UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

APPOLLO SYSTEMS, INC.,

Employer-Petitioner,

Case No.: 18-UC-423

and

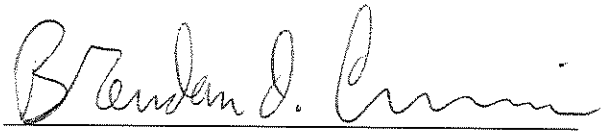
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 292,

Union.

UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND ORDER CLARIFYING AN EXISTING BARGAINING UNIT

Dated: December 31, 2009

MILLER O'BRIEN CUMMINS, PLLP



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REQUEST FOR REVIEW

International Brotherhood of Electrical Workers, Local 292 (the "Union") hereby requests review of the Regional Director's Decision and Order clarifying an existing bargaining unit pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations. The Regional Director took the unprecedented step of "clarifying" the scope of a bargaining unit where the Petitioner is signatory to a construction industry pre-hire collective bargaining agreement with the Union pursuant to section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f). This decision not only lacks any legal or procedural support, it is also inconsistent with the purpose of unit clarification and the plain language of the Act. Further, the Regional Director's decision departs from officially reported Board precedent because it effectively re-writes an existing section 8(f) collective bargaining agreement to exclude work that is expressly covered. Moreover, the Regional Director's processing of the petition resulted in prejudicial error because the Regional Director declined to hold a hearing even though a key fact issue was in dispute as to whether the Petitioner obtained a "historical exclusion" of employees by fraud. Accordingly, this case raises substantial questions of law or policy, and compelling reasons exist for Board review. See NLRB Rules and Regulations § 102.67(c)(1),(3).

QUESTIONS PRESENTED

1. Are there compelling reasons for review of the Regional Director's unprecedented decision to use his power under section 9(b) to clarify a bargaining unit in a section 8(f) agreement despite the fact that section 8(f) expressly states that section 9 does not apply to such agreements?
2. Are there compelling reasons for review of the Regional Director's decision to effectively re-write the collective bargaining agreement to exclude work that is expressly covered?

3. Are there compelling reasons to review the processing of the petition because no hearing was held to address the key disputed fact issue in the case as to whether Petitioner obtained a "historical exclusion" of employees based on a fraudulent misrepresentation?

STATEMENT OF FACTS

Petitioner, Appollo Systems, Inc., was previously known as Focis, Inc. d/b/a Appollo Systems. See Order to Show Cause, p. 1. Prior to 2004, Petitioner had been in business as a residential limited energy electrical contractor. Id. On June 30, 2004, Petitioner purchased the assets of Connectivity Solutions, Inc., a commercial limited energy electrical contractor that had a bargaining relationship with the Union. Id. On September 1, 2004, Petitioner signed a letter of assent binding Petitioner to the Minnesota Limited Energy collective bargaining agreement with the Union. Id. The Agreement covers both commercial and residential work. See Exhibit A to Union Response to Order to Show Cause. On its face, the "Scope of Work" defined in section 1.04 of the Agreement does not differentiate between commercial and residential work. Id.

From the time it recognized the Union until December 21, 2007, Petitioner performed commercial work under the name "Focis, Inc." and performed residential work under the name "Appollo Systems." See Order to Show Cause, p. 3. The Union took the position in its submissions to the Regional Director that at the time the letter of assent was signed and thereafter the Petitioner misrepresented to the Union that its commercial and residential divisions were two separate companies when in fact they were one company all along. See Union Response, pp. 5-8. The Union's position was that as a result of this misrepresentation Petitioner was permitted to perform residential work without adhering to the Minnesota Limited Energy Agreement for years. Id.

Petitioner's position before the Regional Director was that the Union verbally agreed in August 2004 that residential work would not be covered by the Minnesota Limited Energy Agreement even though the Union was aware that Petitioner was one company. See Order to Show Cause, p. 2. The Union denied this allegation and submitted the Business Representative's contemporaneous notes as Exhibit B to its Response to the Order to Show Cause. The Union also offered to produce its Business Representative as a witness at a hearing but noted that it could not obtain an affidavit prior to submitting its response because the Business Representative had not yet received permission from his new employer, the Federal Mediation and Conciliation Service, which has strict rules regarding employees testifying in labor disputes. See Union Response, p. 6.

