

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 REPLY TO GENERAL COUNSEL’S OPPOSITION TO
RESPONDENT’S REQUEST FOR RECONSIDERATION**

NOW COMES A.S.V., Inc., (Respondent), and files this reply to the General Counsel’s opposition to Respondent’s motion for reconsideration, as follows:

A. Respondent Did Not Waive Its Objection to the Unit.

The General Counsel’s contention that Respondent waived its objection to the appropriateness of the assembly unit is without merit. The unit issue was litigated in the representation proceeding, which was later consolidated with the unfair labor practice proceeding. Following a hearing, the Regional Director, relying upon *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), issued a Decision and Direction of Election finding the assembly unit to be the smallest appropriate unit. 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). At that point, Respondent had litigated the unit issue as far as it could go with the Board. Further, as representation decisions are not deemed "final" Board orders, Respondent had no ability at that time to seek review in a federal court of appeals.

Although the representation proceeding was thereafter consolidated with the unfair labor practice proceeding, "[i]t is well established that, in the absence of newly discovered evidence or other special circumstances requiring reexamination of the decision in the representation proceeding, a respondent is not entitled to relitigate in a subsequent refusal-to-bargain proceeding representation issues that were or could have been litigated in the prior representation proceeding." *Shadow Broadcast Services*, 323 NLRB 1002, 1002 (1997). At the time of the unfair labor practice hearing, *Specialty Healthcare* remained the prevailing Board standard, Respondent had no arguable grounds to litigate the unit issue further, and the ALJ had no authority to rule on the appropriateness of the assembly unit. Nevertheless, Respondent made the ALJ aware of its continuing challenge to the appropriateness of the unit.

Similarly, following the issuance of the ALJ's Decision, there was no operable finding of fact or conclusion of law by the ALJ regarding the appropriateness of the assembly unit to which Respondent could take formal exception. After all, since the issue could not be relitigated, the ALJ could make no finding or conclusion of law regarding the unit other than to accept the unit found appropriate by the Board in the representation proceeding. *See Montgomery Ward & Co.*, 162 NLRB 294, 299 (1966) (judge bound by prior representation decision, but employer retained

right to challenge Board's representation decision in court of appeals). Respondent, however, did take exception to the Judge's Conclusion of Law 3:

The Union is the designated collective-bargaining representative of the following bargaining units of the Respondent's employees:

(assembly unit)

All full-time and regular part-time assemblers employed by the Employer at its Grand Rapids, Minnesota facility, including team leads; excluding all other employees, temporary employees, managers, guards and supervisors as defined in the Act, as amended.

[Exception No. 74]

Further, Respondent expressly pointed out in its supporting brief to the Board that it continued to maintain its position that the assembly unit was inappropriate. That is all it was in a position to do at the time. The General Counsel's contention that Respondent somehow had an obligation to regurgitate the arguments it made in its request for review during the representation proceeding has no legal support and would effectively subvert the no-relitigation issue. Similarly, the General Counsel's reliance on *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n. 1 (2005) is misplaced. That case did not involve prior determinations in a related representation proceeding, and the employer merely cited the judge's findings to which it was taking exception without stating either in its exceptions or its supporting brief any specific reason to overturn the judge's findings. Here, Respondent, in its supporting brief, specifically referred the Board back to Respondent's (Employer's) representation proceeding challenge to the appropriateness of the assembly unit. There was no ambiguity whatsoever and no need to repeat what Respondent had already argued (and preserved) in the representation proceeding. No waiver has occurred.

B. PCC Constitutes “Extraordinary” and “Special” Circumstances.

It was not until the Board issued its Decision on August 21, 2018, that Respondent was in a position to “relitigate” the unit issue. As of that date, there was an intervening event in the form of the Board’s decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), which constituted the necessary “special circumstances” to warrant relitigation of the prior unit determination, as well as the “extraordinary” circumstances warranting reconsideration of the *Gissel* bargaining order. The General Counsel suggests that Respondent should have brought the *PCC Structurals* decision to the attention of the Board shortly after it issued in December 2017, but Respondent is unaware of any provision in the Board’s rules and regulations permitting or requiring Respondent to file such a document between the conclusion of all permitted briefing and the Board’s issuance of its decision. Although the federal courts of appeals permit a party to submit supplemental authority in the form of a letter, Fed. R. App. P. 28(j), Respondent is unaware of any corresponding provision in the Board’s rules, and in any event, the failure to submit such a letter could hardly justify a court (or the Board) in applying overruled precedent. The appropriate vehicle for bringing this issue to the Board’s attention is the request for reconsideration authorized by 29 C.F.R. 102.48. Such a request must be filed within 28 days of the Board’s Decision, and there is no contention that Respondent’s motion was untimely.

