

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 REPLY BRIEF OF PETITIONER

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SUMMARY OF THE ARGUMENT

Whether the welders constitute an appropriate bargaining unit reduces to a single question: Should PCC be required to collectively bargain only with welders who are responsible for a single step in a highly integrated production process or is it appropriate that the welders bargain as a group with PCC's other employees?

It is undisputed that the welders share virtually every term and condition of employment with PCC's other manufacturing employees: they work at the same locations on the same products as part of the same highly integrated manufacturing process, report to the same supervisors, are paid on the same wage scale, and are subject to the same workplace rules and policies. There is nothing about which welders might wish to bargain in which other employees would not have an equal or greater interest, and requiring PCC to bargain separately with welders would disrupt its highly integrated manufacturing process.

The Board did not provide a reasoned analysis to the contrary. Because it is unclear which portions of the Regional Director's decision each Board majority adopted, this Court should remand for clarification.

Nor did the Board apply *Boeing* and consider whether any meaningfully distinct interests of excluded employees in the context of collective bargaining outweigh similarities with unit members.

With respect to craft unit certification, PCC was denied due process because it lacked notice and an opportunity to present evidence regarding this theory. On the merits, the Board failed to reason consistently regarding the relevance of craft severance cases and, without explanation, failed to apply its precedent.

ARGUMENT IN REPLY

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

Despite the General Counsel's valiant defense, the Board's decision fails to reflect "reasoned decisionmaking" that can be reviewed by this Court. As a result, this Court should vacate and remand for further explanation.

The General Counsel apparently acknowledges that the short and conclusory statements by the Board in *PCC Structuralists II* do not provide a sufficient explanation for the decision, arguing that the Board's decision is adequately explained only when combined with the Regional Director's decision. NLRB Br. 60.

Here is the General Counsel's explanation: The Regional Director made alternative holdings, one under the community-of-interest test and one under the craft-unit test. One Board majority adopted the community-of-interest portion of the Regional Director's decision, and the other Board majority adopted the craft-unit portion. *See* NLRB Br. 59-60.

The General Counsel thus acknowledges a key proposition of PCC's argument: "community of interest" and "craft unit" are distinct standards. A bargaining unit must be certified either as a community of interest or as a craft unit, not (as the Regional Director found) "a craft unit that shares a community of interest." JA1212; *see also* JA1247 (same).

The General Counsel's characterization of the Regional Director's decision is incorrect. The organization, including the headings and structure, of the Regional Director's supplemental decision does not indicate that he was considering two separate grounds for decision. There are no independent findings or independent holdings.

The General Counsel asserts that the Regional Director "clearly indicated which facts—and factors—he relied on in applying the *PCC I* and craft-unit standards, respectively." NLRB Br. 60. But the General Counsel does not further elaborate or quote any portion of the decision, and the citations it provides—"Supp.Dec.30, 31, 33-34"—merely contain the Regional Director repeating the finding under the amalgamated test: "constitute a craft unit that shares a community of interest." JA1245.

Nor are the Regional Director's findings clearly divisible into "craft unit" and "community of interest." To the contrary, the Regional Director's Supplemental Decision discusses precisely the same factors as the original decision (which considered only the "community of interest" test). *Compare* JA1213-32 (discussing departmental organization, skills and training, job functions and work, functional integration, contact, interchange, terms and conditions of employment, supervision, and collective bargaining history), *with* JA1088-1102 (same).

The Board's divided decision shows that the Board both acknowledged and rejected the Regional Director's merger of the "craft unit" and "community of interest" tests. And no majority of the Board agreed with the Regional Director's analysis as a whole. This Court cannot determine which portion, if any, of the Regional Director's analysis was adopted by each of the different Board majorities.

In its opposition to the General Counsel's motion for summary judgment, PCC noted the need for clarification of the Regional Director's decision: "Importantly for the Board's consideration of issues here, the Regional Director did not actually make two separate unit determination decisions[.] . . . Instead, he hybridized the two tests." JA1403. PCC asked the Board to clarify the basis for the decision before "PCC must engage in proceedings in the federal court of appeals." *Id.* But the Board's majorities, although correctly distinguishing the two tests, failed to explain which portion of the Regional Director's analysis was adopted and rejected.