On December 21, 2007, two days after the current Agreement took effect, Petitioner ceased using the name "Focis, Inc." and began to use the name "Appollo Systems, Inc." for all work performed, commercial and residential, but did not inform the Union of this change. See Order to Show Cause, p. 3; Union Response, Exh. A. At that time Petitioner amended its articles of incorporation changing the name of the corporation to "Appollo Systems, Inc." Id., p. 3, Decision and Order, p. 3. On June 4, 2009, the Union sent a letter to Petitioner stating that it had recently discovered that Petitioner was one company performing both commercial and residential work under the name "Appollo Systems, Inc." See Order to Show Cause, p. 3. The Union stated that the letter should be considered a formal grievance and demanded that Petitioner comply with the Minnesota Limited Energy Agreement for all work performed by the Petitioner, residential and commercial, as required on the face of the Agreement. Id.

On October 21, 2009, the Petitioner filed a unit clarification petition seeking to exclude all employees performing residential work from the scope of the bargaining unit covered by the

section 8(f) agreement. The Regional Director declined to hold a hearing on the matter and issued an Order to Show Cause why the unit should not be clarified as requested. On December 3, 2009, the Regional Director issued a Decision and Order clarifying the bargaining unit to exclude "residential division employees" even though it is undisputed that the Petitioner is one company that is signatory to a contract that covers residential work. The Regional Director's decision failed to resolve the key fact dispute about whether the Union verbally agreed to exclude residential work knowing that Petitioner was only one company or whether instead from the outset the Petitioner had misrepresented that the "residential division" was a separate company and thereby obtained a purported historical exclusion by fraud.

ARGUMENT

I. UNIT CLARIFICATION PURSUANT TO SECTION 9 OF THE ACT IS NOT APPLICABLE TO SECTION 8(F) AGREEMENTS.

It appears that no case law is directly on point as to whether the NLRB may clarify a unit in a section 8(f) pre-hire collective bargaining agreement in the construction industry. One may assume that no cases exist because attempting to clarify a unit in a pre-hire agreement would contradict both the clear language of section 8(f) and the stated purpose of unit clarification in section 9(b).

The plain words of the Act state that unit clarification is intended "to assure ***to employees*** the fullest freedom in exercising the rights guaranteed by this subchapter." 29 U.S.C. § 159(b) (emphasis added). In other words, the purpose is to protect the free choice of employees to select or not select a collective bargaining representative and preserve their right to self-determination. This rationale is expressly inapplicable to construction industry pre-hire agreements, which are specifically authorized by law even where "***the majority status of such labor organization has not been established under the provisions of section 159***." 29 U.S.C. §

158(f) (emphasis added). Thus, the plain words of section 8(f) expressly disavow application of section 9 to pre-hire agreements and disclaim any obligation to protect employee free choice in selection of a bargaining representative. Section 8(f) protects the rights of **employers and unions** in the construction industry to cover certain **work** under a collective bargaining agreement regardless of whether any employees have been hired and without any majority selection process. If employee free choice pursuant to section 9 is not required under a section 8(f) agreement, then it is entirely inappropriate to apply a section 9(b) unit clarification analysis to a section 8(f) agreement.1

The NLRB has previously held that where, as here, two or more entities constitute a single employer and one of them is party to a pre-hire agreement, the agreement may be applied to both regardless of application of section 9. Oilfield Maintenance Co., Inc., 142 NLRB 1384, 1387 (1963); see also B & B Indus., Inc., 162 NLRB 832, 842 (1967) ("***Nor, when two or more entities constitute a single employer and one of them is party to a valid prehire agreement, must the union's majority status be established among the employees of the other entities, before all are bound by the contract's terms.***). (Emphasis added). By analogy, in this case, the section 8(f) pre-hire agreement may be applied to both the residential and commercial "divisions" of the Petitioner—which admittedly constitute a single employer—regardless of any considerations about majority status or community of interest under section 9.

Consistent with the language of the Act, Board law on unit clarification is centered around the statutory policy of protecting employee free choice or "self-determination." The Board's rule against including employees who have been historically excluded—the Regional Director's guiding principle in this case—is founded on this policy of employee self-

1 The only point at which a unit determination analysis would be appropriate is if there were an attempt to "convert" the section 8(f) agreement to section 9(a) status. John Deklewa & Sons, 282 NLRB 1375, 1377 (1987).

determination. See Robert Wood Johnson University Hospital, 328 NLRB 912 (1999), citing Copperweld Specialty Steel Co., 204 NLRB 46 (1973) (holding that a self-determination election pursuant to section 9(c) is the appropriate means to add historically excluded employees to a unit). The Board's strict legal standard requiring a showing of an "overwhelming community of interest" before accretion will be allowed in a unit clarification proceeding is another indication that the animating principle under section 9(b) is protecting employee free choice. The NLRB has explained:

> The Board has followed a restrictive policy in finding accretions to existing units because employees accreted to an existing unit are not accorded a self-determination election and ***the Board seeks to insure that the employees' right to determine their own bargaining representative is not foreclosed***.... The Board thus will find a valid accretion "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted. *Safeway Stores*, 256 NLRB 918, 918 (1981).

