

McDonnell Douglas Corporation; McDonnell Douglas Electronic Systems Company, a Division of McDonnell Douglas Corporation; and McDonnell Douglas Aerospace Information Services Company, a Division of McDonnell Douglas Corporation, Single and/or Joint employers and Southern California Professional Engineering Association and McDonnell Douglas Tulsa, a Division of McDonnell Douglas Corporation; McDonnell Douglas Space Systems Company, a Division of McDonnell Douglas Corporation; and Douglas Aircraft Company, a Division of McDonnell Douglas Corporation, Parties to the Contract. Case 21-CA-27479

November 7, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On September 24, 1993, the National Labor Relations Board issued its Decision and Order in this proceeding.¹ Substantively, the Board found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally, without the Union's agreement, (1) removing bargaining unit employees from the unit on their change of assignment from one to another of the Respondent's component companies, and, approximately 3 months later and (2) returning these employees to the unit for approximately 5 days, and then again removing them from the unit. Procedurally, as discussed below, the Board declined to defer consideration of the unfair labor practice issues to the parties' contractual grievance-arbitration procedure.

On November 29, 1993, the Respondent filed a motion for reconsideration of the Board's Decision and Order. On February 28, 1994, the Board denied the motion.²

On July 18, 1995, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board for it to reconsider the issue of deferral to arbitration.³ On November 21 and 24, 1995, respectively, the Respondent and the General Counsel filed statements of position on remand, and on January 31, 1996, the Respondent filed a reply brief.

The Board has delegated its authority in this proceeding to a three-member panel.⁴

Upon reconsideration of the deferral issue, and for the reasons fully set forth below, the Board has decided to hold this case in abeyance, pending resort to the parties' contractual grievance arbitration procedure.

¹ 312 NLRB 373.

² 313 NLRB 868.

³ 59 F.3d 230. The court expressly did not reach the merits of the unfair labor practice charge. *Id.* at 231, 236.

⁴ Member Fox did not participate in the decision on the merits.

A. Background

The facts are fully set forth in the Board's underlying decision, at 312 NLRB 373. The facts relevant to our reconsideration of the deferral issue are as follows.

The 1987-1990 collective-bargaining agreement between the parties covered employees in certain job classifications in three companies, including the McDonnell-Douglas Astronautics Company-Huntington Beach (MDAC). Among these unit employees were computing analysts, computing engineers, computing specialists, and senior computing specialists. The contract also expressly covered certain employees in the above four classifications who were employed by the McDonnell-Douglas Aerospace Information Services Company (MDAIS), which was not itself a named party to the contract. As explained in the underlying decision, approximately 50 MDAIS unit employees were internally leased to MDAC and worked side-by-side with MDAC unit and nonunit employees at Huntington Beach.

In December 1988, MDAC was reorganized into two new companies: McDonnell-Douglas Space Systems Company (MDSSC) and McDonnell-Douglas Electronic Systems Company (MDESC), both of which continued to operate at Huntington Beach. MDAC's unit and nonunit employees were reassigned to, and became employees of, either MDSSC or MDESC, depending upon the particular nature of their work, without change in representational status.

After this reorganization, unit and nonunit employees of MDESC and MDAIS worked side-by-side or in close proximity on the same or similar projects, and performed the same or similar technical and engineering duties, under common MDESC first-line technical and work assignment supervision, with essentially the same wages, hours, and working conditions. MDAIS employees were supervised by both MDESC and MDAIS supervisors simultaneously.

In October 1988, shortly before the above reorganization of MDAC onto MDSSC and MDESC, the Union and MDAC entered into the Embedded System Software Agreement (ESSA), which set guidelines for present and future unit placement of MDAC (soon to be MDSSC and MDESC) employees working in various phases of the embedded software development lifecycle. More specifically, the parties agreed that employees working in certain specified phases of the lifecycle were performing unit work, and would therefore be in the unit, while other employees, working in other specified phases of the lifecycle, were not performing unit work, and would therefore not be in the unit. Finally, the parties agreed "to continue their efforts to achieve a practical and mutually satisfactory mechanism to insure compliance with the undertakings set forth above."

