

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

A.S.V., INC., d/b/a TEREX)	
Respondent,)	
)	
And)	
)	Case Nos. 18-CA-131987
INTERNATIONAL BROTHERHOOD OF)	18-CA-140338
BOILERMAKERS, IRON SHIP BUILDERS,)	18-RC-128308
BLACKSMITHS, FORGERS, AND)	
HELPERS AFL-CIO,)	
Charging Party)	

**RESPONDENT’S REQUEST FOR RECONSIDERATION OF GISSEL
BARGAINING ORDER ON THE BASIS OF THE BOARD’S
OVERRULING OF SPECIALTY HEALTHCARE**

NOW COMES ASV, Inc., (Respondent), pursuant to NLRB Rules and Regulations, 20 C.F.R. 102.48(c), and moves for reconsideration of the Board’s Decision, which issued on August 21, 2018, insofar as the Board granted a remedial *Gissel* bargaining order. The material error committed by the Board was its failure to apply its intervening decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), which overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). Reconsideration is required because the unit found appropriate, and to which the *Gissel* bargaining order was applied, was based on an application of *Specialty Healthcare*, which is no longer controlling law.

STATEMENT OF CASE

On May 9, 2014, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers (Charging Party/Petitioner) filed a petition in case No. 18-

RC-128308 seeking to represent a unit of all full-time employees employed in the Employer's "Undercarriage Department," including Team Leads. The Employer (Respondent herein) contended that this was not an appropriate unit for collective bargaining, and a hearing was conducted on May 20, 2014. The Regional Director issued a Decision and Direction of Election on May 29, 2014, finding the "undercarriage" unit to be inappropriate, and instead directing an election in a unit of approximately 42 assemblers. (GC Exh. 1(m)). In doing so, the Regional Director applied the Board's *Specialty Healthcare* decision. *A.S.V., Inc.*, 360 NLRB 1252 (2014).

Respondent/Employer filed a timely request for review on June 12, 2014, contending that the assembly unit was inappropriate and that the smallest appropriate unit included numerous employees from other departments. In its request, Respondent/Employer requested that the Board clarify and/or overrule *Specialty Healthcare*. The election was held as scheduled on June 25, 2014, but the ballots were impounded, pending the Board's decision on review. On June 30, 2014, the Board, with Member Miscimarra dissenting, denied the request for review. 360 NLRB 1252 (2014). The majority found that *Specialty Healthcare* was properly applied by the Regional Director. *Id.* at n. 1. The ballots were subsequently opened, and the Union lost the election by a vote of 22 to 15, with 2 non-determinative challenges. (GC Exh. 4(c), (e), (f)). The Union filed timely objections to the election, which were eventually consolidated with the pending unfair labor practice complaint. (GC Exh. 1(o)).

In the final amended unfair labor practice complaint, the General Counsel alleged that the assembly unit was an appropriate unit, and requested that the Board issue a *Gissel* bargaining order as a remedy for Respondent's alleged unfair labor practices. Respondent filed a timely answer, which denied both the appropriateness of the assembly unit and of a remedial bargaining order. The case was heard before Administrative Law Judge David I. Goldman. Before the ALJ,

Respondent reasserted that the assembly unit was inappropriate. On June 9, 2015, Judge Goldman issued his recommended decision, finding (based on the Board’s decision in the representation proceeding) that the assembly unit was appropriate. Judge Goldman recommended that a remedial bargaining order be issued. Judge Goldman specifically acknowledged that Respondent had preserved its position that the assembly unit was inappropriate. *Slip Op.* at p. 53, n. 66.

Respondent filed timely exceptions to Judge Goldman’s decision and a supporting brief. In its supporting brief (p. 69), Respondent “reassert[ed] the position it took in the representation proceeding that the assembly unit is inappropriate as a matter of law.” As noted above, while this case was pending before the Board, the Board issued its decision in *PCC Structurals*, overruling *Specialty Healthcare*. However, when it issued its decision in this case on August 21, 2018, the Board failed to consider, or address, the impact of *PCC Structurals* on the *Gissel* bargaining order. As explained below, *PCC Structurals* wholly undermines the unit determination that underlies the *Gissel* bargaining order and warrants the Board’s reconsideration of this issue.

