

ORAL ARGUMENT NOT YET SCHEDULED**Nos. 19-1256, 20-1011**

In the United States Court of Appeals
For the District of Columbia Circuit

PCC STRUCTURALS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, LOCAL LODGE 63,
Intervenor

On Petitions for Review and Cross-Application for Enforcement of an Order of the
National Labor Relations Board, Case Nos. 19-CA-207792 and 19-CA-233690

FINAL BRIEF OF PETITIONER

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CERTIFICATE OF INTEREST AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. The parties and intervenor who appeared in the administrative proceedings before the National Labor Relations Board and have appeared in this Court are: Petitioner PCC Structural, Inc., Respondent National Labor Relations Board, and Intervenor International Association of Machinists and Aerospace Workers, Local Lodge 63.

PCC Structural, Inc. is a wholly owned subsidiary of Precision Castparts Corporation, which is a wholly owned subsidiary of Berkshire Hathaway Inc.

Rulings Under Review. The decision of the Board in the refusal-to-bargain cases, Nos. 19-CA-207792 and 19-CA-233690, was issued on November 27, 2019 and can be found at JA8-12. The decisions of the Board in the underlying representation case, No. 19-RC-202188, were issued on December 15, 2017 and November 28, 2018 and can be found at JA1085-1110 (*PCC Structural I*) and JA1309-10. No citation exists to any of these decisions in the Federal Register.

Related Cases. The case was not previously before this Court or any other court. There are no related cases, with the exception of the consolidated petition (No. 19-1257) and cross-application for enforcement (No. 20-1011).

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STATEMENT REGARDING ORAL ARGUMENT

PCC Structurals, Inc. respectfully requests oral argument in this case. This case presents complex procedural and substantive issues, and oral argument will assist the Court in reaching a full and complete understanding of those issues and will allow counsel to address any questions from the panel.

GLOSSARY

Term	Definition
PCC	PCC Structural Inc.
<i>PCC Structural I</i>	<i>PCC Structural</i> , 365 NLRB No. 160 (2017). The first case in this series which overturned <i>Specialty Healthcare</i> .
<i>PCC Structural II</i>	The Board's unpublished Order denying the Company's second request for review.
Portland Operation	Three facilities at issue in this case located in the Portland area where the Company manufactures castings.
Summary Judgment	Order issued by the Board granting General Counsel's Motion for Summary Judgment related to the unfair labor practice and denying PCC's Opposition to the Motion for Summary Judgment and Response to the Notice to Show Cause.
The Act	National Labor Relations Act, 29 U.S.C. § 151, <i>et. seq.</i>
The Board	National Labor Relations Board
The Union	International Association of Machinists and Aerospace Workers, Local Lodge 63

STATEMENT OF JURISDICTION

This is a timely Petition for Review, filed December 9, 2019, of a final Decision and Order of the National Labor Relations Board, dated November 27, 2019. This Court has jurisdiction pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(f).

The NLRB has filed a cross application for enforcement of its Decision and Order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e).

The Union also filed a petition for review of the NLRB's decision (docketed as No. 19-1257). The Court consolidated the appeals on January 21, 2020, granted the Union's motion to intervene on January 30, 2020, and granted PCC's motion to intervene on February 4, 2020. Thus, the proceedings are consolidated for all purposes.

STATEMENT OF THE ISSUES

1. Whether the National Labor Relations Board provided sufficient explanation of its reasoning.

2. Whether the National Labor Relations Board, in certifying welders as a bargaining unit under the community-of-interest test, failed to apply its precedent, including *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) (*PCC Structurals I*) and *The Boeing Company*, 368 NLRB No. 67 (2019).

3. Whether the National Labor Relations Board erred in certifying welders as a bargaining unit under the craft unit standard, including:

a. whether PCC was deprived of due process because it failed to receive adequate notice that on remand in *PCC Structurals I*, the Regional Director was considering certification of the bargaining unit as a craft unit;

b. whether the Board, in certifying the bargaining unit of welders as a craft unit, failed to apply its precedent, including *In re Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

STATUTES AND REGULATIONS

The applicable provisions are set forth in the addendum to this brief.

INTRODUCTION

This petition challenges the Board's certification of a bargaining unit of "rework welders and rework specialists" employed by PCC at three different facilities in Oregon. Because rework welders and rework specialists are responsible for only a small portion of a highly integrated manufacturing process and because these employees have no interests distinct from the interests of the other employees involved in the manufacturing process, PCC contends that they are not an appropriate bargaining unit. The only appropriate bargaining unit would be a "wall-to-wall" unit, of all production and maintenance employees.

Although the Union sought certification of the bargaining unit under the community-of-interest test, the Regional Director combined the community-of-interest test with a different test applicable to "craft units." Because PCC never received notice that craft-unit certification was at issue and never received the opportunity to present evidence or argument regarding the craft unit factors, PCC was denied due process.

Although the Board denied review, it rejected the test applied by the Regional Director. As its splintered decision reveals, the Board recognized the traditional community-of-interest test and craft-unit test as alternatives. One member (McFerran) found that the unit was appropriate under both tests. One member (Kaplan) found that the unit was appropriate under the traditional test but not as a

craft unit. And one member (Emanuel) found that the unit was appropriate as a craft unit but not under the community-of-interest test.

Neither finding by the Board is adequately explained, and this Court should grant the petition, vacate, and remand for further explanation. If this Court considers the merits of the Board's findings, it should grant the petition because the Board failed to apply its precedent under both the traditional community-of-interest test and the craft-unit test.

STATEMENT OF THE CASE

PCC and Its Organization

PCC manufactures steel superalloy and titanium investment castings—metal replicas of a particular part—for use in aircraft engines, airframes, industrial gas turbine engines, military armaments, medical prosthetic devices, and other industrial markets. JA21. Because of the critical applications in which these parts are used, PCC’s customers have very, very low tolerance for defects. JA30.

PCC manufactures these castings at three facilities in the Portland, Oregon area. JA47-48. These facilities are referred to as the “Portland Operations.” JA24. PCC regularly transfers operations and employees from one facility to another. JA46. For example, a recently transferred welder may return to a prior facility because more work exists there. JA49.

Each facility makes investment castings using the same general process, but they produce different parts based on customer need, size and shape. One makes large titanium and steel parts for the aerospace industry. JA24. Another makes smaller titanium and alloy castings. JA25. The third principally manufactures castings for the industrial gas turbine industry. JA26.

Each facility maintains the same job titles and classifications. JA25. The departments within the facilities are organized according to product, and within any

given department, multiple job classifications report to the same supervisor. *Id.* There are over 100 job classifications in the facilities. *Id.*

No separate department for welders exists at any facility. There are welders and rework specialists employed at every facility, where they belong to departments that have from eight to fifteen different job classifications. *Id.*

The Highly Integrated Production Process

Because a key factor in determining the appropriate bargaining unit is whether the welders share a “community of interest” distinct from other manufacturing and production employees, understanding PCC’s manufacturing process is necessary to understanding this petition.

Each facility utilizes the same highly integrated multiphase casting cycle. JA26-27. When any facility contracts with a customer to make a part, the end product is a metal casting. JA28. Although the end products are different sizes and shapes, each part follows the same cycle process, with the goal to produce a defect-free casting. *Id.* The casting cycle has eleven phases: wax, investing, foundry, cleaning, inspection, grinding, welding, CCM (coordinate measuring machine), targeting, marking, and shipping.

These steps may need to be performed more than once: for example, if a defect is detected in the mold or casting at any point, the mold or casting will be sent back to an earlier phase of the process where employees would discuss the defect and how

to correct it. JA30-31. This process requires constant interaction between the various employees in the process. *Id.*

When a defect is identified, PCC brings together a group—including the grinder, welder, inspector, foundry operator, and wax operator—to examine the defect, work together to repair it, and construct a solution to prevent the defect from occurring again in the future. JA33. In this group effort, employees participate outside of their strict job titles. A welder might have a suggestion for grinding. Or an inspector may have a suggestion on the most effective type of weld. PCC's employees, regardless of their job titles or assigned specialties, collaborate to ensure the production process will systematically produce defect-free parts that PCC customers expect.

When a new product is being developed, this cycle might be repeated 15 or more times to correct all defects. JA60. PCC's business depends on such coordination to reduce defects in the casting process and meet customer specifications.

