Updates
December 20, 2022

NLRB Returns to Obama-Era Microunit Standard

On December 14, 2022, the National Labor Relations Board (NLRB or the Board) issued a decision in *American Steel Construction, Inc*., in which a 3-2 Board majority threw out the Trump-era standard used to determine whether a microunit (i.e., a small, discrete subset of employees at a larger worksite) is appropriate and reinstated the Obama-era standard which held that petitioned-for units would be found appropriate unless there was an "overwhelming" community of interest between the petitioned-for unit and excluded employees.

The Board was tasked with evaluating a Regional Director's determination that a petitioned-for microunit was not appropriate because the evidence was insufficient to establish that American Steel Construction, Inc.'s (the Employer) field ironworkers, who predominantly work as installers at third-party job sites, possess a community of interest that was "sufficiently distinct" from the Employer's remaining employees. Before addressing the Regional Director's ruling, the Board majority reevaluated its current standard for determining whether a petitioned-for unit is appropriate and explicitly overruled its decisions in *PCC Structurals, Inc*., and *The Boeing Co*., and reinstated *Specialty Healthcare & Rehabilitation Center of Mobile*.

Under *PCC Structural* and *Boeing*, the Board determined whether a microunit was appropriate by looking to "whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interest of employees excluded from the unit to warrant a separate bargaining unit." (emphasis in original). In throwing out these two decisions, the Board majority in *American Steel* wrote that "the standard articulated by *PCC-Boeing* has weak foundation in Board law and lacks any clear guiding principle that can be explained by statutory policy or the Act's test for Regional Directors who are charged with applying it." It also held that "*PCC-Boeing* incorrectly examines the 'overwhelming community of interest' standard in a vacuum and, in overruling it, makes the 'sufficiently distinct' element the Board's highest concern, thereby obscuring and ignoring the Board's primary duty in unit determination cases: to determine whether the petitioned-for unit is appropriate for the purposes of collective bargaining."

After overruling *PCC* and *Boeing*, the Board majority reinstated the Obama-era *Specialty Healthcare* test:

[T]he Board will . . . approve a petitioned-for "subdivision" of employee classifications if the petitioned-for unit: (1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct.

It went on the clarify that "the Board need not address every element in every case: if a particular element is not disputed, it need not be adjudicated." However:

[I]f a party contends that the petitioned-for unit is not sufficiently distinct—i.e., that the smallest appropriate unit contains additional employees—then the Board will apply its traditional community-of-interest factors to determine **whether there is an "overwhelming community of interest" between the petitioned-for and excluded employees, such that there is no rational basis for the exclusion.** If there are only minimal differences, from the perspective of collective bargaining, between the petitioned-for employees and a particular classification, then an overwhelming community of interest exists, and that classification must be included in the unit.

The Board's decision also included dicta concerning the appropriateness of craft units, employer-wide units, and plant-wide units:

Over the years, the Board has developed various tests to analyze the unit configurations articulated in 9(b). Employer-wide and plant-wide units are presumptively appropriate under the Act, and will be approved unless the contesting party can rebut the presumption. Similarly, if the petitioned-for unit meets the criteria to be defined as a "craft unit," it will also be approved.

Notably, the Board did not elaborate on the test used to determine whether a group of petitioned-for employees is a craft unit.

The Board's reinstated *Specialty Healthcare* standard applies retroactively to all pending cases. Here, the Board, "[i]n the interest of fairness," remanded the case to the Regional Director and stated that the Regional Director could reopen the record if necessary. In doing so, the Board acknowledged that its "reinstatement of the *Specialty Healthcare* standard alters the burden placed on [Specialty Healthcare] in terms of litigating whether the petitioned-for unit is appropriate without the inclusion of additional employees—i.e., whether the unit is 'sufficiently distinct.'"

Members Kaplan and Ring vigorously dissented, writing:

PCC Structurals and *The Boeing Company* facilitate the Board's accomplishment of its statutory duty to consider in each case the interests of petitioned-for *and* excluded employees and embody the traditional community-of-interest standard the Board has applied for decades. By overruling *PCC Structurals* and *Boeing* and returning to *Specialty Healthcare*, the majority guts that standard, undermines labor-relations stability, and shackles the Board in fulfilling its duties under Section 9(b).

The Board's return to the *Specialty Healthcare* standard will make it much easier for unions to organize smaller groups of employees, especially in larger, compartmentalized workplaces. Employers operating large production facilities should take steps now to raise the likelihood that the Board will find that their employees share an overwhelming community of interest with other employees at the facility. These steps may include giving employees in one department temporary work assignments in other departments, transferring employees from one department to another, functionally integrating the various steps along a production line, and implementing common personnel systems for hiring, background checks, and trainings.

Authors

Richard B. Hankins

Partner
RHankins@perkinscoie.com 214.259.4960

Michael Alexander Pratt

Counsel
AlexanderPratt@perkinscoie.com 214.259.4922

Explore more in

Labor & Employment

Related insights

Update

Wrapping Paper Series: Issues and Trends Facing the Retail Industry During the Holiday Season

Update

Preparing for the 2025 Public Company Reporting Season