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National Labor Relations Board Overrules Controversial Decision Facilitating Union Organizing of Micro-Units

Article By:

Daniel B. Pasternak

NLRB walks back Specialty Healthcare decision, eliminates "overwhelming community of interest" standard in deciding employer challenges to union-proposed bargaining units

On December 15, 2017, in a 3-2 ruling in PCC Structurals, Inc., the National Labor Relations Board ("NLRB" or "Board") overruled its controversial 2011 decision in Specialty Healthcare & Rehabilitation Center of Mobile ("*Specialty Healthcare*"). In that case, the Board held that a group of Certified Nursing Assistants (CNAs) at a long-term care facility was an appropriate bargaining unit, overruling the employer's objection that the unit should include not only the CNAs, but also dietary, housekeeping, laundry, and maintenance employees working at the same facility. The Board rejected the employer's position, holding that in order for an employer to demonstrate that a bargaining unit proposed by a union inappropriately excludes certain employees, the employer must demonstrate that the employees it seeks to include share "an overwhelming community of interest" with the employees in the unit proposed by the union. The effect of this decision was to substantially raise the bar on the ability of employers to include other employees in proposed bargaining units, and to make it substantially easier for unions to organize discrete groups of pro-union employees working by allowing them to organize what have come to be known as "micro-units."

Citing sound policy reasons, in *PCC Structurals*, the NLRB overruled *Specialty Healthcare* and reinstated the well-known, traditional "community-of-interest" standard for determining an appropriate bargaining unit in union representation cases. Under this standard, the Board is to evaluate the interests of all employees, both those within and outside the petitioned-for unit, without regard to whether these groups share an overwhelming community of interest. The Board explained that the National Labor Relations Act requires that it decide in each case whether the group of employees a union seeks to represent constitutes a unit that is "appropriate" for collective bargaining, but also prohibits treating the extent of the union's organizing as controlling. As the Board explained in its new decision, requiring that an employer demonstrate that the employees excluded from the union's sought-after bargaining unit share an "overwhelming" community of interest with the included employees gives too much weight to the extent of union organizing because it results in the union's petitioned-for unit being deemed appropriate in almost every case and improperly permits unions to handpick groups of workers who are likely to vote in its favor "in all but narrow and highly unusual circumstances." By reverting to the traditional "community of interest" test, a determination of which employees should be in a bargaining unit instead is based on a

balanced assessment of how the workers are organized and classified, the types of jobs they do, and their skills and training, without regard to whether any groups share an “overwhelming” community of interests.

This decision, like the other decisions issued by the Board in mid-December 2017 (see our prior post here) – just before the expiration of Chairman Miscimarra’s term – overturned one of the more unpopular Obama-era NLRB decisions. It leveled playing field and removed the clear advantage given to unions by the *Specialty Healthcare* decision, and for this reason, will be undoubtedly welcomed by the employer community.

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