

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

KALEIDA HEALTH,

Employer,

and

CONCERNED CARPENTERS  
FOR A DEMOCRATIC UNION,

Petitioner,

and

Case 3-RC-077821

BUFFALO BUILDING AND CONSTRUCTION  
TRADES COUNCIL, AFL-CIO,

Intervenor,

and

NORTHEAST REGIONAL  
COUNCIL OF CARPENTERS,

Intervenor.

**MOTION OF THE BUILDING AND CONSTRUCTION TRADES  
DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF, AS  
*AMICUS CURIAE*, IN SUPPORT OF THE REQUEST FOR REVIEW**

The Building and Construction Trades Department, AFL-CIO (“BCTD”) hereby requests permission to file the attached brief, as *amicus curiae*, in support of the request for review in this case. As explained herein, this case presents an issue of importance to the BCTD and its affiliated unions.

The BCTD is a labor organization within the AFL-CIO, composed of thirteen national and international building and construction trades unions. It has

chartered more than 300 state and local building and construction trades councils consisting of local building and construction trades unions that collectively represent more than three million workers engaged, or seeking employment, in the building and construction industry throughout the United States and Canada. The BCTD's constituent unions are the International Association of Heat and Frost Insulators and Allied Workers; the International Union of Bricklayers and Allied Craftworkers; the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; the International Brotherhood of Electrical Workers; the International Association of Bridge, Structural and Ornamental Iron Workers; the Laborers International Union of North America; the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; the Operative Plasterers' and Cement Masons' International Association of the United States and Canada; the International Union of Painters and Allied Trades; the International Union of Elevator Constructors; the Sheet Metal Workers' International Association; the United Union of Roofers, Waterproofers and Allied Workers; and the International Brotherhood of Teamsters.

The issue presented in this case is whether a petitioned-for craft unit of carpenters and millwrights is appropriate. More specifically, the case presents the issue whether a multi-union collective bargaining agreement negotiated by a building and construction trades council and several individual building trades unions had the effect of rendering the petitioned-for unit inappropriate. That multi-

union agreement – in which the employer agreed to comply with the individual collective bargaining agreement separately negotiated by each of the individual local union signatories – is similar to many others negotiated by affiliates of the BCTD. The BCTD and its affiliates therefore have an important interest in the resolution of the issue presented.

The Regional Director concluded that the petitioned-for unit was inappropriate by applying the Board’s Rule on Appropriate Bargaining Units in the Health Care Industry and the Board’s craft severance standards. As explained in the attached brief, neither should have been applied. The type of agreement negotiated by the building trades council and its affiliated local unions in this case does not have the effect of rendering separate craft bargaining units inappropriate. Where, as in this case, several craft unions sign a multi-union agreement but maintain the separate identities of their craft units, those separate units remain appropriate. Accordingly, the Regional Director should have found appropriate any craft unit in which the employees shared a community of interest.

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**BRIEF OF THE BUILDING AND CONSTRUCTION  
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IN SUPPORT OF THE REQUEST FOR REVIEW**

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 4

I. The Multi-Union Bargaining Described in this Case did not  
Render Inappropriate the Petitioned-for Craft Unit of  
Carpenters and Millwrights. .... 4

II. The Board’s Rule on Appropriate Bargaining Units in the  
Health Care Industry is Inapplicable Because the Petition does  
not Seek a New Unit of Previously Unrepresented Employees..... 11

CONCLUSION ..... 18

## INTRODUCTION

This case arises out of a multi-union bargaining arrangement commonly found in the construction industry – one in which an employer agrees that, when it employs craft workers, it will comply with the individual collective bargaining agreements separately negotiated by each craft union. An employer entering into such an arrangement, like the employer in this case, frequently signs a memorandum establishing some terms applicable to all crafts (starting time, for example), but the vast majority of terms and conditions, including wages and benefits, applicable to covered employees are established by individual craft agreements that are either attached or incorporated by reference. *See, e.g., Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011 (9<sup>th</sup> Cir. 2010); *Carpenters Local 623 (E.P. Donnelly, Inc.)*, 351 NLRB 1417 (2007); *Catalytic, Inc.*, 212 NLRB 471 (1974).<sup>1</sup>

