

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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Adam Beaty,  
Petitioner

L&L Fabrication, LLC,  
Employer

Case 16-RD-232491

Sheet Metal Workers International Association Local 68,  
Union

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**EMPLOYER L&L FABRIACTION, LLC'S REQUEST FOR REVIEW**

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**ATTORNEY FOR EMPLOYER**

## **REQUEST FOR REVIEW**

On December 19, 2018, Regional Director Timothy Watson dismissed the Petition for a Decertification Election filed in this case. (Ex. 1). That dismissal was based solely on the Board's "voluntary recognition bar" doctrine. *See Lamons Gasket Co.*, 357 NLRB 739 (2011).

Employer L&L Fabrication, LLC (hereinafter "L&L") submits this Request for Review pursuant to National Labor Relations Act Rules and Regulations. The Board should grant review because this case presents compelling reasons for reconsideration of the "voluntary recognition bar." Employer requests the Board overrule *Lamons Gasket*, or in the alternative, find that *Lamons Gasket* does not apply considering the unique factors presented in this case.

## **ISSUES PRESENTED**

1. Should *Lamons Gasket* be overruled, thereby allowing L&L employees to conduct a secret ballot election to decertify the Union prior to March 4, 2019?
2. Should L&L Employees be permitted to conduct a secret ballot election and decertify the Union prior to March 4, 2019, because the unique factors presented in this case warrant an exception to the *Lamons Gasket* six-month recognition bar.

## **INTRODUCTION**

*Lamons Gasket* does not protect employees or further the purposes of the Act. The six-month recognition bar set forth in *Lamons Gasket* puts union security before the interests of employees. This recognition bar at issue silences the collective voice of employees and turns that voice over to the Union, even where the Union no longer speaks on behalf of employees.

For over forty years, the Board has recognized that where an employer unilaterally recognizes a union as its employees' representative, the Union should be afforded a "reasonable time" to negotiate an agreement on behalf of the employees. *See, e.g., Keller Plastics, Inc.*, 157 NLRB 583, 587 (1966). In *Dana*, the Board limited the effect of voluntary

recognition on employee free choice by establishing a notice requirement and a forty-five (45) day decertification period in order for a voluntary recognition bar to apply. *See Dana Corp.*, 351 NLRB 434 (2007). Deviating from decades of well-established precedent, the Board in *Lamons Gasket* put union security over employee free choice, creating a six-month minimum recognition bar where an employer voluntarily recognizes a union, regardless of whether employees were aware of the effect of recognition. *See Lamons Gasket Co.*, 357 NLRB 739 (2011). The one-size-fits-all recognition bar established in *Lamons Gasket* is inconsistent with the principles expounded in Board law for nearly fifty (50) years and, as applied in this case, deprives employees of their rights under the Act.

### **STATEMENT OF FACTS**

L&L Fabrication is small operation, exclusively manufacturing sheet metal duct, that was established in July of 2015. Prior to hiring any employees, L&L entered into a pre-hire agreement with Sheet Metal Workers International Association Local 68. This pre-hire agreement recognizing Local 68 as bargaining representative for L&L employees was unlawful in light of the fact that L&L is not in the construction industry.<sup>1</sup>

On or about August 15, 2018, the Union produced authorization cards signed by a majority of L&L sheet metal employees, and in an effort to honor the purported wishes of L&L employees, L&L voluntarily recognized the Union. Despite recognition occurring in August of 2018, the Union had served as the bargaining representative for L&L employees (albeit unlawfully) since L&L's inception in July of 2015.

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<sup>1</sup> Please refer to Region 16 findings prior to withdrawal of Union's Charge No. 16-CA-221196.

On September 4, 2018, L&L first met with the Union to bargain over the terms and conditions of employment for L&L employees. Throughout bargaining the Union pushed the Employer to accept the terms of a standard form agreement, which was entirely unworkable for a manufacturing business. The Union dug its heels in on permissive bargaining issues that had no relation to the terms and conditions of employment for L&L employees. A bargaining representative for the Union went so far as to say that he would rather see L&L go out of business than back off the package the Union had negotiated with other contractors. The Union also admitted they did not have one other manufacturing employer in the Local, thereby acknowledging that this Union may not be the best representative for L&L employees. *See* relevant portions of Employer's Bargaining Notes, attached hereto as Exhibit A.

