

Advanced Architectural Metals, Inc., and United Brotherhood of Carpenters Local #1780. Case 28–UC–231

August 31, 2006

DECISION ON REVIEW AND ORDER REMANDING
BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On January 27, 2004, the Regional Director for Region 28 administratively dismissed the Employer's unit clarification petition, finding it appropriate to defer to an arbitrator's award. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's administrative dismissal. On March 25, 2004, a three-member panel of the Board¹ granted the Employer's request for review.

Having carefully considered the matter, we find, contrary to the Regional Director, that this case involves questions of statutory policy. Because questions of statutory policy are within the province of the Board and not an arbitrator, we find that the Regional Director erred in dismissing the petition. Accordingly, we reinstate the petition and remand this case to the Regional Director for further processing of the petition, including conducting a hearing.

The Employer is a fabricator and installer of ornamental metals. On May 30, 1997, the Employer signed a Memorandum of Agreement recognizing the Union as the exclusive bargaining representative of a unit of carpenters, fabricators, machine operators, and laborers at the Employer's Nevada facilities. Shortly thereafter, the Employer became a signatory to the 1995–1998 Master Labor Agreement (MLA), a multiemployer agreement with the Union. That agreement included language that the agreement covered “all work” in the Employer's “warehouses, shops, or yards.” In 1997, the Employer and the Union also signed an agreement that became known as the “shop agreement.” Under the shop agreement, shop employees and employees working outside of the shop received different wages and benefits—the shop employees were paid under the shop agreement while the employees working outside of the shop were paid under MLA. The MLA and the shop agreement were renegotiated and extended. The last shop agreement expired on March 15, 2003, but the MLA continued to exist through June 2004.

In June 2003, the Union filed grievances contending that the Employer had violated the MLA by not paying the MLA wages and benefits to the shop employees after

the March 2003 expiration of the shop agreement. The Union took the position that, upon expiration of the shop agreement, the wages and benefits of the shop employees no longer were governed by the shop agreement, but rather by the MLA, which was not due to expire until June 2004. Shortly thereafter, the Employer filed this unit clarification petition seeking to clarify that there is a separate unit of its shop employees which excludes its other employees working for the Employer under the MLA. On June 19, 2003, the Regional Director dismissed the petition, finding that the issue of “whether the [shop employees] unit should be clarified to exclude all work covered by the [MLA]” is an issue of contract interpretation. The Regional Director emphasized that while the Board generally declines to defer to arbitration awards in representation cases, it will defer when the issue turns solely on contract interpretation. See *St. Mary's Medical Center*, 322 NLRB 954 (1997). The Regional Director concluded that resolution of the contractual dispute between the parties would resolve the issue raised by the petition. He, therefore, deferred the matter to the parties' grievance-arbitration process.

On December 23, 2003, an arbitrator issued an award finding that the shop employees were covered by the MLA upon expiration of the shop agreement. The Regional Director then revoked his June 19, 2003 deferral letter and dismissed the petition, finding “no basis for not deferring to the arbitrator's award.”

In arguing for reinstatement of the petition, the Employer contends that deferral to the arbitral award is not appropriate because the findings of the arbitrator implicate Board law and policy. In arguing that the Board should affirm the Regional Director's dismissal of the petition, the Union emphasizes that even before any collective-bargaining agreement was entered into, the parties agreed that all the employees—inside the shop and outside of the shop—should be in the same unit, and that they remain in the same unit. We find merit in the Employer's contention.

The Board's long-held view is that it generally does not defer to arbitration in representation proceedings except in the narrow class of cases where the sole and dispositive issue is one of contract interpretation. See *Hershey Foods Corp.*, 208 NLRB 452, 457 (1974), relying on *Hotel Employers Assn. of San Francisco*, 159 NLRB 143, 147–148 (1966); *Marion Power Shovel*, 230 NLRB 576 (1977); *St. Mary's Medical Center*, supra; *Verizon Information Systems*, 335 NLRB 558, 560 fn. 9 (2001); see also *McDonnell Douglas Corp.*, 324 NLRB 1202, 1204 (1997), on remand from *McDonnell Douglas Corp. v. NLRB*, 59 F.3d 230 (D.C. Cir. 1995).