The General Counsel suggests that the two tests essentially merge together. *See* NLRB Br. 60 n.14 ("[I]n the non-construction-industry context, the Board does consider all circumstances, including traditional community-of-interest factors, when assessing a petitioned-for craft unit."). Any overlap between the tests increases, rather than decreases, the need for explanation of the Board's decision: "The need for an explanation is particularly acute when an agency is applying a

multi-factor test through case-by-case adjudication.” *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). Neither Board majority adopted the Regional Director’s analysis as a whole, and this Court’s ability to review the Board’s decision requires it to be able to tell which portion of the Regional Director’s analysis was adopted by each majority.

Moreover, if the General Counsel was correct and the craft-unit test incorporates the community-of-interest test, then the Board’s separate majorities are difficult to explain. If the craft unit test incorporates the community-of-interest factors, then how could a unit be appropriate as a community of interest but not a craft unit or appropriate as a craft unit but not a community of interest?

Because neither Board majority set forth the basis for its decision “with such clarity as to be understandable,” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), this Court should grant the petition for review and remand for further explanation. The General Counsel’s contention that different Board majorities adopted (and rejected) different portions of the Regional Director’s decision is “just a guess,” and this Court “can’t rely on guesses.” *CCI Ltd. P’ship v. NLRB*, 898 F.3d 26, 34 (D.C. Cir. 2018). Without “know[ing] how the Board reached its conclusions,” this Court “cannot determine if the Board based its decision on a reasonably defensible interpretation of the NLRA.” *Id.* The petition should be granted and the underlying decision vacated.

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

The General Counsel fails to demonstrate that the Board applied the governing precedent—including *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) (*PCC Structurals I*) and *The Boeing Co.*, 368 NLRB No. 67 (2019) —in concluding that the welders constituted an appropriate unit under the community-of-interest test.

A. The General Counsel Fails to Demonstrate that the Board Applied *Boeing*.

The General Counsel does not dispute that *Boeing* should have been applied by the Board, even though it was decided in between the Board's certification decision and its refusal-to-bargain decision. *E.g.*, NLRB Br. 23–24. *Boeing* clarified that *PCC Structurals I* requires a three-step analysis: (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 of collective bargaining that outweigh similarities with unit members, and (3) guidelines the Board has established for appropriate unit configurations in specific industries. *Boeing*, 368 NLRB No. 67, at 3–4.

Although the Regional Director considered the first step when conducting the community-of-interest test (as discussed below, inconsistently with *PCC Structurals I*), the Board failed to consider the next two.

The Regional Director discussed the interests of welders but neither the Regional Director, nor the Board, made any finding that the excluded employees (*i.e.*, the non-welders) have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members. As discussed in PCC's opening brief, such a finding could not have been supported by substantial evidence. There is nothing about which excluded employees might want to bargain that would not also affect unit members:

- Excluded members and unit members are paid on the same wage scale;
- Excluded members and unit members work on the same production process;
- Excluded members and unit members have the same supervisors;
- Excluded members and unit members are subject to the same workplace rules and conditions; and
- Excluded members and unit members share the same work areas and break rooms.

Even if the Board was correct that welders have enough common interests to add up to a community of interest, the Board did not make any finding that the excluded employees have meaningfully distinct interests, much less find that these distinct interests outweigh their extensive similarities with the welders.

The General Counsel discusses *Boeing's* second step in only a single paragraph. NLRB Br. 41 (“Nor did the Board skip *Boeing/PCC I* step 2 . . .”). But here, the General Counsel simply points back to the Regional Director's discussion

of the common interests of welders. The General Director identifies no separate analysis of the common interests of excluded employees, much less a finding that their distinct interests outweigh their commonalities with the welders.

The Board erred by failing to apply *Boeing*. Had the Board considered *Boeing*'s second step, the only conclusion supported by substantial evidence would be that the only appropriate unit is wall-to-wall, comprising all of PCC's manufacturing employees.

