

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

LEGGETT & PLATT, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
(IAM), AFL-CIO

Cases 09-CA-194057
09-CA-196426
09-CA-196608

**LEGGETT & PLATT, INC.’S MOTION FOR RECONSIDERATION OF
THE BOARD’S DECEMBER 9, 2019 DECISION AND ORDER**

Pursuant to Section 102.48(d)(1) of the National Labor Relations Board’s (“Board” or “NLRB”) Rules and Regulations, Respondent Leggett & Platt, Inc. (“Leggett” or “the Company”) requests the Board to reconsider its December 9, 2019 Decision and Order in the above referenced matter (the “Decision”).

As explained below, the Board’s Decision not to apply *Johnson Controls* retroactively to this case is not only an unjustified departure from its traditional retroactivity standards, but it also contradicts the Board’s own reasoning in support of retroactive application in *Johnson Controls*.

I. PROCEDURAL HISTORY

For the purposes of this Motion, Leggett notes that the Board stated that the facts of this case are fully set forth in the Administrative Law Judge’s (“ALJ”) Decision.¹ Certain aspects of the case’s facts and procedural history are relevant to the Motion, however, as set forth below.

1. On March 1, 2017, Leggett withdrew recognition from the International

¹ See 368 NLRB No. 132, slip op. at 1, n.4. Leggett filed exceptions to of the ALJ’s factual findings, and likewise, it asserted in its brief to the D.C. Circuit that the findings of the Board were not supported by substantial evidence. Leggett reserves the right to argue about the propriety of the ALJ’s and Board’s findings of fact in an appropriate forum.

Association of Machinists and Aerospace Workers Local Lodge 619 (“Union”) based on a decertification petition indicating that the Union lost its majority support, and the Union filed an unfair labor practice charge based on this withdrawal. The Union’s unfair labor practice charge was supported by employee signatures on a counter-petition, many of whom had also signed the decertification petition. The Union withheld the existence of its counter-petition from Leggett. Indeed, Leggett did not receive a copy of the counter-petition until it was disclosed in the 10(j) proceedings discussed below.

2. On June 9, 2017, decertification petitioner Keith Purvis filed case number 09-RD-200329 seeking a decertification election. The Regional Director determined that this petition was blocked by the pending unfair labor practice charges, and the Board upheld this decision on January 19, 2018.

3. The live pleading in this case is the General Counsel’s Second Consolidated Complaint and Notice of Hearing dated June 15, 2017.² The General Counsel additionally sought a preliminary injunction under Section 10(j) of the Act in the United States District Court for the Eastern District of Kentucky. The District Court denied the Board’s request for preliminary injunctive relief on June 20, 2017. *See Lindsay ex rel. NLRB v. Leggett & Platt, Inc.*, No. 5:17-198-KKC, 2017 U.S. Dist. LEXIS 94683, *7 (E.D. Ky. June 20, 2017). Leggett filed its Amended Answer and Affirmative Defenses to the Second Consolidated Complaint on July 14, 2017. On July 19, Keith Purvis and 10 other employees (the “Proposed Intervenors”) filed a motion to intervene, which was denied on July 20 by the Regional Director.

² The General Counsel issued an Original Complaint on April 11, 2017. Leggett filed and served its Answer and Affirmative Defenses on April 24, 2017. The General Counsel issued an Amended Complaint April 27, 2017. Leggett filed and served its Answer and Affirmative Defenses to Amended Complaint on May 11, 2017.

4. After a hearing conducted on July 24 – 26, 2017, the ALJ issued his decision on October 2, 2017. Applying *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the ALJ found that Leggett violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition from the Union because it failed to prove that the Union had actually lost majority support on March 1, and by thereafter unilaterally making changes to employees' terms and conditions of employment without giving the Union notice or an opportunity to bargain.³ Among other remedies, the ALJ recommended an affirmative bargaining order, requiring Leggett to recognize and bargain with the Union for a reasonable period of time.

5. The case was transferred to the Board on October 2, 2017. Leggett filed exceptions to the ALJ's decision on October 30, 2017, as did the Counsel for the General Counsel and the Proposed Intervenors. On December 17, 2018, the Board affirmed the ALJ's rulings, findings, and conclusions and adopted the ALJ's recommended order, with only slight modifications to conform it to the Board's standard remedial language. *Leggett & Platt, Inc.*, 367 NLRB No. 51, slip. op. 1 n. 4 & 5 (Dec. 17, 2018).

6. On January 8, 2019, Leggett filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the D.C. Circuit, and on February 8, 2019, the Board filed a cross-application for enforcement.

