

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Eighteenth Region

APPOLLO SYSTEMS, INC.

Employer-Petitioner

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 292

Union

Case 18-UC-423

**DECISION AND ORDER**

Appollo Systems, Inc. (Petitioner) filed this petition on October 21, 2009, requesting that I clarify an existing bargaining unit to exclude its residential division employees from a unit of installers and technicians employed by Petitioner in its commercial division. Petitioner claims that International Brotherhood of Electrical Workers, Local 292 (Union) is currently recognized by Petitioner as the collective-bargaining representative of its commercial division installers and technicians, but that the Union is seeking through the grievance/arbitration process to add Petitioner's residential employees who have been historically excluded from the unit.

Based on an administrative investigation, including consideration of position statements and evidence submitted by the parties during the investigation, as well as a position statement submitted by the Union in response to an Order to Show Cause issued by me on November 20, 2009, I conclude that I should clarify the existing unit to exclude Petitioner's residential division employees.

Under Section 3(b) of the Act, I have the authority to decide this matter on behalf of the National Labor Relations Board.

Upon the entire file in this case, I find that Petitioner is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>1</sup>

### **HISTORY OF PETITIONER'S OPERATION AND OF COLLECTIVE BARGAINING AT PETITIONER'S OPERATION**

Prior to 2004, Petitioner had been in business for a number of years as a residential low-voltage electrical contractor. At no time prior to 2004 were the employees employed in Petitioner's residential operation represented by any labor organization. On June 30, 2004, Petitioner, using the name Focis, Inc. d/b/a Appollo Systems, purchased the assets of Connectivity Solutions, Inc. of Minnesota. At the time of the purchase, Connectivity Solutions was a commercial low-voltage electrical contractor, and its installers and technicians were represented by the Union. Shortly after the purchase in 2004, Petitioner agreed to recognize the Union as the collective-bargaining agent for a unit of employees consisting of the employees previously employed by Connectivity Solutions, Inc. However, both the Union and Petitioner agreed to an arrangement that the commercial division would operate separately from the residential operation, and that while the commercial division employees would be represented by the Union, the residential division employees would not be represented by the Union.

On September 1, 2004, Petitioner, using the name Focis, Inc. d/b/a Appollo Systems, signed a letter of assent binding Petitioner to the Statewide Limited Energy labor contract with

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<sup>1</sup> Petitioner, Appollo Systems, Inc., a Minnesota corporation with an office and place of business in Maple Grove, Minnesota, is a low voltage electrical/energy contractor in the building and construction industry. During the preceding 12 months, a representative period of time, Petitioner derived gross revenues in excess of \$500,000, and it purchased materials or services valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota.

the Union for Petitioner's commercial division employees. Petitioner also began paying into the Union's benefit funds on behalf of Petitioner's commercial employees. Thus, at all times since September 1, 2004, Petitioner has maintained a collective bargaining relationship with the Union in a unit consisting of Petitioner's installers and technicians in its commercial division, including applying successive Statewide Limited Energy contracts to the unit employees, and contributing to Union benefit funds on behalf of the commercial division employees, as required by the contracts between the Petitioner and Union.<sup>2</sup>

At no time has Petitioner recognized the Union as the collective-bargaining agent of its residential employees, at no time has Petitioner applied any Statewide Limited Energy labor contract to its residential employees, and at no time has Petitioner made contributions to the Union's benefit funds on behalf of its residential employees.

From the time it recognized the Union until December 21, 2007, Petitioner operated the commercial division as Focis, Inc. d/b/a Appollo Systems, and the residential division as Appollo Systems.

#### **EVENTS LEADING TO THE FILING OF THIS PETITION**

On December 21, 2007, Petitioner ceased using the name "Focis, Inc. d/b/a Appollo Systems for its commercial division; both divisions became known by Petitioner's current name, Appollo Systems, Inc. Specifically, the investigation revealed that Petitioner holds itself out to the public as "Appollo Systems Residential Services," and "Appollo Systems Commercial Services."

Nearly 18 months later, in a letter dated June 4, 2009, Stephen Cutty, signing as an organizer for the Union, filed a grievance claiming that the Union had no previous knowledge of

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<sup>2</sup> The Limited Energy Agreement currently in effect does not expire until September 30, 2010.

Appollo Systems operating as one company. Specifically, Cutty stated in the letter, “We were completely unaware of Focis, Inc., executing an amendment of the Articles of Incorporation restating the name of the Corporation to ‘Appollo Systems, Inc.’ on December 21, 2007. I believe this is the point where the two divisions became one company.” Because of this name change, Cutty requested that all employees in the residential division be included in the existing unit represented by the Union.

