

Healthcare, the case on which the Regional Director and the Board explicitly relied in approving the bargaining unit determination.

2. Alternatively, Rule 102.65 expressly permits the Board to consider motions for reconsideration filed within “such further period as may be allowed.” In the present case, given that the *PCC Structurals* decision was issued outside the standard 14-day window for filing a motion for reconsideration from the Certification Decision, the only reasonable application of Rule 102.65 is for the Board to treat the Motion for Reconsideration as timely filed so long as it has been filed promptly after the Board’s policy-changing decision. In the present case, Baker is filing its motion four (4) days after issuance of the *PCC Structurals* decision, which should certainly be considered timely under the extraordinary circumstances of this case. *See Durham Sch. Servs., LP*, 361 NLRB No. 66 (2014) (reaching the merits of motion for reconsideration filed more than 14 days after Board decision based upon newly decided legal authority, even where the motion was filed more than 14 days after the new ruling on which the motion was based); *see also Allied Mechanical Services, Inc.*, 351 NLRB 79 (2007) (granting motion for reconsideration to retroactively enforce change in legal standard); *Terry Mech. Co.*, 348 NLRB 919 (2007) (remanding certification decision to Regional Director in light of change in the law regarding supervisory status).

3. Baker further advises the Board that it intends to test the certification in this case in the U.S. Court of Appeals for the D.C. Circuit. That court will necessarily be aware that there has been an intervening change in Board policy on one of the central issues in the appeal, *i.e.*, the standard by which the Board made the appropriate bargaining unit determination. Under such circumstances, the U.S. Supreme Court has held that appeals courts are required to remand such cases to the Board to decide “whether giving the change retrospective effect will best effectuate

the policies underlying the agency’s governing act.” *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10, n.10 (1974).¹ It is therefore in the interest of judicial economy and will best conserve the Board’s and the parties’ resources, for the Board to decide now the issue of whether the certification in this case was based on an inappropriate legal standard.

4. On the merits, the Board should reopen the record and/or reconsider its Decision to certify the Union as the representative of a fractured unit of Finishers/Cement Masons, because the certified unit is inappropriate for bargaining under the community of interests test newly established (or re-established) by the Board in *PCC Structural*s. As stated therein, having overruled *Specialty Healthcare*, the Board reaffirmed that the community-of-interest test requires the Board in each case to determine:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id., slip op. at 11. In addition, in agreement with the Second Circuit, the Board held in *PCC Structural*s that it must determine whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *Id.*, quoting *NLRB v. Constellation Brands*, 842 F.3d 784, 794 (2d Cir. 2016). The Board further held in *PCC Structural*s that “at no point does the burden shift to the employer to show that any additional employees it seeks to include share an overwhelming community of interest with employees in the petitioned-for unit.” Finally, the Board held that the analysis “must consider

¹ Consistent with this Supreme Court requirement, the Board’s General Counsel has today filed a motion with the D.C. Circuit requesting that the appeals court remand the *Volkswagen* appeal back to the Board for reconsideration of a certified unit that was issued under *Specialty Healthcare*, in light of the *PCC Structural*s decision. See D.C. Circuit docket #16-1309, Document #1709613 (Dec. 19, 2017).

guidelines that the Board has established for specific industries with regard to appropriate unit configurations.” *Id.*

5. It is clear from the foregoing that the Board’s Decision Certifying the Union, along with the underlying Regional Director decision and the Board’s denial of Baker’s request for review, must be set aside. The Board expressly relied on and applied the holding of *Specialty Healthcare* to the unique circumstances of construction industry bargaining units. The Board further declared that *Specialty* was consistent with the Board’s traditional community of interest test, a position which the Board in *PCC* has now held to be erroneous.

6. It must be recalled that the Regional Director conceded in his decision that the now-certified unit is not a distinct and homogenous group of skilled craftsmen. The Board therefore failed to comply with *PCC Structurals* by ignoring this finding and failing to adhere to the Board’s longstanding craft unit tests as established in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), and *Burns and Roe Services Corp.*, 313 NLRB 1307 (1994). In and of itself, this failure constitutes grounds for denying enforcement of any bargaining requirement in the presently certified unit under *PCC Structurals*.

7. In addition, the Board’s previous orders in this case did not determine whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *PCC Structurals*, slip op. at 11. As Baker demonstrated in the record below and in its Request for Review,² the excluded employees here

² Baker’s previously-filed Request for Review is hereby incorporated by reference. However, since the filings of both parties were limited by the Board’s holding (at that time) in *Specialty Healthcare*, the Board should remand to the Regional Director now with an order to allow supplemental briefing on the appropriateness of the petitioned-for unit under *PCC Structurals*. See, e.g., *Terry Mech. Co.*, 348 NLRB 919 (2007) (remanding to the Regional Director to consider supervisory status of petitioned-for employees following changes in Board law on that issue).

did not have such distinct interests as to outweigh their many similarities with unit members. Indeed, it is clear from the record that the employees in the petitioned-for unit did not have distinct skills, training, or job functions, and their job duties “overlapped almost completely” with the excluded laborers and carpenters. In addition, the record demonstrated significant interchange of work between the finishers and other field employees. Finally, the totality of the community of interest factors established a highly integrated workforce working together in the Company’s “team-pour” system, and the Board’s previous certification of a finishers-only bargaining unit cannot be squared with the new standard adopted in *PCC Structural*s.

8. Again, in light of the novelty of the Board’s overruling of *Specialty Healthcare* in *PCC Structural*s, and the unusual procedural posture of this case, the Employer requests an opportunity for supplemental briefing of the bargaining unit issues under the new (traditional) *PCC Structural*s standard, either to the Board in the first instance or, more appropriately, by way of remand to the Regional Director.

Conclusion

For each of the reasons set forth above, and for all the reasons set forth in the Employer’s previously-submitted filings in this case, the Board should reconsider and withdraw the Decision Certifying the Union as Representative of the inappropriate unit of employees in which the election was held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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