

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

Swift Beef Company,

Employer,

and

Case 27-RC-226559

International Union of Operating Engineers,
Local 1,

Petitioner.

INTERVENOR’S OPPOSITION TO REQUEST FOR REVIEW

Intervenor United Food and Commercial Workers Union, Local 7 (“Local 7” or the “Union”), through its undersigned counsel and pursuant to Rule 102.67(f) of the National Labor Relations Board’s (“Board”) Rules and Regulations, hereby submits the following brief in opposition to the Request for Review filed by the Employer (the “Request”), dated October 8, 2018, of the Regional Director’s Decision and Direction of Election in this matter (the “Decision”), dated September 24, 2018. For the reasons set forth below, the Request should be denied in its entirety and the Decision affirmed.

The Request did not address the existence of a contract bar in this case. However, as noted in its position statement to the Regional Director, Local 7 represents employees in a bargaining unit at the Employer’s facility in Greeley, Colorado. There is a collective bargaining agreement (CBA) in place for these employees, effective through July 21, 2019, that recognizes Local 7 “as the sole and exclusive bargaining agent for all production employees,” with some enumerated included positions, none of which are implicated herein. *See* Article 2 of CBA.¹ The individuals in this bargaining unit are therefore subject to a contract bar and may not be included in the petitioned-for election. *See NLRB v. F & A Food Sales, Inc.*, 202 F.3d 1258, 1260 (10th Cir. 2000) (“Under the NLRB’s contract bar rule, ‘if an employer and a union have entered into a [CBA], the agreement constitutes a bar to the holding of a representation election for the life of the agreement, up to a maximum of three years.’”) (citations omitted). *See also Osteopathic Hosp. Founders Assn. v. NLRB*, 618 F.2d 633, 638 (10th Cir. 1980) (holding that, “[w]hen a collective bargaining agreement is in effect between the parties, an incumbent union enjoys a virtually irrebuttable presumption of majority status as long as the agreement is entitled to ‘contract bar’ protection.”) (citations omitted).

Indeed, the existence of a contract bar is a factual predicate to the Regional Director’s finding that a residual unit is appropriate in this context. *See* Decision at 5 (“As it is undisputed

¹ A copy of the CBA is submitted herewith.

that the inventory walkers are represented under the Local 7 contract, in these circumstances, a party to that contract, absent mutual consent, may not disturb that unit.”). The Regional Director was wholly within the boundaries of settled Board law to therefore conclude that “the petitioned-for unit is appropriate as a residual unit of supply group employees,” since “the amended petition seeks all of the unrepresented employees in the supply group.” *Id.* (citing *Eastern Container Corp.*, 275 NLRB 1537, 1538 (1985)). The Board has consistently held that this is an appropriate basis on which to direct an election in a residual unit:

Where a portion of a workforce is already represented, the Board evaluates petitions to represent remaining employees first to determine whether the petitioned-for employees share a separate and distinct community of interest apart from the represented unit employees. If the community of interest of the petitioned-for employees is not separate and distinct such that they could not constitute an appropriate separate unit, the Board then determines whether they constitute an appropriate residual unit. A residual unit is appropriate if it includes “all unrepresented employees of the type covered by the petition.”

Carl Buddig & Co., 328 NLRB 929, 930 (1999) (citations omitted) (emphasis added).

The Board’s recent ruling in *PCC Structural*s did not alter these standards, *see* Decision at 5-6, and the Board has repeatedly rejected the argument, made by the Employer in the Request, that the existence of represented employees with a community of interest with petitioned-for employees bars an election among the unrepresented employees. *See Premier Plastering, Inc. & Plasterers Local No. 80*, 342 NLRB 1072, 1073 (2004) (rejecting Intervenor argument that existence of agreement covering employees not included in the petitioned-for unit meant that “an election can only be held in an overall unit,” and instead directing Regional Director “to craft a residual geographic unit which would exclude from the unit those areas covered by current 9(a) agreements” between Intervenor and Employer, noting that Petitioner had petitioned for such, “[i]n an attempt to avoid potential contract bar problems.”). *See also G.L. Milliken Plastering*, 340 NLRB 1169, 1170 (2003) (noting that, “if the claimed residual unit includes employees who...are covered by the Lansing/Jackson Agreement, the petition may be contract barred.”).

The Employer’s proposed standard, that existing representation is irrelevant in light of *PCC Structural*s’ mandate to consider the community of interest between excluded and included categories of employees, would upend labor peace, and allow any number of existing bargaining relationships and CBAs to be attacked. This directly conflicts with the Board’s mandate to foster stability in bargaining relationships, and undermines multiple other aspects of the well-established community of interest analysis. *See Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 427 (D.C. Cir. 2008) (rejecting argument that residual unit was inappropriate because “all employees who share a community of interest must be included in the same unit,” instead holding that such a “proposition conflicts with the principle that more than one bargaining unit may be appropriate in any particular setting.”) (citation and internal quotation omitted).

Accordingly, the Request for Review should be denied in its entirety.

Dated: October 15, 2018

Respectfully submitted,

s/ Raja Raghunath
Raja Raghunath, Associate General Counsel

UFCW Local 7
7760 W 38th Ave, Suite 400
Wheat Ridge CO 80033
Phone: (303) 425-0897

Counsel for Petitioner

Certificate of Service

I hereby certify that the foregoing *Intervenor's Opposition to Request for Review* was e-filed with the National Labor Relations Board on October 15, 2018, and served on the same date on the below individuals by the means indicated.

Rigo Mendiola via email to **rigo.mendiola@jbssa.com**
Representative for Employer

Paula Sawyer via email to **paula.sawyer@nlrb.gov**
Regional Director, Region 27

John P. Sutton via email to **john@iuoelocal1.org**
Representative for Petitioner

s/ Raja Raghunath
Raja Raghunath