In spite of meetings and correspondence between Petitioner and Union representatives after the Union’s June 4 letter, in which Petitioner contended and provided documentation that it was maintaining two separate businesses for the residential and commercial divisions, including two separate checking accounts, two separate books and accounting systems, two separate management teams, two separate employee benefit plans and, lastly, two separate offices with separate entrances, the Union continues to seek inclusion of the residential division employees in its existing unit. These Union efforts include a letter from Union Organizer Cutty dated July 10, 2009, informing Petitioner that the Union wished to move to a Step 3 meeting called for in its collective bargaining agreement in order to facilitate resolution of the grievance, and a letter dated October 19, 2009, from Union legal counsel informing Petitioner that the Union was proceeding with the grievance.

## **CONTENTIONS OF THE PARTIES**

The Union claims that this petition should be dismissed and the Union should be allowed to proceed to seek inclusion of the residential employees in its existing commercial employee unit through the grievance/arbitration process because its agreement with Petitioner is an 8(f) contract. Thus, the Union contends that a unit clarification petition can only be filed in the context where a union has 9(a) status. In essence, according to the Union, 8(f) representational

issues are to be determined by arbitrators in interpreting contractual language, because 8(f) relationships are not governed by Section 9 of the Act.

The Union's explanation for its position that 8(f) relationships are not subject to unit clarification proceedings relates to the fact that a union need not establish majority support in order for an employer and union to enter into an 8(f) contract. This means, of course, that the Petitioner and Union are free to enter into an 8(f) contract covering Petitioner's residential division employees at any time regardless of the wishes of the employees in the residential division. Thus, according to the Union, its grievance is merely asking an arbitrator to find exactly what 8(f) allows the parties to do – and that is to determine whether the parties have an 8(f) agreement covering residential division employees. Therefore, according to the Union, I should dismiss this petition and allow the Union to go forward with its grievance.

The Union also contends that if I do not dismiss the petition, then I should clarify the unit to include the residential division employees. The Union supports this second contention by arguing that its contract with Petitioner applies to all employees of Appollo Systems; that the Union has never knowingly allowed any employer to sign an agreement covering only a portion of the employer's electricians; that Petitioner cannot rely on historical exclusion because the historical exclusion related to a time when Petitioner operated its commercial and residential divisions with separate names; and that Petitioner cannot rely on historical exclusion for the last 18 months because Petitioner deceived the Union by not informing the Union that, effective in 2007, its employees are employed by one corporation.

In its response to the Order to Show Cause, the Union does not dispute that the residential employees have never been represented by the Union and therefore have been historically excluded from the unit. Moreover, the Union has never suggested that any organizational

changes accompanied Petitioner's decision in 2007 to eliminate "Focis, Inc." from the name of its commercial operation.

On the other hand, Petitioner maintains that it is simply asking me to confirm the historical exclusion of the residential division employees from the existing unit, and that this confirmation is necessary to avoid a contradictory arbitration award, citing *Ziegler, Inc.*, 333 NLRB 949 (2001).

### **CLARIFYING THE UNIT TO EXCLUDE RESIDENTIAL DIVISION EMPLOYEES IS APPROPRIATE**

The Board will not entertain a unit clarification petition where a party seeks to include employees who have been historically excluded in an existing unit. *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999). An exception to this proposition is when there is an organizational change that affects the community of interest of the classification sought to be clarified. However, the change must be substantial and recent, rendering the existing unit no longer appropriate. *Lennox Industries*, 308 NLRB 1237 (1992). For example, in *Stafford-Lowdon Co.*, 253 NLRB 270 (1980), the Board refused to clarify a bargaining unit and dismissed a unit clarification petition where the only change pertinent to the unit was the assignment of a separate manager for each plant in the two-plant unit, when Stafford Lowdon was taken over by another company.

While Petitioner contends that the relationship between it and the Union is in fact a 9(a) relationship because Petitioner was a *Burns* successor to Connectivity Solutions, Inc. when in 2004 Petitioner recognized the Union as the collective bargaining agent for its installers and technicians in the commercial division, for purposes of the proposed findings and conclusions in this case, I will assume that the Union and Petitioner have an 8(f) relationship, as contended by

the Union. Nevertheless, I reject the Union's claim that 8(f) representational issues are excluded from the Board's unit clarification proceedings.

