

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**GREEN JOBWORKS, LLC/ACECO,
LLC**

Case 05-CA-168637

Respondent, and

**CONSTRUCTION AND MASTER
LABORERS' LOCAL UNION 11,
LIUNA,
*Charging Party.***

**INTERVENOR'S RESPONSE TO GREEN JOBWORKS, LLC'S
STATEMENT OF CAUSE TO DENY SUMMARY JUDGMENT**

The Charging Party, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, (hereinafter, the "Union" or "Local 11"), files this response to the Statement of Cause to Deny General Counsel's Motion to Transfer and for Summary Judgment filed by Green JobWorks, LLC's ("Green JobWorks" or the "Employer").

As cause for denying the General Counsel's Motion for Summary Judgment, Green JobWorks notes that the NLRB recently issued its decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) overturning *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, 2011 WL 3916077, 17 (2011), and argues that summary judgment should be denied based upon this change in the law. However, *PCC Structural* cannot be applied to this proceeding. NLRB Rules and Regulation 102.67(g) precludes the raising of any issue that was rejected in a Request for Review from being raised in a related unfair labor practice charge. Section 102.67(g), therefore, supersedes and limits the Board's practice of applying new

decisions to “all pending cases in whatever stage” by specifying that new decisions implementing new procedures for representation cases cannot be applied to pending C-cases that arose from already completed R-cases.

In addition, *PCC Structural*s should not be applied to this case because doing so would be manifestly unjust. Applying *PCC Structural*s would: (1) disrupt the parties’ reliance upon the Board’s prior law as reflected in two separate elections and certifications involving the Employer, Green JobWorks, LLC, and two unrelated using-employers; (2) undermine the purposes of the Act by disregarding a free and fair expression of employee autonomy in favor of collective representation; and (3) the employees would suffer the injustice of having the Board prolong the Employer’s refusal to recognize their demand for collective representation, which originally was expressed in 2015. *PCC Structural*s is essentially a change in Board procedure – a re-allocation of the burdens of proof and production relating to the determination of unit appropriateness. It would be a perversion of the Act to cite concerns over optimal Board procedure as a justification for taking a hammer to the democratic expression of the employees in this unit.

ARGUMENT

- I. RULE AND REGULATION 102.67(G) PRECLUDES THE APPLICATION OF *PCC STRUCTURALS* TO THIS PROCEEDINGS BECAUSE THE EMPLOYER’S ARGUMENTS ON UNIT APPROPRIATENESS WERE REJECTED BY THE BOARD WHEN IT DENIED THE EMPLOYER’S REQUEST FOR REVIEW.

The Board’s usual practice of applying new decisions to “all pending cases in whatever stage” is superseded and limited by Rules and Regulation 102.67(g), which provides as follows:

Finality; waiver; denial of request. The Regional Director’s actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director’s action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

29 C.F.R. § 102.67(g).

In light of this regulation, the issue of unit appropriateness cannot not be relitigated. That issue was resolved with finality on March 8, 2016, when the Board issued an order denying the Employers' request for review.¹ Under Section 102.67(g), Green JobWorks is precluded from seeking to relitigate the issue of the appropriateness of the unit in this proceeding.

II. APPLYING *PCC STRUCTURALS* TO THE INSTANT PROCEEDING WOULD WORK A MANIFEST INJUSTICE.

The Board has stated that it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time so long as this does not work a “manifest injustice.” *SNE Enterprises, Inc. & United Steelworkers of Am.*, 344 NLRB 673 (2005). In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. *Id.*

Here, application of the *PCC Structurals* to the underlying representation proceeding from which this ULP case arises would work a manifest injustice by: (1) disrupting the parties' reliance upon the Board's prior law as reflected in two separate elections and certifications involving the Employer, Green JobWorks, LLC, a company that supplies temporary labor, and two unrelated using-employers; (2) undermining the purposes of the Act by, at minimum, further delaying the effectuation of the employees' statutory right to collective representation, and, at worst, destroying a perfectly free and fair example of employee democratic self-determination;

¹ By the same order, the Board also granted a request for review filed by Local 11. That request for review was withdrawn by Local 11 on September 5, 2017. The request related to an alleged joint employer relationship between supplying and using employers, and did not relate to unit appropriateness.

and (3) causing the employees to suffer the injustice of, at minimum, further delaying the effectuation of their statutory right to collective representation and potentially destroying that right.

A. The complexity of the two separate certifications involving Green Jobworks underscores the parties' reliance on the law prior to *PCC Structural*s.