As several cases show, such multi-union bargaining arrangements do not have the effect of merging the separate craft units into a single, indivisible unit. The individual craft units remain appropriate and a union participating in such an arrangement – or any other union, for that matter – can seek certification as the

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<sup>1</sup> In *Johnson*, a project labor agreement established dispute resolution procedures applicable to the entire project but required employers to use local union hiring halls and comply with local union collective bargaining agreements. 623 F.3d at 1018. The employer in *E.P. Donnelly* signed a project labor agreement that included terms applicable to the entire project but also required the employer to comply with several attached local union agreements. 351 NLRB at 1417-18. In *Catalytic*, the employer signed a memorandum agreement with 13 international unions agreeing to obtain craft employees from the hiring halls operated by their affiliated local unions and pay the wages and benefits negotiated by those locals in their individual collective bargaining agreements. 212 NLRB at 471-72.

representative of one of the included craft units. *See, e.g., Carpenters v. Plasterers*, 826 F. Supp. 2d 209 (D.D.C. 2011) (After several local unions signed a project labor agreement, a Carpenters regional council sought and obtained certification as the representative of all carpenters employed by a signatory employer); *Carpenters v. Plasterers*, 826 F. Supp. 2d 241 (D.D.C. 2011) (same); *Shell Oil Co.*, 116 NLRB 203 (1956) (individual craft units deemed appropriate, despite the fact that several unions had jointly negotiated a single agreement covering all of those units). The Board has long held that such multi-union arrangements, which are essentially matters of convenience for the parties, do not destroy the separateness of the individual bargaining units and do not preclude separate representation of the individual participating craft units. *Consolidated Papers, Inc.*, 220 NLRB 1281, 1282 (1975); *Pacific Coast Shipbuilders Assoc.*, 157 NLRB 384, 386-87 (1966); *Shell Oil*, 116 NLRB at 205-06. Consequently, the question presented by a petition seeking to represent an individual craft unit that has participated in such a multi-union arrangement is simply whether the unit sought is appropriate under the Board's traditional community of interest standards. That should have been the issue here.

The Regional Director in this case, however, did not address that question. Instead she concluded – for reasons having nothing to do with whether the employees in the petitioned-for unit shared a community of interest – that the only appropriate unit would be “a unit of all full-time and regular part-time craft employees employed by the Employer who perform in-house construction

renovation.” (Decision and Direction of Election (“DDE”) at 4, 16) She arrived at that erroneous destination by making a series of wrong turns. She concluded that the Board’s Rule on Bargaining Units in the Health Care Industry was applicable (DDE at 4, 14-16), despite the fact that the rule, by its terms, applies only to petitions seeking to represent previously unrepresented employees. Because the employees included in the petitioned-for unit have been covered by a section 8(f) collective bargaining agreement, she characterized the unit as “akin to a residual unit of unrepresented employees” (DDE at 14) – a proposition inconsistent with the Board’s view of section 8(f). Although she found that the individual craft units had maintained their separate identities (DDE at 20), she nevertheless treated the several separate units as if they had been merged into one. And, although the Board has held that craft severance standards are inapplicable where separate units have not been merged, *Consolidated Papers*, 220 NLRB at 1282 n.1, she concluded that such standards applied here and rendered the petitioned-for unit inappropriate. (DDE at 18-22)

The request for review should be granted and the decision of the Regional Director, which in several respects departs from officially reported Board precedent, should be reversed. If, as it appears, the employees in the petitioned-for unit share a community of interest, that individual craft unit – which, as the Regional Director found (DDE at 20) has retained its separate identity – should be deemed appropriate.

