UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

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

CHARGING PARTY'S OPPOSITION TO RESPONDENT'S REQUEST FOR RECONSIDERATION

COMES NOW International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers AFL-CIO, (Charging Party), to submit its opposition to Respondent's request for reconsideration. The Charging Party contends that Respondent's request should be denied because (1) 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, (2) even if, *arguendo*, Respondent had preserved its arguments regarding the appropriateness of the unit, the Board's issuance of the decision in *PCC Structurals,* which occurred over nine (9) months before Respondent chose to file its request, does not constitute "extraordinary circumstances" required to grant a request for reconsideration under Section 102.48(c) of the Board's Rules and Regulations, and (3) the cases cited by Respondent are not analogous to the case at hand.

I. Respondent did not preserve its arguments regarding the appropriateness of the bargaining unit.

The Charging Party incorporates the arguments put forth by the Counsel for the General Counsel in opposition to Respondent's request for reconsideration, and provides additional reasons for denying the request for reconsideration below.

As the Board held in *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017), a "Regional Director's decision is final—and thus may have a preclusive effect—if no request for review is made [as was the case in *Wolf Creek*] or if the Board denies a request for review [as in this matter]. It does not matter that the Board itself did not address the issue."

In *Wolf Creek,* the Board cites NLRB Rules and Regulations Section 102.67(g), which states that "Denial of a request for review [of a regional director's decision] shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." See, Section 102.67(g) of the Board's Rules and Regulations; *Local 340, New York New Jersey Regional Joint Board (Brooks Brothers, A Division of Retail Brand Alliance, Inc.*, 365 NLRB No. 61, slip op. 1 (Apr. 13, 2017).

The one exception to this rule is when the party seeking relitigation of the previously decided issue satisfies its burden of presenting new factual circumstances that would vitiate the preclusive effect of the earlier ruling. *Id.*; *Carry Cos. of Illinois*, 310 NLRB 860, 860 (1993) ("changed circumstances" exception to preclusion not established because "the Petitioner has failed to produce" evidence of such); *Harvey's Resort Hotel*, 271 NLRB 306, 306-307 (1984) (applying preclusion in context of unfair labor practice proceedings and holding that when it is clear that an issue was "fully litigated," i.e., "put in issue and resolved in the earlier proceeding," preclusion applies unless evidence of changed circumstances is produced).

At no time has Respondent raised evidence of a change in the factual circumstances or newly acquired formerly unavailable evidence of a change in the Unit employees' employment conditions that would vitiate the preclusive effect of the Regional Director's decision. Instead, Respondent waited, at its own peril, until the Board's August 21, 2018 decision in this matter concerning Respondent's unfair labor practices to assert that the Regional Director's 2014 Decision was in error due to the 2017 *PCC Structurals* decision. Just as Respondent did not preserve its arguments regarding the appropriateness of the bargaining unit in its Exceptions, Respondent has not shown evidence of circumstances warranting relitigation of the appropriate bargaining unit. As a result, reconsideration should be denied.

II. There are no "extraordinary circumstances" warranted to grant a request for reconsideration.

The Charging Party incorporates the arguments put forth by the Counsel for the General Counsel in opposition to Respondent's request for reconsideration, and provides additional reasons for denying the request for reconsideration below.

In 2014, the Charging Party sought to represent undercarriage employees in Respondent's Grand Rapids' facility. A hearing was conducted regarding the appropriateness of the petitioned-for undercarriage unit, with Respondent contending that only a broader unit was appropriate for collective bargaining. After a hearing, the Regional Director for Region 18 issued a Decision and Direction of Election on May 29, 2014, in which he rejected the appropriateness of the petitioned-for unit and found that the smallest unit appropriate was a larger unit composed of *all* assembly employees in Respondent's Grand Rapids' assembly area—a unit of approximately 42 employees and which included the undercarriage employees. Notably, prior to the hearing, a stipulated election agreement was reached between the Charging Party and

Respondent over a separate painters unit, in which the parties agreed to the appropriateness of the painters unit, and agreed to an election. Respondent requested review of the Region's Decision and Direction of Election. Around the same time, the Charging Party filed an unfair labor practice charge related to Respondent's objectionable conduct in advance of the election. Respondent's request for review to Regional Director's bargaining unit determination was denied by the Board on June 30, 2014. The Administrative Law Judge found Respondent committed unfair labor practices in his June 9, 2015 decision.

This matter at the present juncture focuses solely on the allegations involving Respondent having committed an unfair labor practice related to its conduct in proximity to the election. 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 Structurals*. The Board denied the request, finding that the decision did not "demonstrate[] extraordinary circumstances warranting reconsideration." The Board further provided, in a footnote, "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." (quoting *Levitz Furniture Co. of the Pacific,* 333 NLRB 717, 729 (2001)).