The heavy reliance interest of the Union, the employees, and the Board in the prior law is demonstrated by the fact that the Union organized units in two separate cases involving Green JobWorks. Local 11 is the certified representative of Green JobWorks employees assigned to ACECO, LLC, which is the context of the current ULP charge. Local 11 also is the certified representative of employees jointly employed by Green JobWorks and Retro Environmental, Inc. The existence of two certifications obtained through two Board proceeding underscores the complexity and difficulty of trying to apply *PCC Structural*s to this proceeding. The Employer believes that the Board should have found a wall-to-wall unit that includes all Green JobWorks employees assigned to all using-employers. Such a finding in this case would conflict with the certification in the Retro case. But the Retro case already has received a final ruling from the Board affirming Local 11 as the exclusive representation of employees jointly-employed by Green JobWorks and Retro Environmental. *See Retro Environmental, Inc.-Green JobWorks, LLC*, 05-CA-195809. The Board, therefore, cannot apply *PCC Structural*s to the Retro Environmental case, and it cannot conduct an election of a wall-to-wall unit in this case without addressing the certification that applies to Green JobWorks employees assigned to Retro Environmental. This procedural complexity demonstrates the difficulty of trying to impose *PCC Structural*s after so many years of reliance on the prior law. The parties' reliance on the prior law has created a knot that is too difficult to untie at this point.

B. Applying *PCC Structural*s to the Current Proceedings Undermines the Central Purposes of the Act.

When evaluating the appropriateness of retroactive application of new decision, the Board has taken into consideration whether the application of the new decision will cause delay in effectuating the employees' statutory right to collective representation. *See Teed Corp.*, 271 NLRB 76, 77 (1984). Here, application of *PCC Structural*s has potential to further delay the effectuation of the collective representation for employees who voted over two year ago in 2015. Indeed, reevaluating the appropriateness of the unit will force the process all the way back a Regional Director's initial pre-election decision, which in this case originally took place on October 21, 2015. Even if the election were affirmed, it may take another two years just to get back to the current posture of a technical 8(a)(5). On the other hand, it is possible that the Union might not have a sufficient showing of interest to proceed to an election if the unit is expanded to the degree sought by the Employer. That outcome would hardly advance the interest relied upon by the *PCC Structural*'s Board of ensuring employees the "fullest freedom" in exercising their rights under Section 7.

C. Applying *PCC Structural*s to this Proceeding Will Unjustly Deny Employees of the Recognition of Their Statutory Rights to Collective Representation and Would Reflect a Callous Disregard of Their Democratic Self-Determination.

The employees of Green JobWorks working for ACECO, LLC, have waited more than two years already to have their Employer recognize their chosen representative. It would be unjust to stretch out even further the length of time that they will have to wait to realize that goal. Moreover, it would be unjust for the Board to disregard that right in order to express its preference for a specific procedural framework in representation cases. *PCC Structural*s is a decision on NLRB procedure, not on employee substantive rights. The decision relates to burdens of proof and production at pre-election hearings. Between the competing values of recognizing

the employees' democratic self-determination having a specific procedures followed in representation cases, the substantive right of the employees should be given priority.

CONCLUSION

Based upon the foregoing, the underlying representation proceeding should not be re-opened for the purposes of applying *PCC Structural*s to it. Instead, the Board should proceed with its consideration of the General Counsel's summary judgment motion.

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Respectfully submitted,

/s/Brian J. Petruska

Brian J. Petruska
bpetruska@maliuna.org
General Counsel
Laborers' Mid-Atlantic Regional Organizing
Coalition
11951 Freedom Drive, Rm. 310
Reston, Virginia 20190
Tel: 703-476-2538
Fax: 703-860-1865
*Attorney to Construction & Master
Laborers' Local Union 11, LIUNA*

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing RESPONSE TO THE EMPLOYER'S SHOWING OF CAUSE TO DENY SUMMARY JUDGMENT was served on the parties identified below by Electronic Mail:

Patrick J. Stewart
Stewart Law, LLC
P.O. Box 6420
Annapolis, MD 21401-0420
Pat@Patlaw.us
Counsel to the Respondent

Daniel M. Heltzer, Esq.
National Labor Relations Board
1015 Half Street, Suite 6020
Washington, DC 20570
Daniel.heltzer@nrlb.gov
Counsel to the General Counsel

/s/Brian J. Petruska
Brian J. Petruska