## ARGUMENT

### **I. The Multi-Union Bargaining Described in this Case did not Render Inappropriate the Petitioned-for Craft Unit of Carpenters and Millwrights.**

According to the Decision and Direction of Election, the employer, Kaleida Health, operates five acute-care hospitals and other health care institutions in Western New York. (DDE at 1, 8) Prior to 2006, construction renovation work at Kaleida's facilities was performed by contractors that had collective bargaining relationships with individual craft unions. Because it wanted greater control over its in-house renovation projects, Kaleida decided to do that work with its own employees. (DDE at 9) In 2006, Kaleida acquired a general contractor's license from the City of Buffalo (DDE at 8-9), and because it needed its own pool of skilled construction employees, signed a memorandum of understanding with the Buffalo Building and Construction Trades Council and fifteen of its affiliated local unions. (DDE at 9, 10)

That memorandum, which by its terms covered small construction projects at Kaleida's facilities (DDE at 9), contained some terms applicable to all crafts (such as hours of work and break times), but also required Kaleida to "apply the terms of the respective signatory union's collective bargaining agreement that governs the trade of the individual employee who [was] hired to perform in-house renovation, unless modified by the MOA." (DDE at 9) In other words, there were a few terms applicable to all craft employees working on Kaleida's renovation projects, but most terms, including wages and benefits, were established by the separate collective

bargaining agreements negotiated by the individual signatory local unions.

The Buffalo Building Trades Council provided Kaleida with copies of those individual craft agreements, and, as the Regional Director found, since 2006 “the Employer has complied with the terms of the individual contracts of craft unions who are signatory to the MOA.” (DDE at 2, 10) Each of those individual craft unions also appointed its own job steward to process grievances and administer the agreement. (DDE at 11)

The memorandum of agreement is thus a multi-union collective bargaining agreement between Kaleida and several unions, covering employees that had previously been part of several separate bargaining units. As commentators have observed, multi-union bargaining has been a common practice for several years, particularly in the construction industry. Milton C. Regan, Jr., *Multi-Unit Collective Bargaining: Autonomy and Dependence in Liberal Thought*, 72 GEO. L.J. 1369, 1377-78 (1984); Lynn E. Wagner, *Multi-Union Bargaining: A Legal Analysis*, 19 LABOR LAW J. 731, 731 (1968). Not surprisingly then, there have been several cases in which, as here, various unions – each representing a separate group of employees – have bargained jointly with an employer for a single agreement covering all the employees represented by those unions. The Board has consistently held that, where each group of covered employees retains its separate identity, such multi-union bargaining does not create a single, indivisible bargaining unit. Instead, in those circumstances, each union retains its right to withdraw from multi-union bargaining and separately represent its own bargaining unit. Joint

bargaining does not render the individual craft units inappropriate and does not preclude individual unions from separately representing one of those craft units.

In *Pacific Coast Shipbuilders Assoc.*, 157 NLRB 384 (1966), for example, nine local unions, the Metal Trades Department and a metal trades council all bargained with an employer association. Each local union signed the multi-union collective bargaining agreements jointly negotiated by the participating unions. When one of those unions asserted its right to bargain separately, the employer refused. Because the negotiated agreements “by their terms recognize[d] the separate identity of the craft units,” – evidenced by the facts that provisions on union security and referral referenced the individual craft unions and each union had the right to appoint its own job steward and obtain access to the employer’s premises – the Board held that the union was entitled to represent its individual unit and bargain separately. 157 NLRB at 385, 386. “[A]lthough the unions had bargained jointly with the Employer for many years, neither the separate identity of the unit nor the Petitioner’s representative status in that unit had been lost.” *Id.* at 386.

