UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

APL LOGISTICS WAREHOUSE MANAGEMENT SERVICES, INC. [1]/

Employer

and

Case 9-RD-2144

KIMBERLY ANN JOHNSON, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL CHEMICAL WORKERS
UNION COUNCIL OF THE UFCW AND
ITS LOCAL 15C [2]/

Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Employer, a corporation, provides warehousing and logistical services at its Shepherdsville, Kentucky facility. The Petitioner filed a petition with the National Labor Relations Board ("the Board") pursuant to Section 9(c) of the National Labor Relations Act ("the Act") seeking to decertify the International Chemical Workers Union Council ("the ICWUC") as the collective bargaining representative of all full-time and regular part-time warehousing employees employed at the Employer's Shepherdsville, Kentucky facility, excluding all office clerical employees, all employees employed by temporary agencies, all professional employees, administrative assistants, guards and supervisors, herein called the Unit.

On February 4, 2010, a pre-election hearing was held in this matter pursuant to *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) to determine whether any causal nexus existed between past alleged unfair labor practices of the Employer and employee disaffection underlying the petition, together with evidence regarding the question concerning representation raised by the petition.

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[1]/ The Employer's name appears as amended at the hearing.

[2]/ The Unions' names appear as amended at the hearing. For ease of reference, and where appropriate, they are collectively referred to as the Union.

The Union, contrary to the Employer, asserts that the petition must be dismissed and advances several arguments. First it contends that the petition, having been materially amended at the hearing, must be regarded as newly filed and thus is now barred by the parties' current collective-bargaining agreement. The Union also asserts that service of the petition was defective. Finally, the Union claims that certain alleged unfair labor practices of the Employer caused employees to withdraw support from the Union and thus tainted the petition. The Employer maintains that the original and timely filing date of the petition is controlling, notwithstanding the amendments made at the hearing. Further, it denies that its alleged unlawful conduct caused employee disaffection and tainted the petition.

As explained in detail below, I find the filing date of the original petition to be controlling and that the parties' current collective-bargaining agreement does not bar the processing of the petition. I also conclude that service of the petition was sufficient. Finally, I find that under extant Board law, the alleged unfair labor practices of the Employer are insufficient to establish taint of the petition. In reaching my determination I have considered the record evidence as a whole as well as the arguments made by the parties at hearing and in their post-hearing briefs. I will address each of the issues raised by the Union and, in doing so, I will set forth the relevant facts, including a brief overview of the conduct alleged to have tainted the petition, as well as the legal analysis and reasoning supporting my conclusion under applicable Board precedent.

II. CONTRACT BAR AND SERVICE OF THE PETITION

At the February 4, 2010, hearing in this matter, the petition was amended to reflect the correct legal name of the Employer as APL Logistics Warehouse Management Services, Inc., rather than APL Logistics, and to reflect the name of the Union as International Chemical Workers Union Council and United Food and Commercial Workers, Local 15C ("Local 15C"). The Unions argue that these amendments constitute material changes and require the filing of a new petition. Consequently, they argue the petition is now barred as its new effective filing date, February 4, 2010, falls within the term of the parties' current collective-bargaining agreement. The Employer maintains that the original filing date should prevail. The Unions also argue that service of the petition was not perfected.

A. Factual Overview of Contract Bar Issue

It is undisputed that the petition initially named only the ICWUC as the representative of the unit until it was amended at the hearing to add Local 15C. It is also clear that the petition, and the related Notices of Hearing and Order Rescheduling Hearing, were served only on the ICWUC at its business address in Akron, Ohio. Although the ICWUC does not deny actual receipt of the petition, it asserts that its attorney, Randall Vehar, to whom the petition was addressed, was not authorized to accept service of the petition on behalf of either the ICWUC or Local 692C. In January 2004, the Board certified the ICWUC as the sole collective bargaining representative of the Unit. The ICWUC is an affiliate of the United Food and Commercial Workers ("UFCW") and came into being as a consequence of a merger between the International Chemical Workers Union ("ICWU") and the UFCW that occurred prior to its certification as representative of the Unit. At some point prior to the execution of the parties' first collective-

bargaining agreement, the record does not disclose the date, the ICWUC created and/or designated Local 692C as its local responsible for administering the collective-bargaining agreement.[3]/ Thus, the first collective-bargaining agreement, effective from September 11, 2006 to September 10, 2007, was between the Employer and the ICWUC and its Local 692C. The petition was filed on July 7, 2007, but further processing was blocked by a series of unfair labor practice charges.

