director properly distinguished *Ready Mix* because the *Ready Mix* Board “considered 8(a)(1) and (5) allegations arising from a successorship.” (RDD at 35 n.11). The *Ready Mix* Board affirmed the ALJ’s finding that the employer violated the Act by refusing to recognize the union, on the union’s demand, three days after the employer purchased the new facilities because, critically, among other reasons, “there was a substantial and representative employee complement at that time.” 340 NLRB at 948. This has nothing to do with the proposition asserted by the Unions herein.

Finally, the Regional Director appropriately distinguished *Progressive*, because the *Progressive* Board “found that the employer unlawfully refused to bargain over including a single employee – a programmer operator – in a bargaining unit with other employees who were represented by the union.” (RDD at 35 n.11). *Progressive* does not involve an opening of a new store with a group of unrepresented employees after an initial start-up period. Rather,

Progressive involves the accretion of a single employee to a bargaining unit of employees that all worked in the same facility.⁷

Thus, as demonstrated above, the Regional Director properly distinguished the cases cited by the Unions, and correctly rejected the Unions argument that the Regional Director erred when she evaluated the opening time period and determined that the temporary placement of unit employees did not support a finding of accretion.

3. The Regional Director Properly Refused to Apply the Accretion Test Developed in *The Sun*, 329 NLRB 854 (1999)⁸

The Regional Director properly applied the traditional accretion test. The Unions argue, however, that the accretion test stated in *The Sun*, 329 NLRB 854 (1999), which was developed in *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982) (“*Bay Shipbuilding*”), should be applied. This, in effect, would convert the traditional high burden on the party seeking to prove accretion to a high burden on the party seeking to require employees to use the Board’s election procedures for representation. 329 NLRB at 857-859. Decades of Board precedent has, however, refused to apply the *Bay Shipbuilding* accretion test to cases involving the opening of a new store. Therefore, the Regional Director correctly determined that it should not be applied here.

In *The Sun*, the employer, who was a party to collective bargaining agreement that

⁷ The Unions also relied on *GHR Energy Corp.*, 294 NLRB 1011 (1089) (“*GHR*”) and *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270 (2005) (“*Frontier*”) in support of their argument that that the Regional Director departed from Board precedent by considering factors that existed after the initial start-up period at the 1180 Madison store. (Opp. at 4). *GHR* is distinguishable because in *GHR*, the union demanded recognition over a year after the employer contracted out its routine maintenance to the employees the union sought to accrete. 344 NLRB at 1048-49. And similar to *Brooklyn Hospital*, *Frontier* is distinguishable because in *Frontier*, the Board determined accretion on the facts as they existed at the time the employer added employees into a unit without an election – not at the earlier date of the union’s demand for recognition. 344 NLRB at 1270 n.3, 1272 n.8.

⁸ The Unions refer to this case as “*John P. Scripps Newspaper Corp.*”

contained a functionally described unit, transferred work from unit employees to a newly created non-unit job classification. *Id.* at 854. The union filed a UC petition to clarify whether the new non-unit employees would remain outside the unit. *Id.* The Board decided to apply the *Bay Shipbuilding* accretion test because *Bay Shipbuilding* and its progeny involved the creation of new job classifications in the face of functionally described units. *Id.* at 859. The Unions, herein, argue that simply because the applicable CBA in this case contains a functionally described unit clause, that this somehow requires the Regional Director to apply the *Bay Shipbuilding* test. (RFR at 11). This is wrong and flies in the face of decades of Board precedent that refuse to use the *Bay Shipbuilding* accretion test to determine whether employees working a newly opened store accrete to a larger unit of employees that work at the employer's other union stores. *See, e.g., Super Value Stores, Inc.*, 283 NLRB at 136 (refusing to apply *Bay Shipbuilding* accretion test where employer temporarily transferred unit employees to new facility because *Bay Shipbuilding* “did not involve the opening of a new facility or the hiring of additional employees to staff”); *Tarmac Am., Inc.*, 342 NLRB 1049, at 1050 n.9, 1056 (2004) (affirming ALJ decision that a typical accretion analysis would not be appropriate because “[the employee at issue] is not working in a new job classification, **or at a new facility**, nor is he part of a historically unrepresented group of employees.” (Emphasis added))

In establishing the *Bay Shipbuilding* accretion test, the Board made it crystal clear that it was creating an accretion test for a scenario distinct from that of a new store opening: A “division of an existing facility cannot and should not be reviewed in precisely the same manner as the addition of a new facility or facilities.” *Bay Shipbuilding Corp.*, 263 NLRB at 1139 (quoting *Rice Food Markets, Inc.*, 255 NLRB 884, 887 (1981)). Further, the Board in *Rice Food*, the case the Board relied upon to develop the *Bay Shipbuilding* accretion test,

distinguished cases where the typical accretion analysis would apply. Specifically, the Board made it clear that the traditional accretion test would apply to the exact scenario addressed in this case where “the addition of one or more retail stores to an existing chain of stores in a particular locality, or the addition of a new plant to a Company’s new plant.” 255 NLRB at 886; *see also Seven-Up/Canada Dry Bottling Co., Div. of Beverage Management, Inc.*, 281 NLRB 943, 946 (1986) (affirming the use of the traditional accretion test where “employees are hired at newly constructed facility, or in connection with the establishment of a new department or operation” but not where “an employer through acquisition or reorganization merges previously separate classifications or categories of employees into a single groups, with a segment thereof having a distinct history of union representation.”) Thus, the Board has already ruled that the *Bay Shipbuilding* accretion test is not applicable to the scenario where a company opens a new, freestanding, facility.