Compact Video Servs., 284 NLRB 117, 119 (1987) (emphasis added). None of this analysis about employee self-determination applies to pre-hire agreements.

Pre-hire agreements were first authorized by the Landrum-Griffin Act in 1959. Congress legalized such agreements based on the recognition that the construction labor market, unlike that of other industries, consists of workers trained in a particular trade, seasonal and transitory employment, and employees working for many different employers at many different work sites. There is no unitary "workplace" in the construction industry. Consequently, and unlike other industries, workers often maintain their long-term relationships with their unions rather than with a particular employer. The union negotiates on behalf of a pool of job applicants, available through hiring halls or referral systems, to work for the employers who are signatory to contracts with the union. All employees on the union's referral list, whether or not they are members, are potential employees for all employers signatory to the union contract.

Congressional discussion of section 8(f) pre-hire agreements was characterized by the remarks of Senator Hubert H. Humphrey, who observed:

> Unlike most manufacturing and service industries, the building and construction industry is characterized by casual, intermittent, and often seasonal employer/employee relationships on separate projects undertaken pursuant to contracts let by competitive bidding . . . . The standardization of costs that result from continuous operations in the manufacturing and service fields is not present in this area and must be attained in other ways. The industry has adapted itself to these special factors pragmatically and has evolved certain institutions and practices to meet its requirements. Labor-management legislation applicable to this industry must account to these functional habits.

S. Rep. No. 1509, 82nd Cong., 2d Sess. 1 (1952). Congress further recognized as follows:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on the various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959) see also Carbonex Coal Co., 262 NLRB 1306, 1323 (1982) (explaining that section 8(f) was adopted because of "T]he instable nature of the work force including the necessity of hiring most employees on a single project basis which would often effectively deprive building and construction employees of an opportunity for representation, if required to adhere strictly to the requirements of Section 9(a) of the Act.") (Emphasis added). As a result, Congress noted that in the construction industry:

> it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps one year or in many instances as much as three years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.

S. Rep. No. 187, 86th Cong., 1st Sess., 27 (1959).

Moreover, Congress emphasized that construction employers benefit from pre-hire agreements. Once awarded a contract, the employer must quickly be able to secure skilled workers of all crafts and cannot afford to start each job with an on-the-job training program. The

pre-hire agreement meets that objective. Additionally, as the 1959 Congress noted, the pre-hire pattern of bargaining "is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based." S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959).

In order to continue the prevailing bargaining practices in the construction industry and to accommodate the terms of the NLRA to the special conditions in the industry, Congress amended the NLRA to add an unfair labor practice exemption providing that employers and unions could enter into pre-hire agreements without an employee election or any showing of majority status. 29 U.S.C. § 158(f). This was an express exemption from the strictures of section 9 based on a thorough consideration of the realities and existing bargaining patterns of the construction industry. To apply a unit clarification analysis under section 9 in the name of protecting the right to majority selection of a bargaining representative would fly in the face of the legislative history and language of section 8(f).

Further, unit clarification analysis is inappropriate for pre-hire agreements because the Board determines an appropriate unit under its own legal tests, including the "overwhelming community of interest" standard, whereas section 8(f) was intended to permit employers and unions to decide on their own the best pattern for bargaining. As indicated by the legislative history of section 8(f), Congress showed substantial deference to the existing patterns of bargaining in the industry developed by employers and unions. To impose the restrictions of section 9 on section 8(f) agreements would run counter to the intent of Congress to allow construction employers and unions to bargain their own agreements in the way they see fit to meet the unique needs of their industry.

II. A UNIT CLARIFICATION PROCEEDING IS NOT THE PROPER FORUM FOR ADDRESSING THE ISSUE OF WHETHER AND TO WHAT EXTENT AN EMPLOYER IS BOUND BY A SECTION 8(F) AGREEMENT.