7. On July 3, 2019, the NLRB decided *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019), a case that began in 2015. Like *Leggett*, *Johnson Controls* involved a situation where employees provided their employer with evidence that a union had lost majority support,

³ The ALJ further found that Leggett violated Section 8(a)(1) when a supervisor unlawfully provided aid to the petition demonstrating the lack of union majority support, which aid occurred after the withdrawal of recognition. The ALJ dismissed an allegation that Leggett violated Sections 8(a)(5) and (1) by unilaterally changing the job-bidding procedure.

the employer announced that it would withdraw recognition when the parties' contract expired, and the union subsequently claimed that it had reacquired majority status before the employer withdrew recognition and without disclosing evidence supporting its reacquired majority status to the employer. On February 16, 2016 (over a year *before* Leggett withdrew recognition), ALJ Keltner W. Locke dismissed the complaint, noting he did not believe that the Board intended *Levitz* to be extended so far that it allowed the union to defeat an employer's withdrawal by withholding evidence. *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 29-30. Exceptions to ALJ Locke's decision remained pending at the Board while Leggett withdrew recognition, litigated the Union's unfair labor practice charges before the Region, the ALJ, and the Board, and appealed the Board's decision to the D.C. Circuit.

8. In *Johnson Controls*, the Board majority announced a new framework for evaluating the lawfulness of an employer's withdrawal of recognition after the expiration of a collective bargaining agreement. In doing so, the Board overruled the portions of *Levitz* on which the determination at issue in this case were based. *See Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 2 ("we overrule *Levitz*, supra, and its progeny insofar as they permit an incumbent union to defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal"). Further, the Board majority found that *Johnson Controls* should apply retroactively. *Id.*, slip op. at 11.

9. As a result, the NLRB filed an unopposed Motion to Remand this case from the D.C. Circuit to the Board to determine whether *Johnson Controls* affected the Board's December 17, 2018 Decision and Order. On August 7, 2019, the D.C. Circuit remanded the case. Shortly after the D.C. Circuit's remand, on September 4, 2019, the Union filed case number 09-RC-

247593, seeking an election in the same bargaining unit from which Leggett withdrew recognition. The Region stayed the Union's petition pending the Board's decision on remand.

10. Following the D.C. Circuit's remand of this case to the Board, no party argued that *Johnson Controls* should not be applied retroactively to this case, and the Board did not seek any statements of position on this issue.

11. On December 9, 2019, the Board affirmed its earlier decision, refusing to apply *Johnson Controls* retroactively to this case. *See Leggett & Platt, Inc.*, 368 NLRB No. 132, slip op. at 2 (Dec. 9, 2019). Nine days later, on December 18, 2019, the Region approved the Union's request to withdraw its election petition.

II. LEGAL STANDARD

"[A] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." 29 C.F.R. § 102.48(d)(1). In doing so, a "motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." *Id.* Further, "until a transcript of the record in a case shall have been filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it." *See also* 29 U.S.C. § 160.

III. ARGUMENT

Reconsideration is warranted here because the Board improperly denied retroactive application of *Johnson Controls* to this case. "The Board's normal practice is to apply new policies and standards retroactively to all pending cases in whatever stage, unless retroactive application would work a 'manifest injustice.'" *Johnson Controls*, 368 NLRB No. 20, slip op. at 11 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). In determining the propriety of

retroactive application, the Board balances 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.” *Id.* (quoting *SNE Enterprises*, 344 NLRB at 673 and *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In evaluating the presence of manifest injustice, the Board considers: (1) the reliance of the parties on existing law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application. *Id.*; *see also Cristal USA, Inc.*, 368 NLRB No. 137, slip op. at 2 (Dec. 11, 2019) (applying factors to determine whether retroactive application of *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), would cause manifest injustice).⁴ Under these standards, the Board committed material errors in refusing to apply *Johnson Controls* retroactively to this case, and it therefore should reconsider its decision.

A. The Board Committed a Material Error by Failing to Apply its Traditional Standards Governing Retroactivity to this Case.

