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

GROCERY HAULERS, INC.

Employer

and

TEAMSTERS LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS **Case 3-RC-11944**

Petitioner

and

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS, INTERNATIONAL UNION, LOCAL 50

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. [1]

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in the proceeding to the undersigned.[2]

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[1] By letter dated February 16, 2010, the Employer filed an Urgent Motion to Stay Representation Proceedings Pending Appeal with the Board. On March 4, 2010, the Board denied the Employer's Motion in its entirety.

[2] On January 22, 2010, the Petitioner filed a Motion for Reconsideration of the Acting Regional Director's November 12, 2009, decision to dismiss the petition in light of additional evidence obtained by the Petitioner that was not considered as part of the administrative investigation. By Order dated February 9, 2010, I reinstated the petition, and issued a Notice of Hearing for the purpose of obtaining testimony relevant to the Petitioner's claim that certain significant facts were not disclosed by the Employer during the administrative investigation.

Upon the entire record in this proceeding, I find:

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

2. The parties stipulated that Grocery Haulers, Inc., hereinafter referred to as the Employer, is a Delaware corporation with a principal place of business located in Avenel, New Jersey and facilities throughout the Northeast, including as of December 23, 2009, a facility located in Albany, New York, where it is engaged in providing logistical services for the food service industry. During the past twelve months, the Employer realized gross revenues in excess of $500,000 and purchased and received at its Avenel, New Jersey location goods and services valued in excess of $50,000 directly from points located outside the State of New Jersey. Based on the parties' stipulation and the record, as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Teamsters Local 294, International Brotherhood of Teamsters, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated, and I find, that Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local 50, hereinafter referred to as the Intervenor, is a labor organization within the meaning of Section 2(5) of the Act.

5. The parties stipulated, and I find, that the appropriate unit, herein called the unit, for purposes of collective-bargaining within the meaning of Section 9(b) of the Act shall include:

> All drivers who service the Bimbo Bakeries account employed by the Employer and who are domiciled at the Freihofer's facilities in Albany, New York and Springfield, Massachusetts and at the distribution center in Canastota, New York; excluding dispatch and fleet safety employees, clerical employees, confidential employees, guards and supervisors as defined in the National Labor Relations Act.

There were three issues raised during the hearing. The first issue, which was raised by the Employer and the Intervenor, relates to whether I properly reinstated the instant petition pursuant to the Petitioner's Motion for Reconsideration. The Petitioner contends that the petition was properly reinstated because all of the relevant facts were not known to the Region at the time the Acting Regional Director made the determination to dismiss the petition. The Employer and the Intervenor, on the other hand, contend that the petition was appropriately dismissed for the reasons stated therein and it was, subsequently, inappropriately reinstated. They argue that all of the relevant facts were available to the Petitioner and the Region during the administrative investigation, at the earliest, and during the appeal period following dismissal of the petition, at the latest. It is their position that the Petitioner failed to follow the proper procedure for seeking a timely review of the Acting Regional Director's dismissal, i.e., an appeal to the Board during the 14-day period following the dismissal of the petition. They contend that the Petitioner should have raised these issues during the appeal period and it failed to do so; therefore, it should be precluded from doing so at this juncture. The Intervenor argues that the Petitioner was well aware during the appeal period that the Employer, as a "perfectly clear" successor under NLRB v. Burns International Security Services,[3] had recognized the Intervenor, commenced bargaining and reached a tentative agreement with the Intervenor and that the contract had been ratified by future employees of the

[3] 406 U.S. 272 (1972).

Employer. The Intervenor argues that the Petitioner, in lieu of pursuing an appeal with the Board on the dismissal of its petition, chose to file unfair labor practice charges and when it did not prevail on the unfair labor practice charges, the Petitioner belatedly requested the Regional Director to reconsider the Region's determination on the dismissal of the petition.

The second issue, raised by the Employer, is the proper date of the petition. It is the Employer's position that, if it is determined that the petition was properly reinstated, then the proper date for the petition is the date of the Regional Director's Order Reinstating the Petition (the Order), rather than the original filing date of the petition. Further, if it is determined that the date of the petition is the date of the Order, the Employer argues that a new showing of interest should be obtained from the Petitioner because the original showing was obtained at a time when the individuals were not yet hired as employees of the Employer.

The third issue, raised by the Employer, is the existence of a contract bar. If it is determined that the petition date should be the date of the Order, and that the Petitioner has a sufficient showing of interest, the Employer argues that there is a contract bar in effect and the petition should be dismissed.

6. Based on the evidence adduced at the hearing and the relevant case law, I conclude that the petition was properly reinstated; the petition date is the original filing date; the original showing of interest is adequate; there is no contract bar to the petition; a question affecting commerce exists concerning the representation of unit employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act and, I shall direct an election in the stipulated unit.