Here, it is undisputed that Brooks Brothers did not create a new classification within an already unionized store or spin-off of an existing store with unit employees. Rather, Brooks Brothers opened an entirely new store and hired new employees. Accordingly, the Regional Director did not depart from Board precedent by not applying the *Bay Shipbuilding* accretion test (which was applied in *The Sun*) to instant case, and this is not a basis upon which to disturb her decision.

4. The Regional Director’s Interpretation of the Parties’ Additional Stores Clause Does Not Require an Unlawful Concession from the Unions.

Lastly, the Unions cite *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970) (“*H. K. Porter*”) to argue that the Regional Director departed from Board precedent by determining that her decision ““does not require a concession from the Unions regarding scope’ and that the

Unions ‘are free to file representation petitions seeking to add these employees in their represented unit through an election procedure.’” (RFR at 24 (citing RDD at 38)). The Unions contend that the general pronouncement by the Supreme Court in *H. K. Porter* that “[t]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements” (397 U.S. at 106) precludes the Regional Director from requiring the Unions to demonstrate majority support. This is a gross misapplication of the Court’s decision.

The Board in a post-*H. K. Porter* decision, *Houston Div. of Kroger Co.*, 219 NLRB 388 (1975) (“*Kroger*”), held that “additional store clauses” must be read to require recognition **only** “upon proof of majority status by a union” and that “the Board will impose such a condition as a matter of law.” 219 NLRB at 389.⁹ In other words, while the parties to a collective bargaining agreement may lawfully agree to waive an election and recognize a union based on a majority showing of support, it is unlawful for a union and employer to simply force a particular union on a group of otherwise unrepresented employees (absent accretion).

There is no support – nor could there be – for the proposition that an unlawful contract clause such as the type that the Union is trying to create, is beyond the jurisdiction of the Board and should be left “undisturbed.” To the contrary, it is the Board’s machinery and process that prevents the very abuse that the Unions are trying to achieve in this case – namely, recognition without majority support and without legal accretion. To sanction a union and employer to circumvent the Board, as the Unions suggest, would license a wholesale abuse of employees’ Section 7 rights. The Supreme Court in *H. K. Porter* never endorsed that kind of bargain, nor

⁹ This is consistent with well-established Board law that “an employer or union cannot insist upon a clause which would be illegal under the Act’s provisions.” *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 360 (1958).

has the Board ever agreed with the Unions' argument to let such an arrangement stand.

Furthermore, the Unions were not deprived of their bargain as they now claim. The Unions received valuable consideration in exchange for whatever they believe they exchanged for the after acquired stores clause – namely Brooks Brothers waived its right to demand an election at the NLRB, and agreed to accept card check as a means of recognition. The Unions have also taken advantage of the lawful use of the Parties' "additional stores clause" by, upon showing of majority support, adding new employees from new stores to their units without an election.

Therefore, for the foregoing reasons, the Regional Director properly applied established Board precedent, and made no error of law.

C. THE REGIONAL DIRECTOR DID NOT MAKE FACTUAL ERRORS AND THE UNIONS WERE NOT PREJUDICED

The Unions argue that the Regional Director made erroneous factual findings in her analysis of the traditional accretion factors of common supervision, functional integration, and employee interchange. Under Section 102.67(c)(2) of the Board's Rules and Regulation, the Board shall grant review of the Regional Director's Decision only if the Board finds that she made an error of fact and such error prejudiced the Unions. 29 C.F.R. § 102.67(c)(2). Here, the Unions identify no errors of significance that would change the outcome of the Regional Director's determination.

1. The Regional Director Did Not Make Factual Errors in Her Analysis of the Common Supervision Factor.

The Unions argue that the Regional Director made the following erroneous factual findings in her evaluation of the common supervision factor in the accretion analysis:

- No date for demand of recognition has been established in the record.
- After the initial start-up period, the store management team at 1180 Madison exercised daily supervisory authority over the employees; and
- The 1180 Madison store managers hire all store employees without consulting with or obtaining approval from outside the store.

(RFR at 37-40; RDD at 35).

As discussed above in Section II.B.1, *supra*, the Unions concede in their submission to the Board that they demanded recognition on **multiple dates**, including before the store even opened, and thus, the Regional Director did not err in her finding that no **one specific date** for demand of recognition was established in the record. (RFR at 39-40; RDD at 35; Tr. 1417-18, 1424).

As for the other two contested facts related to the common supervision factor, the Unions cite the record for examples where hiring and supervision were performed by managers from union stores. However, these facts were not ignored by the Regional Director, but rather, specifically addressed in her decision:

The Union stresses that during the 1180 Madison store's early days, managers and supervisors from the employer's flagship store, which is a Union store, and from higher-level corporate positions were in charge. Some of these managers briefly performed some supervisory functions at 1180 Madison simultaneously with their regular duties. However, the record indicates that the time frame and extent of these dual functions was extremely limited and an aberration from the universally-understood plan for management of the store and from the way the store was managed consistently after its initial weeks of operation. It is clear that after the initial start-up period, the store management team at 1180 Madison exercised daily supervisory authority over the employees. Aside from the single visual employee, no employee at the 1180 Madison store interacted with any manager outside the store after a permanent management team was in place.

