UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  

PENSKE TRUCK LEASING CO., L.P., §  
Employer - Petitioner, §  
and §  
INTERNATIONAL BROTHERHOOD §  
of TEAMSTERS, LOCAL UNION NO. §  
957 §  
Union. §  

CASE NO. 9-UC-281192  

PENSKE TRUCK LEASING CO., L.P.’S OPPOSITION TO THE UNION’S REQUEST FOR REVIEW  

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I. INTRODUCTION

Pursuant to 29 CFR §102.67(f), Employer Penske Truck Leasing Co., L.P. (“Penske”) hereby submits its opposition to Petitioner International Brotherhood of Teamsters, Local Union No. 957’s (“the Union”) Request for Review (RFR) of the Regional Director’s October 1, 2021 Decision and Order Granting Unit Clarification. In that Decision and Order, following an evidentiary hearing and submission of post-hearing briefs by the parties,¹ the Regional Director concluded that technicians employed at the Employer’s Piqua, Ohio facility should be excluded from the existing bargaining unit at the Employer’s Dayton, Ohio facility because they do not share an overwhelming community of interest with the Dayton unit employees. Additionally the Regional Director rejected the Union’s request to defer this matter to arbitration, finding that “since the issues in this case involve a question of representation, accretion, and unit appropriateness, which are solely statutory issues that are not dependent on contract interpretation, deferral to arbitration is not appropriate.” Exhibit C to RFR.

In its RFR, the Union does NOT challenge the Regional Director’s findings that the Piqua employees were properly excluded from the Dayton unit or the specific finding that the Piqua employees did not share an “overwhelming community of interest” with the Dayton employees. Rather without merit, the Union argues that the Regional Director” departed from officially reported Board precedent” by concluding that the matter involved a question of representation, accretion and unit appropriateness and that deferral to arbitration was not appropriate. RFR. P.1. The Union argues that the Region should have stayed its hand and is apparently asking the Board to do the same thing and let an Arbitrator decide the issues. In effect the Union is seeking arbitral review of the Region’s § 9 decision, which is both procedurally improper and contrary to law.

¹ In large measure the Union’s briefing in support of this Request for Review, is a repeat of the Brief it submitted to the Regional Director concerning the UC Petition.
II. ARGUMENT

First, the Union has failed to meet its burden as required by 29 CFR §102.67(d) to show that Review is warranted because there is a “substantial question of law or policy that has been raised as a result of the Regional Director['s]” “departure from officially reported Board precedent.” The Union argues that in denying the Union’s request for deferral, the Regional Director ignored the Board precedent found in *McDonnell Douglas Corp.*, 324 NLRB 1202, 1205 (1997); and *Appollo Systems, Inc.*, 360 NLRB 687, 688 (2014). This is not so.

In its decision, the Regional Director fully considered the Board’s decisions in *McDonnell Douglas Corp.*, 324 NLRB 1202 (1997)\(^2\) and *Appollo Systems, Inc.*, 360 NLRB 687 (2014) and found that deferral was not appropriate because the representation issue – specifically, the analysis of the community of interest between the Dayton and Piqua employees – precluded deferral and instead required analysis of a statutory issue. RFR Ex C, p. 8-9.\(^3\) Contrary to the Union’s assertion, the Regional Director correctly applied applicable Board law and rejected deferral because of the accretion/unit/community of interest issues. Id. at p. 8-9 (citing relevant authority). As stated by the Regional Director “the penultimate issue, i.e. whether it is appropriate to accrete the Piqua technicians into the unit at Dayton, is not susceptible to resolution under the contract. Therefore, it is not appropriate to defer this matter to arbitration.” Id. at 9.

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\(^2\) The Union asserts that the present case involves the same “exact scenario” as that in *McDonnell Douglas*. It does not. In *McDonnell Douglas* the employer primarily argued that its actions were “fully authorized by its agreements with the union”. 342 NLRB 1202, 1205. Therefore, the Board deferred the matter to arbitration because the “entire dispute … could be resolved through arbitration if an arbitrator were to conclude that the Union had agreed to permit the Respondent [to unilaterally act].” Id. In this case, however, the contractual language is not dispositive of the dispute. Instead, in this case statutory considerations govern based on representational issue, subject to application of community of interest standards developed by the Board. As such, this case is distinguishable from *McDonnell Douglas*.

\(^3\) The Regional Director also considered, and rejected, the Union’s position that *United Technologies Corp.*, 286 NLRB 557 (1984) and *Collyer Insulated Wire*, 192 NLRB 837 (1971) also required deferral. Id. at n.7. Quite simply, as the Regional Director so stated, the policies set forth in those two cases are NOT applicable to accretion matters. Even if they were, the standard for deferral under those cases was not met because, among other reasons, the dispute here is statutory and not “within the confines of” the collective bargaining relationship and the arbitration clause does not encompass representational issues.
Second, for its part, the Union seems to argue, in what is a departure from Board precedent, that the Board should always defer representational matters to the arbitration process if there is some type of collective bargaining agreement containing an arbitration provision between the parties. There is no warrant in Board case law for this conclusion, and indeed it is even contrary to the decisions the Union relies on. The law clearly states that purely statutory issues should be determined by the Board, even where the assertion is made that the unit placement should be governed by contract language, and that is exactly what we have here.\(^4\)