In the absence of any support for protecting employee "self-determination" in the context of a section 8(f) pre-hire agreement, the Regional Director reasoned that unit clarification could be used to protect the rights of employers to enter into section 8(f) agreements "voluntarily." See Decision and Order, p. 8. However, section 9(b) says nothing about employer rights or about section 8(f) agreements. Unit clarification is not the proper process for determining whether or to what extent an employer is bound by a section 8(f) agreement.

An employer's remedy if it believes that it is not voluntarily bound by a section 8(f) agreement is to refuse to abide by the agreement in whole or in part, which is what happened here. The Union then would have the right to attempt to enforce the agreement. First, the Union can file a grievance and pursue arbitration to determine the scope of coverage of the contract. This is the remedy the Union chose in this case. If the Employer refuses to submit the matter to arbitration or argues that it is not bound by the contract, the Union can file a lawsuit in federal court pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, which authorizes lawsuits for violations of contracts between employers and labor organizations. See, e.g., Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Textron Lycoming v. UAW, 523 U.S. 653, 658 (1998) ("Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with section 301(a), adjudicate that defense."). If the Employer repudiates its section 8(f) collective bargaining agreement entirely, a union could pursue an unfair labor practice proceeding pursuant to section 8(a)(5) of the Act. John Deklewa & Sons, 282 NLRB 1375 (1987), enf'd sub nom, Ironworkers Local 3 v.

NLRB, 843 F.2d 770 (3d Cir), cert. denied, 488 U.S. 899 (1988). In each of the above-mentioned proceedings the decision-maker would have the power to determine whether or to what extent the employer is bound by the section 8(f) agreement.

III. THE REGIONAL DIRECTOR DEPARTED FROM BOARD PRECEDENT BY EFFECTIVELY RE-WRITING THE CONTRACT TO EXCLUDE WORK THAT IS EXPRESSLY COVERED.

The Regional Director's decision further departs from officially reported Board precedent because it interprets the existing section 8(f) collective bargaining agreement to exclude residential work—even though on its face section 1.04 of the agreement covers such work. See Exhibit A to Union Response. It is not the role of the NLRB to interpret collective bargaining agreements in unit clarification cases, much less to rewrite them. St. Mary's Med. Ctr., 322 NLRB 954 (1997) (in unit clarification cases NLRB defers issues that turn solely on contract interpretation to arbitration); see also McDonnell Douglas Corp., 324 NLRB 1202, 1204 (1997) (NLRB defers to arbitration even in representation cases for issues that depend solely on contract interpretation); see generally Edison Sault Electric Co., 313 NLRB 753, 753-54 (1994) ("The Board has traditionally held that a unit clarification petition submitted during the term of a contract specifically dealing with the disputed classification will be dismissed if the party filing the petition did not reserve its right to file during the course of bargaining."). There is no dispute in this case that the Petitioner is a single company with residential and commercial "divisions" and no dispute that it is bound by the Minnesota Limited Energy Agreement, which on its face applies to commercial and residential work with no distinction. See Union Response, pp. 5-8 and Exh. A; Order to Show Cause, pp. 2-3. By exempting residential work from coverage contrary to the language of the Agreement, the Regional Director has effectively rewritten the Agreement and given the Petitioner an advantage no other signatory employer enjoys.

This case solely involves issues of contract interpretation such that the NLRB should defer the matter to arbitration. St. Mary's Med. Ctr., 322 NLRB 954. The Union filed a grievance in this case alleging that Petitioner failed to adhere to the terms and conditions of the Minnesota Limited Energy Agreement with respect to residential work. See Order to Show Cause, pp. 3-4; Union Response, p. 7. This is exclusively an interpretive question about the scope of coverage of the existing contract and whether it covers residential work. See Union Response, Exh. A. It should be noted that the Union intends to reform the remedy requested in its grievance to limit it to the scope of the violation, i.e. simply ordering the Petitioner to comply with the contract for all residential work rather than also requiring existing residential employees to "become members of the Union." As indicated by the discussion in Part I herein, the issue of which employees are covered is not at stake in a section 8(f) pre-hire agreement. Instead the issue is what work is covered. It is well settled that arbitrators have broad power to fashion a remedy suitable to the violation and do not have to impose the remedy initially requested in the grievance. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); Local 369, Bakery & Confectionery Workers Int'l Union v. Cotton Baking Co., Inc., 514 F.2d 1235, 1237 (5th Cir. 1975). The remedy sought by the Union in its grievance is now limited to compliance with all the terms and conditions of the Minnesota Limited Energy Agreement for all residential work performed by Petitioner. This issue is for an arbitrator, not for the NLRB in a unit clarification proceeding.