Nor does the General Counsel demonstrate that the Board applied the third step of *Boeing*. As PCC noted and the General Counsel does not deny, the Board has regularly refused to permit bargaining units of welders to be carved out from integrated manufacturing processes. *See* PCC Br. 42-43. The General Counsel suggests (at 42) that *Boeing*'s third step is limited to specific industries so that the only relevant cases would involve manufacturers of castings. Not so. The appropriate industry is precision manufacturing. The dissent in *PCC Structural I* cited *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), for the proposition that "welders-only units in this exact industry have been approved by the Board in the past." *See* JA1098 n.1 (Pearce and McFerran, dissenting). Although the cited decision does not support the proposition for which it was cited, the citation does make clear that the Board viewed the "exact industry" as precision manufacturing in

general, not manufacturing of castings in particular. The Board erred by failing to apply *Boeing*'s third step.

B. The General Counsel Fails to Demonstrate that the Board Applied *PCC Structural I*.

PCC Structural I requires the Board to examine the unit based on the following factors: whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) have the amount and type of jobs that 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.

The General Counsel concedes that three factors—Factor 1: Departmental Organization; Factor 5: Functional Integration; and Factor 8: Supervision—weigh against finding that the welders constitute an appropriate separate unit. *See* NLRB Br. 37. Contrary to the General Counsel's suggestion, these factors are dispositive here.

Factors 1 and 5. PCC's departmental organization—in which welders are found in various departments and buildings throughout the Portland Operation—is dictated by its manufacturing process, which requires functional integration.

As the Regional Director recognized, 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.* PCC’s classifications of workers “cannot be viewed in a vacuum and must be viewed as pieces of the whole production process.”

Segmenting welders into their own unit would interfere with the integrated production process demanded by PCC’s customers, a production process particularly important for parts where failures could have catastrophic consequences. Certifying a bargaining unit of welders that is inconsistent with PCC’s departmental organization and manufacturing process fails to follow *PCC Structurals I* because it “fails to relate to the factual situation with which the parties must deal.” JA1087 n.8 (quoting *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962)).

In arguing that the departmental organization and functional integration does not preclude certification, the General Counsel relies on *Home Depot USA*, 331 NLRB 1289 (2000). NLRB Br. 38. But *Home Depot* did not involve anything resembling the integrated manufacturing process at issue in this case. There, the petitioned-for unit of drivers spent only 30-40% of their time inside a Home Depot store, and they spent that time pulling materials for their deliveries. *Home Depot USA*, 331 NLRB at 1290. To the extent that the drivers interacted with store

employees, it was with different employees at different times for different reasons.

Id. Indeed, if the drivers' jobs had been eliminated, the store employees' jobs would have been essentially unchanged.

In contrast, in PCC's casting process, every single product must pass through the welders as part of a standardized, integrated production process. The welders interact regularly with other employees involved in the manufacturing process, and if their positions were eliminated, the manufacturing process would grind to a halt.

The General Counsel does not distinguish the many cases PCC cited demonstrating the error in severing employees from an integrated process. *See* PCC Br. 30-31. The essence of these decisions was not the employees' skills but the employers' integrated process. *See A.C. Pavement Striping Co.*, 296 NLRB 206, 210 (N.L.R.B. 1989) (rejecting a separate unit when employees "work in an integrated process," "function as a team with respect to the job operations," and "work together in close proximity in an interrelated process"); *Avon Prods.*, 250 NLRB 1479, 1482 (N.L.R.B. 1980) (rejecting a separate unit for some employees in a "highly integrated operation with the function of each department being integrally dependent upon the functions of other departments" and requires "precise coordination and totally interdependent operations"); *Chromalloy Photographic*, 234 NLRB 1046, 1047 (N.L.R.B. 1978) (rejecting a separate unit when "camera

repair and maintenance employees perform work which is closely related to the production” as part of a “highly integrated process”).

Factor 8. PCC’s supervisory structure confirms that that the welders do not share an exclusive community of interest. Welders are included in departments (and buildings) throughout the Portland Operation, with numerous classifications of employees organized together. JA1216.

The General Counsel acknowledges the shared supervision but argues that “shared supervision carries less weight here than in some cases because welders consult those shared supervisors only on administrative issues.” NLRB Br. 38.

But “administrative issues” would include virtually all terms and conditions of employment: evaluations, wages, hours, scheduling, vacation, working conditions, and benefits. Even if welders consult with special supervisors regarding technical questions of welding, the potential subjects for collective bargaining concern the responsibilities of shared supervisors. The Regional Director did not make any finding to the contrary. This factor—particularly combined with the departmental organization and functional integration—compels the finding that welders are not an appropriate unit.