First, the Board erred by departing from its admitted “usual practice” of applying new standards retroactively without engaging in the required analysis to support such a departure. Rather than determining whether retroactive application of *Johnson Controls* would work a manifest injustice in this case, the Board simply rejected retroactive application for “institutional reasons” and “to best effectuate the purposes of the Act.” 368 NLRB No. 132, slip op. at 2. In doing so, the Board seemingly has instituted a new test to determine retroactive application without either of the parties asking for a revision to its retroactive application test and without the benefit of any briefing on the issue. The mere fact that this case was at one time pending before the D.C. Circuit does not excuse the Board from applying its traditional retroactivity standards. *See, e.g., Williams Energy Services*, 340 NLRB 764, 764-65 (2003) (on remand from the Fifth Circuit,

⁴ *See also Wal-Mart Stores, Inc.*, 351 NLRB 130 (2007) (applying factors to determine whether retroactive application of *IBM, Corp.*, 341 NLRB 1288 (2004), would cause manifest injustice).

finding that retroactive application of rule in *MV Transportation* would not cause manifest injustice); *Certain-Teed Corp.*, 271 NLRB 76, 76-77 (1984) (on remand from Eleventh Circuit, holding that retroactively applying new *Midland National* misrepresentation rule would not result in any manifest injustice).

Second, the Board’s decision in *Blackman-Uhler Chem. Div.*, 239 NLRB 637 (1978) does not support the Board’s failure to apply *Johnson Controls* retroactively here. Both the Board and courts have recognized that *Blackman-Uhler*’s continued vitality is “questionable”. See *In re Wells Fargo Guard Servs.*, 269 NLRB 236, 241-42 (1984) (ALJ ultimately concluding that “retroactivity is to be favored absent extraordinary circumstances which would unduly penalize a party”); see also *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1058 (11th Cir. 1983) (noting that the precedential effect of *Blackman-Uhler* is “beclouded” by the Board’s inconsistent approach in a nearly identical case, *Purnell’s Pride, Inc.*, 265 NLRB No. 146 (1982)). Indeed, before *Leggett*, the Board had not cited *Blackman-Uhler* on the question of retroactivity in over 30 years—and even then, the Board cited to the *dissent* to support application of its traditional balancing test. See *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987) (citing Member Penello’s dissenting opinion favoring retroactive application); see also *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) (same).

Further, *Blackman-Uhler* was a product of narrow procedural circumstances that are not implicated here.⁵ Unlike in *Blackman-Uhler*, there is no “flip-flop” of Board standards in this

⁵ Specifically, while *Blackman-Uhler*, which involved application of the Board’s *Hollywood Ceramics* rule, was pending before the Fourth Circuit, the Board overruled *Hollywood Ceramics* in *Shopping Kart Food Markets*, 228 NLRB 1311 (1977). The Fourth Circuit indicated that it would not enforce the Board’s bargaining order under *Hollywood Ceramics* but remanded the case for a determination under *Shopping Kart*. *Blackman-Uhler Chem. Div. v. NLRB*, 561 F.2d 1118, 1119 (4th Cir. 1977). Then, on the same day the Board decided *Blackman-Uhler* on remand, it decided to abandon *Shopping Kart* and return to its *Hollywood Ceramics* rule in *General Knit of*

case. Rather, the Board simply abandoned *Levitz* in relevant part in favor of the new framework announced in *Johnson Controls*. Additionally, in *Blackman-Uhler*, the Board’s bargaining order was not enforced in light of the Fourth Circuit’s decision constituting the law of the case—again, a different circumstance than is present here.

Finally, further distinguishing *Blackman-Uhler*, the Fourth Circuit noted that the Board had not addressed retroactive application of *Shopping Kart* in *Shopping Kart* itself, and had not done so in subsequent cases either. *Blackman-Uhler*, 561 F.2d at 1119. In contrast, the Board has determined that *Johnson Controls* should be applied retroactively using its traditional standards. *Johnson Controls*, 368 NLRB No. 20, slip op. at 11. Simply put, *Blackman-Uhler* is insufficient to justify the Board’s failure to apply its traditional retroactivity analysis or its departure from its long-established practice of applying cases retroactively. Thus, this material error requires reconsideration.

B. The Board Committed Material Error By Not Applying *Johnson Controls* Retroactively In this Case.

Second, the Board erred by not applying *Johnson Controls* retroactively to this case under its traditional standards.⁶

1. The Reliance Interests are Weak and Thus Counsel in Favor of Retroactive Application.

Cal., Inc., 239 NLRB 619 (1977). Thus, any question about retroactive application of *Shopping Kart* in *Blackman-Uhler* was effectively moot, whether the *Blackman-Uhler* majority said so or not, because the same question would have been presented about the retroactive application of *General Knit* to the case.