(RFR at 35). Therefore, the Regional Director did not err in her findings related to the common supervision factor.

Moreover, even if the Regional Director did err in making these findings related to the

common supervision factor, her ruling that there was insufficient common supervision to warrant accretion would remain undisturbed. This is because, as discussed above in Section II.B.1, *supra*, it would be inappropriate for the Regional Director to determine accretion based on the facts that existed before there was a representative complement at 1180 Madison - before the 1180 Madison store opened and during its initial operation, the times when the Unions allegedly made their demands for recognition. Further, even if the Regional Director's alleged erroneous factual findings did make the common supervision factor favor accretion, the Regional Director's ultimate conclusion that the 1180 Madison employees did not accrete to the existing unit would remain undisturbed because the other factors, including the "critical" factor of employee interchange, all weigh against accretion. *See, e.g., Potlatch Forests, Inc.*, 165 NLRB 1065, 1067 (1967) (finding no accretion despite evidence of common supervision).

2. The Regional Director Did Not Make Factual Errors in Her Analysis of the Functional Integration Factor.

The Unions argue that the Regional Director made the following erroneous factual findings in her evaluation of the functional integration factor in the accretion analysis:

- The Employer has opened and closed individual stores with some regularity and there is no evidence that one store's opening or closing has a significant effect on the operations of any other store.
- There is no [shared computer system] between 1180 Madison and any Union store.
- The work performed at 1180 Madison does not depend on whether the Flatiron store, or any other store, received its deliveries.

(RDD at 30-31). The Unions attempt to call these findings into question by arguing that the Regional Director failed to consider certain facts in the record. However, as shown below, the

facts the Unions rely upon are not relevant to the evaluation of the functional integration factor in the accretion analysis. Therefore, the Regional Director's findings related to the functional integration analysis are not erroneous. But even if they were erroneous, they are not significant enough to require disturbing the Regional Director's ultimate finding that the 1180 Madison employees did not accrete to the existing unit.

a. The Opening or Closing of Any Other Brooks Brothers Store Did Not Impact 1180 Madison For Accretion Purposes

The Unions argue that the Regional Director erred in finding that “the Employer has opened and closed individual stores with some regularity and there is no evidence that one store’s opening or closing has a significant effect on the operations of any other store.” (RFR at 29; RDD at 30). In support of this contention, the Unions provide examples of employee transfers during the initial operation of the South Hampton, Bleeker Street, Rockefeller Center, and the 1180 Madison store. (RFR at 31-32). These employee transfers, however, all relate to the accretion factor of employee interchange – not functional integration of store operations. Further the South Hampton, Bleeker Street, and Rockefeller Center stores opened at least five (5) years before the 1180 Madison store opened, and thus, transfers at these stores during their initial operation is of little relevance, if any, to the accretion analysis at 1180 Madison. Nor could it establish that the 1180 Madison opening had any effect on any other store. Accordingly, the Regional Director did not err in making this finding.

b. The Regional Director Properly Found that There is No Shared Computer System between 1180 Madison and Union Stores.

Next, the Unions argue that “[t]he Regional Director’s finding that ‘[t]here is no [shared computer system] between 1180 Madison and any Union store,’ is erroneous.” (RFR at 32

(citing RDD at 30). To challenge this finding, the Unions point to Brooks Brothers' intranet portal, BIG, which hosts training and labor relations materials, and Hemline, a data entry system used for tracking tailored items. (RFR at 32). However, the Regional Director correctly determined that although store CEO's may access BIG to review certain policies and Hemline to track alterations, there is no centralized computer system for day-to-day operations involving managerial discretion or supervision. Pursuant to Brooks Brothers' decentralized management approach, store CEOs and assistant managers, without any assistance of a centralized or shared computer system, are solely responsible for budgeting, presentation of the store's windows and displays, interviewing, hiring, training, presence on the floor, teaching best practices, scheduling, writing reviews, handling day-to-day grievances, coaching, disciplining, firing, and merchandizing. (Tr. 114, 745, 1027, 1031-33, 1193-94; RDD at 2). Accordingly, the Regional Director did not err in making this finding.

c. The Regional Director Properly Found that the Work Performed at 1180 Madison Does Not Depend on Whether Any Other Store Received its Deliveries.

Finally, the Unions argue that the Regional Director erred in finding that "the work performed at 1180 Madison does not depend on whether the Flatiron store, or any other store, received its deliveries." (RFR at 33; RDD at 30-31). The Unions attempt to contradict this finding by arguing that Brooks Brothers' New York City Regional Merchandizing Director, David Warren, testified "that merchandise gets allocated among various stores, including from 346 Madison Avenue or Lincoln Center, or any the other union represented stores, to 1180 Madison Avenue." (RFR at 33 (emphasis added)). However, this mischaracterizes Mr. Warren's testimony. Mr. Warren did not testify that merchandise gets **allocated** from other stores to 1180 Madison Ave. Rather, he testified that if a store is overstocked with certain merchandise, the

store will **reallocate** the merchandise to another store. (Tr.1024). Notwithstanding the Unions mischaracterization of Mr. Warren’s testimony, allocation or reallocation of merchandise between the stores is irrelevant to the Regional Director’s finding, because her point is that whether a store receives deliveries, from another store or wherever, such deliveries have no effect on the work performed at the 1180 Madison store. Accordingly, the Regional Director did not err in making this finding.

d. Even if the Regional Director Did Err in Her Factual Findings Related to Her Analysis of the Functional Integration Factor, Such Errors Did Not Prejudice the Unions.

