United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 31, 2012

TO: Daniel L. Hubbel, Regional Director
Region 17

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT:		
	Dean E. Norris, Inc., Professional Mechanical Contractors, Inc. and DEN Management Company, Inc., as a Single Employer	355-2201-5000 355-2220 530-4825-5000
	Case 17-CA-079468	530-4825-5050

This case was submitted for advice as to whether this single Employer violated Section 8(a)(5) by refusing to apply a Section 8(f) agreement that historically covered employees at only one of its companies to employees of its other operating company, following the Union's certification as the Section 9(a) representative of a single unit comprised of employees of both companies.

We conclude that the Employer may lawfully refuse to apply the extant 8(f) contract to the recently added facility, which historically had been excluded from successive 8(f) contracts for over 35 years. Accordingly, the charge should be dismissed, absent withdrawal.

FACTS

In 1971 Dean Norris and his son David Norris founded mechanical contractor Dean E. Norris (Dean) in Wichita, Kansas. In 1977, David Norris formed Professional Mechanical Contractors (PMC), also as a mechanical contractor. In 1984, David Norris created DEN Management Company (DEN), a corporation engaged in the business of managing mechanical contractors, to serve as owner and parent company over Dean and PMC as wholly-owned subsidiaries.

Since September 23, 1971, Dean has been a "me too" signatory to a Section 8(f) collective-bargaining agreement between Sheet Metal Workers' International Association, Local No. 29 (Union) and the Association of Mechanical and Sheet Metal Contractors of Kansas. The most recent collective-bargaining agreement is effective May 1, 2011 to April 30, 2016. At no time since its 1977 creation has PMC had a collective-bargaining relationship with the Union or any other labor organization. DEN, as the managing corporation, does not employ sheet metal workers.

On December 28, 2011, the Union filed a petition to represent the sheet metal employees of Dean, PMC, and DEN, as a single employer. The Employer stipulated at hearing that in the event that a single employer was found, a single overall bargaining unit would be appropriate. The Regional Director concluded that the three separate entities are a single employer. Following a February 22, 2012 election, the Union was certified as the bargaining representative in the overall bargaining unit on March 5, 2012.

The Union demands that the Employer apply the 8(f) agreement to both Dean and PMC. The Employer remains willing to negotiate terms and conditions for the PMC employees but has thus far refused to apply the terms of the 8(f) agreement to those employees.

ACTION

We conclude that the instant Section 8(a)(5) charge should be dismissed, absent withdrawal. While the Union is now the Section 9(a) representative of the Employer's employees in an overall unit covering both facilities, applying the 8(f) agreement to a group of employees who have been excluded from successive 8(f) contracts for over 35 years would in effect be compelling the parties to agree to contract terms, in violation of the principles laid down in *H.K. Porter v. NLRB.*[1]

In *Federal-Mogul Corp.*,[2] the Board articulated a framework of bargaining obligations after an unrepresented "fringe group" of employees votes to join an existing bargaining unit through a *Globe*[3] self-determination election. Under that framework, the employer must maintain any existing collective-bargaining agreement covering the historical bargaining unit while the parties negotiate interim contractual terms to be applied to the newly added employees.[4] No unilateral changes to the fringe group's pay and working conditions are allowed while the parties engage in these interim negotiations.[5] The Board concluded that automatic application of an

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[1] 397 U.S. 99, 102 (1970).

[2] *Federal-Mogul Corp.*, 209 NLRB 343 (1974).

[3] *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937).

[4] *Federal-Mogul Corp.*, 209 at 343-44. The Board noted that an agreement during this interim stage of bargaining "in all likelihood [will] be an addendum to the existing … contract." *Id.* at 344.

