

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 30

SURF-PREP, INC.,

Petitioner,

v.

LOCAL UNION 802, INTERNATIONAL
UNION OF PAINTERS AND ALLIED
TRADES and DISTRICT COUNCIL NO. 7,
AFL-CIO,

Case No. 18-UC-226905
Case No. 18-UC-226908

Unions.

PETITIONER SURF-PREP, INC.'S REQUEST FOR REVIEW

Petitioner Surf-Prep, Inc., by their attorneys Reinhart Boerner Van Deuren, s.c., by John H. Zawadsky, hereby petitions the NLRB pursuant to Section 102.67 of the Board's Rules and Regulations from the Regional Director's dismissal of the two above-referenced unit clarification petitions in Case Nos. 18-UC-226905 and 18-UC-226908 on the following grounds:

I. The Regional Director's decision is clearly erroneous with respect to substantial factual issues and such error prejudicially affects the rights of Petitioner Surf Prep, Inc. Section 102.67 (c)(2).

A. The Regional Director's findings on factual issues.

1. "The union filed a grievance alleging work has been transferred from its bargaining unit at the Employer to employees of the two above-identified businesses" (emphasis added).

2. “It (the union) is seeking to claim work that has been transferred outside the bargaining unit in contravention of the parties’ collective bargaining agreement” (emphasis supplied).

B. The prejudicial errors with the Regional Director’s factual findings.

These factual findings are clearly erroneous and indeed a blatant mischaracterization of the Union’s grievance and its claims. Thus, the grievance does not claim a transfer of work from Surf Prep (the Union employer) to non-union entities. Rather, the grievance states that the Union’s concern is “the operation by your company or its principals of a substandard company called Floor Coatings Pro LLC of work which would otherwise be performed by your company.”

Accordingly, the grievance expressly predicates possible violations of the agreement on the alleged operation of a separate entity by the union company. Such a claim on its face does not represent a “transfer” of work.

Moreover, the Union’s Petition to Compel Arbitration dispels any such conjecture. Thus, in that Complaint, the Union never asserts that the union company has “transferred” work from the union company to either of the two non-union entities in issue. Rather, the Union asserts that the two non-union companies are “alter-egos” of the Union firm. In the Union’s own words:

“The claim raised by the Union’s grievance is whether Floor Coatings Pro, and other companies created by the owners of Surf-Prep, constitute alter-egos of Surf-Prep.” (Paragraph 10 of Unions’ complaint).

To characterize this claim as a “transfer” of work issue simply does not withstand scrutiny. The word “transfer” means “the conveyance from one person... to another.” Webster’s New Collegiate Dictionary. There is no claim that Surf Prep subcontracted or shifted work from the union company to either of the non-union entities. If this was a “transfer of work”

claim, then the Union would have said so and the legal underpinning of its grievance on alleged “alter-ego” relationships between Surf Prep and the two non-union firms would be superfluous.

There has never been a claim that Surf Prep work has been transferred to or subcontracted to the non-union companies in issue in this proceeding or that Surf Prep has ever assigned any such work to the employees of the two non-union companies.

Quite simply, the only way that there can be a finding that the work being performed by the two non-union companies is “Union” work is for there to be a finding that the employees of the two non-union firms are part of Surf Prep’s bargaining unit.

II. The Regional Director’s decision represents a substantial departure from officially reported Board and United States Supreme Court precedent. Section 102.67(c)(1).

A. Legal Authority for the Regional Director’s decision.

The Legal authority for the Regional Director’s decision is sadly lacking and badly misplaced. The Regional Director first cites to *Cincinnati Gas and Electric Company*, 235 NLRB 424(1978) for the proposition that “issues of work assignment are not appropriate for clarification.” However, in that case, the union employer reassigned work from one bargaining unit of union-represented employees to a second bargaining unit of union-represented employees. There was no dispute that the union employer had transferred work.

The Regional Director next relies upon *Al J. Schneider & Associates, Inc.*, 227 NLRB No. 191 (1977). The Regional Director relies upon this case for the proposition that: “Neither does the Board permit the issue of whether an employer is operating an alter ego to be litigated through a unit clarification petition.” The Regional Director ignores in *Al J. Schneider* the fact that Section 8(a)(5) charges alleging an alter-ego relationship between the two companies and

that the union company's contracts were pending. The employer was seeking to bypass a pending case.

Ironically, in this case, the Employer has been forced to file the two unit clarification petitions in issue precisely because the Union is seeking to bypass the NLRB and application of the Board's criteria on alter-ego/appropriate unit. *See* Regional Director's decision at page 1: "The union has also asserted in correspondence that the other two businesses constitute an alter ego of the Employer, though no unfair labor practice charge about this issue has been filed at this time."

Indeed, in that case, the gravamen of the Union's unfair labor practice was that the union company's contract "should be held to cover and apply to the" non-union company's employees. There are no such pending charges in this case. Indeed, this case proves the point—an alter ego claim necessarily means that the Union is seeking to extend union representation to the non-union companies' employees.

B. The Regional Director's decision is at direct variance with Supreme Court and Board precedent.

The Regional Director's decision reveals a lack of understanding of the alter-ego/single employer concept and the ramifications of such a claim on the representational interests of the two non-union firm's employees.

"When two entities are found to be a single employer, one entity's collective bargaining agreement covers the other entity as well, provided that the two entities employees constitutes a single appropriate bargaining unit" (citing to Supreme Court's decision in *South Prairie Construction Company v. Local No. 627 Operating Engineers*, 425 U.S. 800, 805(1976). *Stardyne, Inc. v. NLRB*, 41 F3d 141, 144 (3d Cir. 1994).

“However, if two entities are found to be alter egos, a collective bargaining agreement covering one entity is automatically deemed to cover the other.” *Id.*

Thus, the remedy where an alter-ego relationship is found to exist is always to apply the union company’s union contract to the non-union company’s employees. *See, e.g., ADF, Inc. and its alter ego ADLA, LLC, 355 NLRB No. 14 (2010).*

As the Supreme Court held in the South Prairie Construction case, *supra*, where there is a single employer relationship, the NLRB is the appropriate entity to determine whether an employer-wide unit is appropriate.

“The selection of an appropriate bargaining unit lies largely within the discretion of the Board.” *Id.* at 805. Such a decision is one the Board must make “in order to assure to employees the fullest freedom in exercising the rights guaranteed” by the National Labor Relations Act. *Id.* at 804, quoting from 29 U.S.C. section 159(b). The Board cannot abrogate its fundamental responsibilities under Section 9 of the Act.

Indeed, the NLRB will not defer to an arbitrator’s alter ego finding precisely because the NLRB has primary jurisdiction over representational issues. *Asbestos Carting Corp., 302 NLRB 197(1991). See also, Brooks Brothers, 365 NLRB No. 61 (2017).*

The bottom line in this case is that the union’s alter ego claims necessarily involve the claim that Surf Prep’s union contract covers the employees working for the two non-union firms. It is seeking to represent additional employees—the classic accretion case. *See also, Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272(1964); Laborers Local 1 (Del Construction), 285 NLRB, 593, 594-95(1987).*

Finally, the Regional Director ignores a decision on all fours with this case in which Region 30 (which has subsequently been merged into Region 18) did, in fact, grant a Unit

Clarification petition where a union was claiming that its union contract should apply to two subsidiaries of a Union firm. *See Wingra Redi-Mix, Inc.*, Case 30-UC-429 (2009). The Petitioner provided the Regional Director with a copy of this decision, but the Regional Director inexplicably fails to explain its deviation from the Region's own precedent.

III. CONCLUSION.

For the foregoing reasons, Petitioner Surf Prep, Inc. respectfully requests that this Request for Review be granted.

Respectfully submitted this 26th day of December, 2018.

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