STATEMENT OF FACTS¹

The material facts regarding the unit issue are largely undisputed and are set forth in the Regional Director’s decision, as attached to the Board decision denying review. 360 NLRB 1252 (2014). The Employer operates a manufacturing facility in Grand Rapids, Minnesota, where it manufactures compact track loaders (CTLs) and skid steer loaders (SSLs) for the construction industry. At all relevant times, Jim DiBiagio was the General Manager and the highest ranking official at the facility. The facility is organized into various departments, the primary ones of interest in this proceeding being Assembly, Welding, Fabrication, Quality, Production Control,

¹ References to the record in this section are to the representation proceeding.

Test Track, and Maintenance. Dallas Gravelle was the Manager of Assembly, Joan Hoeschen was the Manager of Welding and Fabrication, Lori Gill was the Manager of Production Control, and Buck Storlie was the Manager of Test Track. Reporting to Gill was a Warehouse Manager, Nancy Dahlgren. The Quality Manager position was vacant, and the two maintenance employees reported directly to General Manager DiBiagio. There are no front-line supervisors below the managers, although several departments utilize Team Leaders. The Team Leaders are not supervisors, and the parties agreed that they should be included in any unit found appropriate. Finally, there was a single Human Resource Manager, Deborah Schultz, (RC Case, Emp. Exh. 2).

All employees in the departments that are in issue, except for Test Track and Maintenance, work four ten-hour days with a 30-minute unpaid lunch, Monday through Thursday, 6:30 a.m. to 5:00 p.m. All employees share common benefits, personnel policies, parking lots, time clocks, and break areas. All employees in issue are paid an hourly wage rate that follows a 36-month progression to the top rate. Wage rates are tightly banded. The Assemblers and Water Striders (warehouse) are the lowest paid, with a top rate of \$17.13. The Painters, Metal Fabricators, and QA Inspectors have a top rate of \$17.47. The top rate for the Warehouse Clerks is \$17.59. The Welders are the highest paid employees at \$17.85 for Welder I and \$18.85 for Welder II. (RC Case, Emp. Exh. 3).

The facility is highly integrated and work flows through the facility on a schedule that is tied to the Assembly schedule. Approximately 80 to 90 percent of what goes on the machine is a purchased part, either a component that's finished like an electrical component or a fabricated component, flat stock that's been cut, burned and then shipped to the Employer from a metal fabricator. These items are received in the warehouse. The water striders deliver the parts from the warehouse to wherever they are needed. Because everything is just-in-time, the water striders are

in frequent contact with Assembly, particularly the Team Leads. The Metal Fabricators cut and bend material, and the Welders weld loaders and chassis. Parts that require painting proceed through the paint booths where they are painted by the Painters. There are two assembly lines, one for CTLs and one for SSLs. There are also numerous sub-assembly stations, including Cab sub-assembly, Loader sub-assembly, Undercarriage, SSL sub-assembly, and Engine sub-assembly. All of the Assemblers perform in-process inspections, which require them to complete various checklists. They also do “witness marking,” which involves placing a mark on all nuts and bolts to indicate that they have been properly torqued. There also are Quality Inspectors stationed throughout the facility to perform final inspection. For example, there is an inspector who works in welding and an inspector who works in undercarriage and who also performs some of the sub-assembly work. There also is a roving inspector in paint. The remaining inspectors are typically located to the right of the assembly lines, where they inspect the final product after it comes off the production line. There are two maintenance employees who report directly to the General Manager, and there is an off-site Test Track department where completed machines are test driven. (RC Case, Tr. 81-144).

There is substantial temporary interchange between many departments, as well as some permanent transfers. Because of a reduction in welding work, at the time of the representation hearing in June 2014, one welder (Jason Basker) and one fabricator (Rory Sisco) had been working as assemblers in undercarriage since November 2013. In addition, two welders (Tony Wilson and Al Rimmer) had been working in Assembly since February 2014, one as a loader and one on the skid steer line. One fabricator (Larry Andrews) had also been working as an assembler in undercarriage since February 2014. Another welder (Mike Kossow) had also been working as an Assembler in undercarriage since February 2014 due to work restrictions. All of

these welders continued to be classified as welders and receive welder pay. Finally, one Assembler (Wes Munger) permanently transferred into Welding in June 2010. Other departments also share a close community of interest with Assembly, Welding, and Fabrication. At least three employees (Linda True, Paul Mattfield, and Jody Windt) have permanently transferred from Assembly into Warehouse positions. Further, one employee in Fabrication (Jim Baldinger) had been temporarily working in the Warehouse since February 2014. The Warehouse employees work all over the facility, and the Water Striders move parts to the Assembly lines for use by the Assemblers. Various inspectors from Quality work out in the other departments. Cory Kuck, a Quality Inspector, is stationed in undercarriage and performs final inspection of undercarriage assemblies. Kuck also performs some undercarriage assembly himself. There is an inspector in Welding and multiple final inspectors who inspect the final product as it comes off the Assembly lines. Two welders (Ryan DeBock, Mike Wilson) and one fabricator (Brandon Rajala) had been working in Test Track on a temporary basis since February 2014. Finally, there are the two maintenance employees. While they do not interchange with other employees, they are functionally integrated and, given the small size of the group, it would not make sense to isolate them into a separate bargaining unit. (RC Case, Tr. 81-144).