In *Consolidated Papers*, the Board observed that *Pacific Coast Shipbuilders* had “announced the principle that joint [multi-union] bargaining . . . which is merely a matter of convenience for the parties does not destroy the separate bargaining units.” 220 NLRB at 1282 n.1. The union in *Consolidated Papers* had bargained jointly with other unions for more than fifty years. Because, however, that union and the unit that it represented had preserved its separate identity, the Board concluded that the long history of multi-union bargaining had not affected its

right to bargain separately as the representative of a single craft unit. *Id.* at 1281-82. The Board based that conclusion on, *inter alia*, the facts that each union had maintained separate offices, appointed its own job stewards, processed its own grievances, and established its own wage schedules. *Id.* 1281-82. Accordingly, the question presented by the union’s demand to bargain for the individual craft union was “whether the unit represented by the Union and sought to be separately bargained for [was] appropriate under Board precedents,” and that question was answered by ascertaining whether the employees in the unit sought shared a community of interest. *Id.* at 1283-84.

The unions in *Pacific Coast Shipbuilding* and *Consolidated Papers* sought to represent individual craft units by demanding the right to bargain separately. Those cases establish the principle that inclusion of a craft unit in multi-union bargaining does not render an individual craft unit inappropriate where the craft unit has retained its separate identity. That principle also applies in representation cases when a union seeks certification as the representative of an individual craft unit previously included in a multi-union agreement – as demonstrated by the Board’s decision in *Shell Oil Co.*, 116 NLRB 203 (1956).

In *Shell Oil*, the Board considered eight representation petitions, each filed by a local union seeking certification as the representative of a separate craft unit. The employer argued that because each of those units had been included in a single agreement jointly negotiated by the parent international unions of those locals, the units sought were inappropriate. But, because the agreement, by its terms,

recognized in various ways the separate identities of the different crafts, the Board rejected that argument and held that the petitioned-for separate craft units were appropriate. *Id.* at 205-06. As the Board explained:

[W]e find that the Internationals' practice of negotiating and signing joint contracts with the Employer, simply because they believe[d], at the time, it was more convenient to bargain in one instrument concerning the various craft groups, does not in view of the record support a contention that collective bargaining under the contract was conducted on an industrial basis. Rather it appears and we find that collective bargaining has proceeded on the basis of continued recognition and separate preservation of individual craft groups.

*Id.*

As these cases show, jointly-negotiated agreements that maintain the separate identities of included craft groups do not preclude representation of an individual craft, as long as the employees in the petitioned-for unit share an adequate community of interest. Where, as in this case, there are only a handful of terms that apply to all covered employees and separate collective bargaining agreements – each negotiated by, and applicable to, a separate craft – are either attached or incorporated by reference, there can be no question that the separate identity of each craft has been maintained. *Compare Consolidated Papers; Pacific Coast Shipbuilders; Shell Oil.*<sup>2</sup>

That joint multi-union bargaining does not render separate craft units inappropriate is also shown by cases on withdrawal from such bargaining. The

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<sup>2</sup> Since, in the construction industry, separately-represented crafts typically work side-by-side, see *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 661-62 (1982), that Kaleida's construction employees may also have worked side-by-side on its renovation projects does not suggest that the separate units had been merged or eliminated.

Board has held that the rules applicable to withdrawal from multiemployer bargaining also apply to a union's withdrawal from multi-union negotiations. Unions can withdraw from such bargaining as long as their withdrawal is timely and unequivocal. *Consolidated Papers*, 220 NLRB at 1283 n.2; *Catalytic, Inc.*, 212 NLRB 471, 472 (1974); *Plumbers Local 525 (Reynolds Electrical & Engineering Co.)*, 171 NLRB 1607, 1642 (1969). That unions can and do withdraw from multi-union arrangements, like the arrangement in this case, and then bargain separately for individual craft units further demonstrates that joint multi-union bargaining is not inconsistent with the separate representation of a craft unit previously included in a multi-union agreement.

