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NLRB RESTORES *SPECIALTY HEALTHCARE* "COMMUNITY OF INTEREST" STANDARD FOR SMALLER BARGAINING UNITS

On December 14, 2022, the National Labor Relations Board ("NLRB") issued a Decision of Review and Order in the case of *American Steel Construction, Inc.,* Case 07-RC-269162. In its decision, the Board reinstated the previously overruled "community of interest" standard for determining an appropriate bargaining unit where the petitioner is not seeking to represent all of the employer's workers. This decision restores longstanding protections for petitioned-for employees that had been severely undermined by a 2017 decision issued by the Trump Labor Board.

Under the Obama Board, the 2011 case *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 "reaffirmed that, in order for [a bargaining] unit to be appropriate, the employees in the petitioned-for unit must be readily identifiable as a group and share a 'community of interest.'" "*Specialty Healthcare* also reiterated that, if a party contends that the unit is nevertheless inappropriate because it excludes additional employees who are not sufficiently distinct from the petitioned-for employees, that party must show that the excluded employees share an 'overwhelming community of interest' in order to mandate inclusion." That decision limited the ability of employers to challenge the appropriateness of bargaining units solely because they did not seek to represent a wall-to-wall unit of all employees.

In *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), the Trump Board overruled the "overwhelming community of interest" standard that had been reaffirmed in *Specialty Healthcare*, thus "making it easier to invalidate a petitioned-for unit based on the supposed interests of excluded employees seeking representation." As the Board clarified in a subsequent case, the *PCC Structurals* standard involved a three-part test: "First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decision on appropriate units in the particular industry involved."

In the recent *American Steel* case, the union filed a petition to represent all journeymen and apprentice ironworkers at American Steel Construction, Inc. The employer argued that the petitioned-for unit was inappropriate because it did not also include the painters, drivers, and inside fabricators employed by American Steel. Applying the standard set by *PCC Structurals*, the Regional Director of the NLRB sided with the employer. The Regional Director concluded that the petitioned-for unit was inappropriate because "the evidence was insufficient to establish that the Employer's field ironworkers, who predominantly work as field installers at third-party jobsites, possess a community of interest that is 'sufficiently distinct' from the Employer's remaining employees." As a result, the Union's petition was dismissed.

The Union filed a petition for review, which the Board granted. On review, the Board in this case found that the stricter *PCC Structurals* standard had "extensive faults" – specifically, "its cumbersome and confusing

approach to the 'sufficiently distinct' element, its detrimental effects on the rights of the petitioning employees, and its hollow statutory reasoning." As a result, the Board reinstated the *Specialty Healthcare* standard, which it described as follows: "[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."

This decision represents a major win for unions, as it strengthens their ability to determine the size of bargaining units and makes it more difficult for employers to challenge them on the basis that additional employees should be included in the petitioned-for unit.

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