About May 1, 2008, Local 692C merged with another local and became Local 15C of the ICWUC. The merger agreement between Local 692C and Local 15C states that the merged locals are to be known as United Food and Commercial Workers/International Chemical Workers Union Council Union Local No. 15C. (Union Ex. 5) The record also establishes that after the merger, the officers of Local 692C became the officers of Local 15C. By letter dated May 13, 2008, Harvey Powers, the president of Local 692C, advised the Employer that the merger was an "internal matter having no affect on the collective bargaining relationship." By e-mail dated July 23, 2008, Attorney Vehar, who appeared as counsel for both Unions in this proceeding, informed the Employer's attorney that, "this merger does not affect the certification of the ICWUC as being the exclusive representative of the APL unit . . ." The parties' second and current collective-bargaining agreement, effective from January 1, 2009 through December 31, 2011, is between the Employer and the ICWUC and its Local 15C.

At the hearing, the parties stipulated that the ICWUC is an intermediate chartered council covered by the UFCW constitution, but the ICWUC has its own officers and by-laws and holds a separate convention. The parties also stipulated that only the UFCW has the authority to authorize a strike undertaken by Locals 15C and 692C or to approve their by-laws or any mergers.

B. Legal Framework

It is well established that when a petition is amended, but the employer and the operations or employees involved were contemplated under the original petition, and the amendment does not substantially enlarge the character or size of the unit, the filing date of the original petition is controlling. *Deluxe Metal Furniture*, 121 NLRB 995, 1000 fn. 12 (1958); *Dobbs International Services, Inc.*, 323 NLRB 1159 (1997). Thus, the Board found the filing date of the original petition controlling where the petitioning union later amended the petition to name an apparently unaffiliated union as its joint petitioner. *Dobbs International*, supra. If the original petition misnames the employer, such misnaming must be material in order to change the effective filing date. *The Baldwin Company*, 81 NLRB 927 (1949); *Allied Beverage Distributing Co.*, 143 NLRB 149 (1963). The Board found the amended date of a petition to be controlling where the original petition wrongly identified an entity as the multi-employer association employing the sought after unit. *Allied Beverage*, 143 NLRB at 151. Although copies of the petition were mailed to 9 of the 15 employers who comprised the unit, the Board

[3] / Although not documented in the record, the Unions maintain in their brief that Local 692C had existed as Local 692 of the ICWU before the merger with the UFCW. They state that after the merger, all local affiliates of the ICWU became affiliates of the UFCW, but a "C" was added to the affiliates' local number to indicate their affiliation with the ICWUC.

reasoned that a substantial number of the employers were neither named in nor notified of the petition until the filing and service of the amended petition. *Ibid.*

C. Analysis

I find that neither the correction of the Employer's name nor the addition of Local 15C to the petition as the collective bargaining representative fall within the exceptions set forth in *Deluxe Metal Furniture*, supra, and, therefore, the filing date of the original petition is controlling. First, I note that no party contends that the petition failed to accurately identify the bargaining unit involved or that the amendments to the petition enlarged or altered the unit in any way. With respect to the Employer's name change, the Employer was named with reasonable accuracy in the original petition and received notice of the petition through service at is business address in Shepherdsville, Kentucky. These factors clearly distinguish this case from the facts in *Allied Beverage*, supra. I find the Union's reliance on *The Baldwin Company*, 81 NLRB 927 (1949), to be misplaced. In that case, the Board found that a petition was materially changed after the petitioner amended the petition to correctly identify the employer as the "Baldwin Piano Company" rather than the "Baldwin Company." Unlike in the instant case, *Baldwin Company* involved a petitioner's confusion over two existing employers, with the original petition being served only on the incorrectly identified employer, which was a separate legal entity with its own corporate structure and workforce. *Baldwin Company*, 81 NLRB at 928. These factors are absent here and there is no record evidence showing that the employer identified in the original petition could be reasonably construed as any entity other than the Employer.

