UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CRISTAL USA, INC. and INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,	Case No. 08-CA-200330

UNION'S MOTION FOR RECONSIDERATION

Now comes the Charging Party, the International Chemical Workers Union Council of the United Food and Commercial Workers International Union, AFL-CIO, CLC ("Union"), by and through the undersigned counsel, pursuant to NLRB Rule 102.48(c), and hereby files this motion requesting that the Board reconsider its denial of the Union's motion for summary judgment entered on December 11, 2019, in the above-captioned matter and its effective granting of Respondent's motion for summary judgment to the extent that the Board agreed with Respondent that its effective adoption of the petitioned-for bargaining-unit in 08-RC-184947, based on utilizing the standards adopted in Specialty Healthcare, should be rejected and that the PCC Structural standards should apply. By its actions in effectively granting Cristal's summary judgment motion, the Board has violated its own, duly-adopted Rules. Despite the Board's own Rule 102.67(g) establishing that its determination, that the petitioned-for unit was appropriate and that such determination was "final" and cannot be relitigated in this unfair labor practice proceeding, as well as Cristal's failure to preserve the issue of whether

the Specialty Healthcare standard should, or should not, be applied here, it has abused its discretion by effectively (a) granting Cristals' motion, (b) overturning this Board's own "final" determination in the related RC-proceeding, (c) rejecting its own, previous, appropriate use of the Specialty Healthcare standards, and, (d) erroneously remanding for re-litigation of the appropriateness of the petitioned-for unit under the different *PCC* standards – just as requested by Cristal – all in violation of its own Rules. For this and for the reasons and as more fully set forth in the accompanying memorandum, the Union requests reconsideration.[1/]

MEMORANDUM IN SUPPORT OF UNION'S MOTION FOR RECONSIDERATION

1. By applying PCC Structurals, Inc., 365 NLRB No. 160, the Board *de facto* effectively granted the Respondent's motion for summary judgment to the effect that it directed that the Regional Director apply the standards from PCC Structurals, rather than respecting the petitioned-for bargaining-unit previously determined by the Regional Director, a decision that this Board twice previously effectively upheld against Cristal's efforts to challenge the Regional Director's unit determination. In doing so, this Board has ignored several matters, including its own duly-adopted Rule 102.67(g), as well as Cristal's failure to preserve any right to challenge in this

[1/]In further support of this motion for reconsideration, as well as in support of its summary judgment motion, the Union incorporates by reference as part of its position herein, its opposition memoranda (with supporting materials) to Cristal's request for review and to Cristal's motion for reconsideration of this Board's denial of that review request in Case 08-RC-184947; the Union's motion for summary judgment and supporting memoranda (and materials) and the Union's opposition memoranda to Cristal's motion for summary judgment in this case, Case No. 08-CA-200330.

instant, or in the related RC, case the standards adopted by Specialty Healthcare, 357 NLRB 934 (2011).

2. As argued more fully in "Charging Party Union's Memorandum in Opposition to Respondent Cristal USA, Inc.'s Motion for Summary Judgment (Plant 2 North Unit) with Supporting Memorandum" in the instant case ("Union Opposition"), which the Union incorporates herein by reference, NLRB Rule 102.67(g) should resolve this matter in the Union's favor. In part, Rule 102.67(g) provides that:

> "The Regional Director's actions are final unless a request for review is granted."

Since this Board, twice, refused Cristal's efforts to have it accept its request for review to challenge the appropriateness of the petitioned-for unit, the Regional Director's determination should have been treated as "final" and, under other provisions of the Rule, not re-litigable in this unfair labor practice proceeding.

3. Nevertheless, Cristal asserted that, despite this Rule providing for **no** exceptions, there are, in fact, two such exceptions: (1) newly-discovered, previously unavailable evidence; and (2) "special circumstances."[2/] Cristal does not allege that the first so-called newly-discovered evidence exception applies. Consequently, the Union need not address this alleged exception.

[2/]Contrary to Cristal's assertion that ***Pittsburgh Plate Glass Co. v. NLRB***, 313 U.S. 146, 162 (1941), recognizes these two (2) exceptions, this is inaccurate. At best, the portion of that case relied on by Cristal only suggests, at best, the newly-discovered evidence exception: "If the Company or the Crystal City Union desire to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue is enough." *Id*.

4. As to the second alleged exception for "special circumstances," Cristal only cited to ***Duke Univ***., 311 N.L.R.B. 182 (1993); ***Heuer Int'l Trucks,*** 279 NLRB 127 (**1986**); ***Sub-Zero Freezer Co.,*** 271 NLRB 47 (1984). Significantly, all of these decisions, including ***St. Francis Hospital,*** *infra,* relied by the Board here, pre-date the Board's adoption in 2014 and effectuation in 2015 of Rule 102.67(g). Notably, the Board's final rule differed somewhat from the Rule that it proposed. The differences reinforces the Union's position.