Even assuming, *arguendo,* the bargaining unit determination remains part of the *pending* case (which it is not), retroactive application of *PCC Structurals* would not change the outcome of the 2014 unit certification decision because the decision was premised on the reinstated traditional community-of-interest standard with little to no reliance on the now abandoned "overwhelming" community-of-interest standard. The outcome would be the same under either

standard. Therefore, to recontest this decision would be inappropriate and its ill effects would result in "manifest injustice." See, e.g., *SNE Enterprises,* 344 NLRB 673, 673 (2005).

In a footnote in agreement with the Board's decision to deny reconsideration in *Baker DC, LLC*, Member Kaplan contended that, even without deciding whether the motion for reconsideration was timely or that the issuance of *PCC Structurals* constituted an extraordinary circumstance, denial was appropriate because

> the Board 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 (2001), 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 classification, distinct skills and job functions, and lack of evidence of interchange.
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> *Id.* at n. 2.

Here, reconsideration should be denied for similar reasoning. The Regional Director's Decision and Direction of Election in this case similarly determined that the unit here is appropriate under the traditional community-of-interest standard renewed by *PCC Structurals*. Specifically, the Regional Director in his decision of May 29, 2014 engaged in a very thorough analysis and ultimately found an appropriate unit – a larger unit than the petitioned-for unit – based on an extensive discussion of the traditional community-of-interest factors renewed by *PCC Structurals*.

Those factors considered by the Board to determine whether a unit of employees is appropriate under the traditional community-of-interest standard include: 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. *PCC Structurals*, 365 NLRB No. 160 (Dec. 15, 2017) (citing standard above as articulated in *United Operations, Inc.,* 338 NLRB 123 (2002)).[1]

In his decision, the Regional Director in this matter considered all of the above factors concerning the bargaining unit that is the subject of the *Gissel* order without reference to the now abandoned "overwhelming" community-of-interest standard. The Regional Director came to his conclusion regarding the appropriate bargaining unit with no reference or appeal to *Specialty Healthcare*, and in fact, the Regional Director made specific reference to the case (*United Operations*) which was reinstated by *PCC Structruals*. He relied solely on the traditional community-of-interest standard. Therefore, it is irrelevant that the operating law at the time was *Specialty Healthcare,* as the outcome would be no different under the standard reinstated by *PCC Structurals.*

III. The cases cited by Respondent are not analogous to the case at hand.

The cases relied upon by Respondent in its Reply to the General Counsel's Opposition to Respondent's request for reconsideration are inapplicable as they do not address the case at hand. They do not present any case where the Board has issued a decision on an unfair labor practice

[1] Notably, the Board in *United Operations* found, just as the Regional Director found in this matter, that the smallest appropriate unit sought by the Petitioner must include additional employees.

charge and grants reconsideration to challenge a much older decision finding an appropriate bargaining unit.

Respondent cites *Woodbridge Winery,* 2018 WL 1794786 (April 13, 2018). *Woodbridge Winery* is inapposite. In *Woodbridge Winery,* the unit determination was a close call and determined by *Specialty Healthcare.* In this matter, the Regional Director made a determination based exclusively on the traditional community-of-interest test and did not rely on *Specialty Healthcare.* In *Woodbridge Winery,* the Employer filed a motion to remand and a motion to dismiss based on *PCC Structurals* while the case was still pending before the Board on remand from the court of appeals. Upon this request, the Board remanded to the Regional Director. In this matter, Respondent did not file a motion to remand to the Regional Director or a motion to dismiss with the Board in light of the *PCC Structurals* decision. Respondent did not bring *PCC Structurals* to the Board's attention. Many months after *PCC Structurals,* the Board issued its decision on the unfair labor practice charge, which Respondent now requests be reconsidered on grounds entirely unrelated to the matter before the Board. The Board should deny reconsideration. The Board was well aware of its decision in *PCC Structurals* (2017) when it issued its decision on August 21, 2018 concerning the unfair labor practice charge. There is no justification for reconsidering the 2014 bargaining unit determination, especially since Respondent failed to identify its opposition to the appropriate bargaining unit determination in its Exceptions. Respondent waited for the Board's decision at its own peril.