Finally, even if there were any minor factual errors, such findings would not have changed the conclusion that the functional interchange prong of the accretion test weighed against accretion. The main fact the Regional Director did consider in finding that the integration of operations between the Brooks Brothers stores does not weigh in favor of accretion – namely, that Brooks Brothers empowers each store manager to be the CEO of their own business – outweighs the facts that the Unions point to, which are of minimal relevance, if any, to the functional integration factor of the accretion analysis. Further, the Board has consistently recognized that a degree of centralized administrative control is characteristic of the retail chain store industry, especially in the areas of recordkeeping, merchandizing, administration, and labor relations policy, and thus, the Board places greater significance on the measure of autonomy that has been vested in the local store manager under whom their employees perform their day-to-day work. *See Haag Drug Co.*, 169 NLRB 877 (1968). Moreover, even if the alleged errors did require a conclusion that the functional integration factor favors accretion, the Regional Director’s ultimate conclusion that the 1180 Madison employee did not accrete to the existing unit would not be disturbed because the two “critical” factors of employee interchange and

common supervision weighed against accretion. (RDD at 32, 33). *See, e.g., Corbel Installations, Inc.*, 360 NLRB No. 3, 19 (2013) (“While the Employer has centralized control over personnel and labor relations policies, payroll, wages and benefits, formal discipline, and new hire training, such matters have been found not to be necessarily determinative, where the evidence also demonstrates significant local autonomy.”); *Pioneer Concrete of Ark., Inc.*, 327 NLRB 333, 336 (1998) (finding no accretion despite integration of wages, 401(k) entitlement, and health insurance).

3. The Regional Director Did Not Make Any Factual Errors in Her Analysis of the Employee Interchange Factor.

The Unions argue that the Regional Director’s conclusion that the employee interchange factor weighs against accretion is based on erroneous factual findings. (RFR at 33). To support this contention, the Unions claim that the Regional Director failed to consider certain facts in the record. However, as shown below, the Regional Director did consider all the facts cited by the Union. Therefore, the Regional Director made no errors of fact in her analysis of the employee interchange factor. But even if the Regional Director did err in her findings related to the employee interchange factor, such errors did not prejudice the Unions.

a. The Regional Director Correctly Found that Employees Did Not Transfer Between the Union Stores and 1180 Madison.

The Unions argue that “[t]he Regional Director’s finding that there is no evidence that any employee transferred between Union stores and the 1180 Madison Store is clearly erroneous.” (RFR at 33; RDD at 33). To contradict this finding, the Unions proffer evidence from the record regarding two temporary transfers to the 1180 Madison store. It is clear from the Regional Director’s Decision that she found that there is no evidence that any employee was permanently transferred to the 1180 Madison store, because her decision specifically provides

that “[t]he only transfers of any sort . . . were the temporary placement of unit employees on a part-time basis.” (RDD at 33 (emphasis added)). Therefore, the Regional Director considered these temporary transfers in evaluating whether there was sufficient employee interchange to warrant accretion.

b. The Regional Director Properly Found that, with the Exception of Two Freelance Visual Contractors, There were No Assignments of Unit or Arguably-Unit Employees into the Store.

The Unions next take issue with “[t]he Regional Director’s finding that ‘[w]ith the exception of two freelance visual employees[,] there were no further assignments of unit or arguably-unit employees into the store.’” (RFR at 33 (citing RDD at 33)). To contest this finding, the Unions argue that the Decision ignores the following four (4) facts:

1. Unionized visual employees performed the work to set up the store and performed the visual work for an extended period of time after the store opened (RFR at 34);
2. The visual department is a centrally directed department, including in the bargaining unit, that has responsibility for all the stores in the geographic areas covered by Local 340 CBA (RFR at 35);
3. The Employer uses the Manhattan seniority group to perform corporate visual work (RFR at 36); and
4. 1180 Madison Avenue visual coordinators worked alongside other unionized visual coordinators with regard to Fashion Week and other corporate events (RFR at 36).

None of these contentions, however, contradict the factual finding that, with the exception of two freelance visual contractors, there were no assignment of unit or arguably-unit employees into the store.

With respect to the Unions first fact that the Regional Director allegedly ignored, that unionized visual contractors performed the work to set up the store and performed

the visual work for an extended period of time after the store opened, the Unions reference one employee and two freelance contractors that the Regional Director did, in fact, consider in her employee interchange analysis: one temporary employee, Luis Leon, and two visual contractors, Noel Melendez and Terry Washington. (RDD at 33, n.10 (“Even if Mendelez and Washington were properly considered unit employees in 2011 for the purpose of demonstrating interchange, . . . when added to the hours of temporarily transferred unit employees, still does not amount to more than a minimal presence of unit employees for start-up activities.”))

The Unions last three facts speak generally to the visual department and not to the specific employee interchange the 1180 Madison store. Therefore, they do not contradict the Regional Director’s finding that, with the exception of two freelance visual contractors, there were no further assignments of unit or arguably-unit employees into the store. Accordingly, the Regional Director did not err in her factual findings related to the employee interchange factor.¹⁰

c. Even if the Regional Director Did Err in Her Factual Findings Related to the Employee Interchange Factor, Such Errors Did Not Prejudice the Unions.

