

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
CRISTAL USA, INC.,	:	
	:	
Respondent,	:	
	:	
And	:	Case No. 08-CA-200330
	:	
INTERNATIONAL CHEMICAL	:	
WORKERS UNION COUNCIL OF	:	
THE UNITED FOOD AND	:	
COMMERCIAL WORKERS	:	
INTERNATIONAL UNION, AFL-	:	
CIO-CLC,	:	
	:	
Charging Party.	:	

**RESPONDENT CRISTAL USA, INC.’S MEMORANDUM IN OPPOSITION TO
CHARGING PARTY’S MOTION FOR RECONSIDERATION**

I. INTRODUCTION

The Union offers nothing in its Motion for Reconsideration (“Motion”) of the Board’s decision denying the Union’s (as well as the General Counsel’s) Motion for Summary Judgment (the “Decision”) that demonstrates, as required by Rule 102.48(c), extraordinary circumstances exist warranting reconsideration of the Decision.¹ On the contrary, not only does the Motion not present anything extraordinary, it presents nothing new. The arguments the Union makes are ones that (1) it made in its Memorandum in Opposition to Cristal’s Cross Motion for Summary Judgment, (2) Cristal showed are misplaced in its Reply to that Memorandum, and (3) the Board

¹ Charging Party International Chemical Workers Union Council of the United Food and Commercial Workers International Union is referred to herein as the “Union”; and Respondent Cristal USA, Inc., which was sold in the spring of 2019 and now operates as INEOS Pigments USA, Inc., is referred to as “Cristal” or the “Company.”

necessarily dismissed in its Decision. With nothing new offered, the Motion should be denied in its entirety.

II. ARGUMENT

A. **Neither The Board's Rules Nor Board Precedent Required Cristal To Raise In Its Statement Of Position In The Underlying R-Case That *Specialty Healthcare* Should Be Overruled**

As a reason why the Board should reconsider the Decision, the Union argues, again, that Cristal failed in its Statement of Position in the underlying R-Case, Case 08-RC-184947, to preserve “the right to challenge the *Specialty Healthcare* standards.” (Motion, pp.1-2, 7-8). The Union’s argument is rooted on a contention that Rules 102.63(b)(1) and 102.66(d) required the Company to identify as an issue that *Specialty Healthcare* was wrongly decided and should be overruled. The argument fails for two reasons.²

First, Rules 102.63(b)(1) and 102.66(d) do not provide, and the Board has never interpreted them to require, that an employer must raise as an issue in its statement of position that Board precedent establishing the legal standards under which a unit determination is made should be overruled. Rule 102.63(b)(1) requires an employer to state the basis for a contention a petitioned-for unit is inappropriate, while Rule 102.66(d) precludes an employer from raising at a hearing an issue it failed to identify in its statement of position. These provisions necessarily require an employer to state in its statement of position why a petitioned-for unit is inappropriate under legal standards in effect at the time the petition was filed. The provisions must be read this way because, in making a unit determination, a regional director, like an administrative law judge in unfair labor

² The Union also asserts, curiously and with no elaboration, that Cristal failed to preserve the right to challenge *Specialty Healthcare* “in this instant . . . case.” (Motion pp.2-3). The contention is baseless. In its Answer, Cristal denied the certified unit is appropriate (¶¶5 and 6), and in its affirmative defenses, the Company alleged the unit should have been found to be inappropriate for the reasons set forth in the Company’s request for review, which included an argument that *Specialty Healthcare* was wrongly decided (¶¶1 and 2).

practice case, is required to apply established Board precedent. *See, Insurance Agents' Int'l Union (The Prudential Company of America)*, 119 NLRB 768,773 (1957); *see also, Lenz Co.*, 153 NLRB 1399, 1401 (1965). In short, because a regional director cannot overrule Board precedent, the Rules do not require and cannot be read to require that an employer assert in its statement of position that it contends Board precedent should be changed.

That Rules 102.63(b)(1) and 102.66(d) do not preclude an employer from first contending that Board precedent should be overruled after a regional director has issued a decision can also be gleaned from Rule 102.67(d). Rule 102.67(d) spells out the grounds upon which the Board may grant a request for review. One of those grounds is that, “there are compelling reasons for reconsideration of an important Board rule or policy.” The inclusion of that as a ground demonstrates that the time for raising an issue the Board should overrule existing precedent is in a request for review, which Cristal did here.³

The second reason the Union’s argument fails is that Cristal, in fact, contended in its Statement of Position that the standards adopted in *Specialty Healthcare* conflicted with and failed scrutiny under the Act. Indeed, Cristal made the same or similar arguments as the employer in *PCC Structurals*. Compare 365 NLRB No. 160 at p.3, with Cristal’s SOP at pp.6-8 and 13.

B. Special Circumstances Justified The Board’s Reconsidering The Finding The Petitioned-for Unit Was Appropriate, Denying The General Counsel’s And The Union’s Motions for Summary Judgment, And Remanding The R-Case To The Regional Director For Reconsideration Of The Appropriateness Of The Unit Under *PCC Structurals*

The Union devotes most of its attention in its Motion to arguing that the Board violated Rule 102.67(g), which precludes relitigation in an unfair labor practice case of issues that were

³ The Board’s decision in *PCC Structurals* states that the employer raised the issue whether *Specialty Healthcare* should be overruled in its request for review. 365 NLRB No. 160, p.3 (2017) (“In its request for review, the Employer contends that *Specialty Healthcare* was wrongly decided.”)

decided in a related representation case, by remanding the R-Case to the Regional Director for reconsideration under *PCC Structurals*. While arguing that under the plain language of this Rule the unit determination in the R-Case was not subject to reconsideration because the Board denied Cristal's Request for Review, the Union acknowledges that the Board has long recognized two exceptions to this Rule, one for newly discovered evidence and one for special circumstances, the exception applicable here. The Union argues, however, that the Board eliminated the special circumstances exception in 2014 when it first proposed an amendment to the prior version of the Rule, Rule 102.67(f), and then in 2015 when it made additional changes and adopted the current version of the Rule, which it renumbered Rule 102.67(g). None of the contentions on which the Union bases that argument withstand the slightest scrutiny.

The Union's first and principal contention is that in adopting Rule 102.67(g), the Board overruled cases in which the Board had mentioned as well as applied the special circumstances exception, including *Duke University*, 311 NLRB 182 (1993), *Heuer Int'l Trucks*, 279 NLRB 127 (1986), *St. Francis Hospital*, 271 NLRB 948 (1984), and *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984). The Union divines that the Board overruled those cases not on anything the Board said in adopting the current rule but on the theory that if "the Board had wanted to codify, or permit, any 'special' or 'exceptional' circumstances exception to finality, it could have easily provided for such in its newly-adopted Rule." (Motion, p.5). The flaws in the Union's analysis, ones that are fatal to the Union's contention, are that (1) neither the current rule nor any earlier versions of it provided for newly-discovered evidence or special circumstances exceptions; (2) the Board adopted those exceptions based upon a finding in the Supreme Court's decision in *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146,162 (1941), a finding by which the Board is bound regardless of what its Rules say; (3) in the Final Rule published in the Federal Register on December 15, 2014,

the Board did not indicate the changes to Rule 102.67(g) were intended to overrule the case law recognizing the newly-discovered evidence and special circumstances exceptions or otherwise provide any substantive comment at all on the changes to the Rule, but it did overrule other case law in adopting other changes to its Rules, including *Barre-National*, 316 NLRB 877 (1995) (Federal Register/Vol. 79, Dec. 15, 2014, p.74386); and (4) the Board has recognized the existence of the newly-discovered evidence and special circumstances exceptions to the Rule in a host of cases since the new Rule went into effect on April 14, 2015, including in at least 15 cases in 2019, among which was *PCC Structural, Inc.* 368 NLRB No. 122 (Nov. 27, 2019).

The Union also contends that in adopting the current version of Rule 102.67(g), the Board adopted the position articulated by Member Zimmerman in his dissent in *Sub-Zero* that a change in the composition of the Board and concomitant change in Board precedent do not warrant reconsidering under new law final decisions rendered in representation cases by a prior Board. (Motion pp.5-6). The short answer to the Union's contention is that no evidence exists in the Final Rule or elsewhere that the Board considered let alone decided to adopt Member Zimmerman's views.

The Union further contends that Cristal failed to show in its Cross Motion for Summary Judgment that in cases in which the Board retroactively applied or said it would retroactively apply the unit determination standards adopted in *PCC Structural*, the unions contended 102.67(g) precluded relitigation of an underlying unit determination. That argument, however, did not need to be raised for an assessment to be made whether the change in law constituted a special circumstance warranting retroactive application of the new standards. The best illustration of that is action the Board took within a week of its issuance of *PCC Structural* in a test of certification case that was then pending post-oral argument before the District of Columbia Court of Appeals,

Volkswagen Group of America v. NLRB, Case No. 16-1309. There, the Board filed a motion with the Court, which the Court granted, asking the Court to remand its *Specialty Healthcare*-based decision to the Board for reconsideration under *PCC Structural*s. Shortly after the Board issued *PCC Structural*s, the General Counsel, in Memorandum OM 18-05, also determined that the case provided the requisite extraordinary circumstances to revisit unit determinations or election agreements made prior to the case's issuance, advising the Regions that the "modification of extant law by the Board in *PCC* constitutes such an 'unusual' or 'extraordinary' change in circumstances as to warrant reconsideration of the propriety of a bargaining unit defined under a stipulated or consent election agreement or decision and direction of election in a currently active case." (See Exhibits A and B to Cristal's Memorandum in Support of its Cross Motion for Summary Judgment).

The Union's remaining argument – that the Board abused its discretion in applying a special circumstances exception in this case – does not require any comment except to say that the Union does not cite any authority in support of the argument and that the authority that exists supports the Board's determination that the appropriateness of the petitioned-for unit should be reconsidered under *PCC Structural*s.⁴

III. CONCLUSION

For all the foregoing reasons, Cristal respectfully requests that the Board issue an order denying the Union's Motion in its entirety.

⁴ The Union also expresses at the end of its Motion that it agrees with the position taken by Member McFerran in her dissent that this case does not present any special circumstances, as well as that it agrees with policy-related points she made akin to those made by Member Zimmerman in *Sub-Zero*. Suffice it to say that the Union's position is not surprising and requires no discussion beyond what has already been addressed.

Respectfully submitted,

/s/ David A. Kadela

David A. Kadela

Brooke E. Niedecken

LITTLER MENDELSON, P.C.

21 East State Street, 16th Floor

Columbus, Ohio 43215

Telephone: 614.463.4201

Facsimile: 614.221.3301

Email: dkadela@littler.com,

bniedecken@littler.com

Attorneys for Cristal USA, Inc.

CERTIFICATE OF SERVICE

I certify that the foregoing *Memorandum in Opposition to Charging Party's Motion for Reconsideration* was electronically filed on January 23, 2020, through the Board's website, is available for viewing and downloading from the Board's website, and will be sent by means allowed under the Board's Rules and Regulations to the following parties:

Nora McGinley, Acting Regional Director
NATIONAL LABOR RELATIONS BOARD
Region 8
1240 East 9th Street, Suite 1695
Cleveland, OH 44199-2086

And

Lance Heasley, General Organizer
International Chemical Workers Union Council of the UFCW
516 N. Main Street
New Martinsville, WV 26155

And

Randall Vehar
UFCW Assistant General Counsel
ICWUC/UFCW Legal Department, 6th floor
1655 W. Market Street
Akron, OH 44313

/s/ David A. Kadela

David A. Kadela