Respondent also cites *Middletown Hospital Association,* 282 NLRB 541 (1986). In this consolidated representation/unfair labor practice case, the administrative law judge first issued a decision finding a unit of registered nurses to be appropriate and recommending the issuance of a *Gissel* bargaining order. While the case was pending before the Board, the Board issued its

decision in *St. Francis Hospital,* 271 NLRB 948 (1984), which created a revised unit analysis paradigm. Following Employer's Exceptions to the bargaining unit determination (which Respondent did not do here), the Board remanded the case to the administrative law judge for reconsideration under *St. Francis Hospital*.[2]

Unlike in *Middletown Hospital,* the Board in this matter made a decision and chose not to remand for reconsideration because there was no request or reason to do so. Respondent's Exceptions to this matter were not directed towards the appropriateness of the bargaining unit. Nothing prohibited Respondent in this matter from filing a similar request for reconsideration to the Board's denial of the request for review of the bargaining unit determination of 2014 when *PCC Structurals* came out. In fact, NLRB Rules and Regulations §102.48(c)(2) requires that any motion for reconsideration before the Board "must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, *except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced*." (emphasis added). If *PCC Structurals* constituted new evidence or special circumstances that warranted reconsideration of the Board's 2014 denial of reconsideration and/or reopening the 2014 record determining the appropriate bargaining unit, Respondent had the obligation to promptly move the Board accordingly, which it did not.

Respondent also cites *Montgomery Ward & Co.,* 162 NLRB 294, 299 (1966). In that case, the Union was conducting an organizing campaign in a group of the Employer's auto service centers. The Union filed unfair labor practice charges. Shortly thereafter, the Union and

[2] The administrative law judge, on remand, acknowledged that Respondent Employer excepted "that the registered nurses unit is not appropriate." Second Supplemental Decision from Administrative Law Judge Claude R. Wolfe (May 24, 1985), as republished in *Middletown Hospital Association,* 282 NLRB 541 (1986). As discussed, Respondent did not have such a specified exception.

Employer met where they discussed the charges and the Union's demand for recognition as the bargaining agent. In the meeting, the Union agreed that employees of each center should be a separate bargaining unit, while the Employer agreed to do a card check and to recognize the Union as bargaining agent if the cards established a Union majority. A month later, an employee filed a decertification petition with the Regional Director. After a hearing, the Director allowed the petition and directed an election. The Union moved for reconsideration of that decision based upon the intervening decision of the Board in *Keller Plastics Eastern*. The Regional Director thereupon vacated his Decision and Direction of Election and transferred the case to the Board. The Board dismissed the petition on the ground that the Union had not been afforded a reasonable opportunity to prove itself as the employees' bargaining agent and that the Union, having been duly recognized, could not be decertified prior to being afforded such an opportunity. The Union subsequently filed an unfair labor practice charge when Employer refused to bargain. The Board found in favor of the Union and ordered Employer to cease and desist from unfair labor practices and upon request, bargain collectively in good faith with the Union. The Seventh Circuit enforced the order. *N.L.R.B. v. Montgomery Ward & Co.,* 399 F.2d 409 (7th Cir. 1968).

Respondent appears to cite *Montgomery Ward & Co.* because of a statement therein that the Board will not relitigate previous bargaining unit determinations without newly discovered or previous evidence, perhaps because Respondent believes *PCC Structurals* constitutes new evidence in this matter. As noted above, if it did constitute "new evidence," then Respondent failed to act promptly. However, Respondent ignores that fact that the Board in *Montgomery Ward & Co.* adopted the Trial Examiner's decision which found "Respondent [Employer]'s assertion that the Union is not the representative of the employees is [] contrary to the Board's

determination arrived at after hearing on the issue, and constitutes an attempt to relitigate here the correctness of the Board's action. This may not be done…."

Respondent also cites *Shadow Broadcast Services,* 323 NLRB 1002 (1997). In that case, the Board similarly states, "It 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." Respondent contends that *PCC Structurals* qualifies as a special circumstance, but fails to show how the Regional Director's bargaining unit determination would be impacted if *PCC Structurals* were applied.

As described above and as is very evident in the Regional Director's decision, the unit determination was made according to the traditional community-of-interest standard with no specific reliance in *Specialty Healthcare.* In addition, Respondent failed to file an exception to the 2014 bargaining unit determination. There are simply no extraordinary circumstances justifying reconsideration of the 2014 bargaining unit determination.

IV. Conclusion

Respondent failed to timely and precisely except to the bargaining unit determination. The argument is waived. Nonetheless, even if the argument is not found to be waived, the Regional Director used the standard reinstated by *PCC Structurals* in his finding that an appropriate unit constituted all assembly employees in Respondent's Grand Rapids' assembly area, which is the bargaining unit that is the subject of the *Gissel* order. As a result, it is irrelevant that the operating law at the time was *Specialty Healthcare,* as the outcome would be no different under the standard reinstated by *PCC Structurals.* There are no extraordinary

circumstances warranting reconsideration of a bargaining unit determination, which should not be considered a pending matter at all. The case before the Board of which the Respondent requests reconsideration concerns an unfair labor practice change, not the bargaining unit determination of 2014.

Therefore, the Charging Party joins in support of the Counsel for the General Counsel's opposition to Respondent's request for reconsideration.

Dated: September 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 27th day of September 2018 the *Charging Party International Brotherhood Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, And Helpers, AFL-CIO's Opposition to Respondent's Request for Reconsideration* was e-filed with the NLRB and emailed to the following:

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