While I have been unable to find a Board case involving the precise issue presented by the Union (that is, involving unit clarification where there is an 8(f) relationship), on the other hand, there is substantial Board law stating that issues concerning representation are not matters of contract interpretation, but rather involve the application of statutory policy. In this regard I note that the Board has long emphasized its statutory power to determine representation matters. In *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521 (1964), the Board rejected the employer's argument that the employer could challenge the continued inclusion of certain employees because the unit at issue was never certified by the Board and because the employer was not challenging the union's majority representative status. The Board concluded that questions concerning representation, accretion, and appropriate unit do not depend on contract interpretation but involve the application of statutory policy, standards and criteria, and that these are matters for decision by the Board rather than an arbitrator. See also, *Marion Power Shovel*, 230 NLRB 576 (1977). Moreover, in *Manitowoc Shipbuilding, Inc.*, 191 NLRB 786 (1971), the Board stated in broad terms: "We find no merit in the Employer's contention that the Board lacks authority to clarify bargaining units *established by agreement of the parties* and not certified by the Board. . . ." (emphasis added) This language suggests, of course, that even if the Petitioner and the Union agreed to the unit in the context of an 8(f) relationship, nevertheless the Board retains authority to decide unit placement issues.

Section 9(b) of the Act, supplemented by other sections, also provides the authority for the Board to determine unit placement of disputed categories of employees even though their representation is not certified. Thus, Section 9(b) mandates the Board to make unit

determinations with the objective of assuring employees “the fullest freedom in exercising the rights guaranteed by [the] Act.” While there are some limitations in Section 9(b) regarding what the Board may do in making unit determinations, none of those limitations includes a limitation on the ability of the Board to decide representational issues where there is an 8(f) contract.

Certainly the Union’s contention that unions and employers can voluntarily enter into 8(f) collective bargaining agreements regardless of the unions’ majority status is correct. However, it does not follow, and the Union cites no case support for the proposition that, unions are free to pursue grievances and convince arbitrators that employers should be required to enter into 8(f) relationships. The very concept of 8(f) relationships is that they are voluntarily entered into by both parties.

Likewise, the Union’s contention that the historical exclusion of the residential division employees is irrelevant because Petitioner changed the name of its commercial division in 2007 is incorrect. While there clearly was a name change, and while I will assume for the purposes of this decision that Petitioner deceived the Union by not informing it of the name change that occurred in 2007, the fact of the name change in 2007 is irrelevant without more. Rather, what matters is whether “significant changes have rendered (the historical) unit inappropriate.” *Lennox Industries*, supra at 1238. In this case at no time has the Union presented evidence of significant changes making the existing unit inappropriate. On the contrary, the Union did not contest the description of facts as summarized in the Order to Show Cause. Thus, there is no evidence contradicting Petitioner’s assertions that even today it maintains two separate businesses for the residential and commercial divisions, including two separate checking accounts, two separate books and accounting systems, two separate management teams, two separate employee benefit plans and, lastly, two separate offices with separate entrances.

Moreover, the Union does not contend that with the name change Petitioner interchanges employees on a temporary or permanent basis between the two divisions.

Finally, I began this analysis with the proposition that the Board will not entertain a unit clarification petition where a party seeks to include employees in a unit when those employees have been historically excluded. I note that in this case Petitioner is asking that I confirm the exclusion from the unit employees who have been historically excluded. While such a petition is not appropriate in most circumstances, it is appropriate and it is to be processed where a union is seeking to include historically excluded employees through use of the grievance/arbitration process. *Ziegler, Inc.*, 333 NLRB 949 (2001). Thus, where a union files a grievance seeking inclusion of historically unrepresented employees in its existing unit, a unit clarification petition should be processed to exclude from the unit the historically unrepresented employees. The *Ziegler* exception applies even if there is only a pending grievance and not an arbitration award, “since ... a pending grievance ... could ultimately result in an incongruous arbitration award.” *Id* at 950. See also, *Tweedle Litho, Inc.*, 337 NLRB 686 (2002).

ACCORDINGLY, **IT IS HEREBY ORDERED** that the unit represented by the Union is clarified to exclude Petitioner’s residential division employees.

### **RIGHT TO REQUEST REVIEW**

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

## Procedures for Filing a Request for Review

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **December 17, 2009**, at **5 p.m. Eastern Time**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:50 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>3</sup>

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

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at [www.nlrb.gov](http://www.nlrb.gov). Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line

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<sup>3</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at Minneapolis, Minnesota, this 3rd day of December, 2009.

/s/ Marlin O. Osthus

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Marlin O. Osthus, Regional Director  
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