FACTS

The Employer's sole witness was Jay Sabin, general counsel and director of human resources for the Employer. Sabin testified that in late September, 2009,[4] the Employer entered into a contract with Bimbo Bakeries to provide trucking services for product produced through Bimbo's Albany, New York facility, otherwise known as the Freihofer facility. Effective December 23, the Employer was going to take over the trucking operation, which was being performed by Penske Logistics, LLC (Penske herein). Sabin testified that it was the Employer's intent to provide the Penske drivers with an opportunity to work for the Employer and that the Employer was aware that the Penske drivers were represented by the Intervenor. Penske and the Intervenor were parties to a collective-bargaining agreement covering the Penske drivers, which, by its terms, was effective from June 1, 2009 through May 31, 2012.

Joyce Alston, the Intervenor's president, testified that sometime in late September or early October, Mark Jacobson, the Employer's president, informed Alston that the Employer intended to provide the Penske drivers with an opportunity to work for the Employer.

The record reveals that on October 8, Kevin Hunter, Petitioner's secretary/treasurer, sent a letter to Jacobson introducing himself and requesting a meeting to discuss the possibility of organizing the employees who would be performing the trucking services under the contract the Employer recently signed covering the Freihofer facility in Albany, New York.

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[4] All dates hereinafter are in 2009 unless otherwise noted.

On October 13, Jacobson met with at least 50 Penske drivers at a local hotel to introduce the Employer's staff, including its safety team. The drivers were provided with applications for employment. The cover letter accompanying the application advised employees that the Employer was aware of the current collective-bargaining agreement between Penske and the Intervenor. It further stated that the Employer planned to meet with the Intervenor for the purpose of discussing changes that the Employer would like to put in place. Joyce Alston and Michael Hitchcock,[5] were present at the October 13 meeting. Alston and Hitchcock testified that Alston spoke at the meeting and advised the Penske drivers that the Intervenor would be reaching out to the Employer to set up dates to meet and begin negotiations for a new collective-bargaining agreement.

Immediately following the Employer's meeting with Penske employees on October 13, the Petitioner held a meeting at the Teamsters hall for any Penske driver who was interested in attending. Petitioner's secretary/treasurer Hunter was present at this meeting. He testified that he recalls Penske drivers giving him some details about the Employer's announced application process. Hunter testified that he did not recall whether the Penske drivers told him that a representative of the Intervenor informed employees that the Intervenor was going to be negotiating an agreement with the Employer. Hunter does recall, however, being told by the Penske drivers that the Intervenor stated it would solicit contract proposals from the members to take to the Employer.

[5] At the time of the October 13 meeting, Hitchcock was a Penske driver and union steward for the Intervenor. At the time of the hearing, Hitchcock was employed by the Employer as a driver and remained a union steward for the Intervenor. Hitchcock also was a member of the Intervenor's negotiating committee in its negotiations with the Employer, which will be discussed in further detail herein.

In a letter from Hunter to Jacobson, dated October 20, the Petitioner informed the Employer that it represented a majority of the Penske employees who had submitted applications for employment and were in the process of being tested for the positions being offered by the Employer. Hunter informed Jacobson that he had a signed petition from these individuals requesting the Petitioner to represent them for purposes of collective bargaining. Hunter offered to send a copy of the signatures to Jacobson and requested that Jacobson contact him.

On October 21, Jacobson responded to Hunter's October 8 and 20 letters. Jacobson stated that the group of employees currently transporting goods from the Albany Freihofer's plant is represented by the Intervenor. He further stated that it is not the Employer's desire to meddle with the choice that the unit has made or to get caught in the middle of a dispute between two locals. Jacobson declined Hunter's invitation to send him a copy of the Penske employees' signature petition referenced in Hunter's October 20 letter.

By letters dated, on or about October 22 and signed by Jay Sabin, the Employer began to offer employment to Penske drivers, contingent on their passing a pre-employment drug and alcohol screening and Department of Transportation (DOT) physical. The letters also stated that the Employer would be discussing any changes it would like to make to their terms and conditions of employment with their union.

By letter dated October 27, Alston, on behalf of the Intervenor, requested that the Employer begin bargaining, as she was aware that offers of employment had been extended to its members that were current Penske drivers. Alston suggested November 4 and 5 as meeting dates for collective bargaining.

The Employer granted recognition to the Intervenor by letter dated October 29, wherein Jacobson acknowledged that offers of employment had been made to 41 drivers who were currently employed by Penske and represented by the Intervenor. Jacobson further stated that the Employer anticipated operations beginning in Albany no later than December 23 and would like the negotiations to conclude far in advance of that date. Jacobson agreed to meet for negotiations on November 4 and 5.

On November 2, the Petitioner sent a letter to the Intervenor in which it listed the names of 26 Penske employees who volunteered to join the Petitioner's organizing committee for the successor employer. A copy was sent to the Employer. Alston and Hitchcock testified that most of the individuals listed in the Petitioner's letter were present at the October 13 meeting when she informed Penske employees that the Intervenor would be meeting with the Employer to set up negotiation dates.

On November 3, the Petitioner filed the instant petition seeking to be certified as the exclusive collective-bargaining representative of the unit. On the same date, the Petitioner sent a letter to Jacobson, wherein it claimed to represent a majority of the Employer's employees and requested recognition and commencement of negotiations.

The record reveals that the Employer and the Intervenor began negotiations for a collective-bargaining agreement on November 4 and 5.