[5] *Id.* at 345.

existing agreement to employees long excluded from the unit "would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the *H.K. Porter* doctrine." [6] However, in describing interim bargaining, the Board noted a party could assert "as a bargaining position, that the existing contract ought to apply and invit[e] … any suggestions as to what specific modifications therein should be made."[7] Once the existing contract expires, the parties are obligated to bargain over a single agreement covering the newly enlarged unit.[8]

Although *Federal-Mogul* dealt specifically with the expansion of an existing, appropriate unit through a *Globe* self-determination election, the Board has applied this framework to other situations where historically diverse employee complements have combined to create a new, consolidated bargaining unit. In *Borden, Inc.,* the employer merged two discrete units after relocating its existing employees to a newly acquired plant, effectively creating "a new, merged unit, different from either preexisting unit."[9] Despite the effective extinction of the former bargaining units, the Board ordered the employer to maintain the two separate collective-bargaining agreements pending their expiration and the negotiation of a new contract at the integrated facility. The Board discerned "no 'legal or practical justification for permitting either party to escape its normal bargaining obligation,' which is to bargain with the employees' previous conditions of employment as the starting point."[10]

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[6] *Id.* at 344, citing *H.K. Porter v. NLRB*, 397 U.S. 99, 102 (1970) ("while the Board does have the power … to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement").

[7] *Federal-Mogul*, 209 NLRB at 345.

[8] *Id*. at 344. *See also Bay Medical Center*, 239 NLRB 731, 732 (1978) ("impediment" to bargaining for contract over single unit comprising pre-existing employees and *Globe*'d employees removed after contract in pre-existing unit expired).

[9] 308 NLRB 113, 114 (1992), *enforced,* 19 F.3d 502 (10th Cir. 1994), *cert denied,* 531 U.S. 927 (1994).

[10] *Id*. at 115, quoting *Federal-Mogul*, 209 NLRB at 344.

On the other hand, the opposite result would obtain under accretion principles as described in *Baltimore Sun Co.*[11] In that case, the Board held that the Employer violated Section 8(a)(5) by failing to apply the existing collective-bargaining agreement to the newly accreted employees; the parties were only required to bargain over terms not covered by that agreement, namely, terms unique to the accreted employees.[12] The Board expressly noted the difference between accretion and self-determination elections with respect to applicability of the existing contract to the newly added employees.[13] Accretion is designed to deal with the unforeseen creation of new jobs after the signing of a collective bargaining contract that are functionally identical to the unit jobs; thus, the "added employees…[already were] within the existing bargaining unit but had not yet been formally included."[14] Employees cannot be accreted, however, "where they *intentionally* and historically were excluded from the existing bargaining unit."[15]

We conclude that the *Federal-Mogul* framework best suits the circumstances and equities here. The representation proceeding resulted in the creation of a new, expanded bargaining unit comprising both the previously represented Dean employees and the PMC employees, who historically were excluded from the unit. The principles of accretion should not apply here because of this group's historical exclusion from the existing unit. Since PMC's creation 35 years ago, the Union has not sought and the Employer has never agreed to cover the PMC employees with the successive Section 8(f) contracts that have applied to its sister company.

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[11] 335 NLRB 163 (2001). Also, as noted by the Region, where ostensibly separate companies are found to be a single employer, an 8(f) contract signed by one of the companies is applicable to employees of related companies if a single bargaining unit is appropriate, provided that a ULP charge is filed within six months of the Union's clear and unequivocal notice of the double-breasted operation. *See Peter Kiewit Sons' Co*, 231 NLRB 76 (1977), *aff'd sub nom. Local 627, International Union of Operating Engineers v. NLRB,* 595 F.2d 844 (D.C. Cir. 1979). Here, the Union had clear and unequivocal knowledge of the Employer's double-breasted operation for 35 years and acquiesced to it rather than filing a timely charge.

[12] *Id*. at 169, citing *NLRB v. Jacobs Mfg. Co.,* 196 F.2d 680, 683, 684 (2d Cir. 1952), *enfg.* 94 NLRB 1214 (1951).

[13] *Id.,* citing *NLRB v. Mississippi Power & Light Company*, 769 F.2d 276, 279-280 (5th Cir. 1985).

[14] *NLRB v. Mississippi Power & Light Company*, 769 F.2d at 279.

[15] *Id.* (emphasis in original).

Thus, as in *Federal Mogul,* the Employer is not required to apply the Dean agreement to the PMC employees. Rather in the interim, before that agreement expires and the parties negotiate a new contract to cover the newly expanded unit, the Employer need only bargain with the Union over the PMC employees' terms and conditions of employment, which, in fact, it has offered to do.

Consequently, the instant 8(a)(5) charge, should be dismissed, absent withdrawal.

/s/
B.J.K.