Even assuming the Regional Director did erroneously fail to consider all the temporary transfers the Unions allege to have been transferred to and from the 1180 Madison store, the Regional Director’s ruling that there was insufficient employee interchange to warrant accretion would remain undisturbed. This is because the Unions failed to proffer any evidence of permanent transfers to the 1180 Madison store and none of the temporary transfers reflect actual

¹⁰ The Unions argument that the Regional Director made an erroneous factual finding by ignoring certain facts is further refuted because the Regional Director’s mere failure to reference a particular fact does not establish that she failed to consider the particular fact, but simply indicates that the Regional Director decided that the fact did not alter her overall analysis. *See KFC Nat’l Management Co.*, 214 NLRB 232, 234 (1974).

employee interchange. As discussed above, sporadic personnel moves during the opening period of a retail store have historically been excluded from assessing interchange of facilities because they are not representative of the actual operation of the subject facilities. *See* n.3, *supra* at p.5. Further, the two temporary transfers that the Unions reference, Mr. Melendez and Mr. Washington, were not even employees when they worked at 1180 Madison, but rather freelance independent contractors.¹¹ Thus, because they were never employees at 1180 Madison, their temporary placement at 1180 Madison is irrelevant to the **employee** interchange factor for purposes of accretion. Finally, even if the Regional Director’s alleged erroneous factual findings did make the employee interchange factor favor accretion, the overall ruling of no accretion would remain undisturbed because the Board has held that even if there is some evidence of employee interchange, there is no accretion where other factors, including the “critical” factor of common supervision, all weigh against accretion. *See e.g., Save Mart of Modesto, Inc.*, 293 NLRB 1190, 1194 (1989) (finding no accretion despite evidence of employee interchange); *Hotel & Restaurant Employees' & Bartenders' International Union, Local 274*, 282 NLRB 939, 940 (1987) (same).

D. THE REGIONAL DIRECTOR PROPERLY DENIED THE UNIONS’ MOTION TO DISMISS THE UC PETITION

The Unions argue that the UC petition should have been dismissed on two separate grounds. Neither argument has any merit.

¹¹ In settling a 2012 grievance between Brooks Brothers and the Unions over the employee status of Mr. Mendelez and Mr. Washington, the Parties agreed that, for the time they worked at 1180 Madison, each of these individuals were “considered an independent contractor of Brooks Brothers, and nothing, herein shall be construed as an admission by Brooks Brothers that such individuals were employees of Brooks Brothers during such times.” (Respondent’s Exhibit 36). Although the Unions “reserve[d their] right to argue otherwise to the NLRB,” the Unions failed to make any argument regarding the employment status of Mr. Mendelez and Mr. Washington in their Request for Review. (*Id.*).

1. The Regional Director Correctly Denied the Unions' Motion to Dismiss Claiming That the Petition Was Actually a Work Assignment Dispute.

The Regional Director correctly denied the Unions' motion to dismiss the UC petition on the basis that the Unions' claim that a unit clarification petition at a new store was really a work assignment dispute under the existing collective bargaining agreement had no merit. The Regional Director distinguished *Rice Food Markets, Inc.*, 255 NLRB 884 (1981) ("*Rice Food*") and its progeny because "the Board explicitly affirmed the ALJ's finding that the situation was not equivalent to that in which a new store was opened." (RDD at 37). The Unions repeat this same argument to the Board, and it should similarly be rejected.

In *Rice Food*, a grocery store chain was required to separate its liquor departments from its grocery stores due to the enactment of a new Texas statute. 255 NLRB at 885. To comply with the new statute, the grocery store chain erected walls between the liquor departments and the grocery stores and built separate entrances. *Id.* The Board affirmed the ALJ's decision not to apply the traditional accretion test because the liquor stores were "not wholly new, either in function, in staffing, or in location." *Id.* at 886. The ALJ carefully distinguished the case from the scenario where a company opens a new store: "What we have here . . . is more of a spinoff from than an addition to the existing supermarkets. It is not, and this is the significant point, the same as opening a new food (or liquor or bakery) store would be." *Id.* at 887. The facts, here, are clearly distinguishable from *Rice Food*. Brooks Brothers' 1180 Madison store is not a spinoff of one of its existing stores. It was not created by partitioning an existing store and building a separate entrance. It is an entirely new store. Thus, the Regional Director correctly applied the traditional accretion test.

The additional cases cited by the Unions to support their argument that the petition raised a work assignment dispute are also distinguishable. *Cincinnati Gas & Elec. Co.*, 235 NLRB 424

(1978) (“*Cincinnati*”) is distinguishable because the Board in *Cincinnati* held that the case did “not represent a unit issue resulting from an enlargement or extension of the Employer’s operations[,] the Employer has simply decided to rearrange the assignment of existing work.” 235 NLRB at 425. Here, Brooks Brothers did not rearrange assigned work, but did enlarge the operation by adding an entirely new store.

Aggregate Indus. & Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631, 2013 NLRB LEXIS 517 (July 8, 2013) (“*Aggregate*”) is also distinguishable because the Board in *Aggregate* held that an employer unlawfully changed the scope of two separate units by applying a different contract to the same group of drivers that were performing the same work, at the same locations, with the same trucks, using the same procedures. Here, Brooks Brothers did not diminish or enlarge the scope of a unit. Brooks Brothers’ temporary use of Union employees did not remove them from their respective units and the newly hired employees at the 1180 Madison store were never in the units. Further, the Unions acknowledge that a majority of the new employees did not want representation. (Tr. 1456, 1487).

