UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAKER DC, LLC
Employer

and Case 05-RC-135621

OPERATIVE PLASTERERS AND CEMENT
MASONS INTERNATIONAL ASSOCIATION,
LOCAL 891
Petitioner

ORDER

The Employer's Motion to Reopen the Record or Alternatively for Reconsideration of Certification of Representative is denied. The Employer has not demonstrated extraordinary circumstances warranting reconsideration,[1] nor has it timely filed its motion for reconsideration, under Section 102.65(e) of the Board's Rules and Regulations.[2]

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[1] "The Board's usual practice is to apply all new policies and standards to all *pending* cases in whatever stage. The propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001) (emphasis added) (internal quotation marks omitted) (citing *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert denied 488 U.S. 889 (1988)). Because this case was not pending when the Board issued its decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), we need not consider whether retroactive application of that decision here would cause "manifest injustice." See, e.g., *SNE Enterprises*, 344 NLRB 673, 673 (2005).

[2] Member Emanuel took no part in the consideration of this case.

Member Kaplan agrees with his colleagues' decision to deny the Employer's Motion to Reopen the Record or Alternatively for Reconsideration of Certification of Representative. In doing so, Member Kaplan would find that, without deciding that the motion for reconsideration is timely and that the issuance of *PCC Structurals, Inc*., 365 NLRB No. 160 (2017), constitutes an extraordinary circumstance, the Board has already considered the applicable evidence and determined that the unit here is appropriate under the traditional community-of-interest standard renewed by *PCC Structurals*. In this regard, in its unpublished decision on October 23, 2014, the Board considered the traditional community-of-interest factors (now reinstated in *PCC Structurals*) when finding the unit of cement masons appropriate. Although the Board stated that the unit was appropriate under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), affd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), it also found the unit appropriate under the traditional community of interest standard, specifically emphasizing the cement masons' separate supervision, distinct

Dated, Washington, D.C., April 24, 2018

MARK GASTON PEARCE,	MEMBER
LAUREN McFERRAN,	MEMBER
MARVIN E. KAPLAN,	MEMBER

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classification, distinct skills and job functions, and lack of evidence of interchange. Then-Member Johnson agreed "that the unit is appropriate under the traditional community of interest standard, and thus finds it unnecessary to consider whether *Specialty Healthcare* is applicable here."

Member McFerran agrees that the motion was not timely and that the Employer has not demonstrated extraordinary circumstances warranting reconsideration. In addition, she concurs with Member Kaplan that the unit is appropriate under the traditional community of interest standard.