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COMMENTARY

Second Circuit Overturns NLRB Unit Determination and Admonishes NLRB for Misapplying *Specialty Healthcare* Standard

On November 21, 2016, the United States Court of Appeals for the Second Circuit handed an employer a rare victory in a challenge to a National Labor Relations Board ("NLRB" or "Board") unit determination confirming a petitioned-for bargaining unit. *Constellation Brands, U.S. Operations, Inc. v. NLRB*, Nos. 15 2442, 15 4106 (2d Cir. Nov. 21, 2016) ("*Constellation Brands*").

In 2011, the Board adopted a new standard for determining the appropriateness of the scope of a bargaining unit proposed by a union seeking to be elected and certified as that group's bargaining representative. *See Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 932 (2011), *enf'd sub nom Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) ("*Specialty Healthcare*"). *Specialty Healthcare* requires a two-step analysis by the Board's Regional Directors when determining the appropriateness of a proposed bargaining unit.

First, the Regional Director must assess whether the petitioned-for employees share a community of interest that is sufficiently distinct from that of excluded employees. Second, if the proposed unit is found to be appropriate, the Regional Director must assess whether the opposing party has shown that the excluded employees it wishes to include share an "overwhelming" community of interest with the employees included in the unit.

Employers have not been generally successful under *Specialty Healthcare* when attempting to broaden petitioned-for bargaining units. Many employers have expressed concern that *Specialty Healthcare* results in the Board merely rubberstamping units as defined by unions seeking to represent them and not appropriately assessing whether other groups of employees belong in the unit. The new standard has resulted in small bargaining units that may make it more difficult for employers to win representation elections and could fracture the workplace once represented, especially when similarly situated employees are excluded from the unit.

In *Constellation Brands*, the Second Circuit followed other courts of appeals—the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits—in upholding the NLRB's two-step standard for determining whether a petitioned-for bargaining unit is appropriate, as set forth

in *Specialty Healthcare*. But unlike these other circuits, the Second Circuit insisted that step one of *Specialty Healthcare* be applied in a way that addresses employers' concerns described above.

The Second Circuit admonished the Board and an NLRB Regional Director for failing to adequately explain the *legal* significance of purported *factual* differences between employees within and outside the petitioned-for unit—here, the "outside cellar" employees at a single Constellation winery. Judge Cabranes, writing for the court, made clear that the Board cannot just rubberstamp the union's choice of unit. He noted that while Regional Directors have broad discretion in determining the appropriateness of a unit, that discretion is not unlimited.

The court confirmed that step one of *Specialty Healthcare* has teeth: it requires the Board to consider whether members of the proposed unit have interests that are "separate and distinct" from excluded employees. In this case, the court found that the Regional Director did not explain why, based on his factual findings, the petitioned-for group had distinct interests, or why any such interests outweighed similarities with excluded employees. In other words, he did not explain the weight or relevance of his factual findings. As such, the court could not rule out the possibility that other employees were arbitrarily excluded from the unit.

Specifically, the court instructed that:

> the Board must *analyze* at step one the facts presented to: (a) identify shared interests among members of the petitioned for unit, *and* (b) explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective bargaining interests are relevant and support the conclusion. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation and to avoid making step one of the *Specialty Healthcare* framework a mere rubber stamp.

p. 20-21 (emphasis in original).

The Regional Director's failure to engage in a full analysis prior to shifting the burden to the employer led the Second Circuit to remand the matter back to the Board to engage in the appropriate analysis.

This decision comes days after the Fifth Circuit denied Macy's, Inc.'s request for rehearing en banc in a case raising materially identical legal issues. Six judges dissented from that order, for reasons that mirror those in *Constellation Brands*. Judge Jolly, writing for the dissenters, explained that in certifying a unit of cosmetic and fragrance employees at a single Macy's retail location, the NLRB applied "an incorrect standard for analyzing the first prong of the *Specialty Healthcare* framework" by failing "to compare employees in the petitioned-for group with excluded employees." *Macy's, Inc. v. NLRB*, No. 15-60022, 2016 WL 6832944, at *2, *4 (5th Cir. Nov. 18, 2016) (Jolly, J., dissenting). Crucially, while the NLRB pointed to factual distinctions between included and excluded employees, it "did not explain how th[ose] distinction[s] w[ere] meaningful." *Id.* at *5. The result was "another example of the current National Labor Relations Board's … determination to disregard established principles of labor law." *Id.* at *1.

Together, these opinions should encourage employers concerned that *Specialty Healthcare* creates a virtually irrebuttable presumption that the scope of a union's petition will be an appropriate unit. Such a presumption could arbitrarily exclude similarly situated employees and lead to difficult issues for employers dealing with multiple fractured units at a single facility.

Employer groups have opposed *Specialty Healthcare*, arguing, among other things, that it promotes "micro" units that are often so small that they can fragment the workforce, require employers to bargain with multiple employee groups at the same location, maintain multiple benefit plans, exclude employees arbitrarily, and generally make it more difficult for employers to win elections.

We reported in October 2013 that *Specialty Healthcare* had already been applied in approximately 90 cases that showed employers having difficulty meeting the overwhelming community of interest standard to successfully expand the scope of

petitioned-for units. *See* "Circuit Court of Appeals Upholds the NLRB's New 'Overwhelming Community of Interest' Bargaining Unit Test," *Jones Day Commentary*, October 2013.

Constellation Brands and *Macy's* are important decisions because they set forth a roadmap for NLRB Regional Directors analyzing the appropriateness of bargaining units. The Board is now on notice that its unit determinations may not be enforced if—at step one of the *Specialty Healthcare* analysis—it does not adequately explain both the community of interest shared by petitioned-for employees and why those interests are sufficiently distinct from those of excluded employees. Employers facing petitions for units excluding similarly situated employees now have a stronger basis to contest a finding that the unit is appropriate if the Regional Director does not offer a thorough analysis that explains the legal significance of any factual distinctions it identifies.

Jones Day represented Constellation Brands before the Second Circuit Court of Appeals and Macy's, Inc. before the Fifth Circuit Court of Appeals.

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