Amending the petition to add Local 15C was appropriate as the record establishes that it is now the recognized bargaining representative along with the ICWUC; however, that amendment did not result in a material change to the petition. Significantly, the original petition correctly identified the ICWUC as the certified representative and the ICWUC does not deny that it received actual notice of the petition, notwithstanding its attorney's claim that he was not authorized to accept service of the petition. The petition was mailed to the regular business address of the ICWUC, which was sufficient to effectuate service under the Board's Rules and Regulations. See, *Board's Rules and Regulations, Sections 102.113(a), (d) and (e)*. It is appropriate to impute knowledge of the petition to Local 692C, and its successor Local 15C, and I find the Unions' arguments to the contrary unconvincing and having no basis in law or fact. I note that the Unions do not deny that Local 15C, or its predecessor, were notified of the original petition at or around the time of its filing. There is no evidence in the record establishing that the Unions were prejudiced in any manner by the failure to name Local 692C in the original petition. Further, where an international union and its local jointly represent a unit of employees, service on one of the entities constitutes service on both entities. See, *P & L Cedar Products*, 224 NLRB 255, 259 (1976) and *International Union of Electrical Radio and Machine Workers, and its Local 644 (Spartos Corporation)*, 271 NLRB 607 (1984). Both of the collective-bargaining agreements between the parties collectively refer to the ICWUC and the respective Locals as "the Union" and the Employer granted exclusive recognition to them as such. These factors alone are sufficient to establish them as joint representatives. See, *IUE and its Local 644*, supra. The maintenance of separate by-laws and conventions relied upon by the Unions are internal matters that do not alter this conclusion.

III. PETITION TAINT

The Union argues that the petition should be dismissed because it was tainted by the Employer's alleged unfair labor practices. In advancing this position, the Union relies on alleged unfair labor practices that were the subject of two unilateral settlements approved on November 22, 2006 and November 20, 2007, respectively. The Union also relies on various unfair labor practice charges that were dismissed for lack of merit. The Employer maintains that there is no causal nexus between its alleged past misconduct and the employee disaffection underlying the filing of the petition.

A. Factual History

The Union filed a number of unfair labor practice charges both before and after the filing of the July 7, 2007 decertification petition. Several of the charge allegations were administratively found to warrant issuance of a complaint and were subsequently remedied through two settlement agreements. On November 22, 2006, I approved, over the Union's objection, an informal settlement agreement to remedy unfair labor practices alleged in a Complaint and Notice of Hearing that issued in Cases 9-CA-40618, 9-CA-40904, 9-CA-42400 and 9-CA-42594 ("Informal Settlement"). [4]/ Between about March and May 2007, the Employer posted the accompanying Notice to Employees at its facility. The cases were closed on May 18, 2007 after full compliance was achieved.

On December 21, 2007, the Region issued a Third Consolidated Complaint ("Consolidated Complaint") in Cases 9-CA-43431, 9-CA-43719, 9-CA-43858, 9-CA-43876 and 9-CA-44009, alleging that the Employer committed various violations of the Act, including withdrawing recognition from the Union after the petition was filed. The Consolidated Complaint, as amended at the unfair labor practice hearing, alleged the following pre-petition misconduct: (1) between October 18, 2006 and January 23, 2007, the Employer unlawfully failed and refused to furnish the Union with information related to its use of temporary employees; (2) from about December 18, 2006, the Employer failed and refused to furnish the Union with amendments to the Employer's sexual harassment policy and information related to complaints made to the Employer's "hotline"; and, (3) from about May 27 to August 6, 2007, the Employer unreasonably delayed in providing certain information related to employees' wages, hours and benefits, that the Union had requested for the purpose of engaging in negotiations for a new contract. (See Exhibit J to the Formal Stipulation [Joint Exhibit 2]). [5]/ The Employer ultimately entered into a Formal Settlement Stipulation ("Formal Settlement"), including a non-admissions clause, in which it agreed to remedy the alleged misconduct. On November 20, 2008, the Board approved the Formal Settlement over the Union's objections. As part of its

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[4] / The Complaint and underlying charges are not a part of the record, however I take judicial notice of the fact that the charges were filed in the Region on various dates between October 16, 2003 and January 13, 2006, based on conduct that allegedly occurred around and between that period.

[5] / The Consolidated Complaint encompassing the charges and the Formal Settlement are a part of the record. The remaining alleged unlawful conduct occurred after the petition was filed and could not, under any Board precedent, have tainted the petition. I therefore deny the Union's request that such alleged conduct be considered in this matter.

remedial obligation, the Employer was required, upon request, to bargain collectively with the Union and execute any collective-bargaining agreement reached between the parties. Consequently, the processing of the petition was held in abeyance pending a reasonable remedial period for the parties to engage in collective bargaining. Cf. *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enfd. 192 F. 2d 740 (4th Cir. 1951); Accord, *Truserv Corporation,* 349 NLRB 227 (2007). The cases were closed on June 23, 2009 after full compliance was achieved.