⁶ Even under the purported test the Board applied, *i.e.*, “institutional reasons” and “the purposes of the Act”, retroactive application is appropriate for all the reasons discussed in Section B—namely, the weak legal ground on which the bargaining order rests, the concerns *Johnson Controls* addressed regarding employee free choice, and the fact that it was the employees, not Leggett, who took the initial steps to upset the bargaining relationship. These facts indicate that institutional concerns and the purposes of the Act should be balanced on the side of employee choice rather than attempting to enforce bargaining orders that are likely to be overturned on appeal.

The reliance interests are weak in this case, meaning the first factor weighs in favor of retroactive application. *See MV Transportation*, 368 NLRB No. 66, slip op. at 12 (Sept. 10, 2019) (finding reliance interests exceptionally weak where the standard being overruled was subjected to sustained criticism). By the time Leggett withdrew recognition, the *Levitz* loophole at issue had been questioned and criticized by ALJs and Board members alike. *See, e.g., Scoma's of Sausalito, LLC*, 362 NLRB No. 174, slip op. 1 at n.2 (Aug. 20, 2015) (Member Johnson suggesting that *Levitz* should not be read as “a policy allowing unions to withhold evidence of reacquired majority support”); *Parkwood Developmental Center*, 347 NLRB 974, 975 n.8 (2006) (Chairman Battista noting that he would require that the union present, within a reasonable time, any evidence of reacquisition of majority status); *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 29 (ALJ Locke declining to extend *Levitz* “so far that it smiles on ‘gotcha’”). Indeed, in *Johnson Controls*, the Board specifically noted that preexisting precedent had been “vigorously criticized” on these grounds, and, in light of the D.C. Circuit’s opinion in *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), “the enforceability of an affirmative bargaining order issued under preexisting law would be in serious doubt.” 368 NLRB No. 20, slip op. at 11.

More importantly, as a result of its decision in *Johnson Controls* to apply the new framework retroactively, the Board created the expectation by all parties that *Johnson Controls* would be applied here, too. Indeed, the Union was sufficiently convinced about the retroactive application of *Johnson Controls* to this case that it filed an election petition while this case was still pending before the Board on remand. Tellingly, the Union then withdrew its petition immediately following the Board’s December 9 decision. As such, the parties could not—and did not—rely on the Board continuing to adhere to its pre-*Johnson Controls* standard. *MV Transportation*, 368 NLRB No. 66, slip op. at 12.

2. Retroactive Application Accomplishes the Purposes of the Act.

Second, retroactive application of *Johnson Controls* to this case accomplishes the purposes of the Act. When it decided this case on December 9, the Board had already held that the *Johnson Controls* standard better promotes the purposes and policies of the Act than the *Levitz* rule on which its bargaining order is based. The new standard “ends the unsatisfactory process of attempting to resolve conflicting evidence of employees’ sentiments concerning representation in unfair labor practice cases” and instead resolves these issues through an election, “the preferred method for determining employees’ representational preferences.” 368 NLRB No. 20, slip op. at 10.⁷ Thus, the *Johnson Controls* approach better safeguards employee free choice, one of the underlying policies of the Act. Additionally, the Board found that the new standard promotes stability in labor relations because employers will no longer be “stumbl[ing] blindly into unlawful withdrawals of recognition.” *Id.* at 11. Rather, “legal and practical considerations will exert substantial pressure on employers to maintain the status quo until the representation process is concluded.” *Id.*

The fact that the Board had issued a bargaining order does not change this result. As explained above, the enforceability of the Board’s bargaining order was already in doubt given the repeated criticisms of *Levitz*, the D.C. Circuit’s *Scomas* decision, and Leggett’s appeal to the D.C. Circuit seeking application of *Scomas*. Moreover, bargaining orders specifically, and Union representation generally, are premised on the fact that a majority of the affected employees support the Union. *See* 29 U.S.C. § 159(a). Here, however, the Union’s majority status is in question due

⁷ The Board further noted that it could not ignore the interests of a majority of unit employees who signed a valid, uncoerced petition that became the basis for a decertification petition—a petition that remained pending but would have been dismissed if *Johnson Controls* was decided under preexisting precedent. *Id.* at 11-12. Likewise, here, the Board’s ruling against retroactive application is inconsistent with and undermines employees’ Section 7 rights by allowing a valid decertification petition to be blocked based on preexisting precedent and preventing an election.

to the presence of a decertification petition and pending RD case as well as the petition filed by the Union after this case was remanded. Under these circumstances, the Board's bargaining order lacks justification from either a legal or a policy perspective. Thus, the Board materially erred by choosing to enforce its weak bargaining order and to impose a union on employees who may not want one, instead of providing them the opportunity to take advantage of the Board's representation procedures through retroactive application of *Johnson Controls*.