During the period subsequent to the filing of the representation petition herein, and prior to the dismissal of the petition, the Intervenor solicited unit employees to sign a petition in support of it as their collective-bargaining representative.

Also subsequent to the filing of the instant petition, Region 3 of the Board conducted an administrative investigation to determine if a question concerning representation existed. During the administrative investigation, Employer representative Jay Sabin provided an affidavit taken by a Board Agent on November 10. Sabin testified that, as of November 10, the Employer had yet to hire any drivers for the Albany operation and that no driver would become an employee before December 23. He further testified that contingent offers of employment had been made to approximately 50 drivers, subject to testing required by the DOT, but that the Employer had not reached any final conclusions as to the staffing and operations for the project. Sabin's affidavit made no reference to the fact that the Employer had already granted recognition to the Intervenor and had met with it on November 4 and 5 for purposes of negotiating a collective-bargaining agreement. There also was no reference in Sabin's affidavit as to the Intervenor having presented the Employer with a showing of majority support for the Intervenor.

Based on the evidence obtained during the administrative investigation, the Acting Regional Director issued a letter on November 12 informing the parties of his decision to dismiss the petition. As set forth in the letter, it was determined that the petition should be dismissed because it was premature and a question concerning representation could not be raised at that time. The determination was based on the facts that the Employer had not commenced operations, did not have any employees on its payroll, and apparently would not have any employees until December 23. The dismissal letter contained a right to appeal to the Executive Secretary's office of the National Labor Relations Board. The appeal deadline set forth in the letter was November 26.

On November 12, the Petitioner sent a letter to Jacobson stating that it had recently come to the Petitioner's attention that the Employer was in the process of negotiating a collective-bargaining agreement with the Intervenor for the business operations which the Employer would be starting in the near future at the Freihofer facility. The Petitioner reiterated that it had a signed petition from a majority of the current Penske employees requesting that the Petitioner represent them for purposes of collective bargaining. The Petitioner enclosed a copy of the signed petition. The Petitioner advised the Employer of its position that any negotiations it may be having with the Intervenor are contrary to labor law and that the Petitioner was prepared to do everything within its power to ensure that a collective-bargaining agreement was not imposed on the employees. Hunter testified that he sent a copy of Petitioner's November 12 letter to the Region.

Hunter testified that he had heard rumors that the Employer was meeting with the Intervenor for the purpose of negotiating a collective-bargaining agreement but was unable to confirm that the meetings were, in fact, occurring.[6] Hunter testified that he never heard directly from the Employer or the Intervenor that they were engaged in contract negotiations. Hunter also testified that as of November 12, no one from the Employer or the Intervenor had informed him that the Employer had recognized the Intervenor. He decided to send the November 12 letter based on the rumors he had heard.

Hitchcock testified that sometime between October 13 and November 4, he asked on Intervenor's behalf about 90 percent of the Penske drivers what they would like to see in the collective-bargaining agreement between the Intervenor and the Employer.

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[6] The record does not reflect when Hunter heard the rumors nor does it disclose the individuals with whom Hunter had conversations about the "rumored" negotiations.

On November 13, the Employer's attorney sent a letter to the Petitioner setting forth the Employer's position that the Intervenor was the current duly-certified collective-bargaining representative of the Albany drivers and that until an election was held and another union was certified by the NLRB, the Intervenor would continue as the bargaining representative of the Albany drivers. The letter also advised the Petitioner that the Employer would return the "petition" to the Petitioner without reviewing it.[7]

Sabin and Alston testified that negotiations resumed on November 16 and that two additional meetings were held on November 17 and 20. Negotiations concluded on November 20 with the agreed-upon terms being reduced to a Memorandum of Agreement (MOA herein). The MOA adopted the terms of the collective-bargaining agreement between the Intervenor and Penske applicable to the Freihofer's Albany area operations to the extent such terms were not modified by, or inconsistent with, the terms set forth in the MOA.

Hitchcock testified that during the period November 4 through 20, he reported to every Penske driver, including the 26 individuals on the Petitioner's organizing committee, about the progress that had been made in contract negotiations, as well as the content of some of the terms in the tentative agreement that the Intervenor was submitting to the membership for a ratification vote on November 21.

On November 16, the Intervenor's vice president, Pat Rohan and Hitchcock posted notices at the Employer's Freihofer facility, advising Penske drivers that there was

[7] The record clarifies that the "petition" being returned to the Petitioner was, in fact, the signature petition that the Petitioner sent with its November 12 letter to Jacobson in support of its claim to have majority support among the Penske drivers seeking employment with the Employer.

going to be a contract ratification vote on November 21 at the Clarion Hotel in Albany, New York.

Hunter testified that on or about November 15, he became aware that the Penske drivers were going to be voting on whether to ratify a tentative agreement that had been reached by the Employer and the Intervenor.

On November 18, the Intervenor received two letters, via facsimile, from two Penske drivers requesting a copy of the proposed collective-bargaining agreement between the Employer and the Intervenor for purposes of reviewing it prior to the ratification meeting scheduled for November 21. The same letter, but signed by a different Penske driver, was sent to the Intervenor, via facsimile, on November 19. Hunter testified that the Petitioner's facsimile number appears at the top of the three requests as the number from which the facsimiles were sent.