During bargaining, the Union engaged in bad faith conduct away from the table, which not only hurt labor relations between the Union and L&L, but also were detrimental to L&L employees. Correspondence attached as Exhibit B shows that the Union engaged in unfair labor practices and ceased bargaining in good faith months ago. Moreover, the Union ceased holding itself out as the bargaining representative for L&L employees by encouraging them to quit their jobs with L&L and requiring affiliates of the Union to discontinue relationships and service with L&L.

After seven in-person bargaining meetings and efforts to bargain via email, the Union refused to meet with L&L and ceased bargaining in good faith. *See* Correspondence from Calvin Young to Jennifer Sweeny, attached hereto as Exhibit B. Mr. Young conditioned the Union's willingness to return to the bargaining table on L&L's acceptance of a wage proposal, which included permissible subjects of bargaining. When L&L rejected the unreasonable and

regressive wage proposal put forward by the Union, the Union ceased all bargaining efforts with L&L.

As a result of Mr. Young's refusal to bargain, L&L had no choice but to file unfair labor practice charges against the Union. In connection with those charges, L&L produced documents evidencing the Union's bad faith conduct. While L&L maintains the Union engaged in several unfair labor practices throughout bargaining, as alleged in these charges, L&L elected to temporarily withdraw its charges against the Union to allow its employees to exercise their Section 7 and Section 9 rights once L&L learned an RD Petition had been filed.

Adam Beaty filed the RD Petition on December 10, 2018 on behalf of the majority of employees who no longer desire to be represented by this Union. Mr. Beaty's RD Petition was dismissed by the Region, which held that decertification was barred until March 4, 2019 pursuant to the six-month recognition bar to decertification established in *Lamons Gasket*. Both the Petitioner and the Employer are requesting further review of the Region's dismissal of Mr. Beaty's RD Petition.

### **ARGUMENT AND AUTHORITIES**

“[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.” *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944) emphasis added. A recognition bar is used to “promote the primary goal of the [NLRB] by stabilizing labor-management relationships and so promoting collective bargaining, without interfering with the freedoms of employees to periodically select a new representative or reject representation.” *Id.*; see also *In re UGL-UNICCO Service Company*, 357 NLRB 801, 801 (2011). Applying a recognition bar in this case would neither stabilize labor-

management relationships nor promote collective bargaining; it would only interfere with the employees' efforts to select their own bargaining representative.

**1. The *Lamons Gasket* Six Month Recognition Bar Should be Overturned.**

A. The Focus Must Be on the Employees' Right to Choose Their Representative.

Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representative of their own choosing ... and shall also have the right to refrain from any or all such activities.

29 U.S.C. Section 157.

Until *Lamons Gasket*, the Board had long favored the established representation procedure of secret ballot elections over the dubious voluntary recognition process in protecting employees' Section 7 rights. See *Dana Corp*, 351 NLRB at 439.

The Board has been tasked with protecting employees' rights to choose a bargaining representative or to choose to represent themselves in connection with the terms and conditions of their employment. Under the Act, employees have an inalienable right to have a voice when it comes to their employment. *Lamons Gasket* silences that voice for six months in favor of union security.

Board precedent does not just recognize the importance of employees' right to choose, but also that employees have the right to change their mind. This is evidenced by the fact that an employee is free to revoke his or her authorization card at any time, and a union is prohibited from preventing an employee from so doing. Further, under the Board's "dual card" doctrine, when an employee signs two documents with conflicting statements of union support — for example, signing a card both for and against union representation — then neither document is a valid proof of the employee's representational preference. See *Parkwood Developmental Center Inc.*, 347 N.L.R.B. No. 95 (2006); *Le Marquis Hotel, LLC*, 340 N.L.R.B. No. 64 (2003). Given

this well-established precedent, the *Lamons Gasket* recognition bar seems even more inconsistent with Board law and the undisputed protections afforded to employees under the Act.