In further support of their argument, the Unions seek to create the impression that Brooks Brothers is some kind of union-busting entity, claiming - without any support in the record - that as soon as Brooks Brothers was apprised of the Unions interest in representing employees at the new store, Brooks Brothers devised a plan, at that moment, to avoid unionization. (RFR at 19, 23). There is simply no truth to these salacious allegations, and they are not supported anywhere in the record. To the contrary, as supported by the record, prior to opening the store, Brooks Brothers met with the Unions and informed them that the Company could not lawfully accrete the new stores into the existing bargaining unit and specifically informed them that they would need a majority showing of interest. The Unions were given access to the employees and the

opportunity to get cards. In one case, the Unions were successful and Brooks Brothers recognized that the Unions represented the employees in that store. In the case of 1180 Madison, the Unions could not obtain enough signed authorization cards to demonstrate a majority showing and Brooks Brothers took the only position that it could - to respect the wishes of its employees. This is a far cry from union-busting.¹²

Accordingly, there is no support for the Unions contention that Brooks Brothers removed any unit work from the 1180 Madison store. *Rice Food* is, therefore, inapplicable to this case and the Regional Director correctly denied the Unions' motion to dismiss based on its argument that the petition raised a work assignment dispute.

2. The Regional Director Appropriately Ruled that Brooks Brothers Did Not Waive its Right to Utilize the Board's Forum

Next, the Regional Director correctly denied the Unions' motion to dismiss on the basis that a UC petition should not have been available to Brooks Brothers, and to do otherwise would deprive the Unions of the benefit of their collective bargaining agreement.¹³ In other words, the Regional Director refused to interpret the parties' additional store clause to permit automatic accretion to the existing unit without either facts to support such accretion or majority support. The Unions rely on *Verizon Info. Sys.*, 335 NLRB 558 (2001) ("*Verizon*") in support of this argument. However, beyond the fact that the Board in *Verizon* specifically stated that the "issue is **not** . . . whether the Petitioner . . . waived its right to file a representation petition" (335 NLRB

¹² The Unions argument that Brooks Brothers decided, midstream, to avoid unionization is further refuted by the testimony of Union Representative Elba Liz, who confirmed that the unit employees themselves were aware that their assignments to 1180 Madison was temporary and only until a permanent complement of employees at 1180 Madison could be hired. (Tr. 1484-85).

¹³ As described above in Section II.B.4, *supra*, the Unions were not deprived of their bargain as they now claim. The Unions have taken advantage of the lawful use of the Parties' "additional stores clause" by, upon showing of majority support, adding new employees from new stores to their units without an election.

at 560 (emphasis added)), the Regional Director properly distinguished *Verizon* from the instance case.

In *Verizon*, the Board held that a CBA barred a UC petition where the CBA contained a specific provision that required “the issue of the description of [the bargaining] unit [to] be submitted to arbitration,” and also required the employer to supply the union a list of employees, their work locations, job titles and home addresses, as well as, provide union access to the employer’s work locations. 335 NLRB at 558. The Regional Director properly distinguished this case on the grounds that “there has been no explicit agreement between the parties to submit unit issues to an arbitrator and [Brooks Brothers] has not availed itself of any benefits derived by the contract or other agreements which could be viewed as estopping it from availing itself from Board processes.” (RDD at 38). The Unions attempt to convert the parties’ additional stores clause in the applicable CBA (Local 25 CBA, Art. 25) into a provision that specifically requires the parties to arbitrate unit scope issues. However, the applicable CBA, here, lacks any provision requiring the parties to arbitrate unit scope issues. The Board in *Tweddle Litho, Inc.*, 337 NLRB 686 (2002) specifically distinguished *Verizon* on this very same fact, reversing a Regional Director’s decision to defer a UC petition to clarify employees at a newly leased facility to arbitration because - unlike *Verizon* - there was no agreement to arbitrate unit scope issues. 337 NLRB at 686.

Moreover, the Board in *Verizon* discussed that while it has “required employers to honor agreements to recognize a union as the representative of employees in stores acquired after the executing of a collective bargaining agreements,” it has only done so “**upon proof of majority support for the union.**” 335 NLRB at 559 n.7 (citing *Houston Div. Kroger Co.*, 219 NLRB 388 (1975) (“*Kroger*”)) (emphasis added). The *Kroger* Board makes it absolutely clear that

“additional store clauses” must be read to require recognition **only** “upon proof of majority status by a union” and that “the Board will impose such a condition as a matter of law.” 219 NLRB at 389. Here, the Unions acknowledge that they lacked majority support from the new employees at the 1180 Madison store. (Tr. 1456, 1487). Accordingly, the additional stores provision in the applicable collective bargaining agreement does not bar Brooks Brothers’ UC petition and, thus, the Regional Director did not depart from Board precedent by denying the Unions motion to dismiss based on this provision.