With respect to two other factors (Factor 6: Contact and Factor 7: Terms and Conditions of Employment), the General Counsel errs in the analysis. Although the

historical facts are undisputed, the Board and General Counsel draw the wrong legal conclusions from them.

Factor 6. It is undisputed that welders interact with excluded employees frequently (and in some cases, daily) as they work together in the highly integrated multiphase casting process to produce a single product. The Board argues that because welders do not interact with every single other classification of employees on a regular basis, this factor weighs in favor of a separate unit. Board Br. 33-35.

Contrary to the General Counsel's contentions, welders play important roles in "tiger teams," meetings with the purpose of collaboration and process improvement led by an engineer, and composed of production workers from every part of the casting process. JA61. During the meeting, all attendees target a particular part or casting and brainstorm improvement on the casting process. *Id.* And in addition to sharing common lunchrooms, common break rooms, and common smoke areas, welders 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.

Moreover, welders interact with other job classifications by working together on the same manufacturing process. Consider an assembly line with 20 different steps. Under the General Counsel's view, the workers on each of the 20 steps could

form a separate bargaining unit, under the theory that there is no interaction between the workers on different steps. Such a result would be absurd—the interaction among employees through an integrated manufacturing process should confirm that the only appropriate unit would be the entire manufacturing line.

Factor 7. Finally, as noted in PCC’s opening brief, welders share terms and conditions of employment with other employees. PCC Br. 40-42. Despite the numerous shared conditions, including holidays, breakrooms, handbooks, company policies, reviews, pay grade, health plan, overtime, and wage increases, JA105-07, the General Counsel argues (at 36–37) that these factor favor a separate unit because welders earn a higher hourly wage (approximately \$10 higher on average) than most excluded employees, JA1245, and welders use specialized tools not used by other classifications. JA1245.

The General Counsel and Union overstate the significance of the higher average wage. Welders are paid on the same wage scale as other production employees, and other job classifications share the same pay grade as welders. *See* Intervenor Br. 22 (acknowledging that “[a]ll hourly employees are paid on a [common] pay grade system”). For example, rework welders are grade 15, as are radiologic evaluators. *See* JA1177. Rework specialists are grade 16, as are CNC machinists, jig & fixture machinists, and layout inspectors. *Id.* Finally, the crucible

welder is a grade 18, as is a calibration metrologist, metrology analyst, CNC programmer, pattern maker and journey moldmaker. *Id.*

Nor are the wage grades independent: from one pay grade to the next pay grade, there is an average of 4.5% increase in pay. JA231. Bargaining with welders over wages would thus affect all PCC's other employees. Welders would either have to be removed from the wage scale entirely or have the pay for their grade (and thus the step increase between grades) increased. In light of PCC's wage structure, permitting a separate unit of welders "fails to relate to the factual situation with which the parties must deal." JA1087 n.8 (quoting *Kalamazoo Paper Box Co.*, 136 NLRB at 137).

The cases cited by the General Counsel do not support its argument. None of them involves a common wage scale like PCC's. NLRB Br. 36. *Rhino Northwest* involved a petitioned-for group of "riggers," who suspend items overhead at major events. 867 F.3d 95, 103 (D.C. Cir. 2017). Aside from the fact that riggers did not share hours of work or supervision with other *Rhino Northwest* employees, riggers also were paid up to \$20 an hour more than their fellow employees.

In *United Operations*, 338 NLRB 123, 125 (2002), the unit sought was a unit of highly skilled HVAC technicians, who had no overlap in job functions with the unskilled employees. In addition, there was no common supervision and no

functional integration. The pay difference of roughly \$4 per hour merely confirmed that the unit was appropriate.

Finally, in *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987), the almost-\$10 per hour disparity in pay between the petitioned-for unit (comprising a union sought to represent a unit of engineers and locksmiths) and excluded employees (housekeepers) did not independently support that the unit was appropriate but merely further bolstered the conclusion there was no substantial overlap in job functions.

None of these cases involves the kind of common wage scale employed by PCC, in which excluded employees are paid on the same scale (and in the same amount) as employees within the unit. Nor does any case hold that a difference in pay can overcome the departmental organization and functional integration present in this case.

