A Timely Analysis of Legal Developments

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Labor Board Likely Emboldened Following Sixth Circuit Decision Paving the Way for Micro-Units

By Jack Lambremont and Kyllan Kershaw

On Thursday, August 15, 2013, the U.S. Court of Appeals for the Sixth Circuit upheld the National Labor Relations Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*,[1] affirming that the Board has broad discretion to determine appropriate bargaining units for union representation elections, including narrow so-called "micro-units."

Specialty Healthcare Standard

Under the *Specialty Healthcare* framework, the Board first evaluates whether a petitioned-for unit shares a community of interest and is therefore appropriate. The Board evaluates the following in doing so: whether the employees sought 1) are organized into a separate department; 2) have distinct skills and training; 3) have distinct job functions and perform distinct work, including the amount and type of overlap among classifications; 4) are functionally integrated with the employer's other employees; 5) have frequent contact with other employees; 6) interchange with other employees; 7) have distinct terms and conditions of employment; and 8) are separately supervised.[2] If the Board determines that a petitioned-for unit is readily identifiable and employees in that unit share a community of interest, the Board will find the unit appropriate, unless the party seeking a larger unit shows that employees in the larger unit share an "overwhelming community of interest" with employees in the petitioned-for unit.[3]

Analysis of Sixth Circuit Decision

In the case before the Sixth Circuit, Kindred Nursing Centers East, a nursing home operator, appealed the Board's order certifying a petitioned-for unit of certified nursing assistants and excluding other service personnel, such as cooks and resident activity assistants, from the unit, even though the certified nursing assistants and the excluded employees shared common benefits, personnel policies, training, and break areas and attended the same monthly meetings and holiday functions. Nevertheless, the Board found that the certified nursing assistants did not share an overwhelming community of interest with the excluded employees because (1) the

1 *See Kindred Nursing Centers East, LLC v. NLRB*, No. 12-1027/1174 (6th Cir. Aug. 15, 2013).

2 *Specialty Healthcare and Rehab Ctr. of Mobile*, 357 N.L.R.B. No. 83 (2011), Slip. Op. at 9.

3 *Id.*

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certified nursing assistants reported to registered nurses while the excluded employees reported to managers; and (2) the certified nursing assistants wore different uniforms than did the excluded employees and participated in some aspects of patient care, such as feeding and positioning.[4]

In its appeal, Kindred asserted that the Board abused its discretion by adopting a new standard representing a material change in the law and by making changes to the law through adjudication instead of rulemaking.[5] The Sixth Circuit rejected Kindred's arguments, noting that the Board has considerable latitude to determine appropriate bargaining units and "has used the overwhelming community of interest standard before, so its adoption in *Specialty Healthcare II* is not new."[6] The Board's articulated reasons for adopting the overwhelming community of interest standard and that the standard is based on prior precedents led the Sixth Circuit to find that the Board did not abuse its discretion in applying the overwhelming community of interest standard in *Specialty Healthcare*. The Sixth Circuit further noted that the Board is not precluded from announcing new principles in an adjudicative proceeding, and therefore the Board did not abuse its discretion by making policy through adjudication instead of notice-and-comment rulemaking.[7]

Impact on Employers

The Board's decisions following *Specialty Healthcare* demonstrate that proving an "overwhelming community of interest" is a hefty burden for employers.[8] The Sixth Circuit's affirmation of *Specialty Healthcare* will likely embolden the newly-constituted Board to continue its predecessors' movement toward rulemaking and decisions that facilitate union organizing. The decision also indicates that the Board's recent trend of finding micro-units to be appropriate will continue.

Targeting smaller groups within an employer's workforce provides labor unions with a great deal of flexibility. Such groups may be more susceptible to organizing activity than the larger, traditional employee complement that would have been included in a proposed bargaining unit under the Board's prior standard. While it is expected that the Board and courts will continue to refine the application of *Specialty Healthcare* in the coming years, employers should be aware that a finding of an appropriate "micro-unit" will be very difficult to avoid in most employer operations. In fact, the vast majority of Board and regional director decisions since the issuance of *Specialty Healthcare* have supported unions' efforts to organize smaller units that would have been deemed inappropriate under the traditional community of interest standard.

An employer may have a chance of convincing the Board that a micro-unit is not an appropriate unit under the *Specialty Healthcare* standard if it can establish: significant interchange and interaction between employee groups; cross-training and cross-utilization between employee groups; significant inter-department transfers on both a temporary and permanent basis; central maintenance of personnel records; uniform employment policies and compensation; common supervision and handling of complaints, discipline, evaluations and leave requests; and central and uniform training.

Jack Lambremont is a Shareholder, and Kyllan Kershaw is an Associate, in Littler Mendelson's Atlanta office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Lambremont at jlambremont@littler.com, or Ms. Kershaw at kkershaw@littler.com.

4 *Kindred Nursing Centers East*, at 4-8.

5 *Id.* at 10.

6 *Id.* at 14.

7 *Id.* at 19.

8 *See, e.g., Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011); *DTG Operations, Inc.*, 2011 NLRB LEXIS 803 (2011); *Grace Industries, LLC*, 2012 NLRB LEXIS 352 (Jun. 18, 2012).

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