

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A.S.V., INC. a/k/a TEREX

Respondent

and

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS, AND HELPERS,
AFL-CIO

Charging Party

Cases 18-CA-131987
18-CA-140338
18-RC-128308

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S REQUEST FOR RECONSIDERATION**

A.S.V., Inc., a/k/a Terex (Respondent's) Request for Reconsideration of *Gissel* Bargaining Order on the Basis of the Board's Overruling of *Specialty Healthcare* (Request) should be denied, for the following two reasons. First, Respondent did not preserve its arguments before the Board regarding the appropriateness of the bargaining unit that is the subject of the *Gissel* remedial order. Second, even if Respondent had preserved its arguments regarding the appropriateness of this unit, the Board's issuance of the decision in *PCC Structurals*, which occurred over nine months before Respondent chose to file its Request, does not constitute the "extraordinary circumstances" required to grant a request for reconsideration under Section 102.48(c) of the Board's Rules and Regulations.

I. Respondent Waived Its Right to Challenge the Appropriateness of the Bargaining Unit By Failing to File Exceptions Over This Issue

The Board's Rules and Regulations (Regulations) contain clear instructions regarding what is required in order to preserve an issue for review. Specifically, Section 102.46(a)(1)(ii) of these Regulations states that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived." These Regulations further make clear that "[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding." § 102.46(f). In interpreting these Regulations, the Board has further clarified that matters which are first raised as part of a request for reconsideration, that were not included in the initial exceptions before the Board, are also waived. *See, e.g., Giant Food Stores, Inc.*, 298 NLRB 410 (1990); *CC 1 Limited Partnership*, Cases 24-CA-011018 et al., Board Order dated January 24, 2013, *available at* 2013 WL 298118 ("Because the Employer failed to except to the judge's finding that the work stoppage was protected, we find that the Employer waived that argument; therefore, its request for the Board to reconsider that portion of the decision is untimely.")

Here, Respondent's Exceptions to the decision of Administrative Law Judge David I. Goldman are completely silent on the issue of whether the underlying assembly unit is appropriate. While Respondent lobs numerous challenges to certain aspects of the Board's *Gissel* bargaining order, its Exceptions are limited to two issues: first, whether the authorization cards and supporting testimony are sufficient to establish majority status in the assembly unit (Exceptions 62–68); and second, whether its unfair labor practices are sufficiently severe to warrant a remedial bargaining order (Exceptions 69–72). All of Respondent's other Exceptions relate to different issues in Judge Goldman's decision; there is no reference in these exceptions to the appropriateness of the assembly bargaining unit. Therefore, the record clearly

demonstrates Respondent did not place the appropriateness of the bargaining unit before the Board in its initial Exceptions, and it cannot revive this infirmity through the instant Request for Reconsideration.

Respondent's Request attempts to cure this fatal issue by pointing to a single sentence in its eighty-four page Brief in support of Exceptions, in which it claims to "reassert[] the position it took in the representation proceeding that the assembly unit is inappropriate as a matter of law." (Brief at 69.) This singular reference, however, was insufficient to place the appropriateness of the unit before the Board during its initial consideration. The Board's Regulations clearly limit the scope of the briefing to those matters contained in the Exceptions, as they state that "[a]ny brief in support of exceptions must contain *only* matter that is included within the scope of the exceptions." § 102.46(a)(2). As this reference was only mentioned in the Brief in support of Exceptions, and not the Exceptions themselves, it was not properly placed before the Board. Further, the Board has consistently held that a bare reference to an issue, without either record citations or legal argument, is insufficient to preserve the issue for review before the Board. *See, e.g., Holsum de Puerto Rico, Inc.*, 344 NLB 694, 694 n.1 (2005). Respondent's single sentence reference to this issue in its brief is insufficient to meet this standard. As such, Respondent has waived its arguments regarding the appropriateness of the assembly unit.

