

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

CUTTER OF MAUI, INC.

Employer-Petitioner

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 142

Union

SUPPLEMENTAL DECISION AND ORDER

Upon a petition duly filed in the above-captioned case under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding,¹ the undersigned finds:

¹ I hereby include as Board Exhibits 2(a) through (g), a post-hearing stipulation with attached documents signed by the parties on February 25 and 26, 2004, respectively. The documents attached to this stipulation include my administrative order dated June 9, 2003, dismissing this petition; the Board's Order dated August 27, 2003, reinstating this petition and remanding this case to me for hearing and supplemental decision; my letter dated September 10, 2003, notifying the parties that a blocking charge had been filed in Case 37-CA-6521-1 (with a copy of the charge attached); and the return receipts for such documents. It should be noted that Board Exhibit 2(f) is a signed copy of Board Exhibit 2.

I also take administrative notice of and include in the record as Board Exhibits 2(h) through 2(l), the following documents: as Board Exhibit 2(h), a letter dated December 31, 2003, from Acting Regional Director Joseph P. Norelli, notifying the parties, in relevant part, that the Section 8(a)(5) refusal to bargain and refusal to provide information allegations of the charge in Case 37-CA-6521-1 were being placed in abeyance pending the outcome in the instant proceeding; as Board Exhibit 2(i), a letter from Subregion 37 dated April 13, 2004, notifying the parties that Case 37-CA-6521-1 was being taken out of abeyance; as Board Exhibit 2(j), a copy of the Complaint and Notice of Hearing in Case 37-CA-6521-1; as Board Exhibit 2(k), a copy of the Amended Complaint and Notice of Hearing in Case 37-

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

2. The parties stipulated, and I find, that the Employer, a Hawaii corporation, is engaged in the sale and repair of automobiles. During the twelve-month period ending December 31, 2003, the Employer derived gross revenues in excess of \$500,000 and purchased and received goods and materials valued in excess of \$5,000 which originated from points located outside the State of Hawaii. Based on the parties' stipulation to such facts, I find that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.

3. This determination is made upon the Board's August 27, 2003, Order granting review of my administrative dismissal of the instant petition and remanding the case to me for a hearing and issuance of a supplemental decision.² The hearing in this matter was held on February 2, 2004. Upon a careful review of the record of that proceeding, I find as follows:

CA-6521-1; and as Board Exhibit 2(l), a copy of the Employer's Answer to the Amended Complaint in Case 37-CA-6521-1.

² After the Board remanded this case to me, the Union filed a blocking charge in Case 37-CA-6521-1, on September 10, 2003, alleging that the Employer had violated Section 8(a)(1), (3) and (5) of the Act by, *inter alia*, refusing to bargain and failing to provide the Union with requested information necessary for collective bargaining. That charge was placed in abeyance on December 31, 2003. By letter dated April 13, 2004, the parties were notified that Case 37-CA-6521-1 was being taken out of abeyance. Thereafter, on July 9, 2004, an Amended Complaint and Notice of hearing issued in Case 37-CA-6521-1 alleging that the Employer had violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union on May 9 and July 25, 2003; and by refusing to furnish the Union with requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit since April 17, 2003. As a remedy for the unfair labor practices alleged, the Amended Complaint seeks an order requiring the Employer to, *inter alia*, bargain in good faith with the Union for the period required under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

On January 21, 2003, the Union was certified in Case 37-RC-4033, as the exclusive collective-bargaining representative of the Employer's employees in the following unit, herein referred to as the Unit:

All maintenance, parts and service employees employed by the Employer, excluding automobile salesperson, outside parts salesperson, dispatchers, service writers, office clerical employees, guards and supervisors as defined in the Act.

The Employer filed the instant petition on May 9, 2003, seeking an election in a unit comprised of all full-time parts and service employees employed by the Employer at its dealership at 237 Dairy Road, Kahului, on the Island of Maui, Hawaii; and excluding sales persons, dispatchers, service workers, office clerical employees, guards and supervisors. The Union objected to the Employer-filed petition on the basis that a certification bar existed to the processing of the petition.