In this case, the regional Director found that the signatory local unions and the Buffalo Building and Construction Trades Council were the joint representatives of all Kaleida employees performing in-house construction renovation. (DDE at 11). In so finding, however, the Regional Directors asked and answered the wrong question. As explained above, the important question is not whether the unions were joint representatives but whether the identity of the otherwise separate units had been maintained. As *Consolidated Papers* and *Pacific Coast Shipbuilders* show, joint representation is not inconsistent with the maintenance of a craft unit's separate identity. *Consolidated Papers* 220 NLRB at 1281 ("the union has bargained for more than 50 years with the joint group"); *Pacific Coast Shipbuilders*, 157 NLRB at 385 ("the Petitioner, together with eight other craft unions, had bargained jointly"). Accordingly, whether the unions were

joint representatives was not a material issue.

The Regional Director did address, albeit briefly, the more relevant question whether each unit had maintained its own identity. She found that “[e]ach craft ha[d] maintained a separate identity, to some degree, by the terms and conditions of employment set forth in its respective collective bargaining agreement,” (DDE at 20) She thereby acknowledged that the various craft units had not been merged.<sup>3</sup> Having made that finding, she should have concluded that the craft unit sought here would constitute an appropriate unit, as long as the employees included in that unit shared a community of interest.

Rather than focusing on that community of interest, she applied the craft severance standards of *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), to determine whether the petitioned-for unit could be separately represented. (DDE at 18-22) The Board, however, has clearly stated that, where several individual craft unions have bargained jointly and the units have not been merged, the question whether one craft can be represented separately cannot be determined by applying craft severance standards. In *Consolidated Papers*, the ALJ treated the union’s demand for separate bargaining as an issue of craft severance. The Board emphatically rejected that analysis in these clearly-stated terms:

The Administrative Law Judge’s reliance on *Mallinckrodt Chemical Works Uranium Division*, 162 NLRB 387 (1966), is wholly misplaced in

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<sup>3</sup> The merger of bargaining units is not something easily accomplished. “The Board does not find a merger in the absence of unmistakable evidence that the parties *mutually* agreed to extinguish the separateness of the previously recognized or certified units.” *Utility Workers (Ohio Power Co.)*, 203 NLRB 230, 239 (1973) (emphasis in original).

the circumstances here and we therefore expressly disavow his discussion of that case. . . . Since we find there has never been a merger of Local 1147 into the multiunion bargaining unit it would be inconsistent to treat the Union's withdrawal from the multiunion bargaining group as craft severance.

220 NLRB at 1282 n. 1. The Board reached essentially the same conclusion in *Shell Oil*, rejecting the employer's argument that, because the several petitioned-for craft units had been included under a single agreement, the appropriateness of separate craft units must be determined by applying *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954), a predecessor of *Mallinckrodt*. 116 NLRB at 203. Accordingly, the Regional Director's reliance on *Mallickrodt* was misplaced, and irreconcilable with her finding that that the craft units had maintained their separate identities.

As *Consolidated Papers*, *Pacific Coast Shipbuilders* and *Shell Oil* show, the question presented in this case is not whether the petitioned-for unit satisfies *Mallinckrodt*. Where, as in this case, several units of craft employees are included in a single jointly-negotiated collective bargaining agreement, but maintain their separate identities, each unit may be separately represented, by either an incumbent union or by another union, as long as the employees in that unit share a community of interest. That is the question that the Regional Director should have answered, but did not.

**II. The Board's Rule on Appropriate Bargaining Units in the Health Care Industry is Inapplicable Because the Petition does not Seek a New Unit of Previously Unrepresented Employees.**

In her decision, the Regional Director defined the question presented, not as whether the employees in the petitioned-for unit shared a community of interest,

but whether the petitioned-for unit was appropriate under the Board’s Rule on Bargaining Units in the Health Care Industry, 284 NLRB 1596-97. (DDE at 8) She concluded that section 103.30(c) of that rule rendered the petitioned-for unit inappropriate. That section states that where there are existing non-conforming units, the board will find appropriate only units “which comport, insofar as practical” with the eight units deemed appropriate in acute care hospitals – one of which consists of all skilled maintenance employees. 284 NLRB at 1597.<sup>4</sup>

Although she acknowledged that section 103.30(c) applied only to petitions for units of previously unrepresented employees and that the employees included in the petitioned-for unit here had for years been covered by union-negotiated collective bargaining agreements (DDE at 6, 8-9), the Regional Director reasoned that the section nevertheless applied because “the craft employees at issue herein are akin to a residual unit of unrepresented employees, as only a Section 8(f)

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<sup>4</sup> Section 103.30(a) of the Rule, applicable to acute care hospitals, states in pertinent part:

Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the [Act].

