Cristal USA, Inc. *and* International Chemical Workers Union Council of The United Food & Commercial Workers, AFL–CIO, CLC. Case 08–CA–200737

December 13, 2019

ORDER DENYING MOTION AND REMANDING

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on June 15 and 28, 2017, respectively, by International Chemical Workers Union Council of the United Food & Commercial Workers, AFL–CIO, CLC (the Union), the General Counsel issued the complaint on June 29, 2017, alleging that Cristal USA, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it and to provide it with relevant and necessary information following the Union's certification in Case 08–RC–188482. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On September 22, 2017, the General Counsel filed a Motion for Summary Judgment.[1] On September 26, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Union filed a reply. On January 2, 2018, the Union filed a Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

For the reasons set forth below, we deny the General Counsel's motion and the Union's motion and remand Case 08–RC–188482 to the Regional Director for Region 8 for further consideration.

In the underlying representation proceeding, following the representation election held January 11, 2017, the Acting Regional Director certified the Union on January 20, 2017 as the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and regular part-time warehouse employees employed by the Employer at its Ashtabula, Ohio facility; excluding all other employees, Plant 2 North chemical operators (process technicians), Plant 2 North relief/step-up operators, Plant 2 North maintenance mechanics, Plant 2 North I&E technicians, Plant 2 South step-up operators, Plant 2 South lead oxide operators, Plant 2 South relief oxide operators, Plant 2 South oxide operators, Plant 2 South lead WAT operators, Plant 2 South relief WAT operators, Plant 2 South WAT operators, Plant 2 South lead finished product operators, Plant 2 South finished product operators, Plant 2 South maintenance mechanics, Plant 2 South I&E technicians, Plant 2 South warehouse leads, and office clerical employees, guards, and managers and supervisors as defined in the Act.

On May 10, 2017, the Board denied the Respondent's request for review of the Regional Director's Decision and Direction of Election, which rejected the Respondent's contention that the petitioned-for unit described above is not an appropriate unit.[3] The Respondent filed a Motion for Reconsideration of the Board's Order or, in the Alternative, to Consolidate Cases in the underlying representation case, and the Board denied that motion on June 27, 2017.[4]

On December 15, 2017, while the General Counsel's motion for summary judgment was pending, the Board issued an Order Granting Review and Remanding to the Regional Director for further consideration in *PCC Structurals, Inc.*,[5] in which the Board majority (then-Chairman Miscimarra and Members Kaplan and Emanuel) overruled 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

[1] The Union filed a separate motion for summary judgment, incorporating by reference and relying on the General Counsel's motion and supporting memorandum, as well as a memorandum in support of the General Counsel's motion. The Respondent also filed a cross-motion for summary judgment, the Union filed an opposition, and the Respondent filed a reply. The Respondent filed a motion to consolidate the instant case with Case 08–CA–200330, the General Counsel filed an opposition, and the Union filed an opposition. Finally, the Union filed a motion to disqualify Member Emanuel.

[2] Member Emanuel took no part in the consideration of this case. Therefore, the Union's motion to disqualify Member Emanuel is moot.

[3] *Cristal USA, Inc.*, 365 NLRB No. 74 (then-Chairman Miscimarra, dissenting).

[4] The Respondent renews its motion to consolidate this case with Case 08–CA–200330, the refusal-to-bargain proceeding in which it has challenged the Union's certification in Case 08–RC–184947. The General Counsel and the Union filed oppositions to the Respondent's motion to consolidate. We reject the Respondent's motion to consolidate.

[5] 365 NLRB No. 160 (Members Pearce and McFerran, dissenting).

reinstated the traditional community of interest standard. The Board's "usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises,* 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006–1007 (1958)). Indeed, "[t]he Board's established presumption in representation cases like this one is to apply a new rule retroactively." *BFI Newby Island Recyclery (Browning-Ferris),* 362 NLRB 1599 (2015), affd. in part and revd. in part 911 F.3d 1195 (D.C. Cir. 2018).

In determining whether to apply a change in law retroactively, the Board must balance any ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule "to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as [retroactivity] does not work a manifest injustice." Id. (internal quotations omitted). In determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id.

