

National Labor Relations Board (NLRB) Rejects Micro-Unit at Retailer

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In a long-awaited decision, the **National Labor Relations Board** has held that a petitioned-for “micro” bargaining unit consisting of women’s shoe sales associates working in two areas within a store, which followed no administrative or operational lines set by the store, was inappropriate under **Specialty Healthcare**, 357 NLRB No. 83 (2011), where the Board seemingly had green-lighted such “micro-units” as appropriate for collective bargaining. The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 NLRB No. 11 (2014).

Manhattan luxury retailer Bergdorf Goodman operates a Women’s store on Fifth Avenue. The petitioned-for unit consisted of women’s shoes sales associates who were located in separate departments within the store — a department called “Salon shoes,” located on the second floor and is its own department, and “Contemporary shoes,” located on the fifth floor and is part of a larger department. Although employees in the two departments shared the same terms and conditions of employment, they were supervised by different floor and department managers, transfers between the departments were few, and sales associates did not substitute for one another or otherwise interchange.

In *Specialty Healthcare*, the NLRB instructed that in cases in which a party contends that the smallest appropriate bargaining unit must include additional employees (or job classifications) beyond those in the petitioned-for unit, the Board first reviews whether the unit is an appropriate bargaining unit: the “employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria[.]” If the petitioned-for unit satisfies this standard, the burden is on the proponent (here, BG) of a larger unit to demonstrate that the additional employees it seeks to include share an “overwhelming community of interest” with the petitioned-for employees.

The employer argued that the petitioned-for unit was not appropriate and that the petitioned-for employees shared an overwhelming community of interest with other selling employees so that an appropriate unit had to include, at a minimum, all selling employees, including not only all sales associates, but also personal shoppers and sales assistants. Alternatively, the employer asserted that a storewide unit was appropriate.

Based on Specialty Healthcare the Board dismissed the petition. It explained that, in making its determination, it must weigh “various community-of-interest factors, including whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer’s other employees; have frequent contacts with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.” Although the Board found the petitioned-for employees were “readily identifiable as a group by virtue of their function[,]” the sales associates in Salon shoes and Contemporary shoes did not meet Specialty Healthcare’s first prong: they lacked a community of interest. The petitioned-for employees had a common purpose, i.e. selling women’s shoes, and shared the same pay structure, hiring criteria, appraisal process and were subject to the same employee handbook. However, the Board found that “the balance of the community-of-interest factors weigh[ed] against finding that the petitioned-for unit was appropriate” because “the petitioned-for unit d[id] not resemble any administrative or operational lines drawn by the Employer.” Instead, the petitioned-for unit consisted of the entire Salon shoe department and only a select portion of employees out of a second department. Thus, unlike the petitioned-for unit in Macy’s, Inc., 361 NLRB No. 4 (2014), which “conformed to the departmental lines established by the employer[,]” this unit was inconsistent with how the employer chose to structure its workplace.

Bergdorf shows that the Board will give some deference to how an employer structures its operations in evaluating whether employees share a community of interest. However, this is not always the case. The Board cautioned that a petitioned-for unit that departs from an employer’s departmental lines may be appropriate where the other community-of-interest factors weigh in favor of appropriateness of the petitioned-for unit, such as when there exists common supervision despite the employees working in different departments, or when there is a significant interchange of employees between departments.

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