¹ Members Schaumber, Walsh, and Meisburg.

Where resolution of the dispute turns on statutory policy, the Board will not defer to arbitration. In *Marion Power Shovel*, 230 NLRB at 577–578, the Board emphasized the policy issues in these kinds of situations that are appropriate for the Board’s determination:

The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator.

Applying the above extant precedent, we find, contrary to the Regional Director, that deferral to the arbitrator’s award in the instant case is inappropriate because the issues presented turn, at least in part, on statutory issues and not solely on the interpretation of the parties’ contract. The principal issue presented in this case is whether the shop unit constitutes a separate appropriate unit from employees outside of the shop who are covered by the MLA. This issue actually involves several overlapping statutory questions. The MLA is a multiemployer contract, while the shop agreement encompasses a single employer unit. Thus, to place the Employer’s shop employees in a multiemployer unit raises statutory issues concerning the well-established difference between single-employer and multiemployer units. In addition, when the MLA was signed by the Employer in 1997, were the shop employees a part of a single unit with employees outside of the shop or were they a part of the MLA multiemployer unit? Assuming they were included in the single unit described above, did the execution of the shop agreement in 1997 create a separate smaller appropriate unit of shop employees, or was the shop agreement a temporary “carve-out” agreement from the MLA only for the life of the shop agreement? If the shop agreement did create a separate appropriate unit of shop employees, then upon expiration of the shop agreement: (a) did the shop employees and the employees outside the shop remain in two separate units, with the shop employees covered by the shop agreement, and the employees outside of the shop covered by the MLA; or (b) did the shop employees revert to, or accrete into, a single unit with the employees outside of the shop and become covered by the MLA?²

² The Employer argues that this unit clarification petition raises issues of accretion. The Union and the dissent argue that it does not. We need not resolve that issue at this time. Suffice it to say that the issue of *whether* accretion is involved and, if so, whether a lawful accretion has occurred, are themselves questions of statutory policy for the Board to resolve. Contrary to the dissent, our conclusion that these issues involve questions of statutory policy is based on the application of extant Board precedent to the facts presented to us, and not solely on the assertions of any party.

Resolving these issues involves application of the Board’s appropriate unit principles, community of interest criteria, and accretion standards. These are the very issues involving “determination of questions of representation, accretion, and appropriate unit” emphasized in *Marion Power Shovel*, supra, that depend on the application of “statutory policy, standards, and criteria.”³ The issue of whether to clarify the shop employees unit as requested in the Employer’s petition therefore is a determination that is “solely one for the Board to make.” See *Super Valu Stores*, 283 NLRB 134, 135 (1987).

Unlike the dissent, we do not view this case as solely a matter of contract interpretation to determine whether the MLA covered the shop employees. Our dissenting colleague’s argument that statutory issues are not implicated is premised on his conclusion that the “unit includes all the Employer’s metalworkers,” including the shop employees, and this conclusion in turn is based on the arbitrator’s analysis of the shop and MLA agreements between the parties. The threshold question to be addressed in this case is not whether the arbitrator’s analysis of the unit issues is correct, but whether the issues raised by the Employer’s petition turn, at least in part, on the statute. Unquestionably they do. While the dissent would rely on the arbitrator’s analysis in deciding this unit issue, we adhere to the general rule that determinations of questions of an appropriate unit are statutory matters that only the Board can resolve. Accordingly, we find the issues arising in this case are statutory matters for the Board’s determination and are not appropriate for deferral to an arbitrator for resolution.

We therefore reverse the Regional Director’s dismissal of the petition and remand this case to the Regional Director for reinstatement and processing of the petition.