B. Legal Framework and Analysis

In *Truserv Corporation*, supra, the Board held that, after an unfair labor practice case is settled, a decertification petition timely filed before the settlement, albeit after the alleged unlawful conduct, can be processed and an election held after the completion of the remedial period associated with the settlement. *Ibid.* The Board found that absent a finding of a violation of the Act, or an admission by the employer of such violation, there is no basis for dismissing a decertification petition based on a settlement of alleged but unproven unfair labor practice cases. *Id.* at 227-228. The Board noted that a Regional Director could still dismiss decertification petitions that are filed after the execution of a settlement agreement but during the remedial period of such settlement, or where the Regional Director finds that the employer instigated the petition or solicited the underlying showing of interest. *Id.* at 227, 229-230.

Initially, I note that the Union's reliance on the alleged misconduct covered by the Informal Settlement is misplaced and beyond the scope of the Notice of Hearing that issued in this matter. [6]/ The petition was filed after completion of the remedial period provided by the Informal Settlement and well after the occurrence of the alleged misconduct that was the subject matter of the settlement. Thus the petition was not barred by the Informal Settlement and there is insufficient record evidence establishing any causal nexus between the alleged misconduct remedied by the Informal Settlement and the employee disaffection underlying the petition. I decline to consider the various unfair labor practice charges referenced in the record that were dismissed for lack of merit. An analysis of alleged taint by virtue of the commission of unfair labor practices requires, at a minimum, that there be a finding on the merits of the alleged unlawful conduct. The present proceeding is an improper forum for such an inquiry. It is well established that the Board does not permit the litigation of unfair labor practices in representational proceedings. *Times Square Stores Corp.*, 79 NLRB 361 (1948); *Virginia Concrete Corp.*, 338 NLRB 1182 (2003).

Finally, I do not rely on the conduct remedied by the Formal Settlement to dismiss the petition. The scenario presented by the execution of the Formal Settlement falls squarely within the reasoning of *Truserv Corp.*, supra. The Employer's alleged unlawful failure to provide certain information to the Union occurred before the petition was filed, and the alleged unlawful conduct was later settled before a determination of merit. Under *Truserv Corp.*, supra, the alleged unlawful conduct is considered "unproven" and may not be relied upon as a basis for dismissing the petition, particularly in light of the non-admissions clause contained in the settlement. *Truserv Corp.*, supra at 228.

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[6]/ The Notice of Hearing limited the question of taint to the unfair labor practices alleged in Cases 9-CA-43431, 9-CA-43719, 9-CA-43858, 9-CA-43876 and 9-CA-44009. (Board Ex. 1(b))

IV. SUMMARY

In sum, I find that the record evidence and extant Board principles do not support dismissal of the petition. The amendments made to the petition with respect the Employer's name and the addition of Local 15C were not material and did not substantially alter the petition. Thus the petition is not barred by the parties' current collective-bargaining agreement because it was timely filed before any insular period prescribed by the Board's contract bar rule. It is also clear that all parties received service of the petition and participated in this hearing. Finally, the past alleged unfair labor practices upon which the Union relies are insufficient in terms of timing and substance to establish that a causal nexus existed between the alleged misconduct and the underlying employee disaffection that served as the basis for the petition. Accordingly, I find that the petition is not tainted and the conduct of an election is warranted.

V. CONCLUSIONS AND FINDINGS

Based upon the foregoing and the entire record in this matter, I conclude and find as follows:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. [7]/

3. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehousing employees employed at the Employer's Shepherdsville, Kentucky facility, but excluding all office clerical employees, all employees employed by temporary agencies, all professional employees, administrative assistants, guards and supervisors under the Act.

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[7]/ At the hearing, the parties stipulated that during the past 12 months, a representative period, the Employer sold and shipped goods valued in excess of $50,000 from its Shepherdsville, Kentucky facility directly to customers located outside the Commonwealth of Kentucky. Accordingly, I am satisfied that the Employer's operations meet the Board's statutory standard for asserting jurisdiction.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote on whether they wish to be represented for purposes of collective bargaining by the International Chemical Workers Union Council of the UFCW and its Local 15C. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

VII. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending 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 then 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.

VIII. 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 the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, John Weld Peck Federal Building, 550 Main Street, Room 3003,

Cincinnati, Ohio, on or before **May 18, 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 by facsimile transmission at (510) 637-3315. Because the list will be made available to all parties if it is determined to proceed to an election, please furnish **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

IX. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer, if an election is subsequently ordered, must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date 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 nonposting of the election notice.

IX. 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, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **May 25, 2010, unless filed electronically.** Consistent with the Agency's E-Government initiative, parties are **encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. [8]/ A copy of the request for review

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[8]/ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Cincinnati, Ohio this 11th day of May 2010.

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
Room 3003, John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

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