Applying these principles, we find that retroactive application of *PCC Structurals* here would not work a manifest injustice. We assume, arguendo, that the Union relied on *Specialty Healthcare* in selecting the scope of the petitioned-for unit, though the Union makes no such assertion in its motion for summary judgment or its opposition to the Respondent's motion. The Board, however, implicitly rejected the view that any such reliance would preclude retroactivity in *PCC Structurals* itself, where the Board remanded the case to the Regional Director for further proceedings applying the standard announced by the Board therein even though the union in that case also presumably relied on *Specialty Healthcare*.[6]

We also recognize that a remand for application of *PCC Structurals* will delay the final disposition of the question concerning representation presented in this case. While prompt determination of such issues is an important purpose of the Act, it is equally true that the Board must insure in each case that units found appropriate will relate to the actual circumstances of the workplace. See *Kalamazoo Paper Box Co.,* 136 NLRB 134, 137 (1962) ("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"). For the reasons fully explained in *PCC Structurals,* application of the traditional community of interest standard is essential to the achievement of this goal and also comports better with the statutory language set forth in Section 9(a), 9(b) and 9(c)(5) of the Act than did *Specialty Healthcare.* On balance, these considerations support retroactive application of *PCC Structurals* here.

Nor is retroactive application precluded at this stage of the proceeding simply because the Board has previously certified the Union. Absent special circumstances, the Board generally will not permit the relitigation, in a certification-testing case, of issues that were or could have been litigated in the representation case. See, e.g., *Radnet Mgmt. d/b/a La Mirada Imaging,* 368 NLRB No. 89, slip op. at 1 (2019). But the Board has permitted relitigation of unit determinations where there was an intervening change in the legal standard applicable to the unit determination. See *St. Francis Hospital,* 271 NLRB 948, 949 (1984) (Board reconsidered and vacated its earlier decision in the underlying representation proceeding and formulated a revised approach to health care employee units). We reach the same result here.[7]

Accordingly, in light of *PCC Structurals*, we deny the General Counsel's motion and the Union's motion and

[6] The Board has also remanded several pre-certification representation cases pending at the time *PCC Structurals* was issued. See, e.g., *Colonial Parking, Inc.,* Case 04–RC–187843 (unpublished order remanding issued March 23, 2018); *IGT Global Solutions,* Case 01–RC–176909 (unpublished order remanding issued April 25, 2018). The petitioning unions in those cases also presumably crafted the units sought in reliance on *Specialty Healthcare,* and the Board's remands in those cases are thus likewise inconsistent with the view that the Board should refuse to apply *PCC Structurals* retroactively on that basis.

[7] Our dissenting colleague opposes retroactive application of *PCC Structurals* in this case, but the dissent neglects, however, to apply the established principle that retroactive application is the Board's "usual practice" applicable to "'to all pending cases *in whatever stage*.'" *SNE Enterprises*, above (emphasis added); see also *Browning-Ferris)*, above, slip op. at 2. Contrary to the dissent's suggestion, this principle is applicable in both unfair labor practice and representation cases. See, e.g., *Kroger Limited Partnership I Mid-Atlantic,* 368 NLRB No. 64, slip op. at 11 (2019). For the reasons explained above, the Board's normal practice of precluding relitigation of representation issues and any reliance on *Specialty Healthcare* on the Union's part do not warrant a departure from that practice in the circumstances presented here.

The dissent also cites the Board's unpublished order in *Baker DC,* 04–RC–135621 (April 24, 2018) *(*unpublished*),* but that decision, which is not precedential in any event, does not support her position either. There, the Board denied a motion to reopen the record and for reconsideration, filed in a representation case, arguing that reconsideration of the unit determination in that case was warranted by the Board's subsequent decision in *PCC Structurals,* which issued after the representation case had been decided. The *Baker DC* representation case was no longer a pending case at the time *PCC Structurals* was decided and, unlike here, there was no pending unfair labor practice case challenging the Board's unit determination. Moreover, in *Baker DC* the Board found that the unit at issue there was appropriate under traditional community of interest principles as well as under *Specialty Healthcare,* so that further proceedings to apply *PCC Structurals* would have served no useful purpose. None of these circumstances are present here.

remand Case 08–RC–188482 to the Regional Director for further appropriate action, including analyzing the appropriateness of the unit under the standard articulated in *PCC* and for the issuance of a supplemental decision. The Regional Director may solicit the parties' positions on whether the current record is sufficient to evaluate the evidence under *PCC* and may reopen the hearing for further evidence, if necessary.[8]

Dated, Washington, D.C. December 13, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The majority remands this case for retroactive application of *PCC Structurals*, 365 NLRB No. 160 (2017), even though the Union was certified as the bargaining representative of the petitioned-for unit at issue more than 2 years ago—a year before *PCC* issued—and the Board denied the Respondent's request for review of the appropriate-unit determination underlying that certification.[9] Indeed, before *PCC* issued, the General Counsel had issued a complaint and filed a motion for summary judgment with the Board alleging that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union. In neglecting this history—and frustrating the legitimate expectations of the employees who chose union representation—the majority disregards the Act's commitment to protecting employee free choice, fostering stable bargaining relationships, and "protect[ing] employees' rights by fairly, efficiently, *and expeditiously* resolving questions of representation."[10]

