

CAREN P. SENCER, Bar No. 233488  
WEINBERG, ROGER & ROSENFELD  
A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
Alameda, California 94501  
Telephone (510) 337-1001  
Fax (510) 337-1023  
E-Mail: csencer@unioncounsel.net

Petitioner International Association of Machinists and Aerospace  
Workers, District Lodge W24

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, DISTRICT LODGE W24,

Petitioner,

and

PCC STRUCTURALS, INC.

Respondent.

No. 19-RC-202188

**OPPOSITION TO REQUEST FOR  
REVIEW OF THE REGIONAL  
DIRECTOR'S SUPPLEMENTAL  
DECISION**

The Employer argues that review is appropriate based on three out of the four potential reasons for review. 29 CFR § 102.67(d) permits review if:

1. There is a substantial question of law or policy based on the absence of or departure from Board precedent;
2. The Regional Director's decision on a substantial factual issue is clearly erroneous;
3. The conduct of the hearing has resulted in prejudicial error; or
4. There are compelling reasons for reconsideration.

Despite claiming that grounds 1, 2, and 3 are applicable, PCC's extensive briefing barely addresses any of those three issues.

**1. The DDE Adheres to the Direction provided in PCC**

PCC asserts that the Regional Director failed to adhere to the directive of the Board in considering and ultimately finding a craft unit appropriate as PCC believes the sum total of the Regional Director's decision should have been based on community of interest factors. The failure to apply *only* general community of interest factors is asserted to be a departure from Board precedent. However, the directive of the Board was not as narrow as PCC claims. The Order of the Board states:

Accordingly, this case is remanded to the Regional Director for further appropriate action consistent with this Order, including reopening the record, if necessary, and analyzing the appropriateness of the unit under the standard articulated herein, and for the issuance of a supplemental decision.

*PCC Structurals*, 365 NLRB No. 160 (2017), Slip Op. p. 13. The standard articulated by the Board, no less than 14 times in the majority decision, is the complete application of 9(b) in each and every unit determination case. (See Slip Op. pp. 3, 4, 5, 6, 8, 12). This provided clear direction to the Regional Director that he was to apply the entirety of Section 9(b) which states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The Regional Director was instructed to determine if the appropriate unit was employer-wide, craft-wide, plant-wide or a subdivision thereof. The Regional Director performed that analysis, using the standard community of interest factors, and made a determination, that is contained within the stated scope of Section 9(b), a craft unit. There is no error by the Regional Director in applying the Act as written.<sup>1</sup>

---

<sup>1</sup> On page 31 of its Request for Review, PCC states: "Additionally, and as noticed previously, the Regional Director failed to consider guidelines that the Board has established for specific industries with regard to unit configuration as ordered." The alleged support for this statement is page 11 of the PCC slip opinion. The Slip Opinion contains no such language or concept. While there is a reference to industry-specific guidelines, neither the Board, the Regional Director nor PCC has referenced any applicable industry guidelines in this case and based on PCC's position that it is in multiple industries, it is difficult to imagine what industry specific guideline it is referring to. (See PCC's Request for Review, p. 20, continued fn. 3.)

Further, the Regional Director explicitly applied both the community of interest test and performed a craft unit analysis. (See Supp. DDE, p. 1 [“I find that the record establishes that the petitioned-for welders constitute a craft unit that possesses a community of interest sufficiently distinct from excluded employees under the standard set forth in *PCC Structural*s, 365 NLRB No. 160 (2017).”].) Following established precedent in non-construction industry craft unit cases, the Regional Director examined *all* factors, from both the craft unit analysis and standard community of interest test in making his decision which was contained in a 37 page Supplemental DDE addressing each factor. (See Supp. DDE, p. 23 *citing* *MGM Mirage d/b/a The Mirage Casino-Hotel*, 338 NLRB 529, 532 (2002) (quoting *E.I. du Pont & Co.*, 162 NLRB 413, 417 (1966)).)

**2. PCC Does Not Identify a Single Factual Error in the Regional Director’s DDE**

The second ground for review raised by PCC is an erroneous factual determination on a substantial issue. In the multi-page section of the request for review entitled “The Decision Contains Factual Errors with Respect to Those Factors the Regional Director Applied” (Request for Review, pp. 23-30) there is not a single claim of factual inaccuracy. Instead, the section asserts that the Regional Director wrongly applied precedent in weighing the community of interest factors. This is not factual inaccuracy.

The Regional Director’s weighing of the evidence after review of the record and coming to a conclusion other than that which PCC is advocating for is not a “clearly erroneous” decision on a “substantial factual issue” such that review is warranted. (29 CFR § 102.67(d).)

**3. Neither Party was Precluded from Presenting Any Evidence**

PCC claims that it was prejudiced by the application of craft analysis because no evidence was taken on severance of craft unit factors and thus, 29 CFR § 102.67(d)(3) should lead to review. This is legally and factually inaccurate. Both parties were given free rein to provide the evidence it believed was appropriate in this case. PCC was well aware of the Union’s position regarding a craft unit prior to the re-opening of the hearing. The Union advocated for a finding of a craft unit in its original post-hearing brief. (See Petitioner’s Post-Hearing Brief, filed 8/11/17 at p. 20). PCC contemplated the craft designation in its own post-hearing brief at the

same time. (See Employer's Post-Hearing Brief, filed 8/11/17 at p. 18.) It was thus aware of the possibility of, and argument for, a craft unit designation. Nothing prevented the Employer from exploring the standards applied to craft units in the reopened hearing. PCC's failure to solicit the testimony and evidence it would have liked to have in the record is no one's fault but its own.

