A.S.V., Inc. a/k/a Terex, *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 18–RC–128308, 18–CA–131987 and 18–CA–140338

December 12, 2019

ORDER DENYING REQUEST FOR RECONSIDERATION

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

In May 2014, the Charging Party Boilermakers petitioned for a representation election among a unit of employees working in the undercarriage section of the Respondent's assembly department. The Regional Director found that the unit should appropriately include the entire assembly department, not just the undercarriage section. The Respondent, contending that the smallest appropriate unit also had to include welding and fabricating employees, filed a request for review with the Board. The Board agreed with the Regional Director and denied the request, finding the assembly unit appropriate. 360 NLRB 1252 (2014).[1] An election was held on June 25, 2014, which the Union lost.[2]

Based on alleged misconduct committed by the Respondent over the week before the assembly unit election, the Union filed objections and corresponding unfair labor practice charges. An administrative law judge upheld the charges[3] and recommended a *Gissel*[4] bargaining order for the assembly unit. 366 NLRB No. 162, slip op. at 58 (2018). The Board subsequently adopted the judge's unfair labor practice findings, set aside the election results, and issued the *Gissel* bargaining order. Id., slip op. at 1–5.

Prior to the Board's issuance of its underlying decision, the Board had issued its decision in *PCC Structurals*, 365 NLRB No. 160 (2017), overruling *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). On September 13, 2018, the Respondent filed a request for reconsideration of the underlying decision in this case, again contending that the assembly unit was too small, this time based on *PCC*. The General Counsel and the Union each filed a brief in opposition, and the Respondent filed a reply to the General Counsel.

The Board has delegated its authority in this proceeding to a three-member panel. As explained below, we deny the Respondent's request for reconsideration because the Respondent has not established extraordinary circumstances warranting reconsideration of the Board's decision under Section 102.48(c)(1) of the Board's Rules and Regulations.[5]

In *PCC*, the Board reinstated the traditional community-of-interest standard for determining the appropriateness of a petitioned-for bargaining unit, as articulated in, e.g., *United Operations, Inc.*, 338 NLRB 123 (2002). In so doing, the Board overruled *Specialty Healthcare*'s requirement that, once a petitioned-for unit is shown to be readily identifiable as a group and to share a community of interest—and thus be appropriate for purposes of collective bargaining—an employer contending that the unit should include additional employees must show that those employees share an "overwhelming community of interest" with the employees in the petitioned-for unit.[6] The Respondent now argues that under *PCC* the assembly unit is not appropriate and, accordingly, that the Board's *Gissel* bargaining order cannot stand.[7]

We conclude that the Respondent's argument lacks merit. Although the Regional Director technically applied *Specialty Healthcare* as extant law at the time of his Decision and Direction of Election, he concluded that the Union's petitioned-for unit of undercarriage assemblers was an impermissible "fractured unit" under *Seaboard Marine*,[8] and then plainly cited and applied the traditional community-of-interest factors set forth in *United*

[1] Then-Member Miscimarra would have granted review based on evidence of functional integration and other interests shared by various assembly and non-assembly production and maintenance employees. 360 NLRB at 1252 fn. 1.

[2] The Union also filed a separate petition for the Respondent's paint department. An election was held for that unit on June 18, which the Union won. The Union was certified for the painters unit, and the parties subsequently reached a collective-bargaining agreement for that unit.

[3] The Respondent was found to have interrogated employees, made threats to close the plant, and made other coercive statements showing antiunion animus in violation of Sec. 8(a)(1). In addition, the Respondent was found to have terminated 13 employees immediately after the assembly election in violation of Sec. 8(a)(3).

[4] 395 U.S. 575 (1969).

[5] Member Emanuel did not participate in the Board's underlying decision or the underlying representation proceeding, and he expresses no views on whether either was correctly decided. He agrees, however, that the Respondent's request for reconsideration should be denied because it fails to establish any grounds warranting reconsideration under Sec. 102.48(c)(1) of the Board's Rules and Regulations.

[6] Member McFerran dissented in *PCC* and adheres to that position.

[7] A *Gissel* bargaining order may issue only for a unit that is "appropriate" for collective bargaining. See, e.g., *Farris Fashions*, 312 NLRB 547, 561 (1993), enfd. 32 F.3d 373 (8th Cir. 1994); *BI-LO*, 303 NLRB 749, 769 (1991), enfd. 985 F.2d 123 (4th Cir. 1992).

[8] 327 NLRB 556, 556 (1999) ("It is well established that the Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis.") (citation omitted).

Operations[9] to find that a unit of all assembly employees constituted a unit appropriate for collective bargaining. Because the Regional Director considered the same community-of-interest factors required under *PCC* in reaching his conclusions with regard to the appropriateness of the unit, the Respondent's assertion that a different analysis would have occurred under *PCC* is misplaced. Accordingly, we find that further consideration of this issue under *PCC* would serve no useful purpose.[10]

IT IS ORDERED, therefore, that the Respondent's request for reconsideration is denied.

Dated, Washington, D.C. December 12, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] 338 NLRB 123, 123 (2002) ("In determining whether a unit of employees . . . is appropriate, the Board considers 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.").

[10] As a result, we find it unnecessary to address the General Counsel's and the Union's additional arguments pertaining to the timeliness of the Respondent's request for reconsideration or to the retroactive application of *PCC* to bargaining units the Board has previously certified or found appropriate. We likewise find it unnecessary to determine whether the issuance of *PCC* while this case was pending, if it were to have required a different analysis by the Regional Director, would have by itself constituted an "extraordinary circumstance" warranting reconsideration of our decision under Sec. 102.48(c) of the Board's Rules and Regulations.