I have already explained the numerous reasons why *PCC* was wrongly decided.[11] I adhere to that position, and I will not repeat those reasons here.[12] I nevertheless have agreed, for institutional reasons, that *PCC* should be applied in pending representation cases. I have also agreed to apply *PCC* retroactively in an unfair labor practice case where no party contested retroactivity.[13] I emphatically disagree, however, that *PCC* should be applied in a situation where a union was certified with Board approval before *PCC* even issued; where there was no doubt about the legal foundation of the precedent underlying the certification; where unit employees and their Union have had every reasonable expectation of bargaining over terms of employment; where a party opposes retroactivity; and where the General Counsel has already begun prosecuting a refusal-to-bargain complaint against the Respondent. A remand in this situation undercuts the Board's certification process and its obligation to resolve questions of representation quickly. It is also manifestly unfair to the employees and their Union.

I.

The Board has a long-standing rule prohibiting a party in a test-of-certification case from relitigating issues that it raised or could have raised in the underlying representation proceeding.[14] The reasons for this rule are obvious: it prevents piecemeal litigation that wastes the Board's and

[8] As evidenced by our remand, we express no opinion with respect to whether the petitioned-for unit is appropriate.

[9] 365 NLRB No. 74 (2017).

[10] NLRB Final Rule, Representation Case Procedures, F.R. Vol 79, No. 240 (December 15, 2014) (emphasis added). See also *NLRB. v. A.J. Tower Co.*, 329 U.S. 324, 330–331 (1946) (emphasis added) ("[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently *and speedily*").

[11] *PCC* overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which had reaffirmed the Board's long-standing criteria for determining whether to approve a petitioned-for bargaining unit and confirmed that an employer contending that only a unit larger than the petitioned-for unit was appropriate had to show that the additional employees in the larger unit had an "overwhelming community of interest" with the employees in the petitioned-for unit.

[12] See Member Pearce's and my dissent in *PCC*, 365 NLRB No. 160, slip op. at 13–26.

[13] *Constellation Brands*, 32–CA–148431 (unpublished, April 13, 2018).

[14] E.g., *Radnet Mgmt.*, 368 NLRB No. 57, slip op. at fn. 2 (2019); *Manhattan Center Studios*, 357 NLRB 1677, 1678–1679 (2011); Sec. 102.67(g) of the Board's Rules and Regulations.

The majority asserts that the Board's "usual practice" is to retroactively apply changes in precedent "to all pending cases in whatever stage," and that "[t]he Board's established presumption *in representation cases* . . . is to apply a new rule retroactively," quoting *BFI Newby Island Recyclery (Browning-Ferris),* 362 NLRB 1599 (2015) (emphasis added), affd. in part and revd. in part 911 F.3d 1195 (D.C. Cir. 2018). They thereby imply that the present test-of-certification proceeding is still part of the previously decided representation proceeding. But that is simply not true. The representation proceeding—which began with the Union's filing of an election petition—concluded with the Board's issuance of the certification. The present test-of-certification proceeding was initiated by the Union's filing of an unfair labor practice charge and the General Counsel's independent discretionary decision under Sec. 3(d) of the Act to issue the complaint. *Kroger Limited Partnership/Mid-Atlantic*, 368 NLRB No. 64, slip op. at 11 (2019), on which the majority relies in this connection, addressed union access to employer property and did not involve a test of certification, a representation case, or even an unfair labor practice proceeding that was related in some way to a previous representation case.

the parties' resources and avoids unnecessary delay that would frustrate the policy of the Act. To be sure, there is a "special circumstances" exception to this rule, and the Board has recognized on limited occasions that a change in Board law may qualify for that exception.[15] On those limited occasions, however, the Board's previous certification of the union had issued at a time when the relevant precedent was already uncertain or had actually been called into question by Board or court authority. In other words, at the time the certification issued, its legal underpinnings were already in doubt and the respondent employer—having been required to litigate the representation case in those circumstances—was denied the potential benefit of a subsequent resolution of that doubt.[16] By contrast, there was no doubt about the relevant precedent underlying the certification in the present case, regardless of whether one agreed with *Specialty Healthcare*.[17] Accordingly no special circumstances justify relitigation here, and the majority's action in reopening the representation case at this late stage can only diminish employers' respect for the Board's processes and encourage attempts to relitigate previously decided issues.[18]

Baker DC, 04–RC–135621 (2018) (unpublished), a representation case, is instructive here. There the Board found the employer's motion to reopen the record in order to apply *PCC* untimely on the independent basis that the case was no longer pending by the time the motion was filed. Because the case was not pending, the majority stated, "we need not consider whether retroactive application of [*PCC*] would cause manifest injustice." Here, not only was the representation case no longer pending (as in *Baker DC*) but (unlike in *Baker DC*) a test of certification was already in progress and the General Counsel had moved for summary judgment in that case when the Board issued *PCC*. There is all the less justification for remanding this unfair labor practice case and resurrecting the representation case than there was in *Baker DC*.

