

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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APPOLLO SYSTEMS, INC.,

Employer-Petitioner,

Case No.: 18-UC-423

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 292,

Union.

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**UNION'S BRIEF ON REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL  
DECISION AND ORDER CLARIFYING A SECTION 8(F) CONTRACT**

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Dated: July 8, 2010

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## INTRODUCTION

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). The decision to apply unit clarification principles to a section 8(f) contract 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 contravenes Board precedent because it applies unit clarification principles to essentially re-write an existing section 8(f) collective bargaining agreement to exclude work that is expressly covered. Accordingly, the Board should rule that unit clarification principles cannot be applied to section 8(f) contracts and, on that basis, should reverse the Regional Director’s decision and dismiss the petition.

## QUESTIONS PRESENTED

1. Does the Regional Director have the authority 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. Does the Regional Director have the authority to apply unit clarification principles to essentially re-write a section 8(f) collective bargaining agreement to exclude work that is expressly covered?

## 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.

On December 31, 2009, the Union filed a request for review of the Regional Director’s Decision. On March 3, 2010, the Board remanded the case for a determination of whether the agreement between the parties was made pursuant to section 8(f) or section 9(a) of the Act. On

April 5, 2010, the parties stipulated that the contract was made pursuant to section 8(f) of the Act. On April 9, 2010, the Regional Director issued a Supplemental Decision and Order clarifying the parties' section 8(f) contract to exclude residential work that is expressly covered by the contract.

## 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 the clear language of section 8(f), the stated purpose of unit clarification in section 9(b), the legislative history of section 8(f), and the Board's interpretation of section 8(f) as articulated in the case law.

#### A. The Statutory Language

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. 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 to select a bargaining representative pursuant to section 9 is not a protected interest 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.

The proper procedure for protecting the free choice of employees covered by a section 8(f) agreement is the option of filing of an election petition as authorized by the second proviso to section 8(f), not a unit clarification petition, which is not authorized anywhere in section 8(f). See John Deklewa & Sons, 282 NLRB 1375, 1386 (1987), enfd sub nom, Ironworkers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 899 (1988) (“*Employee free choice will be enhanced most directly by the resuscitation of 8(f)’s second proviso,*” which states that a section 8(f) agreement “shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).”) (emphasis added).

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.

## **B. The Policy of 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-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 in selection of a bargaining representative. 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.

## **C. The Legislative Intent of Section 8(f)**

Pre-hire agreements were first authorized by the Landrum-Griffin Act in 1959. Congress adopted section 8(f) for the express purpose of permitting construction industry employers and unions to continue to follow their unique patterns of pre-hire bargaining that were established independently of the Act and were inconsistent with traditional Board principles under section 9:

*In considering the 1959 amendments, Congress was confronted with a situation in which the Board had departed from its pre-1948 practice under the Wagner Act by asserting jurisdiction over construction industry employers. In so doing, the Board sought to apply principles that had been developed in a markedly different context to an industry which, independently of the Act, had established its own unique collective-bargaining practices.* It had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union for periods ranging from 1 to 3 years even before any employees had been hired.

.Deklewa, 282 NLRB at 1380 (emphasis added). Thus, one of the reasons Congress adopted section 8(f) was that the Board had begun to apply traditional section 9 principles in the construction industry and thus was thwarting the unique bargaining patterns that had developed independently in that industry. In light of this clear legislative intent to exempt construction industry agreements from traditional section 9 principles, it is not appropriate for the Board now to apply unit clarification principles under section 9 to construction industry pre-hire contracts.

Congress legalized pre-hire 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. Id. 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. Id. 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, 82<sup>nd</sup> 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, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. 27 (1959) see also Carbonex Coal Co., 262 NLRB 1306, 1323 (1982) (explaining that section 8(f) was adopted because of “the 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 . . . . 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, 86<sup>th</sup> Cong., 1<sup>st</sup> 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, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. 28 (1959).

Congress also recognized that authorizing pre-hire agreements without elections to determine majority status was necessary for union representation to be feasible in the construction industry due to the short and sporadic nature of employment:

[B]ecause of the short and sporadic periods of employment typical to the industry, “[r]epresentational elections in a large segment of the industry are not feasible.” S.Rep., 1 Leg. Hist. 451-452. Accordingly, when Congress considered the 1959 amendments it recognized that application of the pre-1959 Act to the construction industry would result in substantial instability in the industry by the invalidation of established industry practices while at the same time employees in the industry would be deprived of both the fruits of collective-bargaining as well as the freedom to express their desires concerning union representation.

Deklewa, 282 NLRB at 1380.

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 traditional 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.

**D. The Board's Decision in Deklewa.**

The Board's landmark decision in Deklewa explained the legal status of a section 8(f) agreement. John Deklewa & Sons, 282 NLRB 1375, 1377-78 (1987). Under Deklewa, a Union that is signatory to a section 8(f) agreement "will enjoy no presumption of majority status." Id. As a result, the essence of Deklewa is that a section 8(f) agreement does not carry with it any bargaining obligation beyond adhering to the contract itself. Id. at 1387. The parties can walk away from the agreement after it expires. Id. at 1377-78. That is to say, the contract itself is the extent of the bargaining relationship. In that sense, in a pre-hire contract there is no traditional "bargaining unit" beyond the contract itself. Because the contract itself is the extent of the bargaining relationship, any attempt to "clarify" the scope of the "bargaining unit" will necessarily involve interpretation of the contract and definition of its scope. It is not proper for the NLRB to interpret a collective bargaining agreement in a unit clarification proceeding. St. Mary's Med. Ctr., 322 NLRB 954 (1997).

Under Deklewa a section 8(f) agreement does not bar a representation election. 282 NLRB at 1377-78; see also second proviso to section 8(f). Employees can file a representation petition at any time, unlike with section 9(a) contracts. The ease of filing an election petition with a section 8(f) agreement, and the absence of any contract bar, alleviate the concern that employees are being forced to have a union contract against their will.

Under Deklewa, the parties are free to define the scope of work covered by a prehire agreement as they see fit. 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. Deklewa, 282 NLRB at 1377. In such cases, the union would be invoking the NLRB's processes to demonstrate majority support of employees, secure an ongoing bargaining obligation, and obtain a contract bar. Thus, the appropriate principles would apply regarding the scope of an appropriate unit for bargaining when 9(a) conversion is sought. Id. In the absence of any attempt to obtain section 9(a) status, it is up to the employer and union in negotiating a section 8(f) agreement to determine the scope of work they wish to cover in the contract.

### **E. Conclusion**

In sum, the statutory language, underlying policy, legislative history, and NLRB case law all make clear that the unit clarification process must not be applied to section 8(f) contracts.

## **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. § 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. Deklewa, 282 NLRB at 1387. 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 APPLYING UNIT CLARIFICATION PRINCIPLES TO ESSENTIALLY RE-WRITE A SECTION 8(F) 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.

### **CONCLUSION**

For the foregoing reasons, the Board should rule that unit clarification principles cannot be applied to section 8(f) contracts and, on that basis, should reverse the Regional Director’s decision and dismiss the petition.