Terms and Conditions of Employment

PCC maintains a competitive job bidding process, in which employees can apply for any open position, with a preference given to senior employees. JA49-50. This rule applies to welders, and approximately twenty percent of welders previously had a different job with PCC. *Id.* PCC maintains the same training

requirements for all production workers, and all production workers attend the same safety orientation, at which policies, procedures, and work rules are discussed.

JA54. PCC's handbook applies to all employees. *Id.*

PCC generally does not make distinctions among its production employees.

All production employees, including welders:

- are reviewed under the same standard performance review, which is based on efficiency, quality, safety, and behavior, JA55, JA64;
- utilize the same lunchroom, break room, smoking areas, parking lots, and time clocks, JA99-100;
- attend the same weekly “standup meetings” with supervisors, JA100;
- wear steel-toed shoes, safety glasses, and hearing protection, *Id.*;
- are subject to the same pay grade structure, same three shifts of work, same step progression, same eligibility for overtime, and same bonus eligibility, JA105-07;
- receive the same annual wage increase percentage as other employees at their facility, *id.*; and
- have the same health plan, health benefits, retirement plan, and leave accrual. JA108-09.

The Union Seeks to Represent a Small Subset of Workers Involved in this Integrated Process

On July 11, 2017, the Union filed a petition to represent a slice of PCC's employees spread across all three facilities. JA870-71. Specifically, the petition sought a bargaining unit consisting of: "All full-time and regular part-time rework welders and rework specialists employed by the Employer at its [three] facilities in Portland, Clackamas, and Milwaukie, Oregon." This brief refers to the "rework welders and rework specialists" as "welders."¹

PCC objected and instead contended that the only appropriate unit would consist of all production employees, because they shared a community of interest with the petitioned-for welders. JA15.

Bargaining Unit

The Board has the duty of determining whether the unit of employees in which the petitioner seeks an election is an "appropriate unit" for collective bargaining.

¹ Rework specialists are experienced welders who train rework welders and provide additional project support, including developing a rework plan for a part that has a large number of defects while interacting with other production employees to correct defects. JA43-44, JA445. As part of the rework plan, rework specialists work with grinders, inspectors, analysts and engineers to determine where a defect occurred, what caused the defect, and how to correct it. *Id.* Where a normal welder would stay on a regular shift and weld, rework specialists are required to go to any shift to conduct training or to work through a rework plan on project parts. *Id.* When work is low in an area, a rework specialist could work on a swing shift and perform grinding on parts. JA368. This could happen as frequently as daily. *Id.* The certified unit of rework specialists, rework welders, and crucible welders (included at the hearing) comprises all welders employed by PCC. JA11.

Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation. Section 9(b) states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

NLRA Sec. 9(b); 29 U.S.C. § 159(b); *see also Health Acquisition Corp.*, 332 NLRB 1308, 1309 (2000) (holding Board has “affirmative statutory obligation to determine the appropriate bargaining unit in each case”).

To determine whether a unit is appropriate, the Board considers whether the employees “share a sufficient community of interest to be grouped together for purposes of collective bargaining.” *Skyline Distributors*, 319 NLRB 270, 277 (1995), *enforcement granted in part and remanded sub nom. Skyline Distributors, a Div. of Acme Markets, Inc. v. NLRB*, 99 F.3d 403 (D.C. Cir. 1996). That is, the Board attempts to group together employees who share a common interest in wages, hours, and other conditions of employment in the same bargaining unit, which requires considering both whether employees in a proposed unit share a sufficient “community of interest” with each other and also whether other employees (outside the petitioned-for unit) are part of the same community of interest. *See* Section II.A and II.B *infra* for full discussion.

At the time of the petition, the governing standard for certifying a bargaining unit as a community of interest was *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011).

A “craft unit” is a special type of bargaining unit, comprising “a distinct and homogeneous group of skilled journeymen craftsmen who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment.” *In re MGM Mirage*, 338 NLRB 529, 532 (2002) (citing *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994)).

The Board’s test for craft units applies special factors different than those of the general community-of-interest test. The Board will principally consider:

(1) whether the employees take part in a formal training or apprenticeship program; (2) whether the work is functionally integrated with the work of the excluded employees; (3) whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; (4) whether the employer assigns work according to need rather than on craft or jurisdictional lines; (5) and whether the petitioned-for employees share common interests with other employees.

In re MGM Mirage, 338 NLRB at 532 (citing *Burns and Roe Services Corp.*, 313 NLRB 1307, 1308 (1994)) (formatting modified). The Board also gives itself latitude to look to “other factors” for certification of a craft unit, potentially including a subset of the traditional community-of-interest factors:

(1) differences in the type of work and skills of the employees, (2) functional integration of operations, (3) bargaining history, (4) differences in wages and employment benefits, (5) extent of interchange and contact between the petitioned-for employees and the excluded employees, and (6) extent of common management and supervision.

Id.

After the Regional Director Finds the Bargaining Unit Appropriate, the Board Overrules Specialty Healthcare and Remands

In this case, because the Union alleged the welder bargaining unit was appropriate under the general community-of-interest test, the craft unit factors were not at issue in the litigation. In August 2017, following an evidentiary hearing the Regional Director issued a Decision and Direction of Election, finding that under *Specialty Healthcare's* formulation of the community-of-interest test, the welders constituted an appropriate unit.

After the Board denied PCC's request to stay, an election, the election was held in September 2017. The votes were 54 for the Union and 38 against. JA1024. The Regional Director issued a Certification of Representation. JA1025-26.

On December 15, 2017, the Board granted PCC's request for review and issued its landmark decision in *PCC Structurals*, 365 NLRB No. 160 (2017) ("*PCC Structurals I*"). JA1085-1110. In that decision, the Board overruled *Specialty Healthcare* and announced that it would "return[] to the traditional community-of-interest standard that [it] has applied throughout most of its history." JA1091.

Because the Regional Director certified the bargaining unit under the *Specialty Healthcare*, the Board reversed and remanded for reconsideration under the new standard. JA1097. The Board's Order directed:

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues warranting review with respect to whether the petitioned-for unit is an appropriate unit for bargaining. Accordingly, this case is remanded to the Regional Director for further appropriate action consistent with this Order, including reopening the record, if necessary, and analyzing the appropriateness of the unit *under the standard articulated herein*, and for the issuance of a supplemental decision.

Id. (emphasis added).

Articulated within its decision, the Board noted that:

Today, we clarify *the correct standard* for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. In so doing, and for the reasons explained below, we overrule the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (Specialty Healthcare), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and *we reinstate the traditional community-of-interest standard* as articulated in, e.g., *United Operations, Inc.*, 338 NLRB 123 (2002).

JA1085 (emphasis added).

Here is how the Board articulated the standard:

We reaffirm that the community-of-interest test requires the Board in each case to determine 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.

JA1095. Notably (given that it was not at issue), the Board's remand order made no mention of considering a craft unit.

On Remand, the Regional Director Finds the Unit Appropriate as a Craft Unit

In December 2017, the Regional Director issued an Order to Show Cause soliciting the positions of the parties as to whether the record should be reopened to take additional evidence. JA1111-12. The Order noted: "The Board directed that I analyze the appropriateness of the unit *under the standard articulated in its Order*, and if necessary, to reopen the record." JA1111 (emphasis added). It continued:

The standard the Board directed that I use to analyze the appropriateness of the unit is:

whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.

Accordingly, the parties are hereby directed to state their positions as to the adequacy of the factual record with regard to the eight (8) category multi-factor test [*i.e.*, the community-of-interest test] utilized by the Board in such an analysis.

Id. Finally, the OSC noted, "The parties are hereby directed to submit their positions as to whether the record should be reopened to take additional evidence *with regard to the multi-factor test noted above[.]*" *Id.* (emphasis added).

In response, both PCC and the Union addressed whether the welders could be recognized as a bargaining unit under the *PCC Structurals I* community-of-interest test. Neither party argued (or presented evidence) regarding the craft unit standards. *See, e.g.*, JA1116 (Union asserted that “the record contains all of the information necessary to analyze the community of interest standard using any community of interest test, including the 8 category test which will be applied in this case on remand.”) (emphasis added).