284 NLRB at 1596-97. A list of eight units follows, one of which is “[a]ll skilled maintenance employees. *Id.* at 1597. Section 103.30(c) states:

Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

*Id.*

relationship exists pursuant to the pre-hire agreement between the Employer and the BBCTC and the signatory unions.” (DDE at 14) Because section 103.30(c) requires a petitioner seeking a non-conforming unit of maintenance employees to seek either a residual unit of all unrepresented skilled maintenance employees or those within the preexisting non-conforming unit, she concluded that the only appropriate unit would be one of all craft employees performing in-house construction renovation (DDE at 4, 16) – which she presumably viewed as the preexisting, non-conforming unit. The petitioned-for unit of carpenters and millwrights was therefore deemed inappropriate. (DDE at 15)

There are two obvious and related flaws in the Regional Director’s analysis. First, section 103.30(c) applies only to petitions to represent previously unrepresented employees and the employees in the petitioned-for unit are not unrepresented. They have been represented by labor organizations for several years. And second, assuming that the relationship between Kaleida and the unions signatory to the memorandum of agreement is a section 8(f) relationship, there is simply no logic or support for the proposition that employees covered by a section 8(f) agreement are “akin to . . . unrepresented employees.”

Two cases clearly establish that the Rule applies only to petitions seeking units of unrepresented employees. In *Crittenton Hospital*, 328 NLRB 879 (1999), the union petitioned for an existing unit of some, but not all, of the employer’s registered nurses. The Board rejected the argument that the unit had to be broadened to conform to the Rule by including all registered nurses. *Id.* at 879-80.

In its decision, the Board explained that “[b]y its own terms, the Rule applies only to initial organizing attempts or, where there are existing non-conforming units, to a petition for a new unit of previously unrepresented employees, which would be in addition to the existing units.” *Id.* at 880. Because the petitioned-for unit did not include previously unrepresented employees, the Board’s Rule simply did not apply. Thus *Crittenton* establishes that, in the health care industry, an existing unit is appropriate, even if it does not conform to the Rule.

The Board reached a similar conclusion in *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), in which a union petitioned for a unit of skilled maintenance employees, which conformed to the Rule, but was smaller than the existing, non-conforming unit represented by the incumbent union. Although section 103.30(c) states that, where there are existing non-conforming units, the Board will find appropriate only petitions for additional units that comport with the Rule, the Board concluded that the section did not apply. The Board explained that “[b]y its terms, Section 103.30(c) applies only to petitions for ‘additional units,’ that is, petitions to represent a new unit of previously unrepresented employees, which would be an addition to the existing units at a facility.” *Id.* at 934. The Rule could not therefore be applied to change the scope of the existing unit.

In *Crittenton* and *Kaiser Foundation*, the pre-existing, non-conforming units were deemed appropriate because the Rule applied only to proposed units of previously-unrepresented employees. Since the carpenters included in the petitioned-for unit here are represented, rather than unrepresented, the Rule

cannot be invoked to determine the appropriateness of the unit sought by the petitioner in this case.

The Regional Director attempted to avoid that unavoidable conclusion by characterizing employees covered by a section 8(f) agreement as “akin to . . . unrepresented employees.” (DDE at 14) That characterization, however, cannot be reconciled with the applicable law under section 8(f), 29 U.S.C. § 159(f).