By letter dated June 9, 2003, I administratively dismissed the petition, reciting the Union's certification in the unit described above, and stating in relevant part, as follows:

Thereafter, on March 31, 2003, Employer sold part of its dealership located on Hana Highway and transferred the unsold portion of the dealership to its Kahului location on Kahului Beach. On April 1, 2003, the Employer began operating a new service department on Dairy Road to service vehicles now sold at the Kahului location. All of the employees who work for the new service department on Dairy Road were employees of the Employer or were members of the bargaining unit as certified by the Board on January 21, 2003. * * * Thus, the instant petition was filed well within the 1-year certification period. It has long been the Board's policy to treat a certification with certainty and finality for a period of one year. Furthermore, even though the employees are now working in a different location of the Employer, there is sufficient continuity of the bargaining unit certified by the Board on January 21, 2003. I am therefore, dismissing the petition in this matter in accordance with the above principle.

As noted above, the Employer timely filed with the Board a request for review of my administrative dismissal of the petition and the Board issued an order reinstating the petition and remanding the matter to me for hearing and issuance of a supplemental decision. The hearing was held on February 2, 2004.

The Union contends that the petition should be dismissed because a certification bar exists to bar the petition. Contrary to the Union, the Employer asserts that because of unusual circumstances, including the sale of one of its dealerships, the lay off of all of its employees at that dealership, and the discontinuance of its sales and servicing relationships with two automotive franchises, no certification bar exists and that the petition should be processed. For the reasons discussed below, I find that a certification bar exists to bar the instant petition and I will dismiss the petition.

The record reflects that the Employer is in the business of selling and providing maintenance and repair services for automobiles. Pursuant to a Stipulated Election Agreement in Case 37-RC-4033 approved by the undersigned on December 4, 2002, an election was held among the Employer's Unit employees on January 10, 2003. The tally of ballots served on the parties at the conclusion of the election reflects that of approximately 36 eligible voters, 22 cast ballots for and 11 cast ballots against representation by the Union. The Union was certified, as the exclusive collective-bargaining representative of the Unit on January 21, 2003.

At the time the Union was certified as the representative of the Unit, the Employer operated two automobile dealerships located within three miles of each other on the Island of Maui: one dealership was located at 260 Hana Highway (the Hana dealership); the other was located at 25 Kahului Beach Road (the Kahului dealership). At

the Hana dealership, the Employer sold nine lines of automobiles, including six General Motors (GM) lines (Buick, Cadillac, Chevrolet, GMC, Oldsmobile, and Pontiac) and three non-GM lines (Hyundai, Mazda and Volkswagen). At the Kahului dealership, the Employer sold two lines of automobiles: Mitsubishi and Nissan. At the time of certification, the Employer employed approximately 96 employees, including 35 Unit employees. The 35 Unit employees included 17 service technicians, two pre-delivery inspection (PDI) technicians, eight parts employees and eight lot attendants. All but five of the Unit employees were employed in the service and parts departments at the Hana dealership. The five remaining employees were employed as sales lot attendants in the sales department at the Kahului dealership but performed work at both dealerships.

At the time of the Union's certification, the service and parts departments for the Employer's two dealerships were located at the Hana dealership. Both departments were located in the same building at that facility. The service department performed automotive warranty repairs, customer repairs, maintenance, and pre-delivery inspections of new vehicles. In this regard, the Employer maintained warranty service agreements for thirteen lines of automobiles including the eleven lines it sold and two GM lines that it did not sell: Saturn and Hummer. Thus, eight of the thirteen automobile lines serviced by the Employer, were GM lines.

The service department at the Hana dealership consisted of nineteen bays or stalls where the service technicians performed automotive repairs. Service Manager Brett Glass was assisted by four service advisors (also called assistant service managers) each of whom oversaw a team of service technicians. At the time the Union was certified, the Employer employed a total of seventeen service technicians. About four or five service technicians worked on each service advisor's team. Of the four teams of service technicians, two teams specialized in servicing GM automobile lines; one team (that of Service Advisor Dennis LeFort) specialized in servicing Volkswagen and Mazda automobile lines; and the fourth team specialized in servicing Nissan and Hyundai automobile lines. The service department also included two pre-delivery inspection technicians who performed pre-delivery inspections of new automobiles to ensure that everything on the vehicle was in working order.