³ In addition to these issues, the Employer argues that the shop agreement is a collective-bargaining agreement under Sec. 9(a) of the Act while the MLA is a prehire agreement under Sec. 8(f) of the Act. The resolution of this matter depends on the application of statutory policy, standards, and criteria, a task within the exclusive responsibility of the Board. The dissent questions whether the 9(a) agreement vs. 8(f) agreement issue bears on the ultimate issue before us. We shall leave the 9(a) agreement vs. 8(f) agreement issue for the Regional Director’s consideration and resolution on remand.

ORDER

The Regional Director's dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action consistent with this Decision on Review.

MEMBER WALSH, dissenting.

This case fits squarely within the Board's policy of deferring to arbitration awards in representation proceedings where the issue is solely one of contract interpretation. The Regional Director properly deferred to the arbitrator's award and dismissed the petition. Accordingly, I dissent.

I.

The Employer fabricates and installs ornamental metals. The metals are fabricated in the Employer's shop and installed by the Employer's employees at various sites. About 60 percent of the Employer's employees work exclusively in the shop, while many of the rest work both inside and outside the shop.

On May 30, 1997, the Employer recognized the Union as the exclusive bargaining representative of the following unit:

Included: All regular full-time and part-time journeyman carpenters and apprentice carpenters, journeyman and apprentice fabricators, machine operators, and all laborers employed at the Employer's Nevada facilities.

Excluded: Office clerical employees, guards, supervisor [sic], and truck drivers.

Shortly thereafter, the Employer became a signatory to the 1995–1998 Master Labor Agreement (MLA), a multiemployer agreement with the Union. Many of the ornamental metals fabricated in the Employer's shop are installed on construction projects covered by the MLA. By its express terms, the MLA “appl[ies] to all work performed in the Employer's warehouses, shops or yards which have been particularly provided or set up to handle work in connection with a job or project, covered by the terms of this Agreement, and all of the production or fabrication of materials by the Employer for use on the projects will be subject to the terms and conditions of this Agreement.” Section XV of the MLA sets forth a grievance and arbitration procedure and states:

It is the purpose and the intent of the parties hereto that all grievances or disputes arising between them over the interpretation or application of the terms of this Agreement shall be settled by the procedure set forth in this section

About 30 days after becoming a signatory to the MLA, the Employer and Union entered into an agreement known as the “shop agreement,” which provided lower wages and different benefits for employees while they worked in the shop. The shop agreement covered “all production and maintenance work in the plant or plants of the Employer in the jurisdiction of the Southern California Nevada Regional Council of Carpenters and its affiliated Local Union #1780.” The agreement also contained a section entitled “Outside the Shop,” which stated:

When construction work is performed by the Employer with employees covered by this agreement, the following conditions will be observed: The current hourly rate of the [MLA] shall include any and all contribution for fringe benefits required to be made under [MLA] to jointly administrated trust funds.

The net effect of the two agreements was that, when employees worked in the shop, they were paid according to the shop agreement; when they worked outside the shop, they were paid according to the MLA.

Both the MLA and the shop agreement were eventually renegotiated. The MLA was extended through 2001 and later through June 2004, and the shop agreement was extended until March 2003.

In December 2002, the Union gave notice to the Employer that it intended to terminate the shop agreement and to negotiate a new agreement. During the negotiations that followed, the Union stated that if a new shop agreement were not reached, the MLA would cover the shop employees. Ultimately, the parties failed to reach a new agreement, and the shop agreement expired on March 15, 2003.

After the shop agreement expired, the Employer continued to apply the wage and benefit provisions of the expired agreement to work performed in the shop. In June 2003, the Union filed several grievances contending that the Employer had violated the MLA by not paying MLA wages and benefits to shop employees.

On June 9, 2003, the Employer filed the instant petition, seeking to clarify the unit to include all production and maintenance work but to exclude all work covered by the MLA. In other words, the Employer seeks to exclude the shop employees from the MLA unit.

On June 19, 2003, the Regional Director deferred resolution of the issues raised in the petition to the contractual grievance-arbitration procedure. The Regional Director stated: “The issue presented, whether the unit should be clarified to exclude all work covered by the [MLA], is one of contract interpretation. Resolution of

the contractual dispute will resolve the issues raised by the petition filed herein.”