The Union argued throughout that a craft unit would be appropriate. PCC did not seek to introduce any specific evidence to the contrary. *Burns & Roe Services Corp.*, 313 NLRB 1307 (1994), makes clear the factors that are applied to determine an appropriate craft unit. PCC has not identified a single *Burns & Roe* factor that was not addressed by the parties at hearing or on which the parties requested to be heard but were denied. Neither the definition of a craft unit or the standards used to determine a craft unit have been left unexplored.

Instead, PCC tries to rely on a series of cases regarding craft severance to assert that the Regional Director inappropriately applied the craft analysis. In relying on *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), PCC conflates initial craft unit determination analysis with craft severance analysis. There is no justification for this amalgamation<sup>2</sup> and the *Mallinckrodt* additional inquires in the severance setting do not make sense in an original unit determination. For example, the maintenance of a separate identity while included in the larger unit has no application without an already determined larger unit. And there has never been Board inquiry into the qualifications of a union to represent particular employees in an initial unit determination (other than ensuring a union seeking to represent guards does not represent others). However, to the extent this inquiry should be considered, the sole statement regarding the qualifications of the union in *E.I. du Pont* is: "Petitioner has long experience in representing journeymen electricians." 162 NLRB at 420. If that is the standard, the union here clearly reaches it in its over 75 years of representing welders. See *Rohr Aircraft Corp.*, 35 NLRB 424 (1941); *Verson AllSteel Press Co.*, 40 NLRB 858 (1942).

---

<sup>2</sup> PCC cites to *E.I. du Pont de Nemours and Co.*, 162 NLRB 413 (1966) to extend *Mallinckrodt* to initial determinations. That misstates *E.I. du Pont* which relies on *Mallinckrodt* to require case by case determination of appropriate units, notwithstanding highly integrated operations in four specific industries. 162 NLRB at 417. *E.I. du Pont* does not explicitly mention the *Mallinckrodt* factors.

Even if the remaining *Mallinckrodt* factors were applicable, the record makes clear the type of work performed by the welders and that there is no history of collective bargaining at the facility involved.<sup>3</sup> There is no statement by the employer as to what industry it is in (see fn. 1) but to the extent the industry is aerospace, there is an extensive public history of welders being represented by the International Association of Machinists (IAM). The remaining *Mallinckrodt* factor, the degree of integration in the production unit, was the subject of multiple days of testimony.

If inquiry into the qualifications of the IAM is appropriate and PCC believed the union was not qualified to represent welders, it had 5 days of hearing in which it could have raised the issue. It could have subpoenaed personnel from the union to testify. It could have search the Board's records and argued that the Union's prior representation of welders, since the 1940s, was insufficient. It did not. As such, the failure, if any, to explore the craft unit factors applicable in severance cases, was within the control of PCC. It did not act then and thus it does not have grounds to object now.

Regardless, the *Mallinckrodt* test is not applied to initial determinations where there is no prior bargaining history. As stated in the Outline of Law and Procedure in Representation Cases (updated 2017):

With respect to craft or departmental units, the general rule is: Where no bargaining history on a more comprehensive basis exists, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is generally appropriate.

(Outline, 16-200). In providing this general statement in a section entitled "Initial Establishment of Craft or Departmental Unit," the Office of the General Counsel recognizes the difference between severance and initial determinations in craft units and specifically directs the *Burns & Roe Services* factors to be used when making initial craft unit determinations. There is no reference to or application of *Mallinckrodt*. PCC agrees that the appropriate test to apply when making an initial craft unit determination is *Burns & Roe*. (See Request for Review, p. 17). As

---

<sup>3</sup> A prior stipulation between parties is not "history of collective bargaining." *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1083 (2004); *Mid-West Abrasive Co.*, 145 NLRB 1665, 1667 (1964).

each of those factors was fully explored at hearing and reviewed by the Regional Director in his Supplemental DDE, there is no prejudice.

Although PCC can disagree with the ultimate outcome of the Regional Director, it cannot reasonably dispute that it was provided a full opportunity to provide any and all evidence it thought was applicable to the case at hand.

In conclusion, there is no basis for review to be granted in this case. Each party was provided a complete opportunity to proffer the evidence it felt was necessary, the Regional Director applied the standards set forth in *PCC Structurals, Inc.*, and there are no misstatements or clearly erroneous findings of fact. The request for review should be denied as the request raises no substantial grounds for review.

Dated: May 25, 2018

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By:

  
CAREN P. SENCER

Petitioner International Association of Machinists  
and Aerospace Workers, District Lodge W24

143584\969911

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On May 25, 2018, I served the following documents in the manner described below:

**OPPOSITION TO REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION**

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

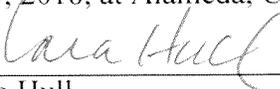
On the following part(ies) in this action:

Mr. Ronald K. Hooks  
National Labor Relations Board, Region 19  
Regional Director  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, WA 98174-1078  
(206) 220-6300 General

Todd Lyon  
Danielle Garcia  
FISHER & PHILLIPS LLP  
111 SW Fifth Ave, Ste. 4040  
Portland, OR 97204  
(503) 242-4262  
tlyon@fisherphillips.com  
dgarcia@fisherphillips.com

Rick Grimaldi  
Lori Armstrong Halber  
FISHER & PHILLIPS LLP  
150 N. Radnor Chester Rd., C300  
Radnor, PA 19087  
(610) 230-2150  
rgrimaldi@fisherphillips.com  
lhalber@fisherphillips.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 25, 2018, at Alameda, California.

  
\_\_\_\_\_  
Lara Hull