After receiving additional evidence, the Regional Director issued a Supplemental Decision. JA1212-48. But rather than reconsidering certification of the bargaining unit as a community of interest under *PCC Structurals I* (as the Board ordered), the Regional Director (without notice to the parties) considered the craft unit factors and ultimately found that the welders “constitute[d] a craft unit that possessed a community of interest” sufficient for certification. JA1212.

The Board Denies Review But Rejects the Regional Director’s Analysis

PCC filed a second request with the Board for review of the supplemental decision. JA1251-1307. PCC explained that the Regional Director had erred by failing to follow *PCC Structurals I* and instead combining the community-of-interest and craft unit certification tests. JA1258.

In November 2018, the Board denied PCC’s Request for Review, JA1309-10 (“*PCC Structurals II*”), although the Board did not embrace the Regional Director’s

reasoning. Unlike the Regional Director, the Board correctly, albeit implicitly, recognized the community of interest and craft unit test as distinct grounds for certification.

But, the Board split in its rationale. Two members—Members McFerran and Kaplan—found that the petitioned-for unit shared a community of interest sufficiently separate from other production employees to constitute an appropriate unit. JA1309 n.1.

Two different members—Members McFerran and Emanuel—found that the petitioned-for welders were a craft unit. *Id.* These members cited cases regarding craft unit severance standards as justifying certification of the craft unit.² *Id.* (“[W]e find the discussions in *Hughes Aircraft*, above, and *C F Braun & Co.* ... on the distinction between skilled craft and noncraft welders to be instructive.”)

PCC Tests the Certification by Refusing to Bargain

Certifications of bargaining units are not directly reviewable under § 10(f), 29 U.S.C. § 160(f) (1982), as final orders. In order to challenge certification of a collective bargaining unit, an employer must refuse to recognize and bargain with the union to obtain judicial review. *E.g.*, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941).

²As detailed below, craft unit severance cases involve a petitioned-for craft unit being “severed” out of an existing bargaining unit.

Because PCC could not immediately petition this Court (or any court) for review of the representation decision, it thus followed the only available route to seek review, by refusing to bargain. In response, the Union filed a charge against PCC alleging that it unlawfully failed to bargain, JA1311, and the NLRB's General Counsel moved for summary judgment on same. JA1312-29.

In opposing the motion for summary judgment, PCC raised several arguments to the Board, including that in finding the unit appropriate as a craft unit, the Board failed to follow *In re Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), the key craft severance case. In November 2019, the Board granted summary judgment, stating that “*Mallinckrodt* did not affect the discussions about what constitutes a craft unit or about craft welders in cases the Regional Director and Board majority cited in the underlying representation decision in these proceedings.” JA8 n.3.

The Parties' Petition for Review of the Board's Decision

PCC petitioned this Court for review of the Board's decision on December 9, 2019, arguing that the Board erred in its certification. JA1415-16. The Board cross-petitioned for enforcement. JA1428. This Court granted the Union's motion to intervene.

Independently, the Union petitioned this Court for review of the Board's decision, arguing that the Board should have provided it with greater relief. This

petition for review has been docketed as No. 19-1257. This Court granted PCC's motion to intervene in that proceeding.

SUMMARY OF THE ARGUMENT

The Board's finding that PCC unlawfully refused to recognize and bargain with the Union rests on the improper certification in the underlying representation proceeding. Although PCC's petition is technically directed to the Board's summary judgment order, PCC's challenges the Board's certification in *PCC Structuralists II*.

The Board's first error was its failure to explain its decision. The Regional Director found that certification was appropriate by combining the traditional community-of-interest test with the standard for craft certification. The Board did not follow this approach. Instead, one majority held certification appropriate under the traditional community-of-interest test, while a different majority held certification appropriate as a craft unit. But neither finding is sufficiently explained.

If this Court reaches the merits, it should vacate the Board's decision. With respect to the community-of-interest finding, the conclusion reached by Members McFerran and Kaplan is inconsistent with the Board's precedent, including *PCC Structuralists I* and *Boeing*. This precedent does not permit fractured units, combinations of employees that are too narrow in scope or that have no rational organizational basis, and the Board failed to apply its precedent in considering whether members of the petitioned-for welders unit share a community of interest and whether the excluded production employees have meaningfully distinct interests

that outweigh similarities with the welders. Nor did the Board harmonize this result with its cases rejecting bargaining units of welders.

With response to the craft-unit finding by Members McFerran and Emanuel, PCC never received notice from the Regional Director that certification as a craft unit was at issue. The Union never sought certification of the bargaining unit as a craft unit. As a result, PCC was denied due process, and the craft unit determination must be set aside. On the merits, the Board failed to apply its precedent, especially given its retreat from the cornerstone craft unit severance decision *In re Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). Under any form of craft unit analysis, however, the welder unit could not have been certified as a craft unit.

Accordingly, the Board's Decision and Order should be reversed, and the results of the election should be set aside. Because the Union's certification is invalid, PCC had no obligation to recognize or bargain with the Union.

STANDARD OF REVIEW

Although the Board is vested with “a wide degree of discretion” in representation cases, *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445, 448 (D.C. Cir. 2001) (internal quotation marks omitted), it nevertheless must “act in a reasoned fashion, not arbitrarily and capriciously.” *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001) (internal citations omitted).

This Court must reverse a decision of the Board that is “arbitrary or capricious or contrary to law.” *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). “An unexplained divergence from [the Board’s] precedent ... render[s] a Board decision arbitrary and capricious.” *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1074 (D.C. Cir. 2016).

This Court must also reverse a decision when the “Board’s factual findings are not supported by substantial evidence.” *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1236 (D.C. Cir. 2012) (quoting *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008)). “Substantial evidence is more than a mere scintilla.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted) (noting that “substantial evidence ... must do more than create a suspicion of the existence of the fact to be established” (citations and internal quotation marks omitted)).

STANDING

Petitioner has standing because it is the object of the action at issue in the NLRB's decision and order. *Sierra Club v. EPA*, 292 F.3d 895, 900–901 (D.C. Cir. 2002).

ARGUMENT

I. The Board Failed to Provide a Reasoned Analysis Capable of Review by this Court.

As a threshold matter, because the Board failed to explain its decision, this Court should vacate and remand to the Board for further explanation. The short and conclusory statements by the Board in *PCC Structuralists II* do not provide this Court with an adequate basis for review.

When the Board acts, “it must explain its action, and its explanation must reflect reasoned decisionmaking.” *Nathan Katz Realty*, 251 F.3d at 994 (internal citations omitted). This rule follows general principles of administrative law: “If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

In other words, “[t]he Board must provide ‘a reasoned explanation’ for its decisions.” *Int’l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006) (quoting *Petroleum Comm. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)); see also *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 276 (D.C. Cir. 2001) (noting that this Court will overturn Board decisions that are “inadequately reasoned”). Where the Board has failed to explain its decisions adequately, this Court has granted a petition for review and remanded to the Board for further explanation. *E.g.*, *Nathan Katz Realty*, 251 F.3d at 994–95 (holding that “the Board’s complete inability to

explain” its conclusion “makes a remand appropriate”); *Macmillan Publishing Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) (granting a petition for review and remanding because regional director’s decision was “inscrutable,” “makes no sense,” and “was the antithesis of reasoned decisionmaking”).

These principles require granting PCC’s petition for review and remanding to the Board. The Board’s decision is inscrutable, failing to set forth sufficient reasoning for this Court to review. In particular, the decision obscures the relationship between the traditional community-of-interest factors for certification of a unit and the separate test that applies to craft units.

The Regional Director’s analysis on remand from *PCC Structurals I* blurred the lines between certification standards for a craft unit and for certification under the traditional community-of-interest test. *Compare* JA1246 (“[T]he petitioned-for employees share a community of interest sufficiently distinct from excluded employees.”) *with id.* (“[T]he petitioned-for welders constitute a craft unit.”) *with* JA1247 (“[T]he petitioned-for welders constitute a craft unit that shares a community of interest sufficiently distinct from excluded employees[.]”).

Here, the Regional Director essentially amalgamated the craft-unit test and the traditional community-of-interest test of *PCC Structurals I*, ultimately holding that the bargaining unit was appropriate because it was a “craft unit that shares a community of interest.” The Board recognized as much, noting that “the Regional

Director relied on *both* the Board’s craft-unit case law and the community-of interest analysis.” JA1309 n.1 (emphasis added).