On November 18, Sabin returned to Petitioner, the showing of majority support that the Petitioner had forwarded to Jacobson on November 12. Sabin testified that he had not reviewed the signatures prior to returning them.

The Intervenor conducted a membership meeting for Penske drivers on November 21, wherein Alston read the MOA to those present. The members voted in favor of ratifying the collective-bargaining agreement by a vote of 33 to 21.

The MOA is dated November 21, and contains only Mark Jacobson's undated signature on behalf of the Employer. The MOA is effective from December 23 until February 1, 2014. There is no testimony as to when Jacobson actually signed the Agreement. It is not signed by any representatives for the Intervenor. The MOA states that the Employer agrees to offer employment to the 60 full-time Penske drivers.

Alston testified that the Intervenor began representing the unit upon commencement of the Employer's operations on December 23.[8] Sabin testified that the collective-bargaining agreement went into effect on December 23 and unit employees went on the Employer's payroll. A majority of the unit as of that date consisted of the former Penske drivers. Alston testified that, as of the date of the hearing, the final copy of the collective-bargaining agreement had not been proofed or signed by the parties.

On November 27, the Petitioner filed unfair labor practice charges in Cases 3-CA-27447, against the Employer, and in Case 3-CB-9045, against the Intervenor, alleging, inter alia, that the parties violated Section 8(a)(1) and (2) and 8(b)(1)(A) and (2), respectively, by negotiating and entering into a collective-bargaining agreement prior to the Employer's hiring of employees and commencement of operations.

Upon completion of the investigation of the above referenced charges, I dismissed the unfair labor practice charges on January 29, 2010. The investigation of the charges had revealed that, during the period subsequent to the filing of the instant petition on November 3 and prior to the dismissal of the petition on November 12, the Intervenor had solicited unit employees to sign a petition in support of it as their collective-bargaining representative. Certain of the individuals who signed the Intervenor's showing of support, had also previously signed the Petitioner's showing of support, thereby nullifying their selection of the Petitioner as their representative under Board law, in a number sufficient to effect majority status. Thus, I found that, the Intervenor enjoyed an unrebutted presumption of continued majority support as of a date subsequent to the filing of the petition, when the Intervenor reestablished its majority status. Accordingly, I

[8] The record is silent as to the specific number of employees in the unit when the Employer commenced operations on December 23. The record does indicate that the former Penske drivers constituted a clear majority of the unit on that date, and no party herein asserts otherwise.

concluded that the Employer and the Intervenor did not commit unfair labor practices by entering into negotiations for a collective-bargaining agreement prior to commencement of operations.

RULINGS ON MOTIONS, ANALYSIS AND CONCLUSIONS

The Employer made several motions at the hearing, all of which I am denying for the reasons set forth below.

The Employer argues that I improvidently granted the Petitioner's Motion for Reconsideration and reinstated the petition. As stated above, on November 12, the Acting Regional Director dismissed the petition on the basis that the Employer had not yet commenced operations or hired employees and that the petition was, therefore, premature. The Petitioner argues that the petition should be reinstated because new evidence was obtained which would show that, at the same time the Employer was denying the Petitioner's request for recognition based on its majority status, the Employer was engaging in negotiations with the Intervenor, which, in fact, resulted in the terms of a tentative collective-bargaining agreement being reached. The agreement was then ratified by the Penske drivers prior to the commencement of the Employer's operations or employees being placed on the payroll. The Petitioner argues that this evidence establishes that a question concerning representation existed at the time it demanded recognition on October 20 and continued in effect as of the date of the filing of the instant petition on November 3.

The Employer and the Intervenor argue that the petition should not have been reinstated because the evidence regarding the Employer and Intervenor's negotiation sessions and agreement on a collective-bargaining agreement was available during the

administrative investigation, at the earliest, or during the period in which the Petitioner could have requested Board review of the dismissal of the petition, at the latest.

It is undisputed that the Petitioner did not file a request for review with the Board of the determination to dismiss the petition during the appeal period from November 12 through November 26. Most of the testimony on the record relates to when the Petitioner acquired knowledge of the Employer and the Intervenor's negotiation sessions and subsequent agreement on terms of a tentative collective-bargaining agreement.

The record establishes that the Petitioner became aware, on or about November 15, that the Penske drivers were going to be voting on a tentative collective-bargaining agreement. Prior to that time, Petitioner had heard rumors about negotiations from the Petitioner's supporters. Based on these rumors, Petitioner sent the November 12 letter to the Employer, enclosing a copy of the Penske employees' signed petition in support of the Petitioner. Thereafter, the Employer returned the signed petition and, for the first time, on or after November 13, through its counsel, advised the Petitioner that the Employer viewed the Intervenor as the bargaining representative of the Albany drivers. The Petitioner subsequently filed unfair labor practice charges on November 27, alleging that the Employer and the Intervenor were unlawfully engaged in negotiations and reached terms for a collective-bargaining agreement. Prior to the investigation of the unfair labor practice charges, which was conducted in December 2009 and January 2010, the Employer and the Intervenor never informed the Region that they were engaged in negotiations or that the parties had reached a collective-bargaining agreement. The unfair labor practice charges were dismissed on January 29; and, 11 days thereafter, the Petitioner filed its Motion for Reconsideration.