II. Even Assuming that Respondent Had Not Waived the Argument Regarding the Appropriateness of the Unit, Its Arguments Do Not Otherwise Demonstrate the Extraordinary Circumstances Required to Grant a Request for Reconsideration

A Request for Reconsideration is not granted as a matter of course. Rather, a party making such a request must demonstrate that "extraordinary circumstances" are present that warrant the Board revisiting its initial determination. § 102.48(c). Where such "extraordinary

circumstances” are not present, the Board will deny such a request. *See, e.g., Santa Barbara News-Press*, 359 NLRB 1110 (2015); *Enloe Medical Center*, 348 NLRB 991 (2006); *Management Training Corp.*, 320 NLRB 131 (1995) (denying motions for reconsideration based on changed law and/or factual circumstances); *cf. Wal-Mart Stores, Inc.*, 351 NLRB 130 (2007) (granting motion for reconsideration where failure to do so would result in “manifest injustice”). Respondent’s contention that the decision in *PCC Structural*s, 365 NLRB No. 160 (2017)—which is factually unrelated to the instant case and issued nine months before the Board’s decision here—constitutes an “extraordinary circumstance” is clearly erroneous.

As an initial matter, the Board has already considered and denied requests for reconsideration based on *PCC Structural*s. For example, in *Baker DC, LLC*, Case 05-RC-135621, Board Order dated April 24, 2018, the Board considered whether to allow an employer to recontest a unit certification decision in light of *PCC Structural*s; the Board denied the request, finding that the decision did not “demonstrate[] extraordinary circumstances warranting reconsideration.” Similarly, in *National Hot Rod Association*, Case 22-RC-18662, Board Order dated April 16, 2018, the Board approved a Regional Director’s Denial of a Motion for Reconsideration based on *PCC Structural*s, where the employer sought to rely on this decision to revisit a unit determination made via a stipulated election agreement. Although these decisions occurred in the context of R-cases, there is no reason that their holdings should not be extended to the instant matter.

Further, in analogous circumstances, the courts and Board have held that the issuance of an intervening change in the law, while a case is under consideration before the Board, does not establish “extraordinary circumstances.” For example in *NLRB v. Konig*, 79 F.3d 354 (3d Cir. 1996), the employer attempted to argue that a Supreme Court decision that issued while the

underlying unfair labor practice was being considered by the Board constituted an “extraordinary circumstance.” The Third Circuit panel unanimously rejected this argument, noting that the employer could have raised the issue before the Board while the case was being decided in that forum, and that therefore the issuance of the Supreme Court decision was not an “extraordinary circumstance.” *Id.* at 360.¹ Similarly, in *Management Training Corporation*, 320 NLRB 131 (1995), the Board denied a motion for reconsideration where there had been an intervening change in a Department of Labor regulation relied on in the Board’s initial decision. The Board again found that this change in the regulations did not amount to “extraordinary circumstances.” *Id.* at 131.

The facts of this case are virtually indistinguishable from those in *NLRB v. Konig* and *Management Training Corporation*. The Board issued its decision in *PCC Structural*s on December 15, 2107. From that date, Respondent had over nine months in which to bring this issue to the attention of the Board before it issued its decision in *A.S.V., a/k/a Terex*. Respondent’s Exceptions clearly failed to place the appropriateness of the unit before the Board in the first instance, and it made no renewed attempts during the nine month period after *PCC Structural*s issued to rectify this error. Its failure to wait until *after* the Board issued its decision is inexcusable, and its negligence should not be rewarded by granting its belated Request.²

¹ Although the Third Circuit’s decision in *Konig* addressed Section 10(e) of the National Labor Relations Act, both Section 10(e) and Section 102.48(c) of the Board’s Regulations rely on similar “extraordinary circumstances” standards.

² In the event that the Board does grant Respondent’s Request, Counsel for the General Counsel requests an opportunity to brief the appropriateness of the unit under the *PCC Structural*s standard.

Conclusion

For the reasons discussed above, Respondent's Request should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I served the attached Counsel for the General Counsel’s Opposition to Respondent’s Request for Reconsideration on the parties listed below, by electronic mail, on this date.

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September 17, 2018

Date

Tyler J. Wiese, Designated Agent of NLRB

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Signature