The ESSA was immediately applied by agreement of the parties to resolve the unit placement of eight MDAC employees. The ESSA was *not*, however, made applicable to the MDAIS employees leased to MDAC who were also working in the embedded system software development lifecycle. Indeed, at the time the ESSA was finalized and applied to MDAC employees in October 1988, there was no consideration given to applying it then or in the future to the MDAIS leased employees who were working in the various phases of the lifecycle. In fact, MDAIS employees had not been included in the Respondent's comprehensive audit of lifecycle job functions leading up to the finalization of the ESSA.

In December 1988, shortly after finalization of the ESSA, and around the same time of the reorganization of MDAC into MDSSC and MDESC, the Respondent's parent company decided to reassign the MDAIS employees to the component companies to whom they were being leased, including MDESC. Consequently, these employees would become employees of the component companies themselves.

There were 39 MDAIS employees reassigned to MDESC. Thirty-five of them were MDAIS unit employees. Three of them remained unit employees in MDESC, changing their assignment (i.e., from MDAIS to MDESC) without any change in their representational status. The other 32 MDAIS employees were working in the embedded system software lifecycle. The Respondent applied the ESSA to them, as new MDESC employees, and determined that the lifecycle phases in which they were currently working did not entail unit work as defined by the ESSA. The Respondent thereupon removed them from the unit.

It is the Respondent's removal of former MDAIS unit employees from the unit upon their change of assignment from MDAIS to MDESC, without any corresponding change in duties, tasks, location, or immediate supervision, that is principally alleged to have violated the Act.

As a preliminary matter, the Board rejected the administrative law judge's recommendation for deferral of the unfair labor practice issues to the grievance and arbitration machinery contained in the parties' collective-bargaining agreement. The Board found that the issue of whether the Respondent unlawfully removed the 32 former MDAIS employees from the bargaining unit necessarily involved the rights of those employees to be represented by the Union, and the Board therefore declined to defer, on the grounds that representation issues involve the application of basic statutory policy and standards, and are matters for decision exclusively by the Board, not an arbitrator. It is this deferral issue that the court has remanded for our reconsideration.

B. *The Court's Opinion*

The court stated that the Respondent's "first defense was that it had acted with union consent, by virtue of the collective bargaining agreement and its later refinements." 59 F.3d at 231. The court observed that "[t]he Board itself agrees that prior union consent is a complete defense to the unfair labor practice charge." 59 F.3d at 233. Yet, in explaining its decision not to defer, the Board "cited no decision in which a party's contractual consent could potentially have been dispositive but instead invoked ones where extra-contractual principles or interests were at stake." 59 F.3d at 231.

Further, the court found inadequate the Board's rationale that this case involves a "representation issue" and that those issues are never deferred to arbitration. 59 F.3d at 234. "Assuming that the issue in this case is properly called a 'representation issue,'" the court found that "the Board's categorical statement that 'representation issues' are not susceptible to resolution by contract does not square with Board precedent." *Id.* In this connection, the court observed that "[t]he Board has never suggested that a union and employer cannot contractually bind each other as to the scope of the bargaining unit." *Id.* In addition, the court stated that "the assertion that any representation issue is necessarily one for the Board alone is completely inconsistent with the Board's own statement of the substantive rule governing this case—that union consent is a complete defense to the unfair labor practice charge." 59 F.3d at 235.

Accordingly, because it found that "this case does not appear in any way to fit the Board's stated rationale for refusing to defer—that the ultimate issue may be resolved *solely* by reference to the national labor laws," the court remanded the case to the Board for further explanation of why its "decision not to defer to arbitration was a lawful departure in this case from its general policy of deferring to agreed-upon grievance and arbitration procedures." 59 F.3d at 236.

C. *Positions of the Parties*

1. The General Counsel

The General Counsel asserts that the Board did not abuse its discretion in declining to defer to the parties' contractual grievance-arbitration procedure, because the unilateral removal of employees from a bargaining unit is a representation issue involving application of the Act and therefore is inappropriate for arbitration. The General Counsel further argues that questions about the application of contractual definitions of the unit in terms of job classifications involve questions about the scope of the unit, and are thus representational matters appropriately addressed by the Board. The General Counsel additionally contends that the Board has con-

sistently refused to defer to contractual grievance-arbitration procedures where the issue is whether employees should be included in or excluded from an existing unit as a result of employer reorganization or changes in the employees' responsibilities, and that this is so even where such an issue might be resolved solely by interpretation of the collective-bargaining agreement, without reference to standards outside the contract.⁵

2. The Respondent

The Respondent first asserts that the court's finding in this regard is the law of the case, and that under this law of the case the Board is compelled to dismiss the complaint and defer the dispute to arbitration.