II.

In determining whether retroactive application of a change in Board law will cause manifest injustice for the parties, the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application."[19] The Union here relied entirely on *Specialty Healthcare* in the underlying representation case, and as noted above had no inkling that *Specialty Healthcare* would be reversed; and while the Respondent argued for such reversal, the main thrust of its argument and the evidence it presented was that the petitioned-for unit was inappropriate even under *Specialty Healthcare*. The "reliance on preexisting law" factor therefore favors the Union or is at least neutral here.

As to the purposes of the Act, to overturn a unit that was certified 2 years ago under then-applicable law will be a public signal that a union and employees in the course of organizing cannot count on achieving employer recognition of a stable bargaining unit even after they win certification. This can only discourage organizing activity while encouraging speculative and unnecessary litigation, as employers will be incentivized to test certification on any arguable basis in the hope that the Board will change the law and apply the change retroactively. This result runs diametrically counter to the Act's goal of encouraging stable collective-bargaining relationships. Similarly, the "particular" injustice in overturning this unit by retroactive application of *PCC* will be the inevitable undermining of the morale of the affected employees, further aggravating relations between the Union, the unit employees, and the Respondent. The Union and the employees did not merely rely on pre-*PCC* law in this litigation; they

[15] See, e.g., *Radnet Mgmt.*, supra; *Brooklyn Psychosocial Rehabilitation Institute, Inc.*, 264 NLRB 114, 114–116 (1982), affd. 742 F.2d 1438 (2d Cir. 1984), cert. denied 467 U.S. 1226 (1984).

[16] In *St. Francis Hospital*, 271 NLRB 948, 949 (1984), remanded on other grounds sub nom. *IBEW Local 474 v. NLRB*, 814 F.2d 697 (1987), cited by the majority, the Board revisited the prior certification of a health-care unit primarily because the relevant criteria it had used to determine such units had been rejected by multiple courts of appeals. See also *Brooklyn Psychosocial Rehabilitation Institute*, above, 264 NLRB 114 (Board agreed to revisit managerial status of employees in previously certified unit where the Supreme Court had issued relevant decision in midst of representation proceeding and following certification the Board had issued several decisions applying the Court's decision); *Heuer International Trucks*, 273 NLRB 361 (1984) (Board reopened prior certification based on demonstrated inconsistency in relevant precedent calling into question the correctness of the certification).

[17] As I have previously noted, prior to its reversal in *PCC*, the *Specialty Healthcare* standard had been endorsed by eight courts of appeals, and no Board or Supreme Court decision preceding *PCC* had indicated that a change in the law was necessary or imminent. In addition, the Board had not even given notice to the public that it was reconsidering *Specialty Healthcare*, e.g., by soliciting public input, before overruling it in *PCC*. *PCC*, supra, 365 NLRB No. 160, slip op. at 14–17.

[18] The majority cites *Kalamazoo Paper Box Corp.,* 136 NLRB 134, 137 (1962), to justify its delay of the unit employees' opportunity to bargain. *Kalamazoo*, however, was a representation case in which the Board reversed its recent practice of "automatically" allowing a truckdrivers' unit to be severed from a larger, preexisting unit with a bargaining history whenever such a severance was *requested, regardless of the unit's actual circumstances. Kalamazoo's* statement of the undisputed principle that a unit determination must "relate to the factual situation with which the parties must deal," merely reimposed the requirement that the Board consider the circumstances of each representation case on an individualized basis. *Kalamazoo* did not address the retroactive application of a change in law or a test of certification.

[19] *Loomis Armored US, Inc.*, 364 NLRB No. 23, slip op. at 7 (2016), citing *SNE Enterprises*, 344 NLRB 673, 673 (2005).

invested considerable time, effort, and resources to win certification and recognition of the bargaining unit for which they petitioned. To effectively deny—or, at a minimum, significantly postpone—their opportunity to negotiate a collective-bargaining agreement with the Respondent by requiring the relitigation of their unit at this late stage qualifies as "particular" and manifest injustice.

For these reasons, I dissent.

Dated, Washington, D.C. December 13, 2019

Lauren McFerran, Member

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The Board's decision can be found at www.nlrb.gov/case/08-CA-200737 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.