

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CRISTAL USA, INC.

and

Case 08-CA-200737

INTERNATIONAL CHEMICAL WORKERS
UNION COUNCIL OF THE UNITED FOOD
& COMMERCIAL WORKERS, AFL-CIO, CLC

GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR CONSOLIDATION

On September 22, 2017, the General Counsel filed a motion to transfer the above-captioned case to the National Labor Relations Board (the Board) and for summary judgment. The basis for the motion concerned Cristal USA, Inc.'s (Respondent) attempt to relitigate the issues that it had previously raised in Case 08-RC-188482 by testing the Certification of Representative of the International Chemical Workers Union Council of the United Food & Commercial Workers, AFL-CIO, CLC (the Union) as the exclusive collective-bargaining representative of a unit of warehouse employees. On this same date, the General Counsel filed a similar motion in Case 08-CA-200330 involving Respondent's attempt to relitigate the issues that it had previously raised in Case 08-RC-184947 concerning the Certification of Representative to the Union as the exclusive representative of a unit of certain production employees.

In separate orders dated September 26, 2017, the Board granted the General Counsel's motions ordering the cases be transferred to and continued before the Board, and to show cause why the General Counsel's motions for summary judgment should not be granted. On October

9, 2017, Respondent filed two motions in each of the two unfair labor practice cases to consolidate the cases with each other. Pursuant to Section 102.24(a), 102.33(d) and 102.50, Counsel for the General Counsel files this Opposition to Respondent's Motion for Consolidation.

In both of its motions to consolidate, Respondent erroneously relies on the similarities of the procedural history of the two distinct bargaining units as a basis for the consolidation. For example, both complaints allege that Respondent violated Section 8(a)(5) and (1) when it failed to recognize and bargain with the certified Union, and failed to provide the Union with requested information. But the similarity of the complaints is of no consequence as the two units are independent of each other and will require separate factual analysis. Respondent also relies on the inconsequentialities that the General Counsel filed similar motions to transfer the proceedings and for summary judgment on the same day, and that the Board subsequently issued orders granting the transfer and to show cause on the same day.

In its motions to consolidate, Respondent also erroneously contends that in each case, the certified units are "inappropriate as a matter of fact and law" and the "only appropriate unit is a wall-to-wall production, maintenance and warehouse unit of all employees who work in what is known as Plant 2 of Cristal's manufacturing complex in Ashtabula, Ohio." (R. Motion, Exh. 1 at 2). However, "what is known as Plant 2" is really two separate plants, i.e., North and South. As fully described in each of the two Decision and Direction of Election, the production employees involved in Case 08-CA-200330 are employed in the North Plant and the warehouse employees involved in Case 08-CA-200737 are employed exclusively in the warehouse located in the South Plant. "Warehouse employees never perform production or maintenance work[.]" (GC's MSJ in Case 08-CA-200737, Exh. 2 at 8).

Notwithstanding that the Board has already denied Respondent's requests for review and consolidation, and denied Respondent's motions for reconsideration in both RC cases, Respondent seeks further bites at the litigation apple by not only testing the certifications of both units, but by also making the instant motions to consolidate the two CA cases. Despite the Board's previous rejections of its arguments, Respondent incorrectly maintains that consolidation will preclude the possibility of future contradictory decisions, and will be the most efficient use of time and resources. Respondent is incorrect because consolidation will have the exact opposite effects.

Contrary to Respondent's repeated contention that the warehouse employees should be included in the same unit with the production employees, the Regional Director utilized "traditional" community of interest criteria in finding the two units to be distinct for purposes of collective bargaining. (GC's MSJ in Case 08-CA-200737, Exh. 2 at 11-16). See also *Vitro Corp.*, 309 NLRB 390 (1992) (unit limited to warehouse employees found appropriate). Consequently, given that a unit consisting solely of warehouse employees is independently appropriate under a traditional community of interest analysis, there is no jeopardy of any future contradictory decisions involving the two units.

Additionally, Respondent asserts that the two summary judgment cases are barred from going forward based on the policy principles established in *Peyton Packing Co.*, 129 NLRB 1358 (1961) and *Jefferson Chemical Co.*, 200 NLRB 992 (1972) concerning the General Counsel litigating all pending allegations within the same proceeding. Although Respondent recognizes that the policy in favor of consolidation is not absolute, it fails to acknowledge the full implications of these cases. "The Board has made clear that [*Jefferson Chemical*] is policy-based, not jurisdictional, and is limited to those instances when the General Counsel attempts to

litigate 'the same act or conduct as a violation of different sections of the Act' or relitigates the 'same charges in different cases.'" *Thesis Painting, Inc.*, 364 NLRB No. 53, slip op. at n.1 (2016) (granting GC's motion for summary judgment in test-of-certification case), enfd. 684 Fed. Appx. 321 (4th Cir. 2017) (per curiam). In the instant cases, the General Counsel is not attempting to litigate the same conduct under different sections of the Act or to relitigate the exact same charges in different cases. Rather, the General Counsel seeks to efficiently litigate by summary judgment two separate refusal to bargain cases involving two separate units of employees.

Thus, consolidation of the two cases would only delay the eventual enforcement orders relating to the two units by entwining irrelevant arguments particularly with respect to the warehouse employees. See *Premier Utility Services, LLC*, 363 NLRB No. 159 n.1 (2016) (noting strong policy considerations favor the prompt completion of representation proceedings); *U-Haul Co. of Nevada*, 345 NLRB 1301 (2005) (granting GC's motion for summary judgment in test-of-certification case, Board recognizes that a blanket rule in favor of consolidation could unduly delay the disposition of pending cases), enfd. 490 F.3d 957 (D.C. Cir. 2007).

Accordingly, it is respectfully requested that the Board deny Respondent's motions to consolidate which it has made in both Cases 08-CA-200737 and 08-CA-200330.

Respectfully submitted,

/s/ Karen N. Neilsen

Karen N. Neilsen, Counsel for the General Counsel
National Labor Relations Board, Region 8
AJC Federal Building, Room 1695
1240 East 9th Street
Cleveland, OH 44199
Phone 216-303-7384 Fax 216-522-2418
karen.neilsen@nlrb.gov

Filed this 23rd day of October, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this day copies of the foregoing General Counsel's Opposition to Respondent's Motion to Consolidation was served by electronic mail upon the following:

David A. Kadela, Esq.
Brooke E. Niedecken, Esq.
Counsel for Respondent
21 East State Street, 16th Floor
Columbus, OH 43215
DKadela@littler.com
BNiedecken@littler.com

Randy Vehar, Assistant General Counsel
Counsel for the Charging Party
International Chemical Workers Union Council
of the United Food and Commercial Workers
1655 West Market Street, 6th Floor
Akron, OH 44313-7004
rvehar@ufcw.org

/s/ Karen N. Neilsen

Karen N. Neilsen
Counsel for the General Counsel
National Labor Relations Board, Region 8
AJC Federal Building, Room 1695
1240 East 9th Street
Cleveland, OH 44199
Phone 216-303-7384 Fax 216-522-2418
karen.neilsen@nlrb.gov

Filed this 23rd day of October, 2017