On December 23, 2003, after a hearing at which both the Employer and the Union participated, Arbitrator Lawrence Zigman issued an award finding that the MLA covered the shop employees. The arbitrator reached this conclusion after examining the language of the MLA and extrinsic evidence of the parties’ intent. Essentially, the arbitrator found that when the shop agreement expired, “the parties reverted back to their status as before,” and therefore the shop employees were covered by the MLA.¹

The Regional Director deferred to the arbitration award and dismissed the Employer’s petition. The Regional Director noted that the arbitrator “rejected accretion” as a basis for resolving the dispute and “instead relied upon his interpretation of the contract.” The Employer filed a request for review, which the Board granted.

II.

Although deferral to arbitration in representation proceedings is infrequent, the Board has plainly stated that it “will find deferral appropriate when the resolution of the issues ‘turns solely on the proper interpretation of the parties’ contract.’” *Central Parking System*, 335 NLRB 390, 391 (2001), quoting *St. Mary’s Medical Center*, 322 NLRB 954 (1997); see also *McDonnell Douglas Corp.*, 324 NLRB 1202, 1204–1205 (1997). In such cases, statutory policy is not implicated, and therefore the Board will honor the parties’ agreed-upon procedures for resolving contractual disputes. This is such a case.

The Employer’s petition seeks to have the shop employees excluded from coverage by the MLA. That issue can and should be resolved by examining and interpreting the MLA, which is precisely what the arbitrator did. First, he considered the language of the agreement. He noted that section II of the MLA, entitled “Coverage,” states that the agreement “shall apply to all work performed in Employer’s . . . shops” However, in the 2001–2004 MLA, the “Recognition” section of the agreement states that, upon a showing that a majority of an employer’s shop employees have designated the Union as their collective-bargaining representative, the individual employer shall agree to negotiate all terms and

conditions of employment appropriate for their shop. Based on that conflict in the language, the arbitrator concluded that the MLA was not clear and unambiguous as to whether the parties intended the MLA to cover the shop employees.

Applying established rules of contract interpretation, the arbitrator then considered extrinsic evidence of the parties’ intent.² The arbitrator observed that the MLA covers shop employees of other employers in the multiemployer unit and that the shop work is “within the description of the jurisdiction of the MLA.” He further observed that the “Recognition” language quoted above was not added to the MLA until 2001, well after the Employer became a signatory. Finally, the arbitrator relied on the testimony of the chief negotiators of the MLA, both labor and management, who testified that the Recognition language was intended to apply prospectively only, to new employers and not to existing signatories. The arbitrator concluded that the evidence demonstrated that the parties intended the Employer’s shop employees to be covered by the MLA. I would defer to that decision.

My colleagues state that the “principal issue” in this case is “whether the shop unit constitutes a separate appropriate unit.” They conclude that resolving that issue requires application of accretion and community-of-interest principles. I disagree.

First, although the Employer argues that the arbitrator effectively accreted the shop employees to the MLA unit and that accretion here would be repugnant to the Act, the Employer’s assertion that the case involves accretion does not make it so. The arbitrator found that here, unlike in accretion cases, the Employer recognized the Union in May 1997—before the shop agreement was negotiated—as the representative of “all” the Employer’s employees. The arbitrator therefore rejected the Employer’s assertion that the shop employees were being “added” to the unit upon the expiration of the shop agreement.

Contrary to the Employer’s argument, the arbitrator’s statement that including the shop employees in the unit would not be repugnant to the Act “even [assuming] arguendo” an accretion issue does not show that his award turns on accretion principles. The award makes plain that the arbitrator did not resolve the case based on accretion, but addressed accretion simply because the Employer raised it.³ The dispositive issue in the case, and

¹ The arbitrator also noted “the Employer’s contention that I must consider” whether applying the MLA to the shop employees would effectively “accrete” the shop employees to the unit. The arbitrator stated that he “did not find the employer’s characterization of the union’s action as constituting an accretion [to be] persuasive.” He then stated that “even [assuming] arguendo, that the employer has raised an issue of accretion,” a bargaining unit including both the field and shop employees would not be repugnant to the Act.