5. The Board in 2014 proposed:

> "(f) *Waiver; denial of request*. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review 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."

Representation-Case Procedures, Proposed Rule, 79 FR 7318-01 (Feb. 6, 2014). Unlike the proposed Rule, however, the final Rule 102.67(g) in its newly-added first sentence emphasized the finality of the Regional Director's actions; the Board even changed the title of the provision by adding the word, "***Finality***," to emphasize its position, while re-lettering the Subsection from (f) to (g):

> "*Finality; waiver; denial of request*. ***The Regional Director's actions are final unless a request for review is granted.*** Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. ***Denial of a request for review 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***."

(bold italics added).

6. The Board could not have made it clearer: it intended that a denial of a request for review was final and could not be re-litigated in an unfair labor practice proceeding. If the Board had wanted to codify, or permit, any "special" or "exceptional " circumstances exception to finality, it easily could have provided for such in its newly-adopted Rule, just as it has allowed for an exception to NLRB Rule 103.30(a), which provides:

> "(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in ***extraordinary circumstances*** and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:.."

29 C.F.R. § 103.30 (emphasis added). Indeed, in providing for a "special circumstances" exception elsewhere in the same set of Rules in 2014, but *not* in 102.67(g), the Board made it even clearer that, now, there is **no** "special circumstance" exception to 102.67(g). *See,* Rule 102.63(b)(1).

Not only did the Board not adopt any exception to Rule 102.67(g), thus rejecting any argument that might be based on ***Duke Univ.***, ***Heuer***, ***Sub-Zero***, or ***St. Francis Hospital***, it re-emphasized its position of finality in the revised, final rule. Consequently, whatever relevance those earlier cases including ***St. Francis Hospital***, 271 NLRB 948 (1984), may have had previously, they no longer apply. The Rule supersedes those cases.

The Union notes that ***Duke Univ***. merely cites ***Heuer*** *in dicta* for the proposition that RC unit determinations might be re-litigable in CA cases, though Duke apparently never argued for those exceptions and, instead, had waived the issue. ***Duke Univ. v. NLRB***, 1994 WL 665124 (unpublished)(D.C. Cir. 1994). ***Sub-Zero*** dealt with violence that precluded the

conduct of a free and fair election, not a unit-scope issue. Further, Member Zimmerman's wise dissent in ***Sub-Zero*** strikes the proper balance between the need for stability in labor issues and factors favoring reconsideration of issues, a balance effectively adopted by the Board in current Rule 102.67(g):

> "The sole reason that relitigation is being permitted here is a change in the composition of the Board from the time the representation case was litigated to the time the test of certification occurred. Certainly, the Act allows for shifts in the law when the composition of the Board changes, and undoubtedly Congress intended for the Board to respond to changing times and conditions. It is, therefore, inevitable that a certain degree of instability in Board law will arise as new Members enter into the decision-making process. ***At the same time, however, such changes undermine the goals stated by a long succession of Board Members of maximizing the voluntary settlement of cases and minimizing the litigation of labor disputes. Those goals call for giving due regard for both stability in the law and finality in litigation. Avoiding unnecessary instability and uncertainty is critical to the efficient administration of the Act***."

Sub-Zero Freezer Co., 271 NLRB 47, 48 (1984)(emphasis added). Member Zimmerman went on to emphasize:

> "Early in my tenure at the Board I took the position that factors favoring stability outweighed those favoring reconsideration of the issues in technical refusal-to-bargain cases. In *Bravos Oldsmobile*, 254 NLRB 1056 (1981), I found that selective application of the rule against relitigation of representation issues could cause far greater damage than that which might result if the representation matter was improperly decided. I decided that, in all unfair labor practice cases testing certification, I would not allow relitigation of the representation matters even if I had dissented on the underlying representation case or would have decided the case differently had I participated in it.
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> A great deal can be gained by applying this form of res judicata to the Board's processes. ***When changes in the Board occur, the parties could at least be certain that decisions already made at the representation level are final. The wisdom of this approach is particularly apparent here where there was a full hearing on the representation issue and a dissenting opinion which apparently sets forth what is now the view of the current Board.*** The reviewing court will have both the record in the hearing and the

> dissenting opinion before it for full consideration. In these circumstances, the Board would lose very little in applying the rule of res judicata and would contribute greatly to the orderly administration of the Act during a period of change."
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> ***Id.*** (emphasis added).

7. By adopting the current version of Board Rule 102.67(g), the Board effectively has adopted Member Zimmerman's wisdom and approach of finality, a *res judicata*-type of application to (closed) RC unit determinations. Here, the related RC case was closed. As former Board Member Zimmerman recognized, such an approach is much more consistent with the purposes of the Act, provides for more efficient administration of the Act, does not promote instability in labor relations, but still allows for a full record before any reviewing court, in order to allow for judicial correction in the event that the Board has seriously erred in the underlying RC case."[3/]

8. Here, this Board not only denied Cristal's request for review -- in which it sought to challenge whether Specialty Healthcare standards were applied appropriately in determining the unit – even though it had *not* preserved the right to challenge the Specialty Healthcare standards, *themselves,* when Cristal filed its Statement of Position

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[3/] The Union more fully addressed the development of NLRB Rule 102.67(g) and its applicability here in Union Opposition, pp. 9—18, particularly given Cristal's failure to preserve any right to challenge the Specialty Healthcare standards, themselves, when Cristal filed its Statement of Position in Case 08-RC-184947. The Union continues to rely on those arguments. Specifically, the Union showed that, when the Board seeks to provide for an "exceptional circumstances," or "special circumstances" exception to application of one of its rules, it knows how to do so. *See, e.g.*, NLRB Rule 102.63(b)(1) and Rule 103.30(a). In fact, Rule 103.30(a) arguably would allow for the "exception" for healthcare units, such as the one in ***St. Francis Hospital***, 271 NLRB 948 (1984), the case relied on, here, by the Board for finding "special circumstances" to apply PCC Structurals retroactively. But the Cristal unit has no connection with any healthcare operations and, therefore, the Rule 103.30(a) "exception," would not apply to Rule 102.67(g)'s finality provisions here.

in Case 08-RC-184947, as required by NLRB Rules 102.102.63(b)(1) and 102.66(d) -- the Board re-affirmed its position, when it denied Cristal's motion for reconsideration of the Board's denial of that request for review.

9. Cristal also responded to the Union's position, that Rule 102.67(g) should end this matter with the petitioned-for unit determination being treated as "final," arguing that, because the Board has taken certain positions in other cases, including in court, this shows its intent to apply PCC Structurals retroactively. However, Cristal failed to show that the unions in those cases ever raised the 102.67(g) issue.

10. Further, such actions by the Board in other cases still do not address the argument that Rule 102.67(g), as duly-adopted pursuant to the Administrative Procedures Act, provides, unlike Rules 102.63(b)(1) and 103.30(a), for ***no*** "special circumstances" exception. Applying a "special circumstances" policy to allow Cristal to challenge application of the Specialty Healthcare standard, particularly when Cristal has not preserved in its Statement of Position in the related RC case the right to challenge that standard, constitutes an abuse of the Board's discretion.

11. Other than the Dissent's apparent acknowledgement in this case that there may be a "special circumstances" exception to Rule 102.67(g) – a position with which the Union disagrees -- the Union otherwise agrees with the Dissent's position that, even assuming such a "special circumstance" exception to the Rule, no such special circumstance, here, justifies the Board's decision and remand. The Union further agrees with the Dissent's position, similar to (former) Member Zimmerman's position as stated above, that the Board's action, here, is inconsistent with the policies of the Act. As Member McFerran stated:

> "As to the purposes of the Act, to overturn a unit that was certified 2 years ago under then-applicable law will be a public signal that a union and employees in the course of organizing cannot count on achieving employer recognition of a stable bargaining unit even after they win certification. This can only discourage organizing activity while encouraging speculative and unnecessary litigation, as employers will be incentivized to test certification on any arguable basis in the hope that the Board will change the law and apply the change retroactively. This result runs diametrically counter to the Act's goal of encouraging stable collective-bargaining relationships. Similarly, the 'particular' injustice in overturning this unit by retroactive application of *PCC* will be the inevitable undermining of the morale of the affected employees, further aggravating relations between the Union, the unit employees, and the Respondent. The Union and the employees did not merely rely on pre-*PCC* law in this litigation; they invested considerable time, effort, and resources to win certification and recognition of the bargaining unit for which they petitioned. To effectively deny – or, at a minimum, significantly postpone – their opportunity to negotiate a collective-bargaining agreement with the Respondent by requiring the relitigation of their unit at this late stage qualifies as 'particular' and manifest injustice."

Cristal, 368 NLRB No. 127, slip op., pp.3—5 (2019).

12. This is a "test of cert" case, that should have been summarily decided but for the question of the appropriateness of the unit, an issue that should not have been, and should not be, relitigated in these proceedings, as described above. The Board should have denied Cristal's summary judgment motion and granted the Union's motion for summary judgment, since there are no genuine disputes that Cristal has refused to recognize and bargain with a duly-certified exclusive bargaining agent.

WHEREFORE, the Union respectfully requests that its motion for reconsideration be granted and that its summary judgment motion, in turn, be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2020, a copy of the foregoing was electronically filed using the Board's electronic filing system and served by email and First Class U.S. mail, postage prepaid, on:

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