



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 29, 2013

[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]

Your appeal from the Regional Director's refusal to issue complaint has been carefully considered. The appeal is denied substantially for the reasons in the Regional Director's letter of September 11, 2012.

Contrary to your appeal, the evidence fails to establish that the Employer was obligated to apply the extant 8(f) agreement to the sheet metal employees at Professional Mechanical Contractors, Inc. (PMC). Where, as here, a historically excluded unrepresented group is added to a unit through a Board election held during the term of a contract, the Board's usual policy is that the newly added employees are not covered by the contract previously negotiated for the represented employees. *Federal-Mogul Corp.*, 209 NLRB 343 (1974) The Fifth Circuit described the Board's usual policy as follows (*id.*):

In regulating fringe-group elections where there is an existing bargaining agreement, the NLRB rulings protect the employer if a fringe group selects a bargaining representative during the term of an existing bargaining agreement. The newly added employees may *not* invoke coverage by the existing agreement; rather, they must bargain the terms of a completely new agreement.

NLRB v. Mississippi Power & Light, 769 F. 2d 276, 280 (5th Cir. 1985) (emphasis in original).

In *Abex Corp. Aerospace Division*, 215 NLRB 665 (1974) *enforcement denied*, 543 F.2d 719 (9th Cir. 1976), the Board applied its *Federal-Mogul* policy in circumstances where the

newly added group performed work that was substantially the same as the work performed by the employees in the represented unit. The Ninth Circuit concluded that where the work performed by the employees in the expanded unit was substantially identical, an exception to the Board's *Federal-Mogul* policy was required and that it was appropriate that the added employees be covered by the existing contract. 543 F.2d at 721.

Because the work performed by the sheet metal employees at PMC is similar to the work being performed by the Dean sheet metal employees, serious consideration was given in this case to urging the Board to overrule its decision in *Abex Corp.*, even though that decision is a controlling Board precedent that ordinarily would dictate the dismissal of the unfair labor practice charge. Ultimately, however, it was concluded that this case presents policy issues that were not before the Ninth Circuit in the *Abex* case and that make this case an unsuitable vehicle for requesting the Board to reconsider *Abex*.

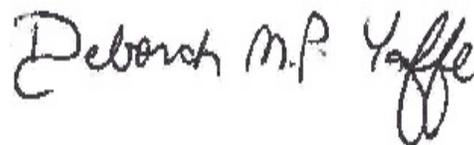
Specifically, this case arises in the construction industry where it is customary for employers such as PMC to rely on estimates of their labor costs in bidding on long term construction projects. In this context, as in *Federal Mogul*, automatic application of an existing agreement to employees long 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." 209 NLRB 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").

For these additional reasons, as well as the reasons stated by the Regional Director, it was concluded that the Employer's refusal to apply the Section 8(f) agreement to the PMC employees was not unlawful under Section 8(a)(5) of the National Labor Relations Act. Accordingly, further proceedings are unwarranted.

Sincerely,

Lafe E. Solomon
Acting General Counsel

By:



Deborah M.P. Yaffe, Director
Office of Appeals

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