Third, and significantly, the Union does not argue that the Regional Director incorrectly determined the representation issue. That is, the Union does not argue that the Piqua employees share an overwhelming community of interest with the Dayton employees and that the Regional Director’s findings to the contrary should be reviewed by the Board. Because the Union did not challenge the Regional Director’s findings on the ultimate representation issue, it doesn’t matter whether the matter could have or should have been deferred to arbitration. Even if an arbitrator were to hold that Penske violated the contract, it does not matter because the Regional Director’s holding that the Piqua employees do not share a community of interest with the Dayton employees precludes, as a matter of law, enforcement of a decision placing them in that unit. See, \textit{Local 340}

\(^{4}\) Questions concerning whether newly created job titles or additional location should be accreted to an existing bargaining unit – which is what the Union sought here – involve matters of representation that are within the primary jurisdiction of the Board to decide. The salient point in each of the following cases, regardless of specific contract language is that in each the Union sought to arbitrate the matter rather than submitting to the jurisdiction of the Board. See \textit{Tweddle Litho Inc.}, 337 NLRB at 686 (holding petition seeking to clarify existing bargaining unit to exclude employees “involves a matter of representation”). The resolution of such questions is statutory, not contractual, and vested exclusively with the NLRB. See \textit{Ziegler, Inc.}, 333 NLRB at 949-50 (“[T]he determination of questions regarding representation, accretion, and unit placement are not matters for arbitration, but rather, are matters within the exclusive province of the Board to resolve…”); \textit{Boeing Co.}, 349 NLRB at 957 (“Resolution of representation matters is within the province of the Board.”); \textit{Tweddle Litho Inc.}, 337 NLRB at 686 (citing \textit{Marion Power Shovel}, 230 NLRB 576, 577-78 (1977) and \textit{Williams Transportation Co.}, 233 NLRB 837, 838 (1977)) (unit inclusion disputes turn not upon contract interpretation, but on the application of statutory policy, standards, and criteria [which] are matters for the decision of the Board rather than an arbitrator.”); \textit{South Prairie Constr. Co. v. Local 627, IUOE}, 425 U.S. 800, 804-05 (1976) (same); \textit{Germantown Devel. Co.}, 207 NLRB 586, 587 (1973) (same). In sum, in asserting its preeminent authority to make unit determinations, the Board has consistently disregarded or overruled efforts to compel arbitration of disputes regarding the proper scope of a recognized bargaining unit.
New York New Jersey Regional Joint Board (Brooks Brothers), 365 NLRB No. 61, slip op. at 3 (April 13, 2017) (union violated Section 8(b) of NLRA by attempting to enforce arbitration award applying CBA to separate store location, where NLRB had previously granted unit clarification petition). Thus, by failing to request review of the Regional Director’s analysis of the representation issue in additional to the decision on deferral, the Union has effectively made its current request moot.

Finally, it is worth stepping back and considering the practical and legal consequences of what the Union is proposing via its RFR. It seeks is to have this matter deferred to an arbitrator to make a decision on both the representation issue and the contractual issue AFTER the Region has already ruled on the representation issue. The union cannot unring the bell. Here, even though the Regional director had before it the union’s arguments about deferral to arbitration it decided to set the unit clarification petition for an evidentiary hearing, implicitly concluding that the question presented involved representation not contractual issues, a decision that is in the Board’s province. And at the hearing the Region took evidence related to whether the Dayton and Piqua employees shared a community of interest. In ultimately concluding that the Piqua employees should be excluded from the Dayton unit the Regional Director assayed the community of interest factors historically applied by the NLRB in the UC setting and involving multiple location units including extent of day-to-day supervision, centralized control of management and labor relations, similarity of skills functions and working conditions, employee interchange, functional integration, collective bargaining history, and geographic proximity.

All these factors relate to whether under the law it would be proper to include the Piqua employees in the same unit as the Dayton employees. Under the Union’s proposed approach, this apparently is to be disregarded in favor of an arbitrator applying contract language to decide upon
representation questions. However, even if the matter is deferred, at this juncture, any ruling in favor of the Union would be contrary to the Regional Director’s finding that the unit should be clarified to exclude the Piqua employees. And, under Brooks Brothers, that arbitrator’s decision cannot be enforced. Thus, not only does the union seek to have an arbitrator review consider and potentially second guess the very decisions that the Region has made, it implicitly signals that an arbitrator’s decision on representational issues should overrule the decision by the Region. A finding in favor of the union will inevitably will lead to conflict, possible protracted proceedings, and the Board’s abdication of its responsibility to decide representation questions.

III. CONCLUSION

As outlined above, the Regional Director correctly determined that this matter involved a representation issue that was not subject to deferral to arbitration. The Union has not established that a substantial question of law or policy was raised by the Regional Director’s decision and it certainly did not identify a departure from officially reported Board precedent. Board precedent does not permit deferral in cases, like this one, were only issues of statutory interpretation are present. Additionally, the Union’s request to defer this representational matter to arbitration is moot because it did not simultaneously challenge the Regional Director’s finding that the Piqua employees did not share a community of interest with the Dayton employees. Thus, even if deferral had been appropriate, the Board’s ultimate decision on the representation issue would preclude a contrary finding by an arbitrator. The Union’s request for review should be denied.
DATED: October 25, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was e-filed with the National Labor Relations Board (NLRB) Region and Executive Secretary and was served on October 25, 2021, via e-mail to the Union as follows:

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