But under the statute, the craft-unit standard and traditional community-of-interest standards are distinct, and, Board precedent confirms they involve different substantive factors.

Although the Board’s reasoning and decision is far from clear, we know the following. The Board undeniably failed to adopt and affirm the Regional Director’s reasoning. Instead, the Board diverged from the Regional Director, treating certification as a craft unit and certification as a community of interest as alternatives. *Id.* The separate majorities make this clear: Members McFerran and Kaplan found that welders “share a community of interest.” *Id.* Members McFerran and Emanuel found “that the petitioned-for unit is appropriate for bargaining as a craft unit.” *Id.*

In other words, Member Kaplan found that the welders were an appropriate unit as a community of interest but not a craft unit, and Member Emanuel found that welders were an appropriate unit as a craft unit but under the traditional community of interest standard. Yet, neither finding is adequately explained.

Neither finding adopts the Regional Director’s analysis *in toto*, and neither finding states what parts of the Regional Director’s analysis are distinguished or rejected (and why) and what parts are adopted (and why). Nor does either finding

supply a rationale for its conclusion. For example, neither majority sets forth and cogently applies the factors from its test to the facts as found by the Regional Director. In short, the Board majorities diverge from the Regional Director, but one has to guess at why and at what facts the Board relied upon.

With respect to the community of interest, the Board's decision simply announces a result, without *any* explanation of its reasoning: “[T]he petitioned-for rework welders, rework specialists, and crucible repair welder share a community of interest sufficiently separate from excluded employees to constitute a unit appropriate for bargaining.” JA1309 n.1. Without any reasoned basis for the Board's decision, this Court cannot review its three-line finding that the bargaining unit is appropriate.

Nor is there sufficient explanation of the craft unit finding. The Board's decision states, “[T]he petitioned-for welders are skilled journeyman craftsmen and ... appropriate for bargaining as a craft unit.” *Id.* The only factual support for that finding is a “note” by Member Emanuel and a statement that the welders perform work on aircraft and military applications. *See id.* This “note” by a single member fails to explain the Board's reasoning sufficiently, the craft-unit test depends on more than a single factor (a factor which in the later *Boeing* case, discussed below, was insufficient to create an internal community of interest.)

And, as detailed below, nor does the more recent craft precedent on military and aviation applications support the Board's craft analysis. The "craft majority" made a similarly brief reference to precedent, noting that "[a]lthough this case does not involve severance issues or all the considerations those raise, we find the discussions in *Hughes Aircraft*, above, and *C F Braun & Co.*, 120 NLRB 282 (1958), on the distinction between skilled craft and noncraft welders to be instructive." *Id.* Aside from this scintilla, there is no rationale or reasoning as to what other factors the "craft majority" relied upon in determining that the welders constituted an appropriate craft unit.

This Court's decision in *CCI Limited Partnership v. NLRB*, 898 F.3d 26 (D.C. Cir. 2018), is illuminating. There, this Court remanded the case back to the Board because the Board's decision failed to address the significance of a letter distributed to employees:

It is unclear to us how CCI's distribution of the letter affected the Board's decision. Perhaps the Board thought the striking employees' knowledge of the Union's position wasn't important unless that knowledge came from the Union itself. But that's just a guess, and we can't rely on guesses. *We cannot determine if the Board based its decision on a reasonably defensible interpretation of the NLRA if we do not know how the Board reached its conclusions.*

Id. at 34 (emphasis added). Accordingly, this Court granted the petition and remanded for the Board to provide a reasoned explanation. *Id.* at 34–35.

Here, the Board failed to adopt the Regional Director's analysis of the bargaining unit. But just like the Board in *CCI Limited*, the Board failed to provide a reasoned explanation for its decision, and this Court should grant the petition for review on that basis.

II. The Board Erred in Finding the Bargaining Unit of Welders Appropriate Under the Traditional Community-of-Interest Test.

The conclusion reached by Members McFerran and Kaplan that the unit could be certified under the community-of-interest test is totally inconsistent with the Board's relevant precedent, including *PCC Structural I* and *Boeing*.

A. The Board Failed to Apply *PCC Structural I*

In *PCC Structural I*, the Board reversed *Specialty Healthcare* and reinstated the Board's longstanding community-of-interest standard. JA1085. Under *PCC Structural I*, when examining the appropriateness of a unit, the Board must consider "the interests of employees both within and outside the petitioned-for unit." JA1094.

The standard set forth in *PCC Structural I* requires the Board to examine the petitioned-for unit based on the following factors:

- (1) whether the employees are organized into a separate department;
- (2) have distinct skills and training;
- (3) have distinct job functions and perform distinct work;
- (4) including inquiry into the amount and type of job overlap between classifications;
- (5) are functionally integrated with the Employer's other employees;

- (6) have frequent contact with other employees/interchange with other employees;
- (7) have distinct terms and conditions of employment; and
- (8) are separately supervised.

JA1095. In weighing both the shared and distinct interests of the petitioned-for and excluded employees, the Board must determine whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.*

The Board’s decision failed to discuss (much less apply) any of these factors to support its independent finding that the welders were an appropriate bargaining unit under the traditional community-of-interest standard.

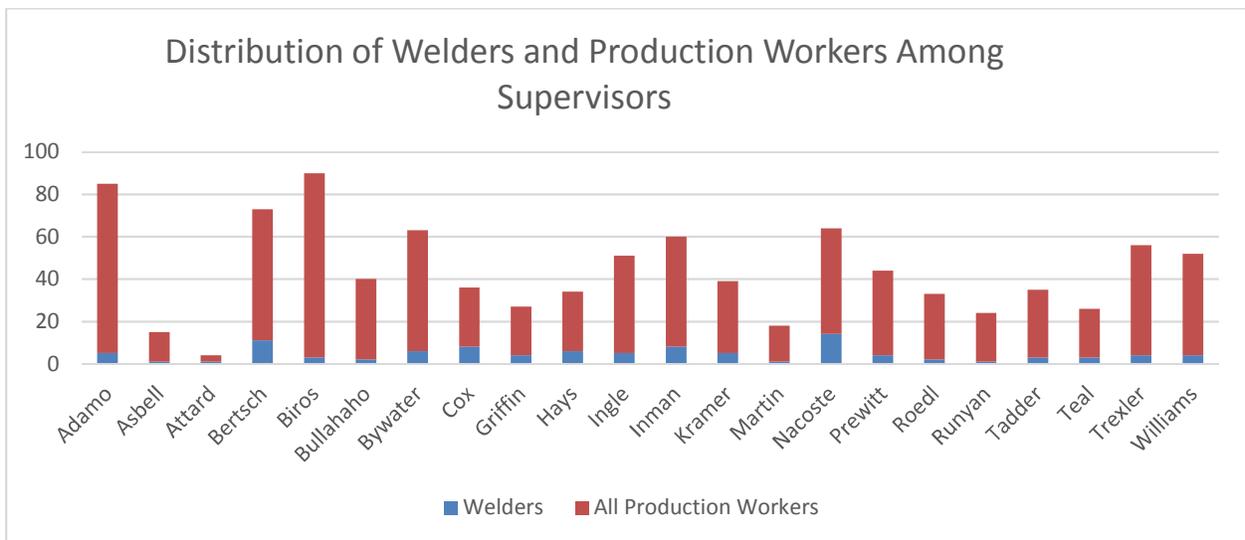
Under *PCC Structural I*, such a finding could not have been supported by substantial evidence. The community-of-interest test does not permit “fractured units,” i.e., combinations of employees that are too narrow in scope or that have no rational organizational basis. See *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999) (finding a unit of petitioned-for employees inappropriate because they did not share a sufficiently distinct community of interest from other employees). See also *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004) (holding that it is particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility); *Boeing Co.*, 337 NLRB 152, 153 (2001) (finding a unit including all production and maintenance employees appropriate because “work is highly

integrated” and distinctions between employees “are offset by the highly integrated work force.”); *A.C. Pavement Striping Co.*, 296 NLRB 206, 210 (1989) (finding that an appropriate unit included both painters and teamsters, because, *inter alia*, “[t]he employees in the two units have interchangeable job functions, work closely together on a day-to-day basis, and work together in a highly integrated process.”); *Avon Products*, 250 NLRB 1479 (1980) (rejecting the regional director’s acceptance of only certain classifications of production and maintenance employees and finding that employees involved in the “order flow process” should be included in the unit); *Chromalloy Photographic Industries*, 234 NLRB 1046 (1978) (finding that in light of the highly-integrated production process, camera repair and maintenance employees did not possess a community of interest separate and apart from those of other production and maintenance employees). Under these traditional standards, *PCC Structurals I* does not permit a separate welders unit. JA1090.