² See, e.g., *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1982), enfd. mem. 760 F.2d 253 (2d Cir. 1985).

³ See award, p. 19 (noting “the employer’s contention that I must consider the ‘accretion issue,’” and p. 20 (“it is the employer and no one else who has characterized this issue as an accretion”). My col-

the one on which the arbitrator based his decision, was one of contract interpretation.⁴

Second, although my colleagues characterize this case as turning on community-of-interest and appropriate unit principles, there is no basis here for questioning the appropriateness of a unit that includes the shop employees. The unit includes all of the Employer's metal workers, as it did before the parties entered into the shop agreement.⁵ The shop employees are not part of a newly established

leagues hold that the Board is presented with a "question of statutory policy," namely "whether accretion is involved," because the parties are at odds over the issue. I strongly disagree. I would not allow the Employer to turn a contractual issue into a statutory one and supplant the parties' dispute resolution procedures simply by asserting, colorably or not, that the case involves accretion.

⁴ My colleagues cite several cases in which the Board declined to defer to arbitration in representation cases. In those cases, deferral was inappropriate because the arbitrator's findings were tantamount to applications of statutory policy or because the case could not be resolved by applying contract principles alone. See, e.g., *Hershey Foods Corp.*, 208 NLRB 452, 457 (1974), *enfd.* 506 F.2d 1052 (3d Cir. 1974) (arbitrator's award, which directed the employer to recognize the union as the representative of certain employees, was predicated on a finding that those employees were accreted to an existing unit); *Marion Power Shovel*, 230 NLRB 576 (1977) (employer was faced with two unions' conflicting claims to represent the same employees at employer's expanded facilities); *Hotel Employers Assn. of San Francisco*, 159 NLRB 143, 148 (1966) (question concerning representation raised by unions' competing claims); compare *St. Mary's*, *supra* at 954 (where resolution of the case required both contract interpretation and accretion analysis, the Regional Director properly deferred to arbitrator's interpretation of the contract but conducted an independent accretion analysis). This case, by contrast, is purely one of contract.

⁵ Contrary to my colleagues' assertion, this finding is not based on the arbitrator's analysis of a statutory "unit issue." The arbitrator did not perform a statutory analysis, and there was no need to do so. He properly confined his analysis to interpreting the contract.

job classification, nor is there any allegation that their duties and responsibilities have changed. See, e.g., *Union Electric Co.*, 217 NLRB 666, 667 (1975) (describing circumstances under which unit clarification is appropriate).⁶ In sum, this case does not turn on principles of accretion or community of interest, and deferral is therefore appropriate.

III.

The parties have agreed on a grievance and arbitration process to resolve their contractual disputes. They utilized that process in the present case to determine whether the MLA covered the shop employees—the issue that is now before the Board. Where, as here, resolution of the issue does not implicate statutory policy, the Board's procedures need not and should not supplant the parties' contractual dispute resolution procedure. The Regional Director correctly deferred to the arbitrator's award and dismissed the petition.

⁶ My colleagues correctly observe that the MLA is a multiemployer agreement but that the expired shop agreement is not. That difference, however, does not lead to the conclusion that there are "statutory issues" involved in determining whether the MLA covers the shop employees. As stated above, there is no basis for questioning the appropriateness of a multiemployer unit that includes all of the Employer's metalworkers.

The Employer also argues that the shop agreement was a 9(a) agreement, while the MLA is a 8(f) agreement. My colleagues state that resolving this matter depends on the application of statutory policy. However, the issue here is whether the shop employees are covered by the MLA. Whether the MLA was a 9(a) or a 8(f) agreement does not bear on that issue. The Respondent's conclusory statement that the MLA was a 8(f) agreement is insufficient to inject a genuine issue of statutory policy into the case.