In its landmark decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3<sup>rd</sup> Cir. 1988), the Board held that “[w]hen parties enter into an 8(f) agreement they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement, unless the employees vote in a Board conducted election to reject (decertify) or change their bargaining representative.” *Id.* at 1385. The Board explained that this “imposition of enforceable contract obligations on signatories to an 8(f) agreement is contingent, in part, on the signatory union possessing exclusive representative status.” *Id.* at 1386. The Board also noted that, because they have the status of exclusive representatives, there was no doubt that union signatories to section 8(f) agreements also owed covered employees a duty of fair representation. *Id.* at 1387 n. 50. In subsequent cases the Board has also held that, because the duty to bargain applies during the term of a section 8(f) agreement, unions can request, and employers must provide, information relevant to the enforcement of the agreement, even if the information is requested after the agreement expires. *Audio Engineering, Inc.*, 302 NLRB 942, 943 (1991). Thus employees, like the

employees here, who have been covered by a series of section 8(f) agreements, cannot accurately be characterized as “unrepresented.” Their employer has a duty to comply with their collective bargaining agreement and their union has a duty to represent them fairly. The Regional Director’s effort to treat them as unrepresented under the Board’s Rule must therefore be rejected. And, because they are and have been represented, the appropriateness of the petitioned-for unit cannot depend on section 103.30(c) of the Rule.

It is worth noting, however, that the Rule, if properly applied, would not have rendered the petitioned-for units inappropriate. *Crittenton* and *Kaiser Foundation* establish that, under the Rule, pre-existing, non-conforming units are appropriate. The Regional Director in this case treated all employees covered by Kaleida’s multi-union agreement as a single, indivisible unit. But, because, as the Regional Director found, each craft unit has maintained its separate identity (DDE at 20), the relevant pre-existing unit is not all craft employees performing renovation work for Kaleida. It is instead the separate craft unit sought by the petitioner. Under *Crittenton* and *Kaiser Foundation*, that pre-existing non-conforming unit should have been deemed appropriate, even if the Rule had been applied.

In this case, several unions have bargained with Kaleida Health, the operator of an acute health care hospital, on a multi-union basis, producing a series of collective bargaining agreements that plainly preserved the separate identities of the individual bargaining units. A non-incumbent union has petitioned for certification as the representative of one of those individual units – carpenters and

millwrights performing construction renovation work for Kaleida. Because those individual units have maintained their separate identities, that unit should have been deemed appropriate, despite the history of multi-union bargaining, as long as the employees in that unit shared a community of interest.

Instead, the Regional Director concluded that the unit was inappropriate under the Board's Rule on Bargaining Units in the Health Care Industry. Because she incorrectly viewed the employees covered by the multi-union agreement as unrepresented, she concluded that the unit sought was a residual, non-conforming unit inconsistent with Section 103.30(c). Alternatively, ignoring her own finding that the individual units had maintained their separate identities, she treated all of the units as a single, merged entity and concluded that the petition here constituted an attempted craft severance. She arrived at that conclusion despite the fact that the Board had explicitly stated that, where the identity of separate units had been maintained, separating one unit from several covered by a multi-union agreement was not an issue of craft severance.

The unit sought here is a separate craft unit whose separate identity has not been compromised by multi-union bargaining. If, as it appears, the employees in that unit share a community of interest, that unit should be deemed appropriate.

CONCLUSION

For all the foregoing reasons, the request for review should be granted. The decision of the Regional Director should also be reversed and the petitioned-for unit should be deemed appropriate.

Respectfully submitted,

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**AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

I hereby certify that on the 30<sup>th</sup> day of August, 2012 a copy of the forgoing Motion of the Building and Construction Trades Department, AFL-CIO for Leave to File a Brief as *Amicus Curiae* and Brief of the Building and Constructions Trades Department, AFL-CIO, *Amicus Curiae*, have been sent by electronic mail to the following:

National Labor Relations Board, Region 3  
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Dated: August 30, 2012