E. THE REGIONAL DIRECTOR’S SUBPOENA RULINGS SHOULD BE AFFIRMED

In her September 13, 2012 decision, the Regional Director properly affirmed the Hearing Officer’s ruling that Brooks Brothers reasonably complied with Subpeona Duces Tecum No. B-707528 (“B-707528”) and that the actual information sought by the Union had minimal probative value, and further delay of the excessively long proceedings was unjustifiable. The Unions now argue that the Board should grant their Request for Review because the Regional Director erred in ruling that Brooks Brothers “made reasonable efforts to comply with paragraphs 3-6 of Subpeona Duces Tecum No. B-707528.” (RFR at 41). The Unions do not provide any new argument to the discussion. They simply repeat the same arguments that were flatly rejected by both the Hearing Officer and Regional Director. Therefore, there is no reason to overturn the Regional Director’s well-founded ruling that Brooks Brothers reasonably complied with B-707528. Last, even if the Regional Director did err in this ruling, the Unions were not prejudiced because there were no documents that were not produced that would have changed the Regional Director’s ultimate decision.

It is well-established Board policy to resolve representation cases as expeditiously as

possible.¹⁴ The Unions openly flouted this policy by abusively issuing at least four rolling subpoenas duces tecum and numerous subpoenas ad testicum in this case over a two year period, even for records that the Union should reasonably have known it wanted at the beginning of the hearing. Brooks Brothers made every effort to comply with the Unions' requests. But the Unions did not stop there – they filed four requests to the Regional Director for special permission to appeal the Hearing Officer's subpoena rulings; a request for the enforcement of two subpoenas; and a request for additional hearing days to submit further evidence and further examination of witnesses.

1. Procedural Background of Regional Director's Ruling on Subpoena Duces Tecum No. B-707258.

On March 7, 2013, almost a year into the UC proceeding, the Unions issued Subpoena Duces Tecum No. B-707258 ("B-707258"). Request nos. 3-6, requested:

- All emails, communications, memos, letter or notes exchanged between David Warren and all store managers, assistant managers, CEOs, contractors, temporary workers or employees of the Employer's stores.
- All emails, communications, memos, letter or notes exchanged between Gerry Ferdella and all store managers, assistant managers, CEOs, contractors, temporary workers or employees of the Employer's stores.
- All emails, communications, memos, letter or notes exchanged between Paul Sadowski and all store managers, assistant managers, CEOs, contractors, temporary workers or employees of the Employer's stores.
- All emails, communications, memos, letter or notes exchanged between and among Paul Sadowski, David Warren and Gerry Ferdella relating to the

¹⁴ See NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11000, "Agency Objective." ("The expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations. The processing and resolution of petitions raising questions concerning representation . . . are to be accorded the highest priority."); see also *NLRB Representation –Case Procedures Facts Sheet*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/news-outreach/fact-sheets/nlr-representation-case-procedures-fact-sheet> (last visited February 12, 2015).

Manhattan stores.

(Subpoena Duces Tecum B-707258).

On June 11, 2013, Brooks Brothers sent the Unions, via email, documents responsive to B-707258. Brooks Brothers notified the Unions in its June 11, 2013 email, which was cc'd to Hearing Officer Gregory Davis, that "Mr. Warren's email inbox reached capacity at the end of February 2013, and deleted earlier emails to make room to receive new emails, which have been produced and were retained upon receipt of the Union's subpoena." (Brooks Brother June 11, 2013 email to the Unions). On June 24, 2013, the Unions requested the Regional Director to enforce B-707258 by ordering Brooks Brothers to "take all necessary steps to retrieve deleted emails, including the hiring of outside vendors if necessary, to accomplish that result." (The Unions June 24, 2014 request for enforcements at p.2).

The Regional Director responded to the Unions June 24, 2013 request for enforcement in an order dated June 25, 2013. She reminded the Unions that the Hearing Officer limited the production of to any emails, communications, memos, or letters pertaining to the 1180 Madison store for the first five (5) months of January, the period from January to May 2011. (Regional Director's June 25, 2013 Order at p.2). The Regional Director also found that "some ambiguity exists regarding the existence of responsive documents." Accordingly, the Regional Director referred the matter to the Hearing Officer to determine whether Brooks Brothers complied with the subpoena. (*Id.*)¹⁵

On July 23, 2013, the Hearing Office denied the Unions' request to compel Brooks

¹⁵ In response to the Regional Director's June 25, 2013 order, Brooks Brothers explained to the Hearing Officer in a letter dated July 1, 2013, that Brooks Brothers produced to the Unions all communications in their possession from David Warren, Paul Sedowski and Gerry Ferdella relating to, or to or from, the 1180 Madison store. (Brooks Brothers July 1, 2013 letter to Gregory Davis at p.1).

Brothers to take additional steps to comply with B-707258. (Hearing Officer July 23, 2013 order at p. 6). The Hearing Officer applied the standard under Federal Rule of Civil Procedure (“FRCP”) 26(b)(2)(C), which requires consideration of the following factors: “The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving these issues.” (*Id.* at p. 5 (citing Fed. R. Civ. P. 26(b)(2)(C))). In his analysis, the Hearing Officer acknowledged that twelve (12) Brooks Brothers officials testified in this matter, including David Warren and Paul Sadowski, and fifty (50) exhibits were entered in the record, including exhibits which show the employees and managerial complement at the 1180 Madison store at its inception through August 2012. (*Id.* at p. 6). The Hearing Officer found that Brooks Brother not only made a reasonable efforts to comply with the documents sought in the subpoena, but also, based on the record and the emails produced by Brooks Brothers, that there was no evidence that any deleted emails would yield probative evidence, making an order for Brooks Brothers to hire a vendor to restore any deleted emails unjustifiable. (*Id.*).