If a union desires more certainty than a revocable card check provides, the Union should be required to go through the process of being certified by the Board, or at a minimum, send the 45 day notice of employees' right to decertify, as set forth in *Dana*. After all, the Act does not guarantee unions a return on their investment in organizing employees. Unions exist to serve employees; not the other way around. See *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999). For this reason, L&L requests the Board review the Region's dismissal of the RD Petition and ultimately overturn *Lamons Gasket*, allowing L&L employees to clarify their present sentiments with respect to the union by voting in a secret ballot election.

B. *Lamons Gasket* has a Chilling Effect on Section 7 Rights.

The Board should consider whether the *Lamons Gasket* recognition bar furthers the purpose of the act or whether this recognition bar has a "chilling effect on Section 7 rights." See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). While this test has generally been applied in the context of employer work rules, it should be considered in connection with any rule that may adversely affect an employee's ability to exercise his or her Section 7 rights.

L&L employees are fed up. They have been threatened, lied to, and left in the lurch for months as the Union continued its campaign to put everyone at L&L out of work. These employees have asked the NLRB for help decertifying this Union, but unfortunately, they have been told their collective voice cannot be heard until March of 2019 under *Lamons Gasket*. *Lamons Gasket*, as applied in this case, deprives employees of a collective voice in favor of the voice of a union that may no longer enjoy majority support.

Depriving employees of their right to choose, where the union has not been certified and there is no collective bargaining agreement in place, has a chilling effect on Section 7 rights. The *Lamons Gasket* recognition bar does not just chill the rights of L&L employees in this case but all employees wish to speak out against their union or refrain from union representation. As such, L&L asks the Board to review the Region's application of *Lamons Gasket* and consider whether the one size fits all six-month recognition time bar has a chilling effect on employees' Section 7 rights.

C. Regions Should Have Discretion to Determine What Constitutes a "Reasonable Time" on a Case by Case Basis.

Board law regarding recognition bars spanning from *Keller Plastics, Inc.* to *Dana Corp.*, have given the Regions a clear road map to determine when a reasonable amount of time has lapsed, such that employees can proceed with an RD petition. The *Lamons Gasket* recognition bar not only undermines an employees' Section 7 rights; it also demonstrates the Board did not trust the Regions to decide what was "reasonable" on a case by case basis. Lee

The Board has provided the Regions a clear test to determine whether a reasonable time has passed before employees may proceed with decertification. See *Lumber & Building Material Corp.*, 334 NLRB 399 (2001). Regions are to consider: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the progress made in negotiations and how close the parties are to an agreement; and (5) whether the parties are at an impasse. *Id.* at 402.

The Regions have the tools and should have the discretion to look at a particular set of facts and determine whether employees should be able to proceed with an RD petition and

secret ballot election. *Lamons Gasket* strips Regions of discretion, even where doing so is detrimental to the Region's ability to ensure employees are safeguarded by Sections 7 and 9 of the Act. The Board should overturn *Lamons Gasket* to give the Regions discretion when determining the rights of employees following voluntary recognition of their Union by their employer.

D. A Secret Ballot Election is the Best Way to Ensure L&L Employees' Section 7 Rights are Observed.

The Board has acknowledged there is good reason to question whether card signings in connection with a card check recognition accurately reflect employees' true choice concerning union representation. *See Dana Corp*, 351 NLRB at 439. The best way to determine employee sentiment is to conduct a secret ballot election, and that is just what a majority of L&L employees are seeking.

In *Dana Corp.*, the Board clarified just why secret ballot elections are more valuable than voluntary recognition: (1) a secret ballot election is more reliable because it is held under the watchful eye of a neutral Board agent and observers from the parties; while a card signing has none of these protections; (2) there is a strong potential for unions or employers to provide misinformation to employees about the card check process; (3) secret ballot elections are clearly more fair and democratic than undemocratic card check campaigns; and (4) secret ballot elections create less of a risk to employees of coercion by the union or employer. *Id.* at 438-439.