ARGUMENT

It is axiomatic that a *Gissel* bargaining order presumes that the Union has established a card majority in an *appropriate* bargaining unit. In this case, both the Regional Director and the Board found, over Respondent's objection, that the assembly unit was appropriate based on an application of *Specialty Healthcare*. Respondent consistently challenged the Board's unit determination throughout the representation and unfair labor practice proceedings, and specifically requested in the representation proceeding that the Board revisit and overrule its

Specialty Healthcare decision. On December 15, 2017, in *PCC Structurals*, while this case was pending, the Board did, in fact overrule *Specialty Healthcare*. The Board observed that *Specialty Healthcare* represented a radical departure from the Board’s historical “community of interest” analysis as it “discounts—or eliminates altogether—any assessment of whether employees *within* the petitioned-for unit are sufficiently distinct from the interests of *excluded* employees to warrant a finding that the smaller petitioned-for unit is appropriate.” 365 NLRN No. 160, slip op. at 6. The Board expressly held that the employer has no burden to demonstrate that excluded employees shared an “overwhelming” community of interest with included employees, and it reinstated the long-standing historical analysis, which requires the Board to decide in each case:

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.

Slip op. at 11 (quoting *United Operations*, 338 NLRB 123, 123 (2002)).

The Board, except in unusual circumstances not present here, typically applies all new policies and standards to “all pending cases in whatever stage.” *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958). Respondent contends that the Board’s failure in this case to apply the correct legal standard (*PCC Structurals*) in determining the appropriateness of the assembly unit warrants reconsideration by the Board. The evidence presented at the representation hearing demonstrates a close community of interest between the assembly employees and numerous other groups of employees. The interests of the assembly employees are not sufficiently distinct to justify their existence as a separate bargaining unit. Although the assembly department has its own separate manager, that is all that distinguishes it from all other production and maintenance

employees (excluding painters).² Thus, Assembly, Welding, Fabrication, Warehouse, and Quality employees work the identical hours, share identical benefits, are subject to identical policies and rules, share a common Human Resource Manager, and utilize the same time clocks, parking lots, and break areas. The work is highly integrated functionally, employees have frequent contact with each other, and there is substantial temporary interchange between many departments, as well as some permanent transfers. With the exception of the Welders, who are the highest paid employees, the pay ranges are very narrow. Further, the Welders are the only employees who have any special skills. But as noted above, numerous welders have worked temporarily as Assemblers for extended periods of time due to a decline in welding work.

CONCLUSION

The Board's overruling of *Specialty Healthcare* while this case was pending before the Board constitutes an extraordinary circumstance warranting reconsideration of the unit appropriateness issue and the *Gissel* bargaining order. The record evidence (from the representation proceeding) clearly demonstrates that numerous other employees must be included in the unit. Because the assembly employees do not constitute an appropriate bargaining unit, Respondent respectfully requests that the Board reconsider its decision in this case and that it set aside the *Gissel* bargaining order.

² Respondent/Employer stipulated to the painters as a separate unit because they constitute a recognized craft (a statutorily appropriate unit) and have distinct skills and working conditions and little, if any, interchange with other employees.

Dated this 13th day of September 2018.

/s/ Charles P. Roberts III

Constangy, Brooks, Smith & Prophete, LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101-4016
(336) 721-6852
(336) 748-9112 (F)
croberts@constangy.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing REQUEST FOR RECONSIDERATION by electronic mail on the following parties:

Tyler Wiese
Counsel for General Counsel
NLRB – Region 18
Minneapolis, MN
Tyler.wiese@nlrb.gov

Jason R. McClitis
Blake & Uhlig
753 State Avenue, Suite 475
Kansas City, KS 66101-2510
jrm@blake-uhlig.com

This the 13th day of September 2018.

s/ Charles P. Roberts III