While Penske drivers, who were on the Petitioner's organizing committee, may have been aware of the negotiations between the Employer and the Intervenor, there is no direct testimony from any of the individuals on the committee as to what they knew, when they knew it and what information was passed along to Petitioner. Hitchcock, the Intervenor's steward, testified that he spoke to most of the employees on the committee as negotiations unfolded, but there are no specific conversations included as part of the record. Further, the record does not establish, nor has any party asserted, that the drivers on the organizing committee are agents or officers of the Petitioner. Thus, I cannot conclude that because some of the Penske drivers, who were on the Petitioner's organizing committee, may have been told about ongoing negotiations between the Employer and the Intervenor, that the Petitioner was aware of specific contract negotiations prior to on or about November 15.

In Air Lacarte, Florida, Inc., 212 NLRB 764 (1974), the Board addressed the issue of a regional director's authority and timeliness of motions for reconsideration in representation cases. In Air Lacarte, the Regional Director dismissed a petition after a hearing was held, based on the representation of the Intervenor's agent as to when its collective-bargaining agreement with the Employer was signed. The Regional Director determined that a contract bar existed. The Petitioner did not file a request for review with the Board. Almost 16 months later, however, the Petitioner filed with the Regional Director, a request for revocation of the Director's decision and reinstatement of the petition in light of new evidence that the Petitioner had obtained as to when the contract had actually been signed. The Intervenor's agent had been indicted and convicted in a court proceeding of making a false statement as to when he signed the contract; thereby

raising doubt as to the existence of a contract bar. The Petitioner did not file its request for revocation until almost two months after the conviction. The Regional Director reinstated the petition and ordered a hearing for the purpose of obtaining testimony regarding the new evidence as to the date the contract was signed. The Intervenor argued to the Board that the Regional Director's order reinstating the petition and reopening the record was improper and had no support in the rules. The Board held that the Regional Director had "full authority to reconsider his decisions in representation cases based on an evaluation of new evidence." Id. at 765, n. 5. The Board also found no merit to the Intervenor's contention that the petition for revocation should have been dismissed because the Petitioner had not promptly filed its petition for revocation upon learning of the newly discovered evidence, as required by Sec. 102.65 (e)(2) of the Board's Rules and Regulations.

Further Board case law regarding a Regional Director's authority in representation cases can be found in Delto Company, Ltd. d/b/a Cabrillo Lanes, 202 NLRB 921 (1973). In that case, after a hearing was conducted regarding the existence of a contract bar, the Regional Director dismissed a decertification petition as untimely. Subsequently, instead of filing a request for review with the Board, the Employer filed a motion for reconsideration with the Regional Director based on the Employer's alleged discovery of new evidence that would render the petition timely. The Regional Director ordered that the hearing be reopened for the purpose of adducing the new evidence. At the second hearing, the Union made a motion to close the record and the hearing, arguing that the evidence the Employer wanted to present was available to it at the time of the original hearing and that the evidence should have been introduced at that time. Upon a

request for review, the Board, without addressing the details of when the evidence became available, stated that: "The Regional Director has full authority to grant motions for reconsideration in representation cases and he has the same authority as the Board to reconsider his decisions in such cases." The Board found that the Regional Director did not abuse his authority in reopening the record and denied the union's motion. See also Pentagon Plaza, Inc., 143 NLRB 1280, 1281 fn. 3 (1963).

The Employer in its post-hearing brief cites North Jersey Newspapers Co., 322 NLRB 394 (1996), for support of its argument that the Regional Director lacks authority to reconsider her decision to dismiss a petition once the appeal period to request review has expired. That case is inapposite, inasmuch as the Board had already granted review of the Regional Director's decision thereby divesting the Regional Director of his authority. In the instant matter, no such request for review was filed, and, accordingly, the case was not pending before the Board at the time the Petitioner requested reconsideration.

With regard to the timeliness of the Petitioner's Motion for Reconsideration, the other cases cited by the Employer in its brief are also inapposite because they concern the Board's denial of untimely requests for review after representation hearings had been held. In Produce Magic, Inc., 318 NLRB 1171 (1995), a hearing had already been held and the case had been transferred to the Board. Tinton Falls Conva Center, Inc., 301 NLRB 937 (1991) and Fall River Savings Bank, 250 NLRB 935 (1980), involved unfair labor practice cases under consideration by the Board, in which a party had requested that the Board reconsider its decision in a prior representation proceeding, well after a hearing

had been held, the case had been transferred to the Board and the Board had issued a decision on review. The Board determined that the motions in those cases were untimely.

