

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 01-1391

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THE BALTIMORE SUN COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

WASHINGTON-BALTIMORE NEWSPAPER  
GUILD, LOCAL 35

Intervenor

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the Baltimore Sun Company (“the Company”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, an order of the Board. The Decision and

Order of the Board (Members Liebman, Truesdale, and Walsh) affirming the decision of the administrative law judge issued on August 27, 2001, and is reported at 335 NLRB No. 10. (A 142-150.)<sup>1</sup>

The Board had jurisdiction over the unfair labor practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over the case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Board’s order in the unfair labor practice proceeding is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on September 5, 2001. The Board filed its cross-application for enforcement on October 22, 2001. Both were timely, as the Act imposes no time limitation on filing for review or enforcement of Board orders. On October 10, 2001, the Court granted the motion of the Washington-Baltimore Newspapers Guild, Local 35 (“the Guild”) to intervene.

#### STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to apply the extant

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<sup>1</sup> “A” refers to the Joint Appendix. “Br” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

collective-bargaining agreement to the Brand Builders Department employees, a conceded accretion to the existing unit.

### RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

### STATEMENT OF THE CASE

Acting on a charge filed by the Guild, the General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to apply the extant 1999-2003 collective-bargaining agreement to the Brand Builders Department employees (“the Brand Builders employees”)<sup>2</sup> who accreted to the existing bargaining unit and, instead, insisting on bargaining for the Brand Builders Department employees over terms and conditions and employment already covered by the extant agreement. (A 144.)

All parties had the opportunity to present evidence over the course of a one-day hearing before Administrative Law Judge Richard H. Beddow, Jr. On January 31, 2001, Judge Beddow issued his decision, finding that the Company had violated the Act as alleged, and recommended a remedial order. (A 144-150.)

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<sup>2</sup> At the time of the issuance of the Regional Director’s Decision and Clarification of Bargaining Unit, the Brand Builders Department was known as the Promotions and Events Department. Following the issuance of the Regional Director’s decision, the name of the Promotions and Events Department was changed to the Brand Builders Department. (A. 144.).

Upon review, the Board affirmed the judge's rulings, findings, and conclusions with some minor modifications to the recommended remedial order. (A 142-143.) The Company initiated these proceedings with a petition to review the Board's order; the Board subsequently filed a cross-application for enforcement of its order. The facts supporting the Board's order are summarized immediately below; the Board's conclusions and order are described immediately thereafter.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACTS

#### A. Background: the Company's Operations; the Bargaining Unit; the Accretion of the Brand Builders Employees to the Bargaining Unit Pursuant to the Regional Director's Decision and Clarification of Bargaining Unit

The Company is a newspaper publisher in Baltimore, Maryland. (A 144.) The Guild has been the exclusive collective-bargaining representative of employees of the Company since 1949. (A 144.) Since 1965, the bargaining unit has been defined to include "[a]ll employees employed in the editorial departments, news departments, commercial department, and library...." (A 152.)<sup>3</sup> The Company's bargaining relationship with the Guild has been embodied in a series of collective-bargaining agreements. (A 144.) The Guild's current

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<sup>3</sup> In late 1994, the Brand Builders Department was established to generate advertising revenue from non-traditional sources using image-promoting techniques such as sponsorships and contests. (A 163-168.)

agreement with the Company is effective from June 23, 1999 through June 24, 2003. (A 144; 228.)

On August 6, 1996, the Guild filed a unit clarification petition with the Board, seeking to have the bargaining unit clarified to include the Brand Builders Department employees. (A 157, 163-168.) After a hearing on the petition, the Regional Director on December 11, 1997, issued a Decision and Clarification of Bargaining Unit, finding that the Branch Builders employees "share an overwhelming community of interest with, and would not constitute an appropriate unit separate from, the represented employees." (A 169.) He found therefore, that the Brand Builders employees constituted an accretion to the existing unit and A 144; RD 151-192) clarified the unit to include "all employees employed in the [Brand Builders Department] including the design manager, but excluding all professional employees, guards, the director, the creative manager, and all other supervisors as defined in the Act." (A 144; 151-192.) The Company filed a timely request for review of the Regional Director's decision that the Board denied on October 22, 1999. (A 144; 254-255.)

#### B. The Parties' Pre-Bargaining Correspondence

By letter dated October 28, 1999, the Guild requested the Company to "engage in good-faith negotiations over any additional terms and conditions of employment covering [the Brand Builders employees]." (A 144; 256.) The

Company responded in a letter on November 12, 1999, stating that it accepted “the NLRB’s recent decision [denying the Company’s request for review]” with respect to the Brand Builders employees, “and is prepared to commence bargaining” regarding those employees. (A 144-145; 258.) The Company further stated that, “we are not certain what you mean when you request to bargain ‘additional’ terms and conditions of employment for these added employees. Any and all substantive contractual terms we agree upon covering [the Brand Builders employees] will be the result of collective bargaining. Please let [the Company] know when [the Guild] would like to commence negotiations as to the appropriate contractual terms to be applied [to the Brand Builders employees].” (A 144-145; 258.) On November 19, 1999, the Guild, in a letter, requested information about the Brand Builders employees from the Company. (A 259.) The Company responded to this information request on December 9, 1999. (A 261.)

In a letter to the Guild dated January 24, 2000, the Company requested certain information from the Guild. (A 145; 262.) In pertinent part, the Company stated that it needed to know how the Guild would ratify “this new contract.” (A 145; 262.) On February 7, 2000, the Guild, in a letter to the Company, stated that the result of the upcoming bargaining sessions would not be, as the Company had suggested, “a new contract” but rather, that “the existing Guild-Sun contract will be applied to the [Brand Builders employees].” (A 145; 264.) On February 11,

2000, the Company replied, denying that it was "insisting on a contract for Brand Builders employees separate from the existing contract[,]. . . it [was] firm on the fact that the substantive terms and conditions applied to Brand Builders employees will be those which result from our upcoming bargaining." (A 145; 265.)

### C. The Two Bargaining Sessions

The Guild and the Company met on February 17, 2000 and March 3, 2000. (A 145-146; 278-281; 347-351.) Richard Ehrmann was the chief negotiator for the Guild; Jack Wilson was the Company's chief negotiator. (A 339.)

At the February 17 meeting, after Wilson had inquired about the Company's information request regarding ratification procedures for the agreement, Ehrmann told Wilson that, as explained in the Guild's February 7, 2000 letter to the Company, the Guild was not bargaining for a new contract. (A 145; 339.) Wilson stated that he did not believe that the letter was responsive to the request. (A 145; 339.) Ehrmann told Wilson that the parties were not bargaining for a new agreement, but were, instead, bargaining over how to apply the existing agreement to the Brand Builders employees. (A 145; 339.) Ehrmann explained that this essentially meant "slotting" the Brand Builders employees' job titles into the wage scales of the existing agreement. (A 145; 64-65, 339.)

Wilson stated that the Company disagreed with the Guild's position. (A 145; 339.) He further stated that the Company's bargaining proposal contained

several sections of the existing agreement that it was willing to apply to the Brand Builders employees as well as provisions covering areas in which the Company believed the Brand Builders employees should be treated differently. (A 145; 339-340.) In response to Wilson's query as to whether the Guild would bargain about anything other than wages, Ehrmann answered that, if there were unique issues having to do with Brand Builders employees, the Guild would hear them and respond based on what the Company presented. (A 145; 340.) Wilson reiterated that the Company believed that it had the right to propose terms and conditions of employment for the Brand Builders employees different from those established in the extant agreement. (A 145; 340.) He then presented the Guild with the Company's two-page bargaining proposal, which was entitled "Sideletter to Existing Collective Bargaining Agreement." (A 145; 340.)

The Company's proposal contained a number of sections of the existing agreement that it was proposing to apply to the Brand Builders employees; it also excluded certain sections. (A 145; 275-276.) The Company's proposal also contained new items -- a new jurisdictional clause, a new definition for workweek, the elimination of the union security clause for the Brand Builders employees, and greater flexibility in outsourcing Brand Builders employees. (A 145; 275-276.) Wilson also stated that the Company would follow "NLRB standards" for determining whether an employee was excluded from the unit, and that, contrary to

the existing agreement, the Guild would not have the right to grieve or arbitrate the Company's decisions regarding exclusions. (A 145.) Ehrmann stated that the Company's position on exclusions was inconsistent with the recent clarification of the unit. (A 145.) The parties agreed to meet at a later date. (A 145.) Ehrmann stated that the Guild would respond to the Company's proposal and would bring its own proposal to the next meeting. (A 145; 340.)

Following the February 17, meeting, the parties exchanged additional correspondence. In a February 18, 2000 letter to the Guild, the Company observed that, "other than 'slotting' Brand Builders employees into wage classifications," the Guild's position was that "the existing...contract must be applied in its entirety to these employees." (A 145; 269.) The Company stated that it "rejects the Guild's proposal to apply the existing contract in its entirety to these employees," and requested additional bargaining sessions "to negotiate the substantive terms and conditions of employment that will govern these employees." (A 145; 269.) In a separate letter, the Company also renewed its information request concerning the Guild's ratification procedures regarding the agreement. (A 145; 267-268.) On February 25, the Guild agreed to meet again to "negotiate the application of the current collective bargaining agreement to employees in the Brand Builders department," stating that it would address the Company's information request at the meeting. (A 145; 270.) On February 28, 2000, the Company, in a letter to the

Guild, stated that the Company “will come prepared to negotiate a contract covering Brand Builders employees.” (A 145; 271.)

The Guild and the Company negotiators met again on March 3, 2000. (A 144; 270, 340-351.) At this meeting, Ehrmann, for the Guild, stated that the Board had accreted the Brand Builders employees into the unit; therefore, as the Guild saw it, the Brand Builders employees were covered by the existing contract. (A 146; 341.) Wilson disagreed. (A 146; 341.) He stated that the Company was not required to accept every term of the agreement for the Brand Builders employees, and that, although the Company was proposing to accept many of the terms of the existing agreement, it also was proposing certain different terms. (A 146; 341.) Wilson asked if the Guild was going to respond to any of the Company’s proposals. (A 146; 341.) Ehrmann stated that the Company’s proposal went beyond the scope of bargaining following a unit clarification, and that the Guild would respond by presenting its own proposal, which the Guild believed contained items appropriate for bargaining in the context of the accretion. (A 146; 341.) Ehrmann presented Wilson with the Guild’s proposal. (A 146; 277, 341-342.)

The Guild’s written bargaining proposal contained three items. Items 1 and 2 proposed to slot Brand Builders’ job classifications into the agreement’s “Minimum Salaries Pay Groups.” Item 3 proposed amending the agreement to add certain exemptions for the Brand Builders department. (A 277.)

Turning to the Company's information request, Ehrmann explained that there would not be a ratification vote because the applicable agreement had already been voted on and ratified. (A 146; 342.) He also presented Wilson with the Guild's March 3, 2000 letter responding to the Company's information request. (A 146; 342.) Ehrmann later stated that the Guild would discuss sections of the agreement relating to wages and exclusions, and would also address any issue that was unique to the Brand Builders employees. (A 146; 342; 346.) Wilson responded that he would define "unique" as anything not included in sections of the agreement relating to wages and exclusions. (A 146; 346.) Wilson asked if the Guild would discuss the Brand Builders employees' workweek; Ehrmann replied that the Guild would not negotiate over any items that would change the terms of the existing agreement. (A 146; 342.) Wilson stated that, in the Company's view, the Guild was refusing to bargain. (A 146; 342.) Ehrmann stated that the Guild felt strongly about its position, and that it probably made sense to resolve the dispute in another forum. (A 146; 342.)

Following the meeting, the Company sent the Guild a letter dated March 3, 2000. (A 146; 273.) In this letter, the Company stated that it was "confirm[ing] the Guild's position with respect to the Brand Builders negotiations"; the Company further stated that, aside from "slotting" certain Brand Builders positions into wage classifications and listing other positions as exemptions in the existing contract, the

Guild would not negotiate over any other term and condition of employment for the Brand Builders employees. (A 146; 273.) The Company also stated that it “disagrees with [the Guild’s position] and requests that the Guild negotiate with [the Company] over the terms and conditions of employment identified in [the Company’s] opening proposal.” (A 146; 273.)

On March 10, 2000, the Guild responded to the Company’s characterization of the Guild’s bargaining position. (A 146; 274.) The Guild stated that “it is not the ‘Guild’s position...that the existing Guild contract must be applied to [the Brand Builders employees] without negotiation.’” (A 146; 274.) The Guild further stated that it was prepared to negotiate at each bargaining session, but the Company’s “insistence on negotiating each of the terms and conditions of employment...instead of honoring the contract and the Board decision, is in our view contrary to the law.” (A 146; 274.)

## II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Liebman, Truesdale, and Walsh), in agreement with the administrative law judge, found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by refusing to apply the extant agreement to the Brand Builders Department employees who constituted an accretion to the unit. (A 142-143, 149.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, coercing or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company to honor the agreement with the Guild, apply the terms and conditions of the agreement, and give the agreement retroactive effect with respect to the Brand Builders employees. (A 142.) The Board's order further requires the Company to make the Brand Builders employees whole for any losses they may have suffered by reason of the Company's failure to timely honor the existing agreement, and to reimburse the Guild for any dues lost as a result of the Company's failure to apply the existing agreement to the Brand Builders employees. (A 142.) The order also requires the Company to bargain with the Guild concerning how to apply the existing agreement to the Brand Builders employees, including the slotting of job titles into the existing wage scales, and any issues that are "unique" to Brand Builders employees, "in the sense" that these issues are not covered by the extant agreement. (A 142.) Finally, the Board's order requires the Company to preserve records necessary for calculating backpay, and to post a remedial notice. (A 142-143.)

## SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5), (1)) by refusing to apply the existing agreement to the Brand Builders employees accreted to the unit and, instead, insisting on bargaining for the accreted employees over terms and conditions of employment already covered by the existing agreement.

The Company does not dispute that the Brand Builders employees were properly accreted into the unit, but contends, only, that it was not obliged by the accretion to apply the existing bargaining agreement to the accreted employees. In this regard, the facts reflect that, during bargaining, the Company took the position that it had the right to bargain over any and all terms and conditions of employment relating to the Brand Builders employees. The Guild took the position that bargaining should be limited to slotting Brand Builders employees' positions into the existing wage scales, determining exclusions from the clarified unit, and other issues of unique relevance to the Brand Builders employees that were not addressed in the existing agreement.

Under well-settled law, an employer violates Section 8(a)(5) and (1) of the Act by refusing to apply an existing agreement to employees who have been accreted to a unit. The principle flows naturally from the very circumstances supporting any accretion determination--that the accreted employees had little, if

any identity separate from the established unit and an overwhelming community of interests with the unit, and had not been excluded, historically, from the unit.

The Company's contentions are without merit. It points to no precedent to support its novel position that all the employment terms and conditions for accreted employees are subject to bargaining, completely independent of the existing agreement.

## ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO APPLY THE EXTANT AGREEMENT TO THE BRAND BUILDERS EMPLOYEES WHO CONSTITUTED AN ACCRETION TO THE UNIT

A. Standard of Review, Introduction, and Application of Controlling Principles to the Uncontested Facts

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views even though the Court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.*, 340 U.S. at 488.

As a result of the Regional Director's Decision and Clarification of Bargaining Unit (and the Board's subsequent denial of the Company's request for review of that decision), the Brand Builders employees were accreted into the unit. (A 144.) The Company does not challenge the merits of the accretion determination. Thus, this case involves only the Company's refusal to apply the existing bargaining agreement to the accreted Brand Builders employees and the Board's finding that the refusal violated Section 8(a)(5) and (1) of the Act. As we show below, the Board's well-settled principles governing accretions to existing

units require the application of the existing bargaining agreement to the accreted employees, and accordingly, the Company's refusal to apply the agreement violated the Act.

Thus, in its most general terms, "an accretion occurs whenever new employees are added to an existing bargaining unit." *Teamsters Nat. UPS Parcel Negotiating Com. v. NLRB*, 17 F.3d 1518, 1520 (D.C. Cir. 1994). The Board will find that employee groups are accretions to existing units 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, Inc.*, 256 NLRB 918 (1981). *Accord Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 427 (4th Cir. 2001); *Safety Carrier*, 306 NLRB 960, 969 (1992). In addition, the Board will not find an accretion where the parties have historically excluded from the unit the disputed employee group. *See United Parcel Service*, 303 NLRB 326, 327 (1991), *enforced* 17 F.3d 1518 (D.C. Cir. 1994).. The requirement that an accretion be recognized only where the above test is satisfied stems from the legitimate concern that, "to a certain extent, an accretion interferes with the employees' 'freedom to choose their own bargaining agents.'" *NLRB v. Illinois-American Water Company Southern Division*, 933 F.2d 1368, 1377 (7th Cir. 1991)(citation omitted). As this Court

observed in *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 850-851 (D.C. Cir. 1979), "[a]n accretion decision requires reconciliation of two competing policies: the need to insure stability of collective bargaining . . . and the need to allow a new group of employees to choose freely their bargaining representative."

Where the test is met, recognizing employees as an accretion to an existing unit serves the legitimate goal of preserving stability in bargaining relationships. The Board's accretion principles "'allow[] adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routines are made.'" *Brooklyn Hospital*, 309 NLRB 1163, 1182 (1992)(citation omitted), *enforced sub nom. Local 144, Hotel, Hospital, Nursing Home & Allied Services Union*, 9 F.3d 218 (2d Cir. 1993). In short, employees accreted into a unit pursuant to a unit clarification proceeding "are...absorbed into the existing unit...and are governed by the unit's choice of bargaining representative." *International Association of Machinists and Aerospace Workers v. NLRB*, 759 F.2d 1477, 1479 (9th Cir.1985). *Accord Lammert Industries*, 578 F.2d 1223, 1225 n.3 (7th Cir. 1978).

It follows that an employer's refusal to apply an extant collective bargaining agreement to accreted employees violates Section 8(a)(5) and (1) of the Act no less than a refusal to apply the agreement to the unit as a whole. For having been absorbed into the unit, the accreted employees

*are considered covered by the existing collective bargaining agreement.*

The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing bargaining unit but had not formally been included due to changed circumstances (for example, evolving or newly created jobs).

*NLRB v. Mississippi Power & Light Co.*, 769 F.2d 276, 279 (5th Cir. 1985)

(citations omitted) (emphasis added). *See also NLRB v. Don Burgess Const. Corp.*,

596 F.2d 378, 387, n.5 (9th Cir. 1979) (upon accretion, “[a]ny union contract

already binding on the....group would *automatically* be extended to the

employees”) (emphasis added); *Universal Security Instruments, Inc. v. NLRB*, 649

F.2d 247, 255 (4th Cir. 1981) (employer violated the Act by failing to apply the

existing agreement to accreted employees and by unilaterally changing accreted

employees’ terms and conditions of employment). *See also Progressive Service*

*Die Company*, 323 NLRB 183 (1997); *St. Regis Paper Company*, 239 NLRB 688

(1978), remanded on other grounds 674 F.2d 104 (1<sup>st</sup> Cir. 1982); *DMR Corp.*, 258

NLRB 1063 (1981), *enforced* 795 F.2d 472 (5th Cir. 1986).

Here, the undisputed facts demonstrate--and the Company does not deny-- that the Company refused to apply the existing agreement to the Brand Builders employees upon their accretion to the existing unit. Instead, as reflected in the Company’s correspondence to the Guild (and its statements during the February and March 2000 bargaining sessions), it sought to bargain over *any and all* terms and conditions of employment for the Brand Builders employees. (A 144-145.) At

bottom, the Company was seeking to negotiate, as it stated in its information request to the Guild, a “new” agreement with respect to the Brand Builders employees. (A 145.) This is further evidenced by the Company’s proposal for *new* terms and conditions of employment for the Brand Builders employees such as a new jurisdictional clause, a new definition of workweek, and the elimination of union security. (A 145.)

Applying these principles to the facts clearly supports the Board's finding that the Company's conduct violated Section 8(a)(5) and (1) of the Act.

#### B. The Company's Contentions Are Without Merit

It is fundamental to this case that the Company does not contest the merits of the Board's baseline determination that the Brand Builders employees constituted an accretion to the unit. The Company's concession that the accretion finding was appropriate negates its contention that bargaining over the accreted employees' terms and conditions begins from scratch.

Thus, the Company would effectively read the Board’s accretion doctrine out of existence, arguing that, because the parties never reached a “meeting of the minds” on the Brand Builders employees’ terms and conditions of employment *prior* to their accretion, the Board cannot order the Company to apply the existing agreement to these employees *following* their accretion. (Br 7.) The parties stipulated that the negotiations for the existing agreement did not reference the

Brand Builders employees by name. (A 100-101.) Further, as the Company points out, the Company -- not the Guild -- specifically stated that it would not bargain over the Brand Builders employees during the parties' negotiations for the existing agreement because it had filed a request for review of the Regional Director's Decision and Clarification of Bargaining Unit. Nonetheless, the Company now inexplicably faults the Guild for not bargaining over the Brand Builders employees prior to their accretion. The contract covers the unit of employees and the accretion made the Brand Builders employees part of the unit.

Moreover, the argument wholly ignores the entire basis for accreting employees to a unit, namely, that they have such an overwhelming community of interests with the extant unit as to have little, if any, separate identity from it. *See NLRB v. Mississippi Power & Light Co.*, 769 F.2d 276, 279 (5th Cir. 1985). Just as the Board, in those circumstances "can safely assume that the accreted employees would opt into that unit if given the opportunity," *The Baltimore Sun Company v. NLRB*, 257 F.3d 419, 427 (4th Cir. 2001), it can with equal certainty assume that the bargaining agreement covering the unit has substantial application to the accreted employees even though it was negotiated without specific reference to those employees. *See Universal Security Instruments v. NLRB*, 649 F.2d 247, 255 (4th Cir. 1981)(upon proper finding that employees constitute accretion to

unit, employer violates Section 8(a)(5) of Act by failing to apply the unit's extant bargaining agreement.)

The Company further argues (Br 15-16) that it did not waive its statutory right to bargain over the Brand Builders employees' terms and conditions of employment, and therefore, could not be required to apply the existing agreement to those employees. The argument ignores that the extant agreement to be applied to the accreted employees *was* negotiated by the Guild and the Company. That is no less the case simply because the agreement is to be applied to the accreted employees who indisputably had no separate identity apart from the unit when the agreement was being negotiated. Not surprisingly, the Company points to no cases where an employer's the obligation to apply an extant agreement to accreted employees has been conditioned on its waiver of its bargaining rights. Indeed, the Company here ignores its refusal to exclude the accreted employees in the bargaining because of a position that they have now abandoned.

Similarly, there is no merit to the Company's argument (Br 15) that the bargaining agreement could not be applied to the Brand Builders employees in the absence of an "application of contract" provision in the agreement. This is simply another "waiver" argument. Thus, an "application-of-contract" clause typically is designed to "constitute[] a waiver of [an employer's] right to insist upon a Board-conducted election when faced with a demand for recognition but [would] not

relieve [a union] of its obligation to provide [an employer] with proof of its majority status among the employees in the group to be added to the existing unit.” *Joseph Magnin Company, Inc.*, 257 NLRB 656, 656 (1981), *enforced* 704 F.2d 1457 (9th Cir. 1983). *See also Kroger Co.*, 219 NLRB 388 (1975); *Frazier’s Market*, 197 NLRB 1156, 1157 (1972). These clauses are only relevant in the absence of an accretion when a merged group retains its separate right to select its own representative. *See Frazier’s Market*, 197 NLRB 1156, 1157 (1972) (“[w]hether a group of new employees...will accrete to the existing unit is a matter to be determined by the Board....”).

For the same reasons, the Company's reliance on *Federal-Mogul Corp.*, 209 NLRB 343 (1974) is clearly misplaced. There, the Board held that a bargaining agreement could not automatically apply to a group of employees who had voted in a self-determination election (*Globe* election<sup>4</sup>) to include themselves in an existing unit. However, *Federal Mogul* does not apply to employees who have no right to a separate election of representative. Thus, *Federal Mogul Corp.* applies, specifically, where the disputed employees, historically, have been excluded from the existing unit. Indeed, as the Board explained in *Federal Mogul (Id. 343)*, the

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<sup>4</sup> The *Globe Machine and Stamping Co.*, 3 NLRB 295 (1937) self-determination procedure “allows employees ‘to determine the scope of a unit by allowing them to cast a vote for each of several potential units which the Board has deemed appropriate.’” *NLRB v. Raytheon Company*, 918 F.2d 249, 251 (1st Cir. 1990) (citation omitted).

disputed employees who had voted to join the unit previously had been "specifically excluded from the [bargaining agreement] between [the employer and the union]." In those circumstances, the Board did not permit the employees to be accreted to the unit or allow automatic application of "a contract which, by its very terms, excluded" the newly added employee group because of the Supreme Court's decision in *H.K Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970)(Board without power to compel agreement on substantive bargaining agreement provisions).

In any event, the Company's insistence that it was entitled to bargain over all the employment terms of the Brand Builders employees is inconsistent with the holding in *Federal Mogul*. The Board in *Federal Mogul* observed (*Id.* 345), its decision was not to "suggest that either party may adamantly insist to impasse upon a totally separate agreement so designed as to effectively destroy the basic oneness of the unit . . . found appropriate." In the light of that caveat, the Company's insistence that all the Brand Builders employment terms and conditions be open for bargaining was out of line with what the Board contemplated even in the absence of an accretion in *Federal Mogul*.

Nor is there any merit to the Company's contention (Br 17-18) that the Board's decisions in *The Baltimore Sun Co.*, 330 NLRB No. 167, *enforcement denied*, 257 F.3d 419 (4th Cir. 2001) (A 352-354) and *Yale University*, 334 NLRB No. 123, ---LRRM--- (2001) are inconsistent with the requirement that an extant

bargaining agreement be applied to accreted employees. It is true, as the Company notes (Br 17-18), that the Board's order in the *Baltimore Sun* case--without mentioning a duty to apply the extant agreement-- required the Company to "[o]n request, recognize and bargain with the Union as the [representative of the SunSpot] employees as part of the recognized unit and, if an understanding is reached, embody the understanding in a signed agreement." The Company in that case was resisting all bargaining obligations because it contested the Board's finding of an accretion. Hence, the Board's order does not address the issue of application of the contract.

The Company's reliance on *Yale University*, a case not involving accretion, is clearly misplaced. Contrary to the Company's contention, rather than reflecting any inconsistency on the Board's part, that case supports the finding here. There, the administrative law judge, analogizing the facts to an accretion, observed that had the disputed employees constituted an accretion, "the company would [have been] obligated to apply the terms of the existing collective bargaining agreement to the new people."

Finally, the Company attempts to demonstrate that the Board's order would result in piecemeal bargaining and contends that under the decision, the Guild is allowed to pick and choose the issues for negotiations. The contention is without merit. The Board's order makes clear that bargaining over the Brand Builders

should be limited to how the extant contract should be applied to them and to "issues that are 'unique' to [Brand Builders employees], in the sense that these issues are not covered by the extant collective bargaining agreement." (A 142.) *See NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (2nd Cir. 1952)(Parties have a continuing obligation, during the term of an agreement to bargain over items not contained in the agreement.) The record evidence shows that this is precisely what the Guild attempted to do at bargaining sessions--limit the issues to how the contract applied to Brand Builders employees and to unique issues not covered by the contract.

As shown, throughout the parties' communications, the Guild emphasized that it would bargain over three items--"slotting" the Brand Builders employees into the existing wage classification; exclusions; and issues that were "unique" to the Brand Builders employees. The Brand Builders inclusion in the unit posed unique issues in each of those subject areas. "Slotting" the Brand Builders classifications into the existing agreement's classifications was necessary because the existing agreement's classifications do not, obviously, include Brand Builders employees. Bargaining over exclusions was necessary because the parties needed to reach agreement as to which Brand Builders employees were managers and therefore excluded from the unit. In short, there is no evidence to support the Company's suggestion that the Guild was unreasonable in its attempt to limit the

bargaining over the Brand Builders employees to just several issues that the agreement did not, by its terms, resolve.

Rather, employees who are not mentioned in an existing agreement's classification (pay scale) scheme *have to be* slotted into that scheme upon accretion. The same is true with respect to exclusions. Contrary to the Company's contention, the Guild's position on the Brand Builders' employees' vacation benefits does not demonstrate that the Guild was seeking piecemeal bargaining. (Br 20.) As Ehrmann, the Guild's chief negotiator, explained, even if the Brand Builders employees' noncontractual vacation benefits are indeed superior to the vacation benefits under the existing agreement, those benefits are not a "unique" issue because provisions of the existing agreement already covered them in a way plainly applicable to the Brand Builders employees. (A. 76.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

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