The Board's analysis failed to follow *PCC Structuralists I* and its other precedent, which does not permit fractured units, splintering off narrow groups of employees in a way that is inconsistent with the factual situation as it exists. Here, "the practical necessities of collective bargaining" with only a small group of welders independent of the other employees would lead to "distortion of the employer's business activities." *Szabo Food Servs., Inc. v. NLRB*, 550 F.2d 705, 709 (2d Cir. 1976); *In re Chromalloy*, 234 NLRB 1046, 1047 (1978) (explaining

that unit should not be certified only among some employees whose work “is closely related to the production of the Employer’s final product”); *Boeing Co.*, 337 NLRB 152, 153 (2001) (finding a separate unit inappropriate because of “the highly integrated work force, the similarity in training and job functions . . . and the comparable terms and conditions of employment”).

Amicus HR Policy Association confirms the dangers of fragmented units, noting that such units can “interfere with productivity, lead to inefficient collective bargaining, and an increase in labor strife to the detriment of both employer and employee alike.” HRPB Br. 6. Dividing PCC’s manufacturing process among different bargaining units would create an “endless stream of bargaining” that is “costly for employers and diverts attention and resources that could otherwise be directed at improving the workplace.” *Id.*; *see also id.* at 10 (“Even a single fragmented unit could disrupt the rest of the employer’s operations through picketing, work slowdowns, and other disruptive tactics, which necessarily affects the rest of the employees in the workplace who may not share the objectives of the fragmented unit.”).

Because the Board failed to apply its precedent in certifying the unit under the community-of-interest test, the petition for review should be granted.

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

Nor does the General Counsel successfully defend Members McFerran and Emanuel's 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.

A. PCC Was Denied Due Process.

The General Counsel fails to defend the process that led to the Regional Director's craft unit finding. In particular, the General Counsel misstates the scope of the Board's remand in *PCC Structurals I*. As PCC explained (and the General Counsel does not deny), the Board's decision in *PCC Structurals I* concerned only the community-of-interest standard, not the craft-unit test. JA1097; *see also* PCC Br. 44. The Board remanded to the Regional Director for analysis "under the standard articulated herein," *i.e.*, the community-of-interest test articulated in the opinion. JA1097.

The General Counsel's position—that the "standard articulated herein" referred to any aspect of Section 9(b)—is untenable. NLRB Br. 55 (citation omitted). The "standard articulated herein" by *PCC Structurals I* is the specific community-of-interest standard articulated in the decision, not the general law of certification. *See id.* (admitting that *PCC Structurals I* concerned "the traditional

community-of-interest factors”). The plain meaning of the words refutes the General Counsel’s argument.

The Union argues, at length, that *PCC Structurals I* did not overturn the portion of the statute permitting certification as a craft unit. Intervenor Br. 8-12. This is true and undisputed, but it is no answer to PCC’s due process argument about notice of the certification sought by the Union in this case.

The Union’s statement that *PCC Structurals I* included “approximately eighteen references to a possible craft unit” is false. *Id.* at 25. The Union appears to be counting the Board’s quotations of the statute, quotes that said nothing about a craft unit being a possible consideration in this case, where the Union had certification only under the community-of-interest test.

The General Counsel mischaracterizes the record in suggesting that the parties litigated certification as a craft unit. The Union argued that the welders were “**akin to a craft unit,**” (*see* JA940 (emphasis added)), not that they **were** a craft unit. And contrary to the General Counsel’s suggestion (at 54), this Court will not find the phrase “craft unit” in PCC’s post-hearing brief. *See* JA872-918

7. “Craft unit” certification was not part of the case, in any way, before *PCC Structurals I*. Notably, in its brief, the Union does not contend that it sought certification as a craft unit until its supplemental post-hearing brief on remand.

And on remand, the Regional Director provided no notice that he was considering going beyond the “standard articulated” in *PCC Structuralists I* and considering the craft unit standard. The General Counsel cites nothing to the contrary.

And while PCC had the opportunity to challenge the craft-unit determination before the Board, NLRB Br. 57, PCC had already been deprived of notice and the opportunity to develop argument and evidence on this issue, and it made precisely the same due process argument that it makes now. *See* JA1305-06 (explaining that PCC was denied “the opportunity to present evidence related to craft unit factors” and denied notice that the Regional Director was considering the craft unit standard).

Fundamental due process requires notice and an opportunity to be heard. The record is clear: PCC received no notice that the Regional Director was considering certification as a craft unit, no notice that it needed to develop evidence on this point, and no opportunity to be heard.

The General Counsel’s primary argument is prejudice, where it postulates a Catch-22: Because PCC was denied notice that craft-unit certification was at issue and the record does not contain PCC’s evidence regarding craft-unit certification, PCC necessarily cannot demonstrate prejudice before this Court. NLRB Br. 58.

This Court’s review is, of course, limited to the administrative record. The General Counsel’s view appears to be that violations of due process based on a lack

of notice cannot be remedied because evidence necessary to show prejudice will, by definition, be absent from the record. Before the Board, PCC detailed precisely the additional evidence that it would have presented to the Regional Director:

[The Regional Director] did not take evidence regarding key [craft unit] factors including the history of collective bargaining of the employees sought at the plant involved and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation; and the qualifications of the union seeking to “carve out” a separate unit, including that union’s experience in representing employees like those involved in the severance action.

See JA1305.

The absence of this evidence from the record confirms, rather than refutes, the due process violation. *Cf. In re Ruffalo*, 390 U.S. 544, 551 (1968) (in finding that attorney discipline violated due process for lack of notice: “How the charge would have been met had it been originally included in those leveled against petitioner . . . no one knows.”); *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (“[W]hen the government entirely fails to give notice of a claim, . . . due process is offended regardless whether the party can show prejudice; the unfairness of such a procedure impugns its results.”). This Court should refuse to speculate “whether additional evidence might exist” when “the complete lack of notice entirely disabled [PCC] from taking any steps at the evidentiary hearing to defend

against the unannounced claim.” *NLRB v. I.W.G., Inc.*, 144 F.3d 685, 689 (10th Cir. 1998) (citation omitted).

And this Court has rejected the General Counsel’s view that there can be no prejudice because relevant evidence was already in the record: “[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.” *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983).

The Regional Director’s failure to heed the mandate of the Board in *PCC Structural I* and (without notice to PCC) certification of the welders as a craft unit denied due process to PCC. On this basis, alone, certification as a craft unit should be reversed.

B. The General Counsel Cannot Defend the Board’s Inconsistency Regarding the Relevance of Craft Severance Cases.

PCC explained in its opening brief (at 47-51) that the Board’s decision in *PCC Structural II* and its refusal-to-bargain decision cannot be harmonized. In *PCC Structural II*, the Board relied on craft severance cases as “instructive” in certifying the unit. *See* JA1310 n.1. But in the refusal-to-bargain case, the Board dismissed craft-severance cases as 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* without explanation.

The General Counsel tries to defend this inconsistency by suggesting that portions of the decisions regarding existence of a craft-unit are relevant but portions regarding severance are not. NLRB Br. 52.

This reasoning is not found in the Board’s decision. PCC argued below that under the key craft-severance cases, *Mallinckrodt* and *North American Aviation*, 162 NLRB 1267 (1967) (a craft welder case applying *Mallinckrodt*), a craft unit of welders was inappropriate. JA1407-08. The Board rejected this argument, finding *Mallinckrodt* irrelevant to its analysis. The Board did not draw the distinction now proposed by the General Counsel. It previously relied on the craft-severance cases to support its decision but then dismissed them as irrelevant when they (the governing craft-severance cases) were cited by PCC.

Indeed, the Union hypothesizes a different distinction than the General Counsel, arguing that “from the specific craftsmen at issue in *C F Braun & Co.*, 120 NLRB 282 (1958) and *Hughes Aircraft Co.*, 117 NLRB 98 (1957) that the Board found prior analyses of the same craft in determining the existence of a craft unit instructive” but *Mallinckrodt* was irrelevant because it involved a different craft. Intervenor’s Br. 17-19. The fact that the General Counsel and the Union draw different conclusions for different explanations for the Board’s inconsistent

treatment of craft severance cases confirms that the Board failed to supply adequate justification for failing to follow its precedent.

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 Structuralists 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.

The finding that the welders are appropriate as a craft unit is not supported by substantial evidence.

Welders do not participate in a formal apprenticeship program, and it is undisputed that individuals are hired with no prior welding experience. JA177.

The General Counsel contends that a formal apprenticeship is not required for a craft unit because “[PCC] requires extensive experience at the time of hire.” NLRB Br. 46; *see also* Intervenor Br. 20-21. But the uncontroverted evidence is that PCC hires welders with no formal training:

Q. And what is the Welding Training Coordinator?

A. Okay. So my responsibility is to train welders from brand new welders off the street to welders that have been trained for multiple years and also to train other operators that have never welded but bid in, have a successful job bid into the welding program. So I'll take them through their class and then we'll certify them and then progress them as a welder.

...

Q. You said that you take people that have successfully bid into the welder position but have no welding experience?

A. That is correct.

JA177-78 (testimony of Welding Training Coordinator Donald Stevenson). Mr. Stevenson himself was one such employee. JA175. Mr. Stevenson provided the names of several individuals he hired who did not have previous welding experience. JA188-92. Fred Collins's testimony, cited by the Union at 21, is not to the contrary—he had no experience as a welder; he simply took a basic class to be able to weld a bead. JA177-78. The General Counsel also cites the testimony of a few individuals who had experience as welders before becoming welders at PCC, NLRB Br. 47, but PCC has never denied that it hires some welders with experience. The point is that PCC neither requires extensive experience nor has a formal apprenticeship program. An individual that applies for an introductory position could have only received training in a high school “shop class” or a basic welding course at the local community college. JA207-08. This is not “extensive” experience as the General Counsel alleges. Rather, this type of basic training shows that an applicant can weld a bead, demonstrate some control in welding the bead, and could be trained to become a welder at PCC.

As noted previously, it is undisputed (and the Regional Director found) “that functional integration exists in this case, and weighs against finding that the petitioned-for welders constitute a craft unit.” JA1243.

The General Counsel argues that the functional integration does not control and contends that the Board properly followed three non-welder cases rather than

North American Aviation, the single post-*Mallinckrodt* welding case—a case that rejected a craft unit of welders. NLRB Br. 50-51.

According to the General Counsel, *North American Aviation* does not control because the Board “found” that welders there lacked “specialized functions, skills and training.” NLRB Br. 52 n.12. There is no such express finding in the *North American Aviation* decision. And the case’s description of the welders—who “acquired skills and experience” from “varied sources,” worked in different departments under different supervisors, and participated in a “closely integrated” manufacturing process—would apply equally to PCC’s welders. *See* Intervenor Br. 20 (noting the varied sources of welders’ skills and experience).

The General Counsel’s speculation that the welders in *North American Aviation* were less competent than PCC’s finds no support in the case, which is indistinguishable and (if followed) would foreclose certification. At a minimum, PCC’s uncontested high degree of functional integration at its Portland Operation weighs heavily in favor of a finding that the welders do not constitute an appropriate craft unit.

The General Counsel acknowledges that there is some overlap of work and assignment of work according to need (including welders performing grinding work), NLRB Br. 48-49, but argues that limited interchange does not negate craft unit status. Substantial evidence does not support a finding that the exchange is

limited: Welders testified that they are assigned to perform non-welding work when needed, JA344, JA346, and the evidence shows that welders perform grinding work on a near-daily basis. JA368. Although welders may predominantly perform welding duties, they also have other duties which require them to engage in “rework teams” and “tiger teams” to work with other classifications to correct issues in castings.

If this Court permits the welders to segregate into a separate bargaining unit, the Portland Operation’s efficiency and flexibility will be diminished greatly. The ability to assign work as needed, across jurisdictional lines, is vital to the operation of PCC’s Portland Operation.

The General Counsel again contends that among the long list of items that the welders undisputedly share with excluded employees, two items—wages and the use of different tools—outweigh the many common interests the welders share with excluded employees.

The General Counsel is wrong, and the Regional Director (and thus the Board) erred in failing to follow the original decision, *PCC Structurals I*. There the Board noted that “all production employees, including the petitioned-for employees, work similar hours, are paid on the same wage scale, receive the same benefit.” JA1086. The Board already addressed this factor in its initial *PCC Structurals I* decision and

by failing to follow this decision, the Board erred. The Board cannot reconsider earlier findings of fact, especially without any explanation.

Because the Board's "craft majority" failed to apply precedent, and substantial evidence does not support 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 6,362 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.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2016 in Palatino Linotype 14-point font, a proportionally spaced typeface.

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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