The Regional Director found that PCC employs a “complex and intertwined metal casting manufacturing process.” JA1243. “[R]ework welders and rework specialists would not be able to perform their duties without the work of the other classifications before them in the production process.” *Id.* For example, “the crucible repair welder would have no need for his work but for the repeated use of the crucibles by other production employees for their job functions.” *Id.* The Regional Director correctly recognized that PCC’s classifications of workers

“cannot be viewed in a vacuum and must be viewed as pieces of the whole production process.” *Id.* (emphasis added). In other words, PCC’s operation is integrated and not one that can be fractured.

PCC’s supervisory structure—which is dictated by its integrated manufacturing process—confirms that that the welders do not share an exclusive community of interest. There is no “Welding Department.” Welders are broken up across multiple facilities, serving on different teams and report to different supervisors. JA35, JA396. Employee teams are organized according to product: a welder, grinder, and inspector working on a single product would all report to the same supervisor. JA38. The below chart shows the distribution of welders and production workers among supervisors. JA993. Every supervisor has at least one welder reporting and some supervisors have up to 14 welders.



Id.; JA38-39. Similarly, as the Regional Director recognized, welders are included in departments (and buildings) throughout the Portland Operation, with numerous classifications of employees organized together. JA1216. The welders are distributed throughout 18 departments and 5 separate buildings. *Id.*; JA35, JA396.

In this case, these factors—departmental organization, functional integration, and common supervision—are determinative. This organizational and functional structure means that all of PCC’s employees share a common community of interest.

As the Board noted in finding that a unit of camera repair and maintenance employees was not an appropriate unit, the integration among a workforce can render a smaller bargaining unit inappropriate:

“In order to achieve the purposes of the facility, a variety of tasks must be performed. These tasks include the repair and maintenance of cameras and related equipment. They also include making necessary modifications to such equipment Without these repairs and modifications, the Employer’s business would cease to operate smoothly. Thus, camera repair and maintenance employees perform work which is closely related to the production of the Employer’s final product.”

In re Chromalloy, 234 NLRB 1046, 1047 (1978).

Similarly, in *Boeing Co.*, 337 NLRB at 153, even though the petitioned-for employees were “separately supervised, attend[ed] separate employee meetings, work[ed] in a separate area ... and never temporarily transfer[red],” a separate bargaining unit was inappropriate because these distinctions were offset by “*the highly integrated work force*, the similarity in training and job functions ... and the

comparable terms and conditions of employment among all three groups.” *Id.* (emphasis added). “In view of the high degree of integration ... the practical necessities of collective bargaining militate against the creation of a fractured bargaining unit, with its attendant distortion of the employer’s business activities ...” *Szabo Food Servs., Inc. v. NLRB*, 550 F.2d 705, 709 (2d Cir. 1976). “The Board must ‘respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations.’” *Id.* (quoting *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 382 (2d Cir. 1968)). If welders can fracture the production and maintenance employees in this fashion (by forming a separate bargaining unit), then PCC will be unable to collectively bargain over its inherently collective, multiphase casting process.

Segmenting welders into their own unit would interfere with the integrated production process demanded by PCC’s customers (particularly where failures could have catastrophic consequences). Teams involving different disciplines need to work closely together. For example, the grinders and inspectors lie “on either side” of welders in the linear casting process. They offer input about welding, and, welders similarly have input into grinding and casting. The casting process requires this collaboration, without an artificial division separating welders from other employees. Breaking apart a production process conflicts with the *PCC Structurals I* unit standards. As the Board held in *PCC Structurals I*:

Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, *if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.*

JA1087 n.8, quoting *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962)

(emphasis added; internal footnotes omitted).

B. The Board Failed to Apply *The Boeing Company's* Clarification of *PCC Structurals I*

Further erring, the Board failed to apply *The Boeing Company*, 368 NLRB No. 67 (September 9, 2019). In *Boeing*, the Board clarified that *PCC Structurals I* contemplated a specific three-step analysis for determining whether a petitioned-for unit is appropriate under the *PCC Structurals I* test.

The Board's customary practice is to apply new policies and standards "to all pending cases in whatever stage." *Aramark School Services, Inc.*, 337 NLRB 1063, 1063 n. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–07 (1958)); *see also MV Transp., Inc.*, 368 NLRB No. 66 at 18 (2019) (holding "Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'").

Tellingly, in other failure-to-bargain cases, the Board's practice is to remand representation cases for reconsideration where there is an intervening change to the applicable legal standard. *See Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2

(2019); *Green Jobworks, LLC*, 369 NLRB No. 20, slip op. at 1 (2020) (“[n]or is retroactive application precluded at this stage of the proceeding simply because the Board has previously certified the Union.”); *St. Francis Hospital*, 271 NLRB 948, 949 (1984), (in denying the General Counsel’s Motion for Summary Judgment, the Board held that the decision in the underlying representation case was incorrect and that “th[e] prohibition against relitigation of representation issues in a subsequent technical 8(a)(5) refusal-to-bargain situation applies to the parties—the employer and the union—and does not preclude the Board from reconsidering its own earlier action.”). *See also Constellation Brands, U.S. Operations, Inc.*, 2018 WL 1794786, **2–3 (Apr. 13, 2018) (noting “while the remand was pending at the Board, the Board issued *PCC Structurals [I]*” and ordering remand to Regional Director to apply *PCC Structurals I*).³ Because the Board did not apply *Boeing*, the petition should be granted and the case remanded to the Board for consideration of the unit under *Boeing*.

Boeing requires the Board to consider (1) whether the members of the petitioned-for unit share a community of interest with each other, (2) whether the employees excluded from the unit have meaningfully distinct interests in the context

³ *ADI Worldlink, LLC*, 367 NLRB No. 10 (Oct. 2, 2018) (denying motion for summary judgment and remanding to Regional Director after applying new standard in *The Boeing Company*, 365 NLRB No. 154, which was issued while case was pending); *Mercy St. Vincent Med. Ctr.*, 2018 WL 4678783, *1 (Sept. 27, 2018) (same) (citation omitted).

of collective bargaining that outweigh similarities with unit members, and (3) guidelines the Board has established for appropriate unit configurations in specific industries. (*Boeing*, slip op. at 3–4.)

The Board failed to provide such an explanation here. Neither the Regional Director nor the Board applied *Boeing*'s first step. If the Board had, it would have recognized that, aside from being “welders,” the members of the petitioned-for unit do not share a community of interest with each other. The petitioned-for unit is scattered across multiple facilities, departments and supervisors. Like the employees in *In re Chromalloy, supra*, the welders perform a single step in PCC's highly integrated production process. Welders share every term and condition of employment, supervision, wage scale, uniform requirement, holiday, and product with all other functionally integrated job classifications at PCC.

But even if the Board were treated as having implicitly analyzed *Boeing*'s first step, granting the petition for review would still be necessary because of the failure to apply *Boeing* steps 2 and 3. At step 2 of *Boeing*, the Board is required to analyze whether the employees *excluded* from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. slip op. at 3.⁴ As the Board, noted, “This inquiry is firmly rooted in traditional

⁴The Board noted that the interests must be “comparatively analyzed and weighed.” *Boeing*, slip op. at 3.

community-of-interest principles.” *Id.*; *see also, e.g., Harrah’s Club*, 187 NLRB 810, 812–813 (1971) (finding that “a unit limited to maintenance department employees does not comprise a homogeneous grouping ... to constitute a separate unit appropriate for purposes of collective bargaining” and that all employees performing a similar function must be included in the unit); *Texas Color Printers, Inc.*, 210 NLRB 30, 31 (1974) (rejecting a separate shipping and receiving unit “in view of the frequent work contacts and temporary interchange and overlapping supervision of employees of the shipping and receiving and bindery departments.”).