**2. The Six Month Recognition Bar Should Not Be Applicable to Mr. Beaty's Decertification Petition Considering Surrounding Circumstances.**

The case at bar is a prime example of how *Lamons Gasket's* one-size-fits-all, six-month minimum recognition bar undermines the purpose of Act by depriving employees of their right to

choose a bargaining representative or refrain from union membership. However, arguing in the alternative, L&L requests the Board review the Region's application of *Lamons Gasket* in this situation, in light of the Union's misconduct and the bargaining history between L&L and the Union.

A. The Union Must Not Be Rewarded for its Misconduct.

During bargaining, the Union engaged in bad faith conduct at the table and away from the table. The Union has made clear that it is no longer representing L&L employees in good faith by filing internal union charges against these employees for continuing to work at L&L and telling L&L customers not to do business with L&L. Statements by bargaining representatives for the Union demonstrate this Union cannot adequately represent the interest of L&L employees while maintaining the gains the Union has made in bargaining with construction industry employees. *See* relevant portions of Employer's Bargaining Notes, attached hereto as Exhibit A. Yet, despite the Union's disregard for the interests of L&L employees, the Region had no choice but to give the Union additional time before facing a decertification election.

On October 24, 2018, the Union unlawfully withdrew from bargaining via email, because L&L would not accept a regressive wage proposal that required, among other things, L&L to contribute to funds that appeared only to benefit employers in the construction industry or the Union itself. *See* Correspondence from Union, attached hereto as Exhibit B. The Union is not currently bargaining with L&L and has not shown any interest in bargaining with L&L in the future, unless L&L gives into the Union's unlawful and unreasonable demands. In effect, the Union declared impasse when it knew full well L&L was ready, willing, and able to continue bargaining.

L&L filed unfair labor practices charges against the Union (see attached) for the ULPs the Union committed throughout bargaining, but in order to allow the employees' RD petition to be processed, L&L has (temporarily) withdrawn those charges. The evidence L&L provided in connection with those charges demonstrates the Union has not represented employees in good faith and is undeserving of additional time to bargain on their behalf.

The *Lamons Gasket* time bar protects unions from decertification even where the union is undeserving of such protection, and even where such protection is violative of employees' Section 7 rights. This recognition bar favors union security or employee choice, even though the Act provides the Union no such security. As such, the Board should review the Region's application of *Lamons Gasket* in this case, and upon review, find that *Lamons Gasket* should not apply.

**B. L&L Employees Have Given this Union Much Longer than Six Months to Succeed.**

This Union has represented L&L employees, albeit unlawfully, since L&L was established in July of 2015. L&L and the Union signed off on a multi-employer bargaining agreement in 2015, which governed the terms and conditions of employment for L&L employees. Although the NLRB ultimately found this agreement was void due to the fact that the Union did not establish a 9(a) relationship with L&L employees, the Union has continued to treat L&L employees as an established bargaining unit within the Local. There should be no question L&L employees have afforded this Union much more than six months to prove themselves and are entitled to a secret ballot decertification election.

**CONCLUSION**

L&L employees asked the NLRB to assist them in determining whether Local 68 has a majority of support by allowing them to vote in a secret ballot election. This election would

be the first time L&L employees would have the opportunity to truly choose their representative.<sup>2</sup> While many L&L employees signed a revocable authorization card to show support for this Union, they never were provided notice of the effect of their authorization cards. Nor can it be said with any certainty that L&L employees voluntarily signed the authorization card, free from coercion or threats.

The Region's dismissal of Mr. Beaty's RD Petition deprives L&L employees of the right to choose their own representative in favor of union security. The *Lamons Gasket* recognition bar protects unions from the loss of employee support during bargaining, even where unions are undeserving of such protection. *Lamons Gasket* must be overruled to afford all employees the opportunity to be heard and truly effectuate the purpose of the act. In the alternative, *Lamons Gasket* should not be applied to Adam Beaty's RD Petition, considering the history between L&L and the Union and the Union's bad-faith conduct.

L&L Fabrication respectfully requests the Board reconsider the Region's dismissal of Mr. Beaty's RD Petition, overturn *Lamons Gasket*, and schedule a secret ballot election for L&L employees as soon as possible.

