

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

-----x
AM PROPERTY HOLDING CORP.,
MAIDEN 80/90 NY LLC, AND MEDIA
TECHNOLOGY CENTERS LLC,
a single employer, a joint employer with
PLANNED BUILDING SERVICES, INC.

and

Case Nos. 2-CA-33146-1
2-CA-33308-1
2-CA-33558-1

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION,

and

UNITED WORKERS OF AMERICA
(Party in Interest)

AM PROPERTY HOLDING CORP.,
MAIDEN 80/90 NY LLC, AND MEDIA
TECHNOLOGY CENTERS LLC,
a single employer, a joint employer with
SERVCO INDUSTRIES, INC.

and

Case Nos. 2-CA-33864-1
2-CA-34018-1

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION,
-----x

CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ's OPPOSITION TO
PLANNED BUILDING SERVICES, INC.'s MOTION FOR RECONSIDERATION

INTRODUCTION

Respondent Planned Building Services, Inc. (“PBS”) has filed a motion for reconsideration that consists of rehashing the arguments it has previously made to the Board plus some repackaging of former Chairman Miscimarra’s dissent. Nothing in its motion demonstrates any “extraordinary circumstances,” and accordingly, its motion should be denied.

ARGUMENT

A. **PBS Has Not Cited Any Authority to Support its Claim of “Extraordinary Circumstances” Warranting Reconsideration.**

PBS cites two cases in support of its argument that its claims of error amount to extraordinary circumstances. Neither case helps PBS. In *Hercules, Inc. v. NLRB*, 833 F.2d 426, 430 (2d Cir. 1987), the Second Circuit found that the employer’s claim that the Board should have considered additional evidence that might have led to a different result was “hardly extraordinary.” The other case, *Independent Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543 (5th Cir. 2013) does not even address the issue of when the Board should grant a motion for reconsideration. Instead, it concerns the circumstances when a reviewing court may consider an objection that was not raised before the Board.

In fact, to discourage losing parties from simply trying to relitigate cases, Board Members routinely deny motions for reconsideration even when they believe that the underlying decision was wrongly decided. *See, e.g., UFCW Local 1996*, 338 NLRB 1074, 1074, n.1 (2003) (“Although Chairman Battista agrees with this

disposition, he has grave doubts about the legal correctness of the Board's decision in the underlying case"). In *UFCW Local 1996*, the Board adopted the view expressed by Members Rodgers and Leedom in *Intl. Hod Carriers, Local 840*, 135 NLRB 1153, 1168, n. 31 (1962) that reconsideration should be limited to circumstances such as where there was an intervening decision by the Supreme Court or where there is newly discovered evidence that diligent efforts did not previously discover. *UFCW Local 1996*, 338 NLRB at 1074, n. 1. There are no such extraordinary circumstances here.

B. The Board's Rejection of PBS's Arguments Does Not Amount to "Extraordinary Circumstances."

Much of PBS's motion for reconsideration consists of arguments it has previously made to the Board. The arguments that remand to an ALJ is necessary to determine whether 80-90 Maiden Lane was an appropriate bargaining unit or that Charging Party Service Employees International Union, Local 32BJ ("Local 32BJ") was required to make a bargaining demand were both made before and already rejected by the Board. Repeating an argument that has already been made and rejected is not an extraordinary circumstance. *Washoe Medical Center, Inc.*, 337 NLRB 944, 944 (2002); *The Wang Theatre, Inc.*, 365 NLRB No. 33 (2017), slip. op at 2, Chairman Miscimarra, concurring.

C. The Board Has Already Considered Former Chairman Miscimarra's Arguments.

In addition to rehashing its previous arguments, PBS has also adopted several of the arguments that former Chairman Miscimarra put forth in dissent. But, all of the arguments that former Chairman Miscimarra made in dissent were already considered and rejected by the majority. Thus, while former Chairman Miscimarra would have found that the issue of PBS's status as an individual successor had not been fully litigated, *AM Property Holding Corp.*, 365 NLRB No. 162 (2017), slip op. at 10, n. 3 (Chairman Miscimarra, dissenting), the majority found that the issue was fully litigated. *Id.* at 3.

The panel majority's refusal to accept former Chairman Miscimarra's views does not amount to an extraordinary circumstance.

D. The Board's Delay in Issuing its Decision is Not a Basis for Reconsideration.

PBS makes the bizarre argument that the Board's delay in issuing its decision on remand from the Second Circuit could somehow be remedied by granting reconsideration and remanding the case for further proceedings before an ALJ. This argument is so patently absurd that it is barely worth responding to. Essentially PBS's argument is that if it prevails in a petition for review, it would be entitled to a hearing before an ALJ, so the Board should just go ahead provide the hearing now. Of course, this same argument applies in every case where the Board denies a request for remand – whether a case is eighteen years old or five year old, there will always be an argument that further passage of time will make it harder

to present evidence. Moreover, the argument ignores the equities on the other side – the workers affected by PBS’s unfair labor practices have been waiting almost eighteen years for justice. There is no reason to countenance PBS’s efforts to further delay these proceedings.

CONCLUSION

Since PBS has not demonstrated any extraordinary circumstances, its motion for reconsideration should be denied. In addition, the Charging Party respectfully requests that due to the age of this case, the Board act as quickly as possible in denying PBS’s motion.

Dated: January 26, 2018

Respectfully submitted,

/s/

Andrew L. Strom
SEIU Local 32BJ
25 West 18th Street
New York, NY 10011
(212) 388-3025

Attorney for Charging Party
SEIU Local 32BJ

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ's OPPOSITION TO PLANNED BUILDING SERVICES, INC.'s MOTION FOR RECONSIDERATION** was served on this 26th day of January via electronic mail on the following parties:

Martin Gringer
mgringer@franklingringer.com

Alan B. Pearl
abp@pearl-law.com

Stephen A. Ploscowe
Marvin L. Weinberg
sploscowe@foxrothschild.com
mweinberg@foxrothschild.com

Olga Torres
olga.torres@nlrb.gov

/s/ _____
Andrew L. Strom