At the time of the Union's certification, the parts department at the Hana dealership ordered and maintained the parts necessary for the service department. It was headed by a parts manager, an assistant parts manager and an inventory clerk. Of the eight Unit employees working in the parts department, four worked at the counter, selling or delivering parts to wholesale and retail customers and to the service department, and three worked in "freight," checking in, inspecting and inventorying incoming freight. One parts department employee worked as a delivery driver. About seventy to eighty percent of the duties of the parts department employees related to handling GM and Nissan parts.

At the time of the Union's certification, the Employer also employed approximately eight Unit lot attendants. Three of the lot attendants worked in the service

department at the Hana dealership. Their duties included moving customer cars in and out of the service department. The remaining lot attendants, called sales lot attendants, worked in the sales department at the Kahului dealership. Their duties included picking up new cars arriving at the pier, cleaning the vehicles, and preparing them for customer delivery. About seventy to eighty percent of the service and sales lot attendants' work involved moving GM or Nissan cars.

The record reflects that during a meeting held in January 2003, Employer President Nick Cutter announced to employees that the Employer was selling its Hana dealership and its GM and Nissan service franchise rights to Jim Falk Motors, another dealership. Cutter told the employees that they would be terminated on March 31, 2003, but that they could apply for employment with both the Employer and Jim Falk Motors. The record further reflects that on January 21, 2003, the Employer sent a letter to its employees notifying them that the assets of the Hana dealership were being sold, that the Hana dealership would cease operating on March 31, 2003, and that they would be separated from their employment with the Employer on that same date. The letter went on to say that while it was anticipated that the majority of the Employer's workforce would be hired either by Jim Falk Motors or by the Employer, the Employer was "unable to make assurances to that effect." At about the same time, the Employer posted a notice at various locations at the Hana and Kahului dealerships, setting forth the same information as contained in its January 21 letter.

Thereafter, Unit employees submitted job applications to the Employer and the Employer forwarded some of the applications to Jim Falk Motors. The Unit employees also turned in their uniforms and were paid out their benefits, including sick leave and

vacation benefits. By letters dated March 24 and 31, 2004, the Employer notified GM and Nissan that it was terminating its sales and service agreements with them. Then, on March 31, 2003, the Employer laid off the workforce at the Hana dealership, closed the facility, and sold the Hana dealership to Jim Falk Motors.

As of April 1, 2003, the Employer's operations consisted of the Kahului dealership and a new service facility located at 237 Dairy Beach Road (the Dairy Beach facility). I take administrative notice that the Dairy Beach facility is located less than a mile from the location of the Hana dealership and less than two miles from the Kahului dealership.

The Employer began operating the service and parts department at the Dairy Beach facility on April 1, 2003. Its employee complement consisted of ten employees who previously were employed in the Unit at the Hana dealership. Of this number, six were service technicians, two were parts employees, and two were lot attendants. As of the date of the hearing, the Employer had not hired any additional employees and the record reflects that it has no intention of hiring additional employees within the classifications listed in the bargaining unit in the foreseeable future. In addition to having eliminated certain Unit jobs in its new service and parts operation, the Employer also eliminated a number of non-bargaining unit positions including those of parts and service director, three service advisors, the assistant parts manager, the warranty clerk, a sales manager position, and two assistant sales manager positions.

The Employer's Dairy Beach facility has six service bays compared to the nineteen service bays it had at the Hana dealership. While the record reflects that the Employer is currently building a new service facility at the Kahului dealership that will

have sixteen bays, the record also reflects that the Employer does not intend to hire additional service technicians when it moves its service department to that facility. Instead, the additional bays will be used to provide each service technician with a bay with a lift to use for a service work and another bay where an alignment rack and a quick lube rack can be installed.

The record reflects that the Employer has not performed any GM or Nissan warranty service work since it closed the Hana dealership. The loss of the GM and Nissan service warranty work has required the assignment of several of the service technicians to work on different automobile lines. In this regard, the record reflects that GM Master Technician Jim Crawford was assigned to handle Hyundai repairs, GM Master Technician Armando Faiola was assigned to handle Mitsubishi repairs, and GM technician Anthony Vierra was assigned to perform Volkswagen repairs. Tien Le, who previously handled GM maintenance, was assigned to perform maintenance and pre-delivery inspection on all remaining lines of cars.

The record reflects that the work the service technicians perform at the Dairy Beach facility is essentially the same as they performed at the Hana dealership. Thus, notwithstanding that they may now work on different automobile lines, the service technicians continue to diagnose and repair automotive problems. However, as the new automobile lines have different service methodologies involving the use of unique diagnostic computerized scanners, several of the Unit service technicians hired to work at the Dairy Beach facility have been given additional training by the Employer. In this regard, the record reflects that Armando Faiola and Tien Le each received two one-week training sessions on diagnostics, computer systems, and scanners from Mitsubishi. Faiola

and Le were also given web-based Mitsubishi training and Le has also received web-based and other training on Volkswagen repairs. Anthony Vierra received on the job Volkswagen training from Robert Remington, and he also received ten to twenty hours of computer training. Because of difficulty in transitioning to the new product lines, two of the GM service technicians employed at the Hana dealership, Armando Faiola and James Crawford, left their jobs at the Dairy Beach facility and went to work for a GM dealer. The record does not disclose whether Faiola and Crawford were replaced by employees who worked at the Hana dealership.

The departmental structure of the Employer's operation at the Dairy Beach facility is essentially the same as that of the Hana dealership before the sale. Thus, at the Dairy Beach facility, the Employer has its service and parts departments, which are the same departments in which most of the Unit employees who had been employed at the Hana dealership had worked. However, unlike the Hana dealership, the Employer has no sales department at the Dairy Beach facility and no lot attendants are employed at that facility.³

The Unit employees hired to work at the Dairy Beach facility work with the same manager, in the same classifications, receive the same wages and benefits, and work under the same work rules as they did at the Hana dealership. Thus, the overall supervision of the service technicians has remained unchanged. Service Manager Glass

³ As noted above, approximately three lot service attendants had worked in the Employer's service department at its Hana facility, moving customer cars in and out of the service department at that location; and approximately three to five sales lot attendants had been employed in the sales department at the Hana facility, moving new cars and cleaning and detailing them. However, after the closure of the Hana Beach facility, the Employer only retained two of its lot attendants who had been employed in the Unit at the Hana facility, and it employed them at its Kahului dealership. It employed no lot attendants at its Dairy Beach facility.

has continued as the service manager at the Dairy Beach facility. However, because of the elimination of the GM and Nissan automobile lines, and the layoff of three of the four service advisors, there are no longer teams of service technicians working under different service advisors. Rather, Service Advisor LeFort now oversees all of the service technicians. Because there is only one service advisor, the service technicians have more interaction with customers. And because there are no longer any lot attendants in the service department, the service technicians are also more involved in moving and parking cars than they were at the Hana dealership.

Since the sale and closure of the Hana dealership, the number of automobile lines handled by the Employer's service and parts department has dropped from thirteen to eight, and the volume of the Employer's service work has dropped to approximately 20 to 25% of its level prior to the sale and closure of the Hana dealership. The Employer has added no new automobile lines since the sale of its Hana dealership and the relocation of its service and parts department to the Dairy Beach facility.

With regard to the parts department, the record reflects that Employer hired two of the eight parts employees formerly employed in the Unit at the Hana dealership to work at the Dairy Beach facility. Their duties have remained basically the same; that is, they continue to receive and process orders for parts. However, there have been some changes in their work. Thus, Jayson Kohama who worked primarily on the retail parts counter and handled backup work at the service parts counter before the sale and closure of the Hana dealership, assumed responsibility for the retail counter, service counter and wholesale counter at the Dairy Beach facility. Similarly, Albert Patricio who handled freight for Hyundai, Mitsubishi and Volkswagen at the Hana dealership, assumed

responsibly for handling freight for the Mazda automobile line and took over delivery driver duties at the Dairy Beach facility. Additionally, the two parts employees from the Hana dealership who were hired at to work at the Dairy Beach facility no longer handle factory-issued GM or Nissan parts.

With regard to the lot attendants, as noted above, approximately three lot attendants had worked in the Employer's service department at the Hana dealership, moving customer cars in and out of the service department at that location; and approximately three to five lot attendants had been employed in the sales department at the Hana facility, moving new cars and cleaning and detailing them. However, after the closure of the Hana dealership, the Employer hired two of the lot attendants who had been employed in the Unit at the Hana dealership to work in the sales department at the Kahului dealership. In this regard, the record reflects that while the lot attendants at the Hana dealership had performed some automotive detailing work before the sale and closure of that facility, the Employer has subcontracted such work after the sale and closure of that dealership.