In this case, *Boeing* required the Board to analyze the distinct and similar interests of the nonwelders and explain why, taken as a whole, they support the appropriateness of the unit:

“Merely recording similarities or differences between employees does not substitute for an *explanation of how and why* these collective-bargaining interests are relevant and support the conclusion. *Explaining* why the excluded employees have distinct interests in the context of collective bargaining is *necessary* to avoid arbitrary lines of demarcation.”

Constellation Brands v. NLRB, 842 F.3d 784, 794–795 (2nd Cir. 2016) (emphasis added).⁵ Neither the Regional Director nor the Board applied *Boeing*’s second step. *See Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)

⁵The Board in *Boeing* found that even though members of the petitioned-for unit were required to hold an A&P license to meet FAA regulations, the licensure requirement was not enough to overcome the community of interest with excluded members. Slip op. at 5.

(“But adjudication is subject to the requirement of reasoned decisionmaking as well. It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced ...”); *see also*, *Nat’l Env’tl. Dev. Assoc.’s Clean Air Project v. EPA*, 752 F.3d 999, 1011 (D.C. Cir. 2014); *Taylor v. U.S. Dept. of Agriculture*, 636 F.3d 608, 617 (D.C. Cir. 2011); *Siegel v. SEC*, 592 F.3d 147, 161–62 (D.C. Cir. 2010).

Even if the Board were treated as having implicitly analyzed *Boeing’s* second step, granting the petition for review would still be necessary because substantial evidence would not support excluding the rest of PCC’s employees from the bargaining unit.

At PCC, the production employees excluded from the petitioned-for unit do not have meaningfully distinct interests in the context of collective bargaining. There is significant and unavoidable overlap between the excluded and included employees in the petitioned-for unit.

Welders are supervised by over 20 different supervisors, and are distributed among many departments. JA35, JA38, JA396. Those supervisors supervise between 15–18 other types of production employees across various phases. Supervision – an important part of any employee’s daily work life – is shared.

Welders also share terms and conditions of employment, including wages. For example, Pay Grade 18 is shared by the crucible welder and seven other job classifications. Pay Grade 18 jobs are found in 15 different departments and are supervised by 14 different supervisors.

Welders share numerous terms and conditions of employment with other production and maintenance employees, including supervision, hours, company policies (corrective action, attendance harassment, nondiscrimination, etc.), rules, safety training, and benefits. JA35, JA39, JA54-55, JA102-03, JA106, JA108-09, JA211-12, JA224. All employees are subject to the same company handbook and are all invited to participate in the same grievance process. JA54, JA157, JA159, JA382-83. Annual wage increases are distributed to all production and maintenance employees, including members of the petitioned-for unit at the same time, and in the same percentage. JA107. All production and maintenance employees are evaluated based on the same standardized performance matrix. JA55-57.

Welders also have frequent – often daily – contact with excluded employees. They all serve as part of the multiphase casting process, and work together toward producing a single casting.⁶ They also share roles in “tiger teams” that work on

⁶In *Boeing*, the Board found it “particularly compelling” that the employees in the petitioned-for unit had a “high degree of functional integration with excluded employee” on the 787 production line. The Board noted, “the 2700 ... employees stationed throughout the production line all work together toward producing a single product, 787 aircraft.” Slip op at 5. The Board also noted that the petitioned-for

process improvements. JA61. Further, welders and excluded employees share common lunch and break rooms, where they interact on a daily basis. JA99-100, JA342, JA369-70. In fact “[i]t’s not uncommon to see [welders and excluded employees] in the [break] room sitting together having lunch or having a break.” JA370.

Not only do welders regularly interact with excluded employees, but welders also perform the duties of excluded employees. For example, welders will commonly perform the same grinding work performed by excluded employees. JA344-46, JA368. Depending on the amount of work, welders may perform such duties on an almost daily basis, for up to an entire shift. JA368. Finally, all production and maintenance employees, including welders are subject to the same uniform options, and must wear steel-toed shoes, hearing protection and safety glasses. JA543-864; JA71, JA100-01. There is nothing that excluded employees might seek to bargain over that the welders would not also seek to bargain over.

The third step of *Boeing* also forecloses certification of a bargaining unit of welders. The Board has considered welder bargaining units in the past. *See North American Aviation*, 162 NLRB 1267 (1967) (applying *Mallinckrodt* to find that military/aviation product welders do not constitute an appropriate unit). Since 1967,

employees were only exclusively responsible for about one percent of the overall process necessary to deliver the product to the customer, “Otherwise they aid earlier production stages by finishing and fixing other [work] ...” *Id.*

the Board has not permitted welders to form craft units under the traditional community-of-interest test.⁷ But the Board failed to consider *Boeing's* third step and (as detailed below) summarily dismissed both the long-standing *Mallinckrodt* standard, and *North American Aviation*, the most current precedent involving a unit of similar welders.

Because the Board failed to apply *PCC Structurals I* and *Boeing*, this Court should grant PCC's petition for review with respect to whether the bargaining unit is appropriate under the traditional community-of-interest test as found by Members McFerran and Kaplan.

III. The Board Erred in Finding the Bargaining Unit of Welders Appropriate as a Craft Unit.

Members McFerran and Emanuel erred in finding that the welders were an appropriate craft unit. As an initial matter, the craft-unit determination denied PCC due process. The Union never sought certification of the bargaining unit as a craft unit. And, in any event, certification of the welders as a craft unit would conflict with the Board's precedent.

⁷ The only subsequent welder case, *CNH America LLC*, 25-RC-116569, Decision and Direction of Election, 2013 BL 469199 (Dec. 20, 2013), review denied 2014 BL 513046 (January 16, 2014) is not a basis to depart from *Mallinckrodt*. The case is nonprecedential as unpublished, and it is easily distinguishable. *CNH America* involved a separate, discrete welding department under separate supervision, and was decided under the now-invalid *Specialty Healthcare* standard.

A. PCC Was Denied Due Process Because It Never Received Notice That Certification as a Craft Unit Was at Issue Post-*PCC Structurals I* Remand.

Certification of the welders as a craft unit violates fundamental principles of procedural due process. PCC never had notice that certification of the welders as a craft unit was at issue on remand and (as a result) never had the opportunity to present evidence regarding certification of the welders as a craft unit.

From the beginning, the Union sought certification of the welders as a bargaining unit under “traditional community of interest standards,” not under the test for a craft unit. *See, e.g.*, JA1027 (“[T]he decision of the Regional Director is sound in applying traditional community of interest standards that have been in place well before the clarification of such standards.”). The closest the Union came was characterizing the welders as “akin to a craft unit,” (*see* JA940), but it never argued that they were a craft unit. The Regional Director’s original certification decision thus rested on community-of-interest factors, not on a craft-unit determination.

In the Board’s review of the Regional Director’s original certification decision, *PCC Structurals I*, the phrase “craft unit” appears only in quotes from the statute. The Board made clear that it was applying only the traditional community-of-interest standard—its Order said nothing about the different standard applicable to certification of craft units. JA1097.

Similarly, the Board's instructions to the Regional Director on remand said nothing about consideration of the unit as a craft unit. *See id.* (remanding to the Regional Director for analysis: "*under the standard articulated herein,*" *i.e.*, the traditional community-of-interest standard).

On remand, the Regional Director's Order to Show Cause adhered to the limited mandate: "The Board directed that I analyze the appropriateness of the unit *under the standard articulated in its Order*, and if necessary, to reopen the record." (emphasis added)

In response, both PCC and the Union briefed whether the welders could be recognized as a bargaining unit under the community-of-interest test, and neither argued (or presented evidence) regarding the craft unit standards. The Regional Director provided no notice that he was considering craft unit certification, and PCC had no opportunity to present any argument or evidence relating directly to the craft unit factors.

As PCC explained in its request for review to the Board, JA1303-06, the craft-unit determination thus denied due process to PCC. PCC had no notice that craft-unit certification was at issue and thus was presented with no opportunity to submit argument or evidence regarding certification as a craft unit. Due process does not permit such an ambush. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding procedural due process requirements include of notice

and fair opportunity to be heard); *see also Bruce Packing Co., Inc. v. NLRB*, 795 F.3d 18, 23–24 (2015) (denying enforcement of part of Board order because late amendment to complaint failed to give employer notice and opportunity to litigate issue) (citing *NLRB v. Blake Const. Co.*, 663 F.2d 272, 281 (D.C. Cir. 1981)).