Sec. 102.63 of the Board's Rules and Regulations expressly governs dismissals of petitions prior to hearing, but is unclear as to the requirements for filing motions for reconsiderations with the Regional Director prior to hearing. Section 102.63 specifically states that Section 102.71, referenced by the Employer in its brief, shall not govern regional directors' dismissals of petitions without a hearing. Sections 102.65 and 102.67, relied on by the Employer in support of its position that the Petitioner was required to file a request for review to contest the Acting Regional Director's dismissal of the petition, pertain to motions and other procedural matters made during or after an administrative hearing. Inasmuch as the Board's Rules and Regulations don't resolve the specific issue being raised, it is necessary to rely on Board case law. Accordingly, the Board's holdings in Air Lacarte and Cabrillo Lanes regarding Regional Directors' authority to reconsider representation case matters would apply.

At the time the Petitioner filed its Motion for Reconsideration in the instant matter, no representation hearing had been held, nor had the Board issued a decision on review. Prior to the Region's dismissal of the petition, I was not aware that the Employer had granted recognition to the Intervenor and negotiations were ongoing between them; nor had the Employer notified the Petitioner that it had granted recognition to the Intervenor and begun negotiations. In addition, the October 21 and November 13 letters from the Employer and its counsel, respectively, did not inform the Petitioner that the Employer was engaged in negotiations with the Intervenor. The record revealed that the Petitioner obtained knowledge of the Employer's recognition of the Intervenor, on or

after November 13. It was on or about November 15 that the Petitioner obtained knowledge of the Employer's negotiations with the Intervenor. In Air Lacarte, *supra*, the Board allowed the new evidence to be heard where the petitioner's motion for reconsideration was filed approximately two months after its discovery. The timing of the Petitioner's Motion for Reconsideration in this case is similar to that in Air Lacarte. Thus, I find no merit to the Employer's and the Intervenor's arguments that the Petitioner's Motion for Reconsideration is untimely, nor do I agree with their assertion that the Petitioner was required to file a request for review in order to have the evidence it discovered on or after November 13 heard. Based on the Board's decisions in Air Lacarte and Cabrillo Lanes, I conclude that I acted within my authority by granting the Motion for Reconsideration filed by the Petitioner, reinstating the petition and conducting a hearing which allowed the additional evidence to be heard.

The Employer made a motion at the hearing that, should the Regional Director determine that she had the authority to reinstate the petition, then it should be reinstated as of February 9, 2010, the date of the Order Reinstating Petition. I deny the Employer's motion and conclude that the petition should be reinstated as of its filing date of November 3. In Air Lacarte, 212 NLRB 764 (1974), the Regional Director reinstated the petition as of the date it was filed, not as of the date of the order reinstating the petition. In addition, the Board based its ruling in that case on the evidence pertaining to the circumstances that existed at the time the petition was filed.

The Employer also made a motion at hearing that, if the Regional Director determines that the petition should be reinstated as of the date of the Order Reinstating Petition, then a contract bar exists and the petition should be dismissed. It is well

established that for the purpose of applying the Board's contract-bar rules, the original filing date of a petition will control where the petition is dismissed on its merits and later reinstated. Deluxe Metal Furniture Co., Inc., 121 NLRB 995 (1958). In the instant case, the petition was filed on November 3. The contract between the Intervenor and the Employer was reached on November 21. Accordingly, I conclude that there is no contract bar and deny the Employer's Motion to Dismiss the Petition on that basis.

Inasmuch as I have concluded that the petition should be reinstated as of the original date of filing, the Employer's motion to check the showing of interest as of the date of the Order Reinstating Petition is also denied.

At the hearing, the Employer moved to stay the Regional Director's decision and an election, if ordered, pending the issuance of a decision by the Board on the Employer's February 16, 2010 Urgent Motion to Stay Representation Proceedings. As previously stated herein, the Board denied the Employer's motion on March 4, 2010. Therefore, these motions are now moot.

At the hearing, the Employer also moved to hold the election in abeyance until the parties have an opportunity to request review of the Director's decision and until the Board has had an opportunity to issue a decision on the request for review. Once a request for review of the Regional Director's decision has been granted by the Board, the case is transferred to the Board, which has the sole authority to determine whether the election should be held in abeyance. Sec 102.67(b) of the Board's Rules and Regulations. Thus, the Employer's motion is denied.

The remaining issues to be decided are whether a petition is premature and whether a question concerning representation can exist before a "perfectly clear"

successor employer "hires" employees and commences operations. While I have not found, nor do the parties cite, any Board cases that are directly on point, the following cases are instructive.

In MV Transportation, 337 NLRB 770 (2002), the Board overruled St. Elizabeth Manor, Inc., 329 NLRB 341 (1999), which provided an insulation period following a successorship where the incumbent union enjoyed an irrebuttable presumption of continuing majority status that could not be attacked by a rival union. In MV Transportation, the Board returned to the doctrine that an incumbent union enjoys only a rebuttable presumption of continuing majority status in an ordinary successorship situation. The Board noted at page 772:

> It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice – choice with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships. See *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1983). The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and operates with respect to those situations where employees have chosen a bargaining relationship. When these two objectives conflict, it is the Board's obligation to strike an appropriate balance between them. *NLRB v. Circle A & W Products Co.*, 647 F.2d 924 (9th Cir. 1981).

