JONES DAY

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CIRCUIT COURT OF APPEALS UPHOLDS THE NLRB'S NEW "OVERWHELMING COMMUNITY OF INTEREST" BARGAINING UNIT TEST

The U.S. Court of Appeals for the Sixth Circuit, in a recent decision, approved the National Labor Relations Board's ("NLRB") application of its new "overwhelming community of interest test" in bargaining unit determination cases. The case, *Specialty Healthcare and Rehab. Ctr. of Mobile,* 357 NLRB No. 83 (2011), involved the question of whether a union could single out certified nurse assistants for representation at a long-term care facility and no longer apply the Board's bargaining unit determination standards for such facilities as provided for in its previous decision in *Park Manor*, 305 NLRB No. 135 (1991).

The Court of Appeals, in *Specialty Healthcare*, rejected all of the employer's challenges to the Board's decision and found that not only did the Board have considerable discretion under the National Labor Relations Act ("NLRA") in determining the appropriateness of voting units, but also that the Board, in this case, did not substantially change prior law in the unit determination area. The Court of Appeals also held that the Board's decision in *Specialty Healthcare* did not violate Section 9(c)(5) of the NLRA, which prohibits the approval of bargaining units on an extent of organizing basis. The court held that while the wording in Section 9(c)(5) is ambiguous, the Board did provide a rationale for its unit determination finding and did not simply defer to the unit being sought by the union. The court also rejected the employer's arguments that the Board should have engaged in rulemaking before making this change in its voting unit determination standards.

The *Specialty Healthcare* decision and its affirmance by the Sixth Circuit, unless or until the Supreme Court or other circuit courts hold differently, establishes a new "overwhelming community of interest test" to be used by the Board and its Regional Directors in voting unit and bargaining unit cases. Previously, the Board had applied its traditional "community of interest test" in virtually all unit determinations cases and only utilized the "overwhelming community of interest test"

in accretion cases wherein small groups of unrepresented employees could be combined with represented employees without a secret ballot election being held. This standard will require an employer that attempts to add job classifications or positions to a unit being petitioned for by a union to establish that such additional employee complement has an "overwhelming community of interest" with the petitioned-for employees. This will be an exceedingly difficult standard to meet, and, as noted below, employers to date have been largely unsuccessful in meeting this standard.

The NLRB and its Regional Directors have applied the new "overwhelming community of interest test," in one fashion or another, in approximately 90 cases to date. In virtually all of these decisions, the employer has not been successful in increasing the size of the petitioned-for unit due to the application of this new test. A sampling of these decisions include the following:

***DTG Operations, Inc.*, 357 NLRB No. 175 (2011).** The Board found appropriate a unit of 31 rental service agents and overturned a Regional Director decision that had added additional employee positions to the petitioned-for unit. The Board found that there was no overwhelming community of interest for the additional employee positions and relied on evidence that the petitioned-for employees worked separately from other employees and performed distinct sales tasks with qualifications, expectations, and consequences for failure to meet those expectations that were not required of other employees.

***Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151 (2013).** The Board affirmed the Regional Director's finding that a unit consisting of canine welfare technicians and instructors was appropriate and concluding that the employer had not met its burden of demonstrating that other "dog handling" employees shared an overwhelming community of interest with the petitioned-for unit.

***Henkel Corp.*, Reg. 32 No. 32-RC-108535 (Aug. 8, 2013).** The Regional Director found that the petitioned-for unit including all paste and film employees at a facility was appropriate and rejected the employer's argument that an appropriate unit should also include warehouse operators, maintenance mechanics, lab technicians, and planners.

***Copper River of Boiling Springs, LLC*, Reg. 10 No. 10-RC-098046 (Mar. 7, 2013).** The Regional Director found that an appropriate unit consisted of servers, bartenders, and hostesses and declined the employer's claim that cooks and dishwashers should be included in the appropriate unit. According to the Regional Director, the cooks and dishwashers had different functions and job skills, rarely interacted or interchanged jobs with other employees, performed work in a separate area, had different supervisors, and were not subject to the tip-credit scheme. Similar terms and conditions of employment, such as facts that established that all employees wore similar uniforms, had the same insurance options, took similar trainings, followed the same handbooks, and used similar work schedules, were insufficient to create an overwhelming community of interest.

***Corliss Resources*, Reg. 19 No. 19-RC-080317 (June 12, 2012).** The Regional Director found that an appropriate unit was composed of 29 dump truck drivers and rejected the employer's claim that all 74 truck drivers, including concrete mixer drivers, should constitute a unit. The Regional Director reasoned that while all drivers shared the same skills, training, and terms and conditions of employment, there was no overwhelming community of interest because the departmental organization, job functions, and supervision of the dump truck drivers were different from that of the concrete mixer drivers, and the two job types had little contact or interchange.

***Bergdorf Goodman*, Reg. 2 No. 02-RC-076954 (May 4, 2012).** The Regional Director found that all women's shoes associates in the 2nd Floor Designer Shoes Department constituted an appropriate unit, despite the employer's claim that the appropriate unit should comprise all store employees or at least all selling associates at the store.

The NLRB's 2011 decision in *Specialty Healthcare* has received substantial attention since it issued, and many analysts have described it as one of the most important precedent-changing decisions ever to be issued by the Board. There also have been predictions that this decision will permit unions to gain entry into non-union businesses through the successful organizing of various small or "micro" bargaining units. While the *Specialty Healthcare* decision certainly does open the door for small or "micro" bargaining units, perhaps more importantly, especially for large employers, it

opens the door for unions to obtain rulings from the NLRB that significant segments of an employer's workforce can be "carved out," to form a bargaining unit on an extent of organizing basis, and thereby result in the fragmentation of segments of an employer's operations. Indeed, partial unionization of otherwise integrated departments or operations of an employer can not only create labor disharmony but also lead to the potential for work stoppages, protracted collective bargaining, and interference in an employer's ability to expeditiously change, on a plant-wide or department-wide basis, operational policies and procedures.

Employers that have union-free workforces, and those employers that have partially unionized workforces, should pay particular attention to the Board's new "overwhelming community of interest test" and be prepared, in any contested voting unit case, to develop very complete and thorough records in Board unit determination hearings of the integration of their workforce with respect to employee positions it desires to add to the petitioned-for unit. Employers also should, to the extent possible, establish commonality with respect to terms and conditions of employment of its employees and utilize, whenever possible, cross-training and transfer initiatives to be able to establish that the various positions that make up its workforce have an overwhelming community of interest with virtually no deviation, from one position to another, with respect to terms and conditions of employment.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Doreen S. Davis
New York
+1.212.326.3833
ddavis@jonesday.com

Jessica Kastin
New York
+1.212.326.3923
jkastin@jonesday.com

Patricia A. Dunn
Washington
+1.202.879.5425
pdunn@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

E. Michael Rossman
Columbus
+1.614.281.3866
emrossman@jonesday.com

Michael S. Ferrell
Chicago
+1.312.269.4226
mferrell@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com

Willis J. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com