As detailed in the chart below, the standards for a craft unit and the community of interest are different standards.

Craft Unit Standard	Community of Interest Standard
<p>1) whether the petitioned-for employees participate in a formal training or apprenticeship program;</p> <p>2) whether the work is functionally integrated with the work of the excluded employees;</p> <p>3) whether the duties of the petitioned-for employees overlap with the duties of the excluded employees;</p> <p>4) whether the employer assigns work according to need rather than on craft or jurisdictional lines; and</p> <p>5) whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.</p>	<p>1) whether the employees are organized into a separate department;</p> <p>2) have distinct skills and training;</p> <p>3) have distinct job functions and perform distinct work;</p> <p>4) including inquiry into the amount and type of job overlap between classifications;</p> <p>5) are functionally integrated with the Employer’s other employees;</p> <p>6) have frequent contact with other employees/interchange with other employees;</p> <p>7) have distinct terms and conditions of employment; and</p> <p>8) are separately supervised.</p>

Because PCC had no noticed that the Regional Director was considering the craft unit factors, PCC was unable to present any evidence or any argument regarding the factors for certification of the welders as a craft unit. This is significant prejudice – the Regional Director made findings on issues on which PCC had no opportunity to present evidence or argument.

Because certification of the welders as a craft unit violated due process, the petition for review should be granted.

B. The Board Failed to Engage in Reasoned Decision-Making When It Switched Rationales Without Elaboration or Explanation.

On the merits, in certifying the welders as a craft unit, the Board failed to apply its precedent. Accordingly, remand is appropriate in this case.

In *PCC Structuralists II*, the Board relied on a line of *craft severance* cases as “instructive” in finding the unit. *See* JA1310 n.1 (“we find the discussions in *Hughes Aircraft*, above, and *C F Braun & Co.*, ... on the distinction between skilled craft and noncraft welders to be instructive.”) But, in the refusal-to-bargain case, PCC pointed out that the Board failed to apply *Mallinckrodt*, the controlling craft-severance authority. In response, without explanation, the Board determined that craft-severance cases were irrelevant. *See* JA8 n.3. (accusing PCC of “confus[ing] the question of what constitutes a craft unit with the separate question of whether such a unit may be severed”). The Board thus departed from its precedent in *PCC*

Structurals II—relying on craft-severance cases as instructive—without any explanation for the inconsistency.

The decisions cannot be harmonized. If the decision below is correct (and craft-severance cases are irrelevant), then the Board erred in *PCC Structurals II* by relying on *Hughes Aircraft* and *CF Braun & Co.* If *PCC Structurals II* is incorrect (and craft-severance cases are instructive), then the Board erred below by failing to follow *Mallinckrodt*, the controlling craft-severance case.

This Court has remanded cases where the Board has departed from precedent without providing a reasoned basis for its decision. *See, e.g., Randell Warehouse*, 252 F.3d at 448–49; *Brusco Tug*, 247 F.3d at 278. For example, in *Randell Warehouse*, 252 F.3d at 448–49, the Court remanded the case after the Board, without explanation, overturned one precedential decision, but refused to overturn other, similar precedent. This Court held that after the Board made a “*volte face*” as to the first decision, explaining “the applicability of [the second, similar precedential decision] [wa]s a critical issue the Board should have examined carefully.” *Id.* Because the Board failed to do so, this Court “remand[ed] to the Board for further consideration and a reasoned opinion, thereby providing a meaningful basis for judicial review.” *Id.* at 449 (internal quotations and citations omitted); *see also Brusco Tug*, 247 F.3d at 277–78 (remanding case because Board failed to provide

reasoned explanation as to why decision justified departure from established precedent).

In this case, when the Board changed from relying on craft-severance cases to treating them as irrelevant, the Board executed an unexplained *volte face*, necessitating remand. The Board needed to provide a reasoned explanation why either (i) it departed from the well-established factors in *Mallinckrodt* when making its decision to deny PCC's request for review or (ii) its decision was not inconsistent with Board precedent. There are only two possibilities, either: (a) craft severance cases were relevant, which would have required the Board to explain how its ruling was consistent with the *Mallinckrodt* standard; or (b) craft severance cases were irrelevant, in which cases the Board erred in *PCC Structurals II* and the Board would have needed to explain how the craft unit determination was appropriate without reference to the craft-severance cases. Because the Board did neither, it failed to engage in reasoned decision-making.

Both the Regional Director and *PCC Structurals II* applied craft-severance cases but failed to apply *Mallinckrodt*, the leading craft-severance case. The Regional Director's Supplemental Decision expressly rejected consideration of *Mallinckrodt* and the one welder case (*North American Aviation*, 162 NLRB 1267 (1967)) decided under *Mallinckrodt*. He reasoned that "the instant case is distinguishable as there is no question of craft severance and no history of collective

bargaining, but rather is an initial organizing campaign not subject to the legal standard set forth in *Mallinckrodt*.” JA1246 n.2.⁸

Despite distinguishing craft-severance cases, the Regional Director relied on a number of craft-severance cases – indeed, all of the craft welder cases cited by the Regional Director were craft severance cases – as persuasive.⁹

Members McFerran and Emanuel committed a similar error, disregarding *Mallinckrodt* but relying on other craft-severance cases, *Hughes Aircraft* and *C F Braun & Co.*¹⁰

⁸The Regional Director further stated that unlike the welders in *North American Aviation*, the petitioned-for welders possess a high degree of specialization and skill acquired through extensive training.” *Id.* As the Company noted in its Opposition to Summary Judgment, this argument is wrong – the welders at issue in *North American Aviation* were responsible under contracts with the U.S. Government for research, engineering, design, and manufacture of missiles and components used in the Apollo, Saturn, and Hound Dog programs. To contend that the welders in *North American Aviation* were any less skilled than the welders at issue in this case is absurd.

⁹All the welder cases relied upon by the Regional Director are also craft severance cases. *See Aerojet General Corp.*, 129 NLRB 1492-1493 (1961) (“The Petitioner seeks to sever a craft unit of welders from the existing production and maintenance unit presently represented by the United Steelworkers of America, AFL-CIO, herein called the Intervenor.”); *Arrowhead Products Div. of Mogul Bower Bearings, Inc.*, 120 NLRB 675 (1958) (“Petitioner seeks a craft severance of heliarc welders from the existing production and maintenance unit represented by the Intervenor ...”); *Parker Bros. & Co., Inc.*, 118 NLRB 1329 (1957) (finding a welder craft unit appropriate after remand for craft severance determination) on remand from 117 NLRB 1462, 1464 (1957) (“There remains for consideration the alternative unit requests of the Petitioner for craft severance of a unit of welders and burners at the shipyard.”).

¹⁰Both welder cases noted by the two Board Members in the “craft majority” are severance cases. *See Hughes Aircraft Co.*, 117 NLRB 98 (1957) (“The Petitioner

PCC pointed out this mistake to the Board: “*Mallinckrodt* is indisputably the lead precedent for unit determinations in craft severance questions.” JA1406.

But the Board rejected PCC’s contentions by noting that, “*Mallinckrodt* did not affect the discussions about what constitutes a craft unit or about craft welders in cases the Regional Director and Board majority cited in the underlying representation decisions in these proceedings.” JA8 n.3. This response provided no explanation or discussion of the Board’s decision-making.¹¹ It did not explain how the Board retrofitted its holding to account for its failure to apply the well-established factors in *Mallinckrodt* in denying review, while relying on as “instructive” outdated case law, or even generally why its decision was consistent with precedent.

Had the Board applied *Mallinckrodt*, and *North American Aviation*, the Board would have found that the petitioned-for unit could not be a proper craft unit. Under

seeks to sever a craft unit of welders, their helpers, apprentices, and leadmen from an existing production and maintenance unit at the Employer’s Tucson, Arizona, air guided missile plant, represented by the Intervenor.”); *C F Braun & Co.*, 120 NLRB 282, 283 (1958) (“Petitioner seeks to sever ‘all employees of C F Braun & Co at its Alhambra, California, plant, who devote 50 percent or more of their time to welding or burning or a combination of both, and who are within the unit covered by the Employer’s agreement with the Metal Trades Council of Southern California”).