IV. THE REGIONAL DIRECTOR'S DECISION NOT TO HOLD A HEARING CONSTITUTED PREJUDICIAL ERROR BECAUSE THERE IS A FACT DISPUTE REGARDING THE CRITICAL ISSUE WHETHER THE PETITIONER OBTAINED A "HISTORICAL EXCLUSION" BY FRAUD.

It was prejudicial error not to hold a hearing in this case because the parties presented sharply differing accounts of the relevant facts. Specifically, the Petitioner took the position that

the Union was aware since the inception of the agreement that Petitioner was a single employer and nonetheless agreed to the exclusion of residential work from contractual coverage. See Order to Show Cause, p. 3. In contrast, the Union took the position that at the inception of the contract the Petitioner misrepresented that residential work was performed by a separate company and that the Union only discovered that the Petitioner is a single employer just prior to the filing of the grievance in June 2009. See Union Response, pp. 5-8. Thus, the parties disagree over the key fact of whether residential employees were "historically excluded" based on a fraudulent misrepresentation, or whether they were legitimately excluded based on mutual agreement of the parties. The Union submitted preliminary evidence in support of its position to the Regional Director but was not allowed a hearing to develop it further. See, e.g., Exhibits B, C to Union Response and pp. 6, 8. In repeatedly requesting a hearing, the Union emphasized that its evidence submitted in its Response to the Order to Show Cause was only preliminary because its main witness, a former Business Representative, now worked for the Federal Mediation and Conciliation Service and had to go through a strict approval process before being allowed to testify. Id., pp. 1, 5-6. A hearing would have been particularly important to resolve credibility issues underlying the fact dispute.

If the Regional Director had the power to entertain a unit clarification petition, this fact dispute would become critically important. After all, the Regional Director's principal reason for his ruling was that the residential employees were "historically excluded," a proposition with which he began and ended his decision. See Decision and Order, pp. 6, 9. The historical exclusion rationale becomes a thin reed indeed if it is premised on a lie by the Petitioner—i.e., that the residential employees were purportedly not covered by the Agreement because they worked for a different employer. A historical exclusion obtained by fraud should not be the

basis for a Regional Director's decision. If the Union's factual allegations about the Petitioner's misrepresentation were found to be accurate, then the outcome of this proceeding would likely have been different. Thus, the failure to hold a hearing constitutes prejudicial error.

The Regional Director attempted to sidestep this central fact dispute by "assuming" that the Petitioner deceived the Union. See Decision and Order, p. 8. However, the Regional Director's assumption was inconsistent with the Union's allegations. The Regional Director "assumed" that the Petitioner "deceived the Union by not informing it of the name change that occurred in 2007" but also assumed that in 2004 "both the Union and Petitioner agreed to an arrangement that . . . the residential division employees would not be represented by the Union." Id., pp. 2, 8. However, the Union's Response to its Order to Show Cause stated the opposite: "Petitioner alleges that the Union knowingly agreed to allow Petitioner to sign an agreement with respect to only its commercial division, and not its residential division. Such an allegation is patently untrue." See p. 5. The Union explained that its argument was based on "***misrepresentation of the entity employing the residential division employees***" and "it filed the grievance in this matter as soon as it became aware that the residential division employees ***were, in fact, employed by the same entity*** that had signed the letter of assent." Id., pp. 7, 8 (emphasis added). In short, the Union is complaining of the Petitioner's misrepresentation of the fact that the residential and commercial divisions were one and the same company all along, which the Regional Director erroneously dismissed as a mere failure to disclose Petitioner's name change in 2007. The Union's factual allegations about misrepresentation should be squarely addressed, not sidestepped using an erroneous assumption. A hearing should be held to resolve the key fact dispute regarding whether the Petitioner's claimed "historical exclusion" is predicated on a longstanding misrepresentation.

CONCLUSION

For the foregoing reasons, the Regional Director's decision raises a substantial question of law or policy because of (i) the absence of and (ii) the departure from officially reported Board precedent and conflict with the language and purpose of sections 8(f) and 9(b) of the Act. Further, the Regional Director's decision not to hold a hearing to address the key fact dispute as to whether the Petitioner obtained a "historical exclusion" of employees by fraud resulted in prejudicial error. Accordingly, compelling reasons exist for Board review. See NLRB Rules & Regulations, § 102.67(c)(1),(3).