Analysis. As noted above, the Employer contends that no certification bar exists to bar the petition in this case because of the "unusual circumstances" of the sale of the Hana dealership and relocation of its parts and service departments, which it asserts have greatly reduced the size and altered the nature of its operations and the working conditions of employees in the Unit classifications. For the following reasons, I reject the Employer's contention and find that a certification bar requires dismissal of the instant petition.

It has long been the Board policy to treat the certification of a labor organization under Section 9 of the Act with certainty and finality for a period of one year. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). In upholding this policy, the Supreme Court stated in *Brooks*, 348 U.S. at 103, that “[t]he underlying purpose of this statute [the Act] is industrial peace. To allow employers to rely on employees’ rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.”

To foster collective bargaining and industrial stability, the Board has long held that a certified union's majority status ordinarily cannot be challenged for a period of one year. *Chelsea Industries, Inc.*, 331 NLRB 1648 (2000); *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952). See also, *LTD Ceramics, Inc.*, 341 NLRB No. 14 (January 30, 2004). If a representation petition is filed before the end of the certification year, the Board will dismiss it because "the mere retention on file of such petitions, although unprocessed, cannot but detract from the full import of a Board certification, which should be permitted to run its complete 1-year course before any question of the representative status of the certified union is given formal cognizance by the Board." *Centr-O-Cast, supra*, 100 NLRB at 1508-1509.

In *Brooks*, the Court approved the Board's requirement that, absent “unusual circumstances,” an employer must recognize the union for the entire certification year, even if it is presented with evidence of the union's loss of majority. As the Court explained in *Brooks*, the certification-year rule is intended, among other things, to give a

union "ample time for carrying out its mandate on behalf of its members [without] be[ing] under exigent pressures to produce hothouse results or be turned out." 348 U.S. at 100. In addition, the rule is intended to deter an employer from violating its duty to bargain: " It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time . . ." *Id.* Indeed, in situations where an employer has failed to carry out its statutory duty to bargain in good faith, the Board has extended the certification year for a period of time equal to the time of the delay caused by the Employer's unlawful refusal to bargain such that the certification bar commenced on the resumption of negotiations. The Board did so in order to ensure "at least one year of actual bargaining." *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962). In other words, the one-year certification bar means that an employer must bargain in good faith for a period of one year before it may challenge a union's certification. *Id.* In sum, the Court has held that the "underlying purpose of this statute is industrial peace," 348 U.S. at 103, and that the Board's certification-year rule advances that goal.

Certain limited exceptions exist to the one-year certification bar rule in which the Board will process a petition even though it is within the certification year. As discussed by the Supreme Court in *Brooks*, these exceptions occur in situations involving "unusual circumstances," including where: (1) where the certified union has dissolved or become defunct; (2) where, as a result of a schism, substantially all of the members or officers of the certified union have transferred their affiliation to a new local or international; and (3) where the size of the bargaining unit has fluctuated radically within a short period of time. 348 U.S. at 98-99.

In the instant case, the Employer, citing *Westinghouse Electric & Mfg. Co.*, 38 NLRB 404, 409 (1942), argues that the sale of the Hana dealership, the resulting change in its business operations, and the drastically reduced size of the bargaining unit constitutes “unusual circumstances,” requiring the Board to dismiss the instant petition and direct an election. However, while the Board has found that changes in operation, which have resulted in a radical *increase* in the size of a workforce thereby rendering a certified unit unidentifiable or numerically overshadowed, may warrant a refusal to honor the certification bar rule, it has also made plain that a mere *reduction* in the size of an employer’s operation or of its workforce does not do so. Thus, as the Board observed in *Georgetown Dress Corp.*, 217 NLRB 41, 42 (1975), enf denied on other gds sub nom. *N.L.R.B. v. Georgetown Dress Corp.*, 537 F.2d 1239, (4th Cir. 1976):

It is well established that since the Union was selected by majority employee choice, Respondent's obligation to bargain extends for 1 year from the date of the Union's certification herein . . . and employee turnover, diminished employment, or reduced operation does not constitute "unusual circumstances" within the Supreme Court's decision in *Ray Brooks v. N.L.R.B.*