The Respondent further argues that what it terms the classification issues here—even if characterized as representational—may readily be resolved through the parties' grievance and arbitration procedures. The Respondent concedes that an employer may not alter the scope of a bargaining unit unilaterally. The Respondent contends, however, that the boundaries of the unit had previously been established by the parties by reference to the type of work being performed, and thus the asserted classification dispute here—whether the MDAIS unit employees were to be classified out of the unit based upon the work they were performing at the time they were transferred to MDESC—does not involve an issue regarding the scope of the unit. Rather, argues the Respondent, the instant dispute concerns only the propriety of MDESC's application of the previously agreed-upon criteria in the ESSA to determine whether the newly transferred MDAIS unit employees were to be classified out of the unit. The Respondent contends that the asserted classification dispute here is thus precisely the type of dispute that should be deferred both as a matter of precedent and as a matter of sound labor relations policy.

In essence, the Respondent contends that in applying the ESSA after the transfer of the MDAIS employees to MDESC, it was not attempting to change the scope of the unit, but was merely reclassifying the 32 newly transferred MDAIS unit employees out of the unit in accordance with its right to "classify" and "reclassify" employees under the collective-bargaining agreement. Further, the Respondent asserts that the Union had the contractual right to grieve any of the Respondent's initial classification of unit employees out of the unit.⁶

⁵The General Counsel also argues that deferral is inappropriate because there is no agreed-upon mechanism for resolution of the underlying dispute.

⁶The Respondent also presents arguments in regard to the merits of the unfair labor practice charge. But, as seen, these matters are outside the scope of the court's remand, and are thus not addressed herein.

D. Analysis

On January 28, 1997, approximately a year and a half after the court's remand, the Board issued its decision in *St. Mary's Medical Center*, 322 NLRB 954, a case of particular relevance here because it clarifies Board law on deferral to arbitration in representation proceedings. In *St. Mary's*, the employer filed a petition seeking to exclude a newly created position from the bargaining unit. The Employer relied on language in the contractual recognition clause "excluding . . . positions requiring 600 hours or more of formal training, education, or apprenticeship." Previously, a grievance had been filed seeking the inclusion of the position in the unit, and an arbitrator had issued an award rejecting the employer's contract claim and including the new position in the bargaining unit. The Regional Director deferred to the arbitrator's finding that the "600 hours" exclusionary language was not meant to apply to the position in question. In addition, the Regional Director independently determined, based on a community-of-interest analysis, that the position should be accreted to the existing unit.

The employer filed a request for review with the Board, contending that the Regional Director erred in deferring to the arbitrator's interpretation of the recognition clause. 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. See *Hershey Foods Corp.*, 208 NLRB 452, 457 (1974). Where resolution turns on statutory policy, the Board will not defer. *Marion Power Shovel*, 230 NLRB 576 (1977).

Applying these principles to the facts of *St. Mary's*, the Board found that the Regional Director correctly "limited the scope of his deferral to the issue which turned solely on contract interpretation—the meaning of the '600 hour' exclusion language of the recognition clause." The Board also found that the Regional Director properly "refused to defer resolution of the accretion issue but resolved the issue through an independent analysis." Accordingly, the Board agreed with the Regional Director's clarification of the unit to include the newly created position.

The Board's decision in *St. Mary's* goes far toward addressing the concerns the court expressed here and narrowing the area of possible disagreement between the Board and the court. In light of *St. Mary's*, we agree with the court that the Board erred in its original decision in this proceeding when it indicated that it never defers to arbitration in cases involving representation issues. 312 NLRB at 375. ("Representation

issues . . . are matters for decision *exclusively* by the Board, not an arbitrator.’’) (Emphasis added.) The Board regrets using such overbroad language. The Board today reiterates what it said in *St. Mary’s*, 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.” 322 NLRB at 954.

At the other end of the spectrum, the Board and the court would also appear to be in agreement that deferral is normally not warranted where the representation issue presented turns on statutory policy. Thus, the court discussed with apparent approval the *Marion Power Shovel* case cited in *St. Mary’s*, 59 F.3d at 235, and indicated that it agreed with the Board that deferral is not appropriate where “the ultimate issue may be resolved *solely* by reference to the national labor laws.” 59 F.3d at 236 (emphasis in original).

Like *St. Mary’s*, the instant case presents both a “contract interpretation” issue and a “statutory policy” issue. As discussed in our original decision, precedent establishes that an employer “violates the Act when it removes a substantial group of employees from a bargaining unit, unless it either (1) obtains the agreement of the union to do so, or (2) is able to establish that the removed group is sufficiently dissimilar from the remainder of the unit to warrant removal.” 312 NLRB at 375; see 59 F.3d at 233. In remanding the case, the court stated that “the company’s primary defense is that its actions were fully authorized by its agreements with the union.” 59 F.3d at 233. Therefore, we now find, in light of *St. Mary’s*, that the first issue is suitable for deferral because it turns solely on the proper interpretation of the parties’ contract and ancillary agreements.⁷ With respect to the second issue, however, it is clear under *St. Mary’s* that deferral would normally not be appropriate because its resolution turns on statutory policy, i.e., an analysis of community-of-interest factors.

In *St. Mary’s*, the Board was able to defer to the arbitration award on the contract issue, while deciding the statutory issue itself. Inasmuch as there is no arbitral award here, we cannot defer to an award in the sense of honoring it. However, we can defer to the arbitral process by holding in abeyance our processes while arbitration takes its course.

The entire dispute in this case could be resolved through arbitration if an arbitrator were to conclude that the Union had agreed to permit the Respondent unilaterally to remove the MDAIS unit employees from the unit. If an arbitrator so found, there would be

⁷Of course, in interpreting a collective-bargaining agreement, it is appropriate to look to both the contract language itself and relevant extrinsic evidence. See *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986).

no need to resolve the representational statutory policy issue. If, on the other hand, the arbitrator were to find that the Union had not agreed to permit the Respondent unilaterally to remove the MDAIS unit employees from the 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.

Under the unique circumstances of this case, however, including the court’s remand of the deferral issue to us, and the subsequent clarification of Board law in regard to deferral to arbitration in representation proceedings in *St. Mary’s*, and also in order to avoid further bifurcating and segmenting the processing of this case, we shall defer as follows to the parties’ contractual grievance-arbitration procedure. We defer the contractual issue of whether the Union had agreed to permit the Respondent, unilaterally: (a) to apply the ESSA to the then-recently-transferred MDAIS unit employees, (b) to determine that they were no longer in the unit, and (c) to remove them from the unit.⁸ If the arbitrator finds that the Union did not so agree, then we defer to the arbitrator also the resultant representational statutory policy issue of whether, even absent the Union’s agreement, the job duties and functions, and terms and conditions of employment, of the then-recently-transferred MDAIS unit employees had become sufficiently dissimilar from those of the remaining unit employees so as to warrant the Respondent’s unilateral removal of the MDAIS employees from the unit upon their change of assignment to MDESC.⁹

In deferring both of these issues under the unique circumstances of this case, including the fact of the court’s remand, we emphasize that we are only making an exception to, and most decidedly not abandoning, our longstanding general policy, reiterated in *St. Mary’s*, against deferral of representation issues which can only be resolved through application of statutory policy—in this case, an analysis of community of interest factors.¹⁰ We emphasize also that any arbitral proceedings that do take place as a result of our 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 or representational issue—fail to satisfy our long-standing requirements for postarbitral deferral.¹¹

⁸ 312 NLRB at 377.

⁹ Id.

¹⁰ Chairman Gould agrees, for the reasons set forth above, that deferral of both the contractual and the representational issues is appropriate in this case. He is also of the view that the presumption favoring deferral is not overcome by the fact that resolution of the 8(a)(5) issue may involve a representation issue in addition to the contractual question. Thus, even absent the court’s remand of the deferral issue, Chairman Gould would find that deferral of both issues is appropriate.

¹¹ See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).

ORDER

The National Labor Relations Board orders that

1. The complaint, as amended, is dismissed.
2. The Order at 312 NLRB 373, 379 (1993) is rescinded.
3. The Respondent's First Affirmative Defense in its Answer to Amended Complaint as Amended is granted to the extent that it asserts that the complaint allegations should be deferred to the grievance and arbitration provisions of the parties' collective-bargaining agreement.

4. Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on the proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Supplemental Decision and Order, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act, including, if applicable, a result that is repugnant to Board law in representational matters.