



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 17
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OVERLAND PARK, KS 66212-4676

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Telephone: (913)967-3000
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September 11, 2012

[REDACTED]
JOLLEY WALSH HURLEY RAISHER & AUBRY, P.C.
204 W LINWOOD BLVD
KANSAS CITY, MO 64111-1328

Re:	Dean E. Norris, Inc., Professional Mechanical Contractors, Inc., and DEN Management Company, Inc., as a Single Employer
	Case 17-CA-079468

Dear [REDACTED]:

We have carefully investigated and considered your charge that Dean E. Norris, Inc., Professional Mechanical Contractors, Inc., and Den Management Company, Inc., as a single employer has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

The investigation disclosed that in 1971 Dean Norris and his son David Norris founded mechanical contractor Dean E. Norris (Dean). 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 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.

On December 28, 2011, the Union filed a petition to represent the sheet metal employees of Dean, PMC, and DEN, as a single employer. On March 5, 2012 the Union was certified as the collective bargaining representative in an overall bargaining unit of Dean and PMC sheet metal employees. DEN does not employ sheet metal employees.

Since certification, the Union has insisted that the Employer apply the existing 8(f) agreement to both Dean and PMC employees. The Employer remains willing to negotiate terms

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and conditions for the PMC employees but has thus far refused to apply the terms of the 8(f) agreement to those employees.

I find that the Employer may lawfully refuse to apply the extant 8(f) contract to the PMC employees, which historically have been excluded from the successive 8(f) contracts for over 35 years. While the Union is now the Section 9(a) representative of the Employer's employees in an overall unit covering both groups of employees, 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*, 397 U.S. 99, 102 (1970).

I find the present situation to be analogous to *Federal-Mogul Corp.*, 209 NLRB 343 (1974). In *Federal-Mogul Corp.*, the Board articulated a framework of bargaining obligations after an unrepresented "fringe group" of employees votes to join an existing bargaining unit through a 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.

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.*, 308 NLRB 113, 114 (1992), *enforced*, 19 F.3d 502 (10th Cir. 1994), *cert denied*, 531 U.S. 927 (1994), 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." 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." *Id.* at 115, quoting *Federal-Mogul*, 209 NLRB at 344.

I 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. 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. In these circumstances, automatic application of an 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.

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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.

Accordingly, I am refusing to issue complaint in the matter.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlr.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **September 25, 2012**. If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other documents you want us to consider through the Agency's website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than September 24, 2012.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before September 25, 2012**. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

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Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Daniel L. Hubbel

Daniel L. Hubbel
Regional Director

DLH:kec

Enclosure

cc GENERAL COUNSEL
OFFICE OF APPEALS
FRANKLIN COURT BUILDING
NATIONAL LABOR RELATIONS
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SHEET METAL WORKERS'
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DEAN E. NORRIS, INC.,
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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Case Name(s).

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)