Respectfully submitted,

/s/ Jennifer Bley Sweeny  
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Fort Worth, Texas 76107  
[jennifer@blumenfeldsweeny.com](mailto:jennifer@blumenfeldsweeny.com)

**ATTORNEY FOR EMPLOYER**

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<sup>2</sup> Many L&L employees were previously in the construction industry and became members of the Sheet Metal Workers Union, initially, by way of a pre-hire agreement between the Union and their previous employers.

# **EXHIBIT A**

**(Bargaining Notes from Final Two Meetings)**

**Meeting 6 - October 2, 2018**

**Calvin, Buddy, Henry // Jenny, Rob, Joe**

**Start Time: 9:06 am**

**Union states that International will not make any changes to fringe package**

**Jenny:** Do bargaining reps have the authority to bargain over proposals?

**Calvin:** Confirms he has authority to bargain over terms and conditions of employment

**Company Request for Information-** other contracts and compensation packages for other employers who are just in manufacturing industry

Break for caucus, need to come to table with good faith offer counter proposal; L&L cannot support offer Calvin brought to table, made no concessions to L&L off,

**Calvin** is adamant will not come down from wage offer. "We worked too hard to wage benefits over last 5-6 years even if it means L&L will close down"

**Jenny:** L&L Fab agreed pre-hire to assume the same pay and benefit levels, along with fringes, that Lewis and Lambert employees had. They have stayed there, even though our guys aren't contractors— manufacturing.

**Break (time?)**

**Return at 1030am**

**Union Proposal**

- 1. Union proposes one year agreement**
- 2. Delete contribution to SMACNA industry funds**
- 3. Ration 1-5 instead of 1-3  
(Calvin revise 29.95 to 29.00)**
- 4. 6 Month intervals instead of one year \$1.20 savings.**

**Jennifer:** Union only giving away SMACNA's money. Union unwilling to take a haircut- would rather employees take the financial hit.

Union will not negotiate a lower rate on the other funds.

**Union request for Information- Payroll information—want employee salaries (bargaining unit and admit)**

**Jenny:** If the Union is not going to make any financial concessions, is the Union willing to give the company no ratios, no equalization, and unlimited or longer move up time for PATs?

**Rob:** Still plan to keep Journeyman- not trying to get rid of anyone

**Buddy:** "Can't be member of the Yacht club if you do can't afford a yacht."

**Next Meeting Friday October 5, 2018 @ 9:00 am.**

## **Meeting 7 - October 5, 2018**

Calvin, Buddy & Henry

Jenny, Rob & Joe

9:50 am – Negotiations begin

**Jenny:** Need New Authorization forms for due's verification.

### **Union produces responsive information to information requests**

- Explanation of health benefits
- Copy of pension plan
- No contracts for manufacturer only shops (no others in Local 68)
- Did not produce information for Local 67

### **Company proposal on employee classification and definitions/Job descriptions**

**Break** > 10:17 am – 11:15 am

### **Union makes updated wage proposal**

**Calvin:** Need counter offer for wage proposal or have members vote. Union has made best offer to date. Last best final!

**Calvin:** Company should not do an .81 wage increase across the board- don't have to do an across the board increase.

**Jenny:** We priced out health outside the Union, and it may not be feasible, and the Union's plan isn't going to result in a cost savings. We anticipated getting some savings from the health plan, but now we need to get that money from elsewhere.

**Calvin:** Must have a Wage & Fringe agreement with L&L to move forward. Company needs to present last final package for vote include all fringe benefits into last proposal.

### **Jenny and Calvin will proceed via email with final and counter proposals.**

Jenny: Company can't deduct anything without lawful dues deduction authorization. Want to make sure employees are eligible to vote on our package. Let Company know how we can help get employees eligible to vote.

**11:30 am End Meeting.**

**EXHIBIT B**  
**(Relevant Correspondence)**

Jennifer Sweeney  
October 24, 2018

Thank you for your invitation to meet again at the table. Please review my revised copy of the proposed wage increases. If L&L Fabrication agrees to the current proposal with written acceptance of the (wages, fringes and ratio's) as proposed, Local 68 would agree to further negotiate on the Articles in the SFUA. I feel that it is in the best interests of the members of Local 68 and L&L Fabrication to get this resolved as soon as possible.