Unsatisfied, on August 4, 2013, the Unions filed their fourth and final special permission to appeal the Hearing Officer’s July 23, 2013 order regarding, among other things, the ruling that Brooks Brothers made reasonable efforts to comply with B-707258. (The Unions’ August 4, 2013 special appeal at p.1). In its appeal to the Regional Director, the Unions requested that Brooks Brothers be sanctioned for spoliation of evidence. (*Id.* at p.3). The Unions argued that sanctions are justified because Brooks Brothers sought “to shield itself from its discovery obligations to the Union by its willful policy of keeping its employees ignorant.” (*Id.* at p.6). The Unions, however, did not proffer any evidence demonstrating that Brooks Brother

maintained a “willful policy” to keep employees ignorant – because there was no such policy. Further, the Unions did not request that the Regional Director impose sanctions on Brooks Brothers, but rather “hold a hearing on sanctions, which would have caused additional unjustifiable delay in concluding the year and half long “expedited” proceeding. (*Id.* at 12).

On September 11, 2013, the Regional Director properly denied the Unions request for further production by Brooks Brothers, affirming the Hearing Officer’s ruling that Brooks Brothers has made reasonable efforts to comply with the production of documents sought in requests nos. 3-6 of B-707258. (Regional Director September 11, 2013 order at p.1). In affirming the Hearing Officer’s July 23, 2013 ruling, she affirmed the reasoning that the actual information sought by the Union had little to no probative value, and balancing Brooks Brothers’ compliance, the long overdue nature of proceeding, and burdensomeness of the requests, further delay was unjustifiable.

2. The Regional Director Properly Affirmed the Hearing Officer’s Ruling that Brooks Brothers Complied with the Unions’ Subpoena Duces Tecum No. B-707258.

The Unions now request review of the subpoena rulings by rehashing all the same arguments that the Regional Director squarely rejected. Because the Unions do not advance any new argument, there is no reason to disrupt the Regional Director’s well-founded ruling that Brooks Brothers reasonably complied with B-707258 considering that the actual information sought by the Union had minimal probative value and that further delay of the excessively long proceedings was unjustifiable. Additionally, there is no reason to grant the Unions’ request for sanctions because there is no evidence in the subpoena record, or the entire record, that Brooks Brothers willfully withheld responsive documents to B-707258 or any of the subpoenas issued in this case. Rather, the record shows that Brooks Brothers not only produced voluminous

documents, in addition to many witnesses, in response to the Unions subpoenas, but Brooks Brothers also fully disclosed that Mr. Warren deleted emails for reasons unrelated to the instant proceeding. Accordingly the Regional Director did not err in denying the Unions request for Brooks Brother to hire a vendor to produce deleted documents or for spoliation sanctions.

3. The Regional Director's Order Denying the Unions Request for Brooks Brothers to Hire a Vendor to Restore Deleted Documents Did Not Prejudice the Unions.

Grounds for review under Section 102.67(c)(3) require the Unions to establish not only that the Regional Director erred in a ruling, but also that the error prejudiced the Unions. 29 C.F.R. § 102.67(c)(3). The Unions have failed to demonstrate any real prejudice by the Regional Director's September 11, 2013 ruling. The Unions would like the Board to believe that Mr. Warren deleted a treasure trove of highly relevant emails, but it is clear from the emails Brooks Brothers produced to the Unions that Mr. Warren deleted only a few emails to free up space for new incoming email. (Brooks Brother June 11, 2013 email to the Unions). The Unions contend that the deleted emails are relevant to the accretion analysis by arguing that some of the produced emails concern transfers of unit employees from Union stores to 1180 Madison. As discussed above and as the Regional Director and Hearing Officer have previously recognized, it is well established that the initial flurry of temporary personnel moves necessary to launch a new store has limited to no probative value regarding the accretion analysis. *See* n.3, *supra* at p.5. Therefore, even if Brooks Brothers did hire an expensive vendor and the vendor did restore the deleted emails and Brooks Brothers did produce the deleted emails, the Regional Director's ultimate decision that there was no accretion would remain undisturbed. Accordingly, the Regional Director's ruling that Brooks Brothers complied with B-707258 was not prejudicial error.

III. CONCLUSION

For the forgoing reasons, Brooks Brothers respectfully submits that the Board should deny the Unions' Request for Review and affirm the findings, rulings, and ultimate decision of the Regional Director that the 1180 Madison store employees are excluded from the Unions' existing bargaining units.

Dated: New York, New York
February 23, 2015

Respectfully submitted,



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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

BROOKS BROTHERS,

Petitioner,

-against-

LOCAL 340 AND LOCAL 25, NEW YORK AND
NEW JERSEY REGIONAL JOINT BOARD,

Respondent.

Case No. 2-UC-62745

CERTIFICATE OF SERVICE

I, Adam Roth, hereby certify that on February 23, 2015, I served a true and correct copy of Petitioner's Opposition to Respondent's Request for Review of the Regional Director's Decision via Electronic Mail on:

Thomas M. Murray, Esq.
Kennedy, Jennik & Murray, P.C.
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New York, New York 10003
(212) 358-1500
tmurray@kjmlabor.com

A true and correct copy of same was filed with the Regional Director of Region 2 via e-filing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 23rd day of February 2015 in New York, New York.

By: _____


Adam J. Roth