3. No Particular Injustice Arises in Applying *Johnson Controls* Retroactively.

Third, retroactive application would not give rise to any particular injustice in this case. Although the Board reasoned that retroactive application “would seriously undermine the Board’s expectation of prompt compliance with its bargaining orders,” “incentivize parties to delay compliance with bargaining orders in the hope or expectation of a change in that law,” and “disrupt the bargaining relationship of the parties to this case,” this logic is flawed for several reasons. 368 NLRB No. 132, slip op. at 2.

As discussed above, the Board's bargaining order in this case has been on weak legal ground since its inception. As the Board recognized in *Johnson Controls*, “**the enforceability of an affirmative bargaining order issued under preexisting law [was] in serious doubt**” because of the D.C. Circuit's March 2017 *Scomas* decision. 368 NLRB No. 20, slip op at 11 (emphasis added). Thus, the D.C. Circuit had already issued a decision that “seriously undermine[d] the Board’s expectation of prompt compliance” at the time the Board issued its December 17, 2018 decision. Neither Leggett, nor any other party going before the D.C. Circuit, had to hope for or expect a change in the law.

Further, any incentive for delayed compliance with a bargaining order is built into the Act itself. Board orders are not self-enforcing, so aggrieved parties have a right to appeal adverse

Board determinations to an appropriate court of appeals, and in the event a party chooses not to comply with a Board order, the Board’s recourse is to do the same. *See* 29 U.S.C. §§ 160(e), (f); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990) (“A remedial order issued by the Labor Board is not self-executing. The respondent can violate it with impunity until a court of appeals issues an order enforcing it.”). Leggett’s delayed compliance was merely a function of its statutory right to appeal adverse Board determinations, exercised because it had good reason to believe the Board’s bargaining order would not be enforced by the D.C. Circuit.⁸ The Board’s decision in *Leggett* has no effect on this statutory structure.

Finally, there is no danger that retroactive application of *Johnson Controls* will “disrupt the bargaining relationship of the parties in this case.” 368 NLRB No. 132, slip op. at 2. Even prior to Leggett filing its petition for review with the D.C. Circuit, Leggett’s employees had disrupted the bargaining relationship by presenting a majority decertification petition to Leggett in December 2016. *See Leggett & Platt, Inc.*, 09-RD-200329 (petition filed June 9, 2017). In short, the Board’s reasons for rejecting retroactive application are not valid here.

IV. CONCLUSION

In conclusion, the Board has failed to justify its decision to ignore its own precedent to avoid retroactive application of *Johnson Controls* in this case. The Board’s reliance on *Blackman-*

⁸ Relatedly, the fact that there was over a six month time period between the Board’s December 2018 decision in this case and its 2019 decision in *Johnson Controls* does not help the Board’s case for not applying *Johnson Controls* retroactively under its long-established standards. It was a function of the Board, not Leggett, deciding cases in a certain order. Thus, any delay that would be caused by retroactive application of *Johnson Controls* is the Board’s fault, not Leggett’s. *See, e.g., TNS, Inc. v. NLRB*, 296 F.3d 384, 404 (6th Cir. 2002) (finding “inexcusable delay” by the Board); *NLRB v. Laverdiere’s Enters.*, 933 F.2d 1045, 1055 (1st Cir. 1991) (finding the Board’s “inordinate delay” weighed strongly against enforcing bargaining order); *Emhart Indus. v. NLRB*, 907 F.2d 372, 378-79 (2d Cir. 1990) (noting that the court has come to expect “long delays that...often force workers to wait years for a decision” from the Board).

Uhler and the presence of a bargaining order are not sufficient reasons to avoid application of the Board’s traditional retroactivity test, or to avoid retroactive application of *Johnson Controls* in this case. This point is illustrated by the Board’s own conclusion that the legal viability of bargaining orders like the one at issue were in “serious doubt” even before it issued *Johnson Controls*, and in fact before it issued its first decision in this case in December 2018. Rather, the Board’s failure to apply *Johnson Controls* retroactively to this case undermines the statutory right of Leggett’s employees to choose whether or not they want to be represented by the Union. Accordingly, for the reasons stated above and in Leggett’s previous filings in these proceedings, which are incorporated herein by reference, the Board should grant Leggett’s Motion, reconsider its Decision, and dismiss the relevant portions of the Complaint consistent with its decision in *Johnson Controls*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Reconsideration of the Board's December 9, 2019 Decision & Order were served on the following by electronic filing at NLRB.gov, email, and/or U.S. Mail this 3rd day of January:

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