UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PENSKE TRUCK LEASING CO., L.P., Employer/Petitioner,
and
TEAMSTERS LOCAL UNION NO. 957, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Union/Respondent.

CASE NO. 09-UC-281192

UNION’S REQUEST FOR REVIEW

Pursuant to Section 102.67(c) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Respondent, Teamsters Local Union No. 957 (“Union” or “Local 957”) submits this Request for Review of the Regional Director’s October 1, 2021 Decision and Order Granting Unit Clarification (“Decision”), in the above-captioned matter. In accordance with Section 102.67(d) of the Board’s Rules and Regulations, compelling reasons exist for granting Local 957’s Request for Review. Specifically, the Decision raises substantial questions of law because of its departure from officially reported Board precedent.

I. PROCEDURAL HISTORY

On August 12, 2021 Penske Truck Leasing Co., L.P., (“Penske” or “the Employer”) filed a Unit Clarification Petition (Exhibit A) seeking to exclude from a bargaining-unit two hourly employees who are employed by Penske and work in Penske’s newly-opened Piqua, Ohio facility. Penske took the position that the two employees at the Piqua facility have a separate and distinct community of interest from the employees Local 957 represents at the employer’s Dayton, Ohio
facility. Local 957 took the position that that question of whether the two Penske employees at the Piqua facility should be represented by the Union is a question of contractual interpretation that should be decided by an arbitrator, in accordance with two separate and distinct provisions of the Parties’ collective bargaining agreement (“CBA”) (Exhibit B).

A virtual hearing into the matter was conducted by the National Labor Relations Board on September 2, 2021. Following the hearing, both Parties submitted Post-Hearing Briefs. On October 1, 2021 the Regional Director released his Decision (Exhibit C) and, in doing so, rejected the Union’s position that the Employer’s UC Petition be deferred pending an arbitration of the Union’s previously-filed grievance (Exhibit D) on the matter, which alleged the Employer failed to apply the CBA to the employees at the Piqua facility. Instead, he found that a question of representation exists and the existing bargaining unit represented by the Union should be clarified to exclude the Employer’s Piqua, Ohio employees. Deferral pending arbitration of the Union’s grievance was not appropriate, according to the Regional Director, because the issues in this case involve questions of representation, which are solely statutory issues that are not dependent on contract interpretation.

II. RELEVANT FACTS

The Employer operates a nationwide network of facilities that are engaged in the business of providing full-service leasing of trucks, tractors, and trailers; contract maintenance of such

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1 In the alternative, Local 957 took the position at the Hearing that Penske’s two employees at the Piqua facility share a sufficient community of interest with the Penske’s employees who work in Dayton and are currently represented by the Union such that the Piqua employees represent a valid accretion to the existing Dayton unit. The Union does not advance this argument in its Request for Review.
vehicles; as well as consumer and commercial rental of vehicles. Approximately 47 employees work at Penske’s 2519 Nordic Road, Dayton, Ohio facility, including 22 bargaining unit employees represented by Local 957.

Local 957 has represented employees at Penske’s Dayton, Ohio facility since at least 1999. The parties’ current CBA is effective from March 1, 2019 to February 28, 2023. The Union represents two types of employees at the Employer’s Dayton facility: technicians (“Tech I,” “Tech II,” and “Tech III”) and customer service representatives (“CSRs”). These employees repair and service vehicles that are either owned by Penske and leased to customers (“full-service lease”) or owned by third-parties (“contract maintenance”). The Technicians are responsible for vehicle maintenance and repair, the CSRs are responsible for fueling, cleaning and washing the vehicles that come to the facility for service.

The CBA contains two references to future Penske operations commenced in the greater Dayton, Ohio area. The first reference, contained in Article 1 (Recognition), states:

“This agreement shall also apply to future Penske operations commenced in the greater Dayton, Ohio area, where Penske is contracted to provide truck maintenance and leasing services, however, such recognition is limited to Penske’s discretion to exclude any new facility or operation based on customer or operational requirements.”

The second reference to future Penske operations in the CBA is contained in a Letter of Understanding, dated March 5, 2012, which is appended to and incorporated into the CBA. The text reads, in pertinent part:

“To the extent that a customer account assigned to Penske Truck Leasing Co., LP, at Dayton, Ohio, is serviced at or by employees represented by Teamsters Local Union No. 957, the Collective Bargaining Agreement between Penske and Local 957 will apply in its entirety unless otherwise modified below.
Specific to any new Penske facility opened to service an account that was assigned to Penske at Dayton, Ohio, such new facility would remain on the Dayton master Seniority List for purposes of layoff, recall and job openings; however, shift, vacation and overtime considerations shall be addressed at the location level.”

Penske opened a new truck repair facility in Piqua in January, 2021. Piqua is located in Miami County whereas Dayton is located in Montgomery County, however, they are contiguous counties. Penske’s Piqua facility is approximately 26 miles from its Dayton facility. Travel between the Piqua facility and the Dayton facility is accomplished via interstate highway and takes approximately 26 minutes. Prior to the opening of the Employer’s Piqua facility, the Dayton facility frequently serviced vehicles that were leased to customers located north of Piqua.

At the time of the hearing, Penske employed two individuals at the Piqua facility. Both were classified as technicians. These employees are classified the same, have the same skills and perform the same work as the technicians employed by Penske at the Dayton facility. Technicians, depending on their level of experience, perform preventative maintenance and repairs, ranging from minor repairs to complex engine and transmission work. With respect to wages, the wages of the Piqua and Dayton technicians are nearly identical. Hours and work shifts differ somewhat between the Dayton and Piqua facilities. The Employer’s employee handbook applies to the Dayton and Piqua employees; the handbook contains policies regarding drugs and alcohol, cell phone use, codes of conduct, work rules, safety rules and anti-harassment prohibitions. Although their paid leave terms are slightly different, the employees in Dayton and Piqua are entitled to paid holidays, sick leave, vacation or personal days, and leaves of absences. Employees in both locations can participate in the same health-insurance plan offered by the Employer.
Mark Morell, Business Agent for the Union, began to hear rumors in 2019 that Penske would be opening a facility in Piqua. Piqua is within the Union’s historical jurisdiction. After Penske opened the Piqua facility in January, 2021, Morell inquired with members of the Employer’s management team whether Penske would honor the terms of the parties’ CBA by applying the CBA to the Piqua facility. The Union has consistently maintained that Penske’s two Piqua technicians (and any future technicians or CSRs hired at Piqua) should be included in the bargaining unit because the parties’ CBA states that it applies to “future Penske operations commenced in the greater Dayton, Ohio area, where Penske is contracted to provide truck maintenance and leasing services…”

When it became clear to Morell that Penske would not honor the terms of the parties’ CBA, the Union filed a grievance in May, 2021, contending that any technicians employed at the Piqua facility are subject to the CBA. On June 25, 2021, Morell communicated to Penske that the Union intended to advance the matter to arbitration, pursuant to the CBA’s grievance and arbitration provisions, based upon Penske’s refusal to apply the CBA to the Piqua technicians.

III. ISSUE FOR REVIEW

Pursuant to 29 C.F.R. § 102.67(d), the Board may grant review when a substantial question of law or policy is raised because of the absence of or a departure from officially reported Board precedent. The Union seeks review of the Regional Director’s determination that the issue of whether the technicians employed at Penske’s Piqua facility should be subject to the parties’ CBA turns on statutory application of the Board’s accretion doctrine rather than a contractual interpretation and should therefore be decided by the Board rather than an arbitrator. In doing so, the Regional Director deprived the parties of their agreed-upon arbitration
procedure, denying the Union of both the benefit of its contractual bargain with the Employer and control over the administration of the CBA.

IV. ARGUMENT

A. This Case Presents Classic Questions of Contract Application; The Regional Director’s Decision Failed to Follow Board Precedent Regarding Deferral of Representational Issues That Can Only Be Resolved Through Application of Statutory Policy

Well-established Board precedent stands for the proposition that deferral of questions of representation to an arbitrator is appropriate “when resolution of the issue turns solely on the proper interpretation of the parties’ contract.” Appollo Systems, Inc., 360 NLRB 687, 688 (2014). Deferral is not appropriate if the representational issues “can be resolved only through application of statutory policy.” Id., citing McDonnell Douglas Corp., 324 NLRB 1202, 1205 (1997). Deferral to arbitration when resolution of the issue turns on contractual interpretation is proper because employers and unions that enter into CBAs with binding arbitration provisions are entitled to expect that disputes within the coverage of those provisions will be adjudicated by the method they voluntarily selected. The Regional Director erred when he held the inclusion of Piqua technicians into the Dayton bargaining unit is not susceptible to resolution under the CBA.2

2 The Board can add employees to existing bargaining units without conducting a representation election through the process of accretion. NV Energy, Inc., 362 NLRB 14, 17 (2015). The purpose of the accretion doctrine is to “preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made.” NLRB v. Stevens Ford, Inc., 773 F.2d 468, 473 (2d Cir. 1985). Because accreted employees are added to an existing unit without an election, tension exists between an employee’s Section 7 rights and the accretion doctrine’s goal of promoting industrial stability. NV Energy, 362 NLRB at 16.

Under the accretion standard set forth in Safeway Stores, Inc., 256 NLRB 918 (1981), the Board finds a valid accretion “only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted.” In determining whether this “overwhelming community of interest” standard has been met, the Board considers a non-exclusive list of factors such as integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, degree of separate
Arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy. United Technologies Corp., 286 NLRB 557, 558 (1984). The reason for its arbitration’s favored status is the underlying conviction that the parties to a CBA are “in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract. Id. Congressional intent regarding the use of arbitration is abundantly clear:

“Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”

U.S.C. § 173(d). United Technologies traced the Supreme Court and Board’s endorsement of arbitration as a preferred means of preserving industrial peace. 268 NLRB at 558. As early as 1943, the Board stated in Consolidated Aircraft that it would not effectuate the statutory policy of encouraging collective bargaining for the Board to assume the role of policing contracts between employers and labor organizations as parties would thereby be encouraged to abandon their efforts to dispute of their disputes through arbitration.

The Board expounded on this approach in Collyer Insulated Wire, 192 NLRB 837, 843 (1971) in which the Board dismissed a complaint alleging unilateral changes in wages and working conditions in violation of Section 8(a)(5) in deference to the parties’ grievance-arbitration machinery. Collyer identified several factors favoring deferral to arbitration, nearly all of which

daily supervision, and degree of employee interchange. NV Energy, 362 NLRB at 16-17; See Super Value Stores, 283 NLRB at 136.
are applicable to the present dispute: (1) the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) there was no claim of employer animosity to the employee’s protected rights; (3) the parties’ contract provided for arbitration for a broad range of disputes; (4) the arbitration clause clearly encompassed the dispute at issue; (5) the employer asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute was well-suited to resolution by arbitration. Here, the dispute between Local 957 and Penske has arisen within the confines of a long and productive contractual relationship that dates back to at least 1999; Local 957 has made no claim that Penske has general animosity toward organized labor; the CBA between Local 957 and Penske contains an arbitration clause that provides for arbitration based upon an alleged violation of the CBA; the arbitration clause in the CBA clearly applies to this dispute, which cites Article I of the CBA as the Article that Penske has violated; and the dispute is well-suited to resolution by an arbitrator. According to Collyer, disputes such as these “can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by [the] Board of a particular provision of [the NLRA].” Id. at 839. Deferral of this contractual dispute between Local 957 and Penske is appropriate under the Board’s Collyer factors.

The Board clarified its position on deferral to arbitration in proceedings involving issues of contract and representation in St. Mary’s Medical Center, 322 NLRB 954 (1997), which contained both a ‘contract interpretation’ issue and a ‘statutory policy’ issue. There, the union filed a grievance seeking the inclusion of a newly created position in the bargaining unit. Id. at 955. The matter was arbitrated and the arbitrator found the position to be within the bargaining unit. Following the arbitrator’s decision, the employer filed a petition seeking to exclude the
position from the bargaining unit on the grounds that the contract contained a recognition clause excluding positions requiring substantial training, education or apprenticeship. Id. The Regional Director deferred to the arbitrator’s finding that the contract clause excluding positions requiring substantial training was not meant to apply to the position in question. Id. The employer filed a request for review with the Board; the Board summarized the governing test as follows:

“Although the Board only infrequently defers to arbitration in representation proceedings, the Board will find deferral appropriate when the resolution of the issue turns solely on the proper interpretation of the parties’ contract. When resolution turns on statutory policy, the Board will not defer.”

Later that year, in McDonnell Douglas Corp., 324 NLRB 1202, 1205 (1997), the Board reiterated what it said in St. Mary’s, 322 at 954, i.e., “although the Board only infrequently defers to arbitration in representation proceedings, deferral is appropriate when the resolution of the issue turns solely on the proper interpretation of the parties’ contract” (internal quotations marks omitted). However, deferral is not appropriate where “the ultimate issue may be resolved solely by reference to the national labor laws” Id.

In McDonnell Douglas, the employer, as part of an internal reorganization, unilaterally removed several employees from a bargaining unit. Id. at 1202-1203. The employer alleged that its actions were authorized by the parties’ CBA. Id. at 1205. This presented a ‘contractual interpretation’ issue. Id. Separately, if the employer could establish that the removed employees were sufficiently dissimilar from the remainder of the bargaining unit, its actions would be lawful. Id. This presented a second, ‘statutory policy’ issue, i.e., “an analysis of community-of-interest factors.” Id. This is the exact scenario in the present case – Local 957 believes the clear language
of the CBA requires Penske to apply the CBA to the Piqua facility; Penske believes the Piqua employees are sufficiently dissimilar based upon the Board’s accretion case law.

The Board in McDonnell Douglas held that the issue of whether the employer’s actions were authorized by the CBA was “suitable for deferral because it turns solely on the proper interpretation of the parties’ contract and ancillary agreements.” Id. With respect to the second, statutory policy issue, the Board held that deferral would not normally be appropriate because its resolution turns on an analysis of community-of-interest factors. Id. However, the Board noted that the entire dispute could be resolved through arbitration if an arbitrator were to conclude that the union had agreed to permit the employer unilaterally to remove the employees from the bargaining unit. Id. If that were the case, there would be “no need to resolve the representational statutory policy issue.” Id. If, on the other hand, the arbitrator were to find the union had not agreed to permit the employer to unilaterally remove the employees from the bargaining unit, “then it would be necessary to reach the second issue, a question that under St. Mary’s can normally only be decided by the Board.” Id.

However, the Board went one step further, and held that it would defer both the contractual issue of whether the union had agreed to permit the unilateral removal of the employees from the bargaining unit and, if the arbitrator found the union did not so agree, the resultant representational statutory policy issue of whether, absent the union’s agreement, the removed employees shared a community-of-interest with the remaining employees so as to warrant the employer’s unilateral removal from the bargaining unit. Id. McDonnell Douglas stands for the proposition that not only is deferral to arbitration appropriate when the Board is faced with a contractual interpretation issue, deferral is also appropriate when the case presents
both contractual and statutory policy issues. Local 957 believes the Regional Director erred by not following *McDonnell Douglas*.

Recently, in *Appollo Systems*, the Board reiterated its *McDonnell Douglas* holding. There, the union represented commercial electricians at a company that was purchased by Appollo Systems, which employed unrepresented residential electricians. 360 NLRB at 687. The company began to take steps to combine the residential and commercial electricians, leading the union to file a grievance asserting the two divisions had become, in effect, one company and therefore the residential electricians should be included in the bargaining unit representing the commercial electricians. *Id.* The employer responded by filing a unit clarification petition with the Board.\(^3\) According to the Board, “[i]n a typical unit clarification proceeding, we consider the employees’ duties in relation to the existing unit of employees,” but, the dispute – like in the present case between Local 957 and Penske- turned “on whether there was a valid agreement between the employer and the union as to their unit status, what the terms of such agreement were, and whether the employer subsequently breached that agreement.” *Id.* at 688. Each element of the dispute in *Appollo Systems* (whether there was an agreement as to the bargaining-unit status of the employees, what the terms of any such agreement were, and whether the employer breached the agreement) is *identical* to Local 957’s dispute with Penske.

According to *Appollo Systems*, the dispute raised “classic questions of contract and are not the unique province of the Board.” *Id.* Therefore, those issues should be “left to the parties’

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\(^3\) The Board has explained that “[u]nit clarification…is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, *come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past.*” *Union Electric Co.*, 217 NLRB 666, 667 (1975)(emphasis added). Neither Board-endorsed scenario is applicable to Penske’s UC Petition.
contractual grievance and arbitration procedure.” Id. The Board dismissed the employer’s unit clarification petition while emphasizing that “any arbitral proceedings that do take place as the result of [its] deferral will remain subject to post-arbitral review by the Board.” Id.

Like Appollo Systems, Penske has filed a UC petition in an attempt to keep its Piqua employees out of the Dayton facility’s bargaining unit. And like in Appollo Systems, the dispute turns on the application of contract language. Here, it is whether or not Piqua is located within the greater Dayton area and, if so, whether customer or operational requirements exist that would allow Penske to exempt the Piqua facility from coverage under the CBA.

The Regional Director was correct in his Decision when he stated, “[t]he Board has rejected deferring to arbitration representational matters that can be decided only by the application of statutory policy.” But this case, like McDonnell Douglas and Appollo Systems, involves a representational matter that can be decided through contract interpretation because whether the Piqua technicians should be in the Local 957 turns solely on interpretation of the parties’ CBA.

To support his Decision that the issue of whether the Piqua technicians should be part of the Local 957 bargaining unit turns on statutory application, not contractual interpretation, the Regional Director cited to Board decisions that contain dissimilar facts from the present case. For example, the Regional Director cited to Tweddle Litho., Inc., 337 NLRB 686 (2002), in which the Board refused to defer a dispute to arbitration because it primarily involved a matter of representation. The employer in Tweddle had a collective bargaining agreement with a union that covered shipping and receiving clerks. Id. The employer opened a new facility where it performed additional shipping and receiving work. Id. The union filed a grievance that the
employees at the new facility were doing bargaining unit work. Id. Importantly, Tweddle is silent as to the actual contract language that the employer allegedly violated, whereas in the present case, Local 957 has alleged the Employer has violated language that specifically addresses the opening of a new facility in the greater Dayton area, which is exactly what Penske has done.

Ziegler, Inc., 333 NLRB 949 (2001), cited by the Regional Director, is also distinguishable based upon its facts. There, a union and employer were parties to a collective bargaining agreement which covered service department employees at all of the employer’s facilities and warehouse employees at only two specific locations. Id. The union filed a grievance alleging the employer failed to apply the contract to warehouse employees at six other locations. Id. The employer responded that the employees in question had historically been excluded from the parties’ contract and filed a unit clarification petition. Id. Based upon their historical exclusion, the Board found the employees’ status should be determined through the unit clarification procedure. Id. But here, the Piqua employees have not been historically, and specifically, excluded, in like Ziegler. Instead, contract language exists that specifically includes them in the Local 957 bargaining unit, so long as an arbitrator determined Piqua is located within the greater Dayton area. Unlike Ziegler and Tweddle, the CBA and its recognition clause lies at the center of this dispute. See Collyer, 192 at 842 (dispute arose in confines of long and productive collective-bargaining relationship, contract contained a broad arbitration clause that embraced the dispute, the contract lay at the heart of the dispute). This case features specific, direct contract language that supports the inclusion of employees within the bargaining unit. Thus, the Union’s Request for Review should be granted because the Regional Director should have deferred resolution of
the contractual dispute to an arbitrator, in accordance with McDonnell Douglas and Appollo Systems.

B. The Regional Director’s Rigid All-or-Nothing Decision Departs from the Board’s Deference to Contractual Issues Arising in Representation Proceedings

The Regional Director’s decision to not to defer this contractual dispute to arbitration represents a rigid, all-or-nothing approach that does not comport with the Board’s flexible deferral policy found in McDonnell Douglas and Appollo Systems that still provides some Board oversight of the matters.

In McDonnell Douglas, which deferred both the contractual issue and the representational issue to an arbitrator, the Board stated that any arbitral proceedings that took place as the result of its deferral “will remain subject to postarbitral review by the Board upon assertion by either party that the arbitral proceedings or decision – on either the contractual issue or representational issue – fail to satisfy [the Board’s] long-standing requirements for postarbitral deferral.” 324 NLRB at 1205. The Board in Appollo Systems also emphasized that arbitral proceedings would remain subject to by the Board to postarbitral review. 360 NLRB at 688.

As the Board held in United Technologies, “deferral is not akin to abdication.” 268 NLRB at 560. Instead, it is “merely the prudent exercise of restraint, a postponement of the use of the Board’s own processes to give the parties’ own dispute resolution machinery the chance to succeed.” Id. Deferral of the UC Petition to an arbitrator’s decision on the Union’s grievance would still allow the Regional Director to review the arbitration proceeding to ensure the Board’s standards for postarbitral deferral were met.
The Regional Director erred when he failed to apply McDonnell Douglas and Appollo Systems to the present case. The Union’s Request for Review should be granted because, in light of Board precent and the language of the parties’ CBA, the Regional Director should have deferred the Employer’s UC Petition to an arbitrator’s decision on the Union’s grievance.

If Penske breached the CBA by opening the Piqua facility and declining to apply the CBA to technicians and CSRs employed at Piqua, the Union is surely entitled to a remedy. The Regional Director’s Decision allows the Board’s representational procedures to be used to foreclose the Union from pursuing a remedy to which it may be entitled.

V. CONCLUSION

Whether the CBA between Penske and Local 957 applies to the technicians employed by Penske at the Piqua facility should be decided by an arbitrator in accordance with the CBA’s grievance and arbitration language. The CBA contains specific language which ultimately renders this dispute a matter of contract interpretation, appropriate for an arbitrator, despite the Employer’s attempt to utilize representational procedures to evade its responsibility under the CBA. The Union’s Request for Review should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Union’s Request for Review on behalf of Teamsters Union Local No. 957 was served upon counsel for Petitioner Penske Truck Leasing Co., L.P. and the following via email this 18th day of October, 2021:

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