The Board concluded that the well-established principle to which it was returning in MV Transportation represented the most appropriate balance of the Act's competing purposes of protecting employee freedom of choice and maintaining the stability of bargaining relationships, whereas the successor bar doctrine set forth in St. Elizabeth promoted the stability of bargaining relationships to the exclusion of the employees'

Section 7 rights to choose their bargaining representative. The Board found it significant that, by eliminating the insulation period and establishing a rebuttable presumption of continuing majority status in a successor situation, the decision whether to remain with the incumbent union, decertify the union, or attempt to secure representation by another union, would be left to the employees.

As stated previously, there is no dispute that the Employer herein is a perfectly clear successor within the meaning of NLRB v. Burns International Security Services, 406 U.S. 272 (1972). The Board did not specifically address a "perfectly clear" successor situation in its decision in MV Transportation. The Board did state, however, that the rebuttable presumption of continuing majority status in an ordinary successorship situation will not serve as a bar to an otherwise valid rival union petition.

In Road & Rail Services, Inc., 348 NLRB 1160 (2006), the Board held that a perfectly clear successor does not violate Section 8(a)(2) of the Act by recognizing the incumbent union and entering into a collective-bargaining agreement with it prior to the hiring of the Respondent's work force and the commencement of operations. The Board's decision in Road & Rail is significant to the instant case for two reasons.

First, it establishes an exception to longstanding Board law that it is unlawful for an employer to recognize and bargain with a union and sign a collective-bargaining agreement prior to hiring employees and commencing operations.

Second, in finding no Section 8(a)(2) violation in Road & Rail, the Board placed particular emphasis on the fact that at no point during the parties' contract negotiations or the representation proceedings in that case was there ever evidence of a loss of majority

support for the Union. The Board's emphasis suggests that its findings would have been different if evidence had been presented that indicated a loss of majority status.

With regard to the first point in Road & Rail, if the Board has created an exception in unfair labor practice cases to allow for lawful recognition and collective-bargaining negotiations prior to hiring the work force and commencement of operations in a perfectly clear successorship situation, then it could be argued that an exception should apply in representation cases which would permit a question concerning representation to be raised prior to commencement of operations in a perfectly clear successorship situation. This should apply in particular, in circumstances such as those presented here, where the Petitioner has rebutted the Intervenor's presumption of majority status at the time the petition was filed and offers of employment had been extended to a substantial and representative complement of the unit. To hold otherwise would promote an extant bargaining relationship to the exclusion of the employees' Section 7 rights to choose their bargaining representative, the very approach the Board rejected in MV Transportation.

It could be concluded from the Board's decision in Road & Rail that the appropriate time for raising a question concerning representation and rebutting the Intervenor's presumption of majority status in a "perfectly clear" successor case is coincident to the Employer's bargaining obligation with the Intervenor. Thus, an analysis is necessary of when the Employer's bargaining obligation to the Intervenor attached in the instant case.

The Supreme Court held in Burns, *supra*, that there would be times when it is "perfectly clear" that the successor intends to hire all of the predecessor's employees and

in those circumstances, the successor may not impose initial terms without first bargaining with the union representing the employees. In Spruce Up Corp., 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975), the Board held that a "perfectly clear" successor's bargaining obligation over initial terms and conditions of employment with the union representing the employees begins when it has invited the predecessor's employees to accept employment without announcing its intention to set new conditions. In Elf Atomchem North America, Inc., 339 NLRB 796 (2003), the Board found that the employer was obligated to bargain with the union, as a "perfectly clear" successor, as of the date it informed its predecessor's employees that it would provide employment to them, recognize their seniority, and provide equivalent salaries and comparable benefits.

Based on the Board's findings in the above cases and the record in the instant case, I conclude that the Employer's obligation to bargain with the Intervenor began on October 29. On October 13, the Employer announced that it intended to offer the opportunity to all Penske drivers to fill out applications for employment and be hired. It also announced on October 13 that it intended to negotiate any changes to the employees' current terms and conditions of employment with the Intervenor. As of October 29, the Employer granted recognition to the Intervenor and had extended offers of employment to 41 Penske drivers, a majority of the employee complement ultimately employed on December 23.[9] Thus, as of October 29, the Employer invited the predecessor's employees to accept employment without announcing its intention to set new conditions. Inasmuch as I have concluded that the Employer's bargaining obligation to the Intervenor

[9] As noted above in footnote 8, the record is silent as to the specific number of employees in the unit when the Employer commenced operations on December 23. The record is clear, however, that the Employer agreed in the November 21 MOA with the Intervenor to offer employment to 60 former Penske drivers and that the Penske drivers constituted a clear majority of the unit on December 23. There was no evidence in the record, nor has any party asserted, that the Employer expanded the unit once it commenced operations.

attached on October 29, the appropriate time to rebut the Intervenor's majority status would also begin on October 29.

Although employees were not on the Employer's payroll as of the date of the filing of the petition, a substantial and representative complement of the unit was offered employment by the Employer,[10] to be employed within seven weeks of the filing of the petition.[11] The drivers were going to be performing the same work for the Employer as they did for the predecessor and, inasmuch as the Employer was a perfectly clear successor, the drivers' terms and conditions of employment were to remain the same upon the Employer's commencement of operations subject to subsequent negotiations with the Intervenor.

There are circumstances where the Board directs elections prior to an employer's commencement of operations. In Yellowstone International Mailing, Inc., 332 NLRB 386 (2000), the Board directed an election in a plant relocation situation, where it was reasonable to infer that at least a substantial number – if not virtually all – of the current employees would accept the offers of employment and remain employed with the employer following relocation where the new facility was only approximately 1.5 miles from the employer's existing facility, the nature of the work and functions performed

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[10] The fact that the Employer's offers were contingent on the employees passing a pre-employment drug and alcohol screening and a DOT physical is immaterial to the finding of a "perfectly clear" successor with an obligation to bargain. In S & F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach, 351 NLRB 975 (2007), the Board majority found that the successor was a perfectly clear successor with an obligation to bargain before making any changes to employees' terms and conditions of employment, despite the fact that, as noted by Member Schaumber in his dissent, the predecessor's employees were subject to a pre-employment physical, drug test and acceptable reference and background checks, as a condition of employment by the successor.

[11] It is well settled that the Board will direct an election when the employer's current complement of employees is "substantial and representative" of the unit workforce to be employed in the near future. See Total Industries (Atlanta), 323 NLRB 645 (1997); General Cable Corp., 173 NLRB 251 (1968). In general, the Board finds an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. Custom Deliveries, 315 NLRB 1018, 1019 fn. 8 (1994).

would not change, and there was no hiatus between the closing of the current facility and the opening of the new facility. While Yellowstone is not a perfectly clear successor case, it is instructive as to circumstances under which the Board will direct an election. Similar to the facts in Yellowstone, the Employer herein extended offers of employment to all employees in the unit, their job functions did not change and there was no hiatus between the cessation of one operation and the commencement of another. Indeed, in the instant case, unlike the employees in Yellowstone, the employees were not required to relocate. Thus, at the time the instant petition was filed, it was reasonable to assume that a substantial number of the employees would accept the Employer's offers of employment (and, in fact, almost all of the drivers in the Penske unit started working for the Employer on December 23).

The cases cited by the Employer in its post-hearing brief, are cases in which the Board has held that in order to be eligible to vote in an NLRB representation election, the employees must not only be hired but must actually be employed. These cases are inapposite, as the issue presented here is not whether the employees are eligible to vote, but whether the instant petition can be processed at a time when employees have been offered employment but the employer has yet to commence operations.

The instant case differs significantly with regard to the second point in Road & Rail, wherein at no point during the parties' negotiations or the related representation case proceedings was evidence presented of a loss of majority support for the union. On October 20, the Petitioner herein put the Employer on notice that it represented a majority of unit employees who had submitted applications for employment and were in the process of being tested for the positions being offered by the Employer. On October 20,

the Petitioner offered to send a copy of the petition with the employees' signatures to the Employer for verification and the Employer declined the offer.[12] On October 29, the Employer's bargaining obligation to the Intervenor attached, and in fact, on that date, the Employer recognized the Intervenor as the unit employees' collective-bargaining representative. On November 3, the Petitioner filed the instant petition with the Board and the next day the Employer and the Intervenor began contract negotiations. On November 12, the Petitioner sent a copy of the signed petition to the Employer who rejected and returned it. The record herein discloses evidence that the Petitioner represented a majority of employees in the unit on November 3 when the instant petition was filed. Accordingly, I conclude that as of November 3, the Employer had in its possession evidence rebutting the Intervenor's continuing majority status. The fact that the Employer chose to decline the Petitioner's earlier efforts to present this evidence is irrelevant to the question concerning representation.

Accordingly, after having carefully considered the entire record and based upon guidance from the Board law discussed herein, I conclude that the petition was not premature when it was filed, that the Petitioner presented evidence to rebut the Intervenor's presumption of majority status, and, therefore, that a question concerning representation exists.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit, as described above, at the date, time and place set forth in the

[12] After being presented with the Petitioner's claim of majority status, the Employer did not pursue its right to file an RM petition under Levitz Furniture Co. 333 NLRB 717 (2001).

notice of election to be issued subsequently subject to the Board's Rules and Regulations. The employees will vote whether or not they desire to be represented for collective bargaining purposes by: **Teamsters Local 294, International Brotherhood of Teamsters; Bakery, Confectionery, Tobacco Workers' and Grain Millers, International Union, Local 50; or Neither.**

A. <u>Voting Eligibility</u>

Eligible to vote in the election are those in the unit who were employed during the payroll period immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **April 5, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlrb.gov,[13]

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

by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **four** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional office.

C. Notice of Posting Obligation

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT

April 12, 2010. The request may be filed electronically through the Agency's web site, www.nlrb.gov,[14] but may not be filed by facsimile.

DATED at Buffalo, New York this 29th day of March, 2010.

/s/ Rhonda P. Ley
RHONDA P. LEY, Regional Director
National Labor Relations Board
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

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