Thanks  
Calvin Young

**2018 AGREEMENT**

between

**International Association of Sheet Metal, Air Rail and Transportation Workers  
Local Union No. 68 and L&L Fabrication, LLC**

*All of the terms and conditions set forth in this Agreement shall begin November 1, 2018 and shall remain in effect through November 30, 2020, with the following specific exceptions:*

**A. Journeyman Wages (Addendum No. 2 to Article VIII)**

- Effective **May 1, 2019** there shall be a Journeyman hourly wage rate increase applied of sixty cents (\$.60).
- Effective **November 1, 2019** there shall be a Journeyman hourly wage rate increase applied of sixty cents (\$.60).
- Effective **May 1, 2020** there shall be a Journeyman hourly wage rate increase applied of sixty cents (\$.60)

**B. Journeyman Upgrade Training**

Eligibility to receive a May 1<sup>st</sup> hourly wage increase, beginning May 1, 2019, is contingent upon a Journeyman's successful completion of eight (8) hours (minimum) industry-related upgrade training during the preceding twelve (12) month period. Said "industry-related upgrade training" shall be overseen and coordinated by the appointed Joint Apprenticeship and Training Committee. Completed training beyond eight (8) hours may carry over and apply to the subsequent year's minimum upgrade training requirement.

**C. Classified Worker Wages (Addendum No. 2 to Article VIII)**

Effective **November 1, 2018** the minimum hourly base wage rate shall be forty-five percent (45%); and hourly contributions to the International Training Institute (\$.12), the National Energy Management Institute (\$.03) and the SMW Occupational Health Fund (\$.02) shall be applied.

Effective **May 1, 2019** and continuing thereafter a Classified Worker shall receive a **May 1<sup>st</sup> wage increase**, based on the May 1<sup>st</sup> contractual wage increase applied the Journeyman, provided the Classified Worker's successful completion of eight (8) hours (minimum) industry-related upgrade training during the preceding twelve (12) month period. Said "industry-related upgrade training" shall be overseen and coordinated by the appointed Joint Apprenticeship and Training Committee.

**D. Pre-Apprentice Wages (Addendum No. 2 to Article VIII)**

Effective **November 1, 2018** the minimum hourly base wage rate shall be forty-five percent (45%); and hourly contributions to the International Training Institute (\$.12), the National Energy Management Institute (\$.03) and the SMW Occupational Health Fund (\$.02) shall be applied.

**E. Maintenance of Benefits (Addendum No. 30)**

Effective **May 1, 2019** the Employer's maximum hourly cost per the provisions of Addendum No. 30 shall not exceed twenty-five cents (\$.25) a year.

*Agreed to and in witness whereof the \_\_\_\_ day of \_\_\_\_\_, 2018.*

\_\_\_\_\_  
SMART Local Union No. 68, Business Manager

\_\_\_\_\_  
L&L Fabrication, LLC

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**From:** [jsweeny@dphllp.com](mailto:jsweeny@dphllp.com) [mailto:[jsweeny@dphllp.com](mailto:jsweeny@dphllp.com)]

**Sent:** Thursday, November 1, 2018 12:19 PM

**To:** Calvin Young <[calvinlu68@hotmail.com](mailto:calvinlu68@hotmail.com)>

**Subject:** Re: L&L

You are correct. We remain willing to bargain, but L&L will not be coerced into agreeing to a regressive wage and fringe proposal that was clearly made by the union to frustrate our efforts to bargain. You have not left us much choice other than to file a ULP charge. It's my hope that the NLRB can get the union to bargain in good faith with full authority to enter into agreements on ALL mandatory bargaining issues. Once our charge is prepared/filed, I will send you a courtesy copy.

Jennifer

On Nov 1, 2018, at 9:40 AM, Calvin Young <[calvinlu68@hotmail.com](mailto:calvinlu68@hotmail.com)> wrote:

I have not heard back from you, I am taking this as a no.

*Calvin Young  
Business Manager/FST  
SMART Local Union 68  
817-267-9213*