Contrary to the General Counsel’s contentions, the Board’s intervening decision in *PCC Structurals* does constitute extraordinary circumstances within the meaning of 29 C.F.R. 102.48(c). Indeed, the General Counsel’s suggestion that the Board’s own overruling of the very precedent upon which it relied to find the assembly unit appropriate is immaterial is itself a startling proposition. Certainly, when the Board reverses prior precedent, it is not required to reopen every past decision that might require a different result under the new precedent, but as to

cases that are still *pending before the Board* when the change in law occurs, the standard practice is to apply the new precedent regardless of how advanced in the process the case may be. In *Baker DC, LLC*, 05-RC-135621 (2018), a case cited by the General Counsel, the employer's motion for reconsideration, based on *PCC Structural*s, suffered two defects. One, it was not timely filed within 28 days of the final Board decision. Two, the case was not *pending before the Board* when *PCC Structural*s was issued. Thus, the Board denied the employer's request on these grounds. Neither defect is present here. Respondent's motion was timely, and this case was still pending at the time *PCC Structural*s was decided.

The Board itself has recognized that *PCC Structural*s should be applied to any cases still pending, including cases on remand from a court of appeals. In *Woodbridge Winery*, 2018 WL 1794786 (N.L.R.B.), the Board had found the petitioned-for unit appropriate under *Specialty Healthcare*, but the employer refused to bargain, and sought review in the court of appeals. The court subsequently remanded the case to the Board for further consideration. While the case was pending on remand, the Board issued its decision in *PCC Structural*s. This resulted in the employer filing a motion to remand, as well as a motion to dismiss. The Board acknowledged that *PCC Structural*s was the governing standard and that the case had to be evaluated under that standard. Thus, the Board remanded the case to the Regional Director to reopen the record and reconsider the unit determination.

Middletown Hospital Association, 282 NLRB 541 (1986) is yet another example of the Board reconsidering a prior unit determination based on a change in Board precedent. There, in a consolidated representation/unfair labor practice case, the judge issued a decision finding a unit of registered nurses to be appropriate and recommending the issuance of a *Gissel* bargaining order. The employer filed exceptions, and while the case was pending, the Board issued its

decision in *St. Francis Hospital*, 271 NLRB 948 (1984), which created a revised unit analysis paradigm. As a result, the Board remanded the case to the judge for reconsideration under *St. Francis Hospital*. Applying the revised standard, the judge found the unit to be inappropriate and revised the recommended remedies to delete the bargaining order. The Board affirmed.

The decisions cited by the General Counsel are inapposite. As noted above, in *Baker DC*, the case was no longer pending when *PCC Structural*s was decided. In *National Hot Rod Assoc.*, 22-RC-18662 (2018), the employer had stipulated to the appropriateness of the unit. No such stipulation occurred here. In *NLRB v. Konig*, 79 F.3d 354 (3d Cir. 1996), the employer *never made any contention to the Board that its LPNs were supervisors*. Only when the case reached the court of appeals did the employer make this contention and it relied on a Supreme Court decision that was issued *before* the Board had issued its decision, but had never been brought to the Board's attention. In *Management Training Corp.*, 320 NLRB 131 (1995), the employer based its request for reconsideration on the fact that certain DOL regulations cited by the Board in its decision had been superseded. The Board acknowledged this fact, but found that the revisions in the regulations did not materially alter the law and did not undermine the validity of the Board's decision. Here, it is beyond dispute that *PCC Structural*s dramatically and materially altered the analysis applied by the Board in determining the appropriateness of the assembly unit. In *Enloe Medical Center*, 348 NLRB 991 (2006), the Board did grant (in part) the employer's request for reconsideration by remanding the case to permit the introduction of additional evidence. In *Santa Barbara News-Press*, 359 NLRB 1110 (2015), the employer contended that the Board's remedy was inconsistent with precedent. Although the Board denied the request for reconsideration, it did not do so summarily. Rather, it considered the employer's arguments and found them substantively insufficient to warrant any modification of the remedy.

PCC Structurals radically altered the legal standard applied by the Board in determining that the assembly unit was appropriate. Respondent's request for reconsideration is timely, and this case was pending at the time the Board repudiated *Specialty Healthcare*. No plausible grounds exist for not applying the correct legal standard in this case.

C. Respondent Agrees That Further Briefing Is Appropriate On The Unit Issue.

Inasmuch as the unit determination by both the Regional Director and the Board in the representation proceeding was based on an application of *Specialty Healthcare*, which is no longer prevailing law, it seems appropriate (as the General Counsel suggests in footnote 2 of its opposition) that all parties be given the opportunity to submit supplemental briefs directly to the Board regarding whether the assembly bargaining unit is an appropriate unit under *PCC Structurals*.

WHEREFORE Respondent respectfully requests that the Board grant Respondent's request for reconsideration, and that it issue an order directing the filing of supplemental briefs limited to the issue of the appropriateness of the assembly bargaining unit under *PCC Structurals*.

Dated this 21st day of September 2018.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing REPLY BRIEF by electronic mail
on the following parties:

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This the 21st day of September 2018.

s/ Charles P. Roberts III