Accord: *Shamy Heating & Air Conditioning*, 331 NLRB No. 34 fn. 1 (2000) enf’d sub nom, *NLRB v. Shamy Heating & Air Conditioning, Inc.*, 170 LRRM 2448 (6th Cir. 2002); *Pony Express. Courier Corp.*, 286 NLRB 1286, 1289 (1987); *Atlantic International Corp.*, 246 NLRB 291, 295, (1979) enf’d sub nom *NLRB v. Atlantic Intern. Corp.*, 612 F.2d 1308 (4th Cir. Dec 26, 1979); *Nichols-Homeshield, Inc.*, 214 NLRB 682, 683 (1974) enf’d sub nom *N.L.R.B. v. Nichols-Homeshield, Inc.*, 519 F.2d 1404, (7th Cir. 1975); *Midstate Telephone Co., Inc.*, 179 NLRB 85, 86 (1969).

As shown above, while the Employer's sale and closure of its Hana dealership and the relocation of its service and parts departments to the Dairy Beach facility has resulted in a substantial reduction in the size of the bargaining unit (from thirty-five to ten employees), this reduction has not resulted in the unit employees being numerically overshadowed by non-unit employees. Indeed, *all* of the employees hired within the classifications set forth in the bargaining unit at the new location *are* Unit employees. Further, the record discloses that the Employer has no intention of hiring any new employees in the immediate future and that its present employee complement is a stable one. After the relocation, bargaining unit employees have remained in the same classifications, performing the same type of work, under the same management within a mile of their prior location. In these circumstances, despite the reduction in the number of employees and product lines that has taken place, I find that there has been a substantial continuity in the bargaining unit and that a certification bar remained in effect after the relocation to the new facility.

The Employer's reliance on *Westinghouse Electric & Manufacturing Co.*, 38 N.L.R.B. 404 (1942), *Renaissance Center Partnership*, 239 N.L.R.B. 1247 (1979), *St. Bernadette's Nursing Home*, 234 NLRB 835 (1978), and *NLRB v. Shamy Heating & Air Conditioning, Inc.*, 170 LRRM 2448 (6th Cir. 2002), enforcing *Shamy Heating & Air Conditioning*, 331 NLRB No. 34 fn. 1 (2000), to support its contention that unusual circumstances warrant a refusal to apply the certification bar in this case, is misplaced. Thus, *Westinghouse Electric* concerned an extraordinary increase in the number of employees at a defense plant in the early months of World War II, occasioned by a planned expansion that would almost quadruple the number of unit employees within the

certification year. *Renaissance Center Partnership* involved the consolidation of two bargaining units during the certification year. One of the units had been represented by a union, while the other, which was the larger of the two units, was unrepresented. The Board found that the previously certified unit was no longer appropriate because the employees who would be added would "numerically overshadow" the existing unit by doubling the number of employees. *St. Bernadette's Nursing Home* involved the nondiscriminatory merging of a certified unit into a larger unit that encompassed what had formerly been three nursing home facilities. The union in that case was aware at the time of the certification that *St. Bernadette's* was closing. The resulting group of employees was more than three times the size of the certified unit. Thus, unlike the situation in the instant case, in *St. Bernadette's*, the original certified unit could no longer be identified and was numerically overshadowed by non-unit employees in the group resulting from the merger. However, in cases which do not involve this numerical overshadowing of unit employees, the Board continues to apply the certification bar even if employee turnover and/or the relocation of an employer's operations has occurred. See e.g., *Action Automotive*, 284 NLRB 251 (1987); *General Electric Co.*, 186 NLRB 289, 293 (1970); *Paper Mfg. Co.*, 274 NLRB 491, 496 et seq. (1985). For example, in *Paper Mfg.*, *supra*, the Board distinguished *St. Bernadette's* and applied the certification bar in a situation in which the medical packaging employees in a unit represented by a graphic arts local were relocated from Southampton to Philadelphia, Pennsylvania; the complement of medical packaging unit employees at the new location was enlarged, new machinery was introduced at the new location, and the relocated employees in the certified unit were housed under the same roof that already sheltered employees of a

separate production division who were themselves separately represented by a local of the Teamsters Union. Despite these changes, the Board nevertheless found that the employer's duty to bargain was not obviated, stating:

If the obligation on the part of the Employer under a Board certification to bargain with a certified union was dependent on the Employer's remaining at the plant located name in the certification with the original personnel in the unit, he would have it within his power to vitiate the certification at will by moving his plant to another location and changing the personnel of the appropriate unit. Obviously, such a circumvention is not within the intent of the Act. [footnote omitted]

The Board in *Paper Mfg.*, 274 NLRB at 497, pointed out the differences between the circumstances in that case and in *St. Bernadette's*, differences which also distinguish the instant case and *St. Bernadette's*, that is, the lengthy hiatus between the closing and opening of the old and the new enlarged facility in *St. Bernadette's*; the fact that neither the operations nor the staff were moved intact from one location to the other; and that a "wholly new group of workers were employed, the vast majority of whom had no prior connection with the old facility." Similarly, in *Action Automotive*, 284 NLRB 251 (1987), the Board applied the certification bar rule to find that an employer's expansion of its operation following entry of a certification order by the Board did not alter the obligation to bargain with the union where the certification order affected only stores in existence at the time of the order and not new stores.

Finally, the Employer's reliance on *Shamy* is misplaced. In *Shamy*, the Sixth Circuit enforced the Board's decision and order finding that a reduction in the size of a bargaining unit from eleven to five employees was not a valid defense to an employer's

refusal to bargain.⁴ In contrast to the cases cited by the Employer, the original bargaining unit in the instant case is clearly identifiable, and there have been no changes in the classifications of employees or the basic nature of their work. Nor does the record indicate that such changes are coming in the foreseeable future.

In these circumstances, I find “unusual circumstances” do not exist to warrant an exception to the application of the Board’s certification bar doctrine. Accordingly, as the petition in this case was filed within the certification year, I find that it is barred by the Board’s certification bar doctrine and I will dismiss the petition.

Further, as noted above in footnote 2, an Amended Complaint issued against the Employer on July 9, 2004, in Case 37-CA-6521-1. The Amended Complaint specifically alleges that during the first year of the Union’s certification, the Employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union. The Employer conduct alleged to be unlawful in Case 37-CA-6521-1 involves a refusal to bargain with and a refusal to furnish information to the Union, which occurred prior to or simultaneous with the filing of the petition in the instant case. Thus, as alleged in the Amended Complaint, the Union requested the Employer on April 17, 2003, by letter, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Employer’s employees in the unit certified in Case 37-RC-4033, and to provide the Union with requested relevant information in connection with such bargaining. As

⁴ In *Shamy*, an employer refused to bargain rather than filing an RM petition after the bargaining unit decreased in size. The Sixth Circuit observed that the employer should have raised its “unusual circumstances” argument in the context of an RM proceeding rather than refusing to bargain. The Court stated that “[t]he ‘unusual circumstances’ exception to the one-year presumption of majority support cannot serve as a defense to an unfair labor practice complaint for refusing to bargain. Both this court and the Supreme Court have made clear that an employer’s sole remedy to account for such unusual circumstances within this year after the election is petitioning the NLRB for a new election.” See also *V & S Schuler Engineering, Inc.*, 332 NLRB No. 118 (Nov. 9, 2000).

further alleged in the Amended Complaint, the Employer, by letter dated May 9, 2003, the same date that it filed the petition in the instant case, notified the Union that it was not going to bargain with the Union and refused to provide the relevant information requested by the Union. This refusal by the Employer in May 2003, occurred four months into the certification year. Among the remedies sought in the Amended Complaint in Case 37-CA-6521-1, is an order requiring the Employer to bargain with the Union and an extension of the certification year as required under *Mar-Jac Poultry Co., supra*. In these circumstances, the processing of the instant petition would be inconsistent with the processing of the unfair labor practice proceeding. See, e.g., *The BOC Group, Inc.*, 323 NLRB 1100 (1997); *Big Three Industries, Inc.*, 201 NLRB 197 (1973).⁵

ORDER

IT IS HEREBY ORDERED that the petition herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 28, 2004.

⁵ Thus, as observed above, the certification is extended by the Board in situations where the employer has failed to carry out its statutory duty to bargain in good faith. The extension equals the time of the delay and commences on the resumption of negotiations. *Mar-Jac Poultry Co., supra*, 136 NLRB at 787.

DATED at San Francisco, California, this 7th day of September, 2004.

/s/ Robert H. Miller

Robert H. Miller, Regional Director
National Labor Relations Board

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