¹¹Notably, both the severance cases identified and cited with approval as “instructive” by the Board craft majority were decided *before* *Mallinckrodt*, so it is unsurprising that the “discussions” in those cases were not “affected” by *Mallinckrodt*. Regardless, stating that unspecified “discussions” were not “affected” is far too vague to be reasoned decision-making on this point.

North American Aviation, the Board found that welders had no separate community of interest where a “continuous flow” production process evinced several facts:

We are also convinced that any separate community of interest possessed by the welders has been largely submerged into the more encompassing community of interest shared with all other employees. As heretofore indicated, the Employer’s Tulsa operations involve a continuous flow process, with the work of welders being performed in conjunction with that of nonwelders and intimately related to the overall production effort. This, together with frequent contacts between and interdependence of welders and nonwelders in performance of their duties, common supervision of welders and nonwelders, and the fact that the welders are themselves separated from each other both on a geographic and supervisory basis, support our conclusion that they have common interests with the other employees.

162 NLRB at 1271 (emphasis added). PCC’s operations are indistinguishable from those at issue in *North American Aviation*. For example:

- PCC’s casting operation is a continuous flow process (JA1260-65);
- PCC welders’ work—fixing flaws in the casts that are the core product of PCC—is performed in conjunction with that of nonwelders and is intimately related to the overall production effort (JA1295-96);
- There is no separate welding department (JA35, JA274);
- Welders are dispersed on a geographic basis throughout departments along with various other job titles (JA136, JA247-48, JA274, JA289, JA313-14, JA353);
- Common supervision of PCC welders and nonwelders exists (*see*, e.g., JA1239, JA1246), Welders span across 18 departments in four different

physical locations, all of which include nonwelders (*see* JA1272), while welders are supervised by 28 different supervisors and are combined with up to 15 other job titles in any given department. JA35.

Had the Board applied *Mallinckrodt*, instead of relying on pre-*Mallinckrodt* craft-severance precedent, the welders could not have been certified as a craft unit.

The Board failed to apply its precedent, and substantial evidence does not exist to support a finding that a craft unit is an appropriate unit under the correct standard. This Court should grant the petition for review.

C. Even Under the Craft Standard the Board Ostensibly Adopted, the Board was Incorrect.

1. The Board needed to explain which, if any, community of interest factors are incorporated in the craft unit standard.

As noted above, in *PCC Structurals II*, the Board divided into two separate majorities. Neither majority adopted the Regional Director's analysis, and neither explained why it did not adopt the full analysis. When PCC challenged this decision, the Board merely replied, "Contrary to the Respondent, the overlapping majorities' analyses are neither inconsistent with one another nor mutually exclusive." JA8 n.3. The Board's commentary lacks explanation and is irrelevant to reasoned decision-making. The analysis of Members McFerran and Emanuel failed to explain any of the following, as part of their determination of the existence of the craft unit:

- whether they adopted any community of interest factors;

- why such factors were adopted;
- which such factors were adopted;
- how such factors applied, given the facts; and
- whether and how any of the “step” tests from the *Boeing* clarification of the community of interest test applied.

Because the Board failed to provide a reasoned analysis as to the basis of the craft decision, this Court should remand to the Board.

2. Even if the Board correctly omitted any discussion or application of community of interest in its craft analysis, a craft unit is still inappropriate.

Even apart from the failure to apply *Mallinckrodt*, the craft-unit decision is unsupported by substantial evidence under the Board’s governing precedent. In cases involving initial craft unit determinations, the Board must consider:

- whether the petitioned-for employees participate in a formal training or apprenticeship program;
- whether the work is functionally integrated with the work of the excluded employees;
- whether the duties of the petitioned-for employees overlap with the duties of the excluded employees;
- whether the employer assigns work according to need rather than on craft or jurisdictional lines; and

- whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.

Burns and Roe Services Corp., 313 NLRB at 1308 (formatting modified).

PCC's welders do not participate in a formal apprenticeship program. *See* JA1241. The Regional Director (and presumably, Members McFerran and Emanuel) concluded that the lack of a formal apprenticeship program is not dispositive. *Id.* In rejecting the significance of a formal apprenticeship program, the Regional Director found that the petitioned-for employees have training and certification requirements prior to hire and undergo additional training upon hire. *See id.* (finding that "the petitioned-for welders meet experience or education requirements at the time of hire"). This finding is not supported by substantial evidence. For example, Welding Training Coordinator Don Stevenson testified that there is no requirement by the Company that an applicant obtain outside training or certification prior to be hired into a welding position. JA154, JA177-78. Additionally, Stevenson testified that his "responsibility is to train welders [including] brand new welders off the street". JA177. There was no controverting evidence.

It is undisputed that functional integration exists between the petitioned-for unit members and excluded employees. The Regional Director "[ou]nd that functional integration exists in this case, and weighs against finding that the

petitioned-for welders constitute a craft unit that shares a community of interest distinct from excluded employees.” JA1243.

It is undisputed that the next factor—whether the duties of the petitioned-for employees overlap with the duties of the excluded employees—weighs against a finding that the petitioned-for welders constitute a craft unit. Indeed, in *PCC Structural I*, the Board noted that “that functional integration weighs in favor of finding an overwhelming community of interest between the petitioned-for employees and the rest of the production employees; rework welders and rework specialists function as part of an integrated production process, repairing defects identified by other employees and working ‘rework teams’ that include employees in other job classifications.” JA1086. Production and belt grinders perform rework grinding on a daily basis in an effort to repair defects, because the part must often be grinded following welding or inspection. JA371-72. Welders also perform grinding work on a near daily basis. JA368.

With respect to whether the employer assigns work according to need rather than on craft or jurisdictional lines, the record demonstrates that on a near daily basis, welders are assigned grinding work based on need. *Id.* Welder Brett Clevidence testified that he had been asked to perform nonwelding work because of a lack of welding work and that he knew of other welders who had similar experiences. JA344, JA346.

Finally, it is undisputed (as the Regional Director found that) “the petitioned-for welders have the same or substantially similar terms and conditions of employment as excluded employees with regard to work rules and policies, benefits, and schedules” and that these “all weigh against finding that the petitioned-for welders share a community of interest sufficiently distinct from excluded employees.” JA1245.

The Board failed to follow *PCC Structuralists I* by adopting the Regional Director’s reasoning that this factor weighed *in favor* of finding that the petitioned-for welders constitute a craft unit because wages outweighed all the other. The Regional Director stated that “except for the few classifications with which the petitioned-for welders share a wage rate, wages do establish that the petitioned-for welders share a community of interest sufficiently distinct from the vast majority of excluded employees.” *Id.* This contradicts what the Board itself noted in *PCC Structuralists I*. There, the Board found that “all production employees share the same terms and conditions.” JA1086. “Thus, all production employees, including the petitioned-for employees, work similar hours, are paid on the same wage scale, receive the same benefits, are subject to the same employee handbook and work rules, wear similar attire and protective gear (steel-toed shoes, safety glasses and hearing protection), work under the same safety requirements, and participate in ongoing training regarding harassment, safety and other matters.” *Id.* Because the

Board had already considered this factor in *PCC Structural I*, the Board failed to harmonize its actual findings in *PCC Structural I* with the Board's later decisions on review in *PCC Structural II* and on summary judgment.

Because the Board's "craft majority" failed to apply precedent, and substantial evidence does not the craft unit finding, this Court should grant the petition for review.

CONCLUSION

The Employer's petition for review of the Board's Order should be granted, the Union's petition for review of the Board's Order should be denied, and the Board's cross-application for enforcement of its Order should be denied.

Dated: August 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,905 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), according to the word count of Microsoft Word 2016.

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Dated: August 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on August 26, 2020, a copy of the foregoing was served upon all counsel of record by operation of the Court's CM/ECF system.

Dated: August 26, 2020

/s/ Harry I. Johnson, III

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ADDENDUM

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§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce.

The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 159

§ 159. Representatives and elections

* * *

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * *

29 U.S.C. § 160

§ 160. Prevention of unfair labor practices

* * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as

hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *