

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

GREEN JOBWORKS, LLC

Case 05-CA-168637

Respondent, and

**CONSTRUCTION AND MASTER
LABORERS' LOCAL UNION 11,
LIUNA,
Charging Party.**

**INTERVENOR'S MOTION FOR RECONSIDERATION
OF ORDER DENYING SUMMARY JUDGMENT AND TO REMAND**

The Charging Party, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, (hereinafter, the "Union" or "Local 11"), files this Motion for Reconsideration of the Board's Order, dated February 4, 2020, denying the General Counsel's Motion for Summary Judgment and of the Board's procedurally improper order to "remand" a different case that was not before it, namely, Green JobWorks, LLC, 05-RC-154596.

- I. THE BOARD LACKED AUTHORITY TO PERMIT THE RELITIGATION OF THE DETERMINATION OF THE BARGAINING UNIT.**
 - A. PCC Structurals Cannot Apply to Case No. 05-RC-154596 Because That Case Was Not Pending When PCC Structurals Was Announced or When the Board Issued Its Order.***

In its Order of February 4, 2020, the Board denied the General Counsel's motion for summary judgment and claimed to "remand" Case 05-RC-154596 to the Region to apply *PCC Structurals*, 366 NLRB No. 160 (2017), to the determination of the bargaining unit. Although the Board relied upon its longstanding practice of applying new decisions to "all pending cases

in whatever stage,” *see e.g., SNE Enterprises*, 344 NLRB 673, 673 (2005), that rule cannot result in applying *PCC Structural*s to the present case. Quite simply, *PCC Structural*s announced a rule applicable only to Representation Cases. The rule, however, has no application to a Complaint case, like the present case pending before the Board. Although *PCC Structural*s could apply to the underlying Representation Case between the present parties. i.e. the underlying Representation Case 05-RC-154596, that case is closed and no longer is pending. Indeed, Case No. 05-RC-154596 was not pending when *PCC Structural*s was decided. Because the underlying representation case is not and was not pending, *PCC Structural*s would not apply to it, even under the Board’s longstanding practice of applying new rules to “all *pending* cases in whatever stage.”

Indeed, the Board must be aware that it is shoehorning the retroaction application of *PCC Structural*s into a situation where it does not fit, because the Board is indulging in legal fictions in order to obtain the result it wants.

The first legal fiction is that *PCC Structural*s can apply to this case. *PCC Structural*s cannot apply to this case because this is a Complaint case where the Employer is alleged to have failed to recognize the Union, which is its employees’ certified representative. *PCC Structural*s has nothing relevant to say in the instant context.

The second legal fiction indulged by the Board is that it is “remanding” Case No. 05-RC-154596. Merriam-Webster’s Dictionary defines “remand” to mean “to order back: such as (a:) to send back (a case) to another court or agency for further action.”¹ The Board, however, cannot “send back” what is not before it, and Case No. 05-RC-154596 is not before it and therefore cannot be “remanded.”

¹ Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/remand>. Accessed 10 Feb. 2020.

What the Board actually is doing is ordering Region 5 to “re-open” Case No. 05-RC-154596. Presumably, however, the Board is reluctant to say this straightforwardly so as not to attract attention to the fact that this case is not currently “pending,” but, in fact, has been closed.

In sum, *PCC Structural*s does not apply to Case No. 05-RC-154596 because that case is closed and is not currently pending, and *PCC Structural*s does not apply to the instant case, 05-CA-168637, because this is a Complaint Case whose issues pertain to whether or not the Employer lawfully refused to recognize the employees’ certified exclusive representative, an issue on which *PCC Structural*s has nothing of relevance to say.

B. *St. Francis Hospital* Is Inapposite Because No Special Circumstances Are Present Justifying the Board to Reconsider the Underlying the Representation Case in the Context of the Board’s Review of the Complaint Case.

Board Regulations prohibit the relitigation of issues that could have been raised in a representation in any subsequent complaint case. *See* Rules and Regulation 102.67(g).² The Board improperly relied upon *St. Francis Hospital*, 271 NLRB 949 (1984) as precedent for revisiting an issue from the underlying representation case during the complaint case testing the certification. *St. Francis Hospital* does not support the argument that the Board can permit the relitigation of an underlying representation case so long as the NLRB has issued a new rule in the

² Rules and Regulation 102.67(g) provides as follows:

Finality; waiver; denial of request. The Regional Director’s actions are final unless a request for review is granted. 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.

29 C.F.R. § 102.67(g) (emphasis added).

intervening time since the representation case was concluded. To the contrary, *St. Francis Hospital* holds that the Board can act in contravention of its regulations barring the relitigation of representation cases in complaint cases only in the presence of “special circumstances.” *St. Francis Hospital* Board makes clear, however, that the “special circumstances” that justified relitigation of the unit description in that case was not the existence or even the opportunity to announce a “new rule.”

The *St. Francis Hospital* Board is clear that the “special circumstances” that were present in that case was the existence of a decade-long circuit split among federal courts of appeals and the NLRB over the validity of the Board’s approach to defining appropriate units for health care facilities. The Board identified the “special circumstances” present in the case as follows:

In view of the history of controversy surrounding the issue of appropriate bargaining units in the health care field—and noting particularly the frequency with which courts of appeals have disagreed with our unit determination—we have decided to reconsider our earlier decision.

St. Francis Hosp., 271 NLRB 949 (1984) (emphasis added)

The Board continued to describe a split of opinion among the circuit courts, writing, “[t]he principal division is between the Ninth and Tenth Circuits, which advocate a “disparity-of-interests” test, and the Second, Eighth, and Eleventh Circuits which, although acknowledging the necessity to restrict health care units, disagree with that test.” *St. Francis Hosp.*, 271 NLRB 948, 952 (1984) (footnotes omitted)

Because *St. Francis Hospital* was a test-of-certification case, the purpose of the case was to bring the matter before a circuit court of appeal, in that case either the Ninth Circuit Court of Appeals or the DC Circuit. For that reason, the Board deemed it appropriate to announce a new rule in an effort to resolve the circuit split, rather than applying the prior rule which already was subject to a circuit split with half of the courts disagreeing with Board’s position. The lesson of *St. Francis Hospital*, therefore, is that the Board can disregard the ordinary rules against re-

litigating representation cases in complaint cases when the Board is attempting to resolve a circuit split.

Critically, the *St. Francis Hospital* Board nowhere ruled that simply announcing a “new rule” is sufficient to disregard the Board’s rule against the relitigation of representation cases in complaint cases. If that were sufficient, then the *St. Francis Hospital* Board would not have needed to announce a “special circumstances” exception to the prohibition on relitigation; instead, the Board would have simply have announced a new rule and then followed its customary practice of applying new rules retroactively, including by permitting the relitigation of an issue from a representation case in complaint cases. *St. Francis Hospital* contains no such holding because the Board does not have a customary practice of permitting the relitigation of representation cases in the context of complaint cases. Indeed, in the history of the Board’s administration of Act, *St. Francis Hospital* stands out precisely because it constitutes a rare deviation from regular Board practice of not permitting the relitigation of representation cases during subsequent complaint cases. And the reason the Board gave for deviating from its own rules was to address a truly “special” and unusual situation involving a broad split in circuit court opinion regarding the Board’s approach to finding appropriate units in healthcare facilities.

Indeed, allowing relitigation of representation cases anytime a new rule is announced would dramatically broaden the exception to the Board’s rule against relitigation. After all, the argument that the Board should establish a new rule is a standard justification for making a request for review to the Board in the first place. *See* 29 C.F.R. 102.76(b)(4) (permitting a request for review on the grounds that “there are compelling reasons for reconsideration of an important Board rule or policy”). If the Board were to make the announcement of a new rule a reason for relitigating a representation case in the context of a complaint case, the Board would be permitting parties to seek relitigation of the representation case in virtually every test-of-

certification complaint case. An exception that broad would leave almost nothing remaining of the Board's regulation prohibiting the relitigation of representation cases in the context of complaint cases. The *St. Francis Hospital* Board certainly did not understand itself to be essentially taking a wrecking ball to the prohibition against relitigation. Rather the *St. Francis Hospital* Board was attempting to deal with a decade-long and thorny disagreement between itself and federal courts of appeal. That was the circumstance in which the Board was willing to make an exception to its prohibition against relitigating representation cases in complaint cases.

Here, there is no thorny circuit split that justifies disregarding the Board's regulation prohibiting the relitigation of a representation case in a complaint case. To the contrary, the Board's prior rule of *Specialty Healthcare* was uniformly affirmed by the federal circuit courts.³ No "special circumstance," therefore, permits the relitigation of the underlying representation case here.

C. Because the Representation Case 05-RC-154596 Was Not Pending When *PCC Structural*s Was Announced, and Because *St. Francis Hospital* Does Not Apply, the Board Lacked Authority to Permit the Relitigation of the Bargaining Unit.

Because Case No. 05-RC-154596 was not pending at the time *PCC Structural*s was announced or when the Board considered the General Counsel's summary judgment motion, the Board lacked authority to apply *PCC Structural*s under the Board's customary practice for retroactively applying new rules to all cases then pending. In addition, because *St. Francis Hospital* does not apply because there was no circuit split with respect to *Specialty Healthcare* requiring the Board to engage in additional development of Board doctrine to attempt to resolve

³ *Specialty Healthcare* was affirmed by all eight circuit that reviewed it. See *Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016), cert. denied, 137 S.Ct. 2265 (2017); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017).

the dispute, no special circumstances are present here justifying the Board's deviation from the Board's rule that prohibiting the relitigation of issues that could have been raised in the underlying representation case.

Accordingly, under its own rules, the Board lacked authority to permit the relitigation of the unit determination in this case. For that reason, the Board's order denying summary judgment and "remanding" Case No. 05-RC-154596 to the Region was in error and should be vacated.

II. IN ANALYZING THE MANIFEST INJUSTICE OF APPLYING *PCC STRUCTURALS* TO THE INSTANT CASE, THE BOARD FAILED TO CONSIDER THE FACT THAT THE UNION HAS OBTAINED TWO CERTIFICATIONS INVOLVING DIFFERENT GROUPS OF GREEN JOBWORKS LABORERS IN RELIANCE ON *SPECIALTY HEALTHCARE*, UNDERSCORING THE PARTIES' RELIANCE ON THE LAW PRIOR TO *PCC STRUCTURALS*.

In its initial order, the Board failed to address the fact that the Union has organized two separate cases involving Green JobWorks in reliance on *Specialty Healthcare*. Local 11 is the certified representative of Green JobWorks employees assigned to ACECO, LLC, which is the context of the current ULP charge. Local 11 also is the certified representative of employees jointly employed by Green JobWorks and Retro Environmental, Inc. *See Retro Environmental, Inc.-Green JobWorks, LLC*, 05-RC-153468. The existence of two certifications obtained through two Board proceedings underscores the complexity and difficulty of trying to apply *PCC Structurals* to this proceeding.

The Employer believes that the Board should have found a wall-to-wall unit that includes all Green JobWorks laborers assigned to all using-employers. Such a finding in this case would conflict with the certification in the Retro case. But the Retro case already has received a final ruling from the Board affirming Local 11 as the exclusive representation of employees jointly-employed by Green JobWorks and Retro Environmental, as well as being enforced by the Fourth Circuit Court of Appeals. *See Retro Environmental, Inc.-Green JobWorks, LLC*, 05-CA-195809; *aff'd NLRB v. Retro Environmental, Inc. and Green JobWorks, LLC*, No. 18-1245 (4th Cir. 2018).

The Board, therefore, cannot apply *PCC Structurals* to the Retro Environmental case, and it cannot conduct an election of a wall-to-wall unit in this case without coming into conflict with the certification that applies to Green JobWorks employees assigned to Retro Environmental. This procedural complexity demonstrates the difficulty of trying to impose *PCC Structurals* after so many years of reliance on the prior law. The parties' reliance on the prior law has created a knot that cannot be untied.

CONCLUSION

Based upon the foregoing, the Board's order denying summary judgment and "remanding" Case No. 05-RC-154596 to the Region was in error and should be vacated.

February 14, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing MOTION FOR RECONSIDERATION was served on the parties identified below by Electronic Mail:

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