



By: John R. LaBar

## U.S. SIXTH CIRCUIT UPHOLDS NLRB DECISION ALLOWING “MICRO UNIONS”.

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On August 15, 2013, the U.S. Court of Appeals for the Sixth Circuit affirmed the National Labor Relations Board’s (“NLRB” or “Board”) decision in *Specialty Healthcare*.<sup>1,2,3</sup> In *Specialty Healthcare*, the Board overruled over 20 years of practice in how the Board determines the appropriate bargaining unit in nonacute healthcare facilities. Of particular concern to employers is that the underlying decision in *Specialty Healthcare* permits unions to petition for smaller “bargaining units”, with such units consisting of only one department or even job classification, as compared to the Board’s prior preference of favoring “wall-to-wall units” at a single site.

Under federal labor law<sup>4</sup>, workers in the private sector who wish to be represented by a union must petition the NLRB to hold an election to determine if a majority of the workers want union representation. Section 9(b) of the Act gives the Board wide discretion to determine an appropriate “bargaining unit” or term for the group of workers that will vote on union representation. However, “[t]he Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a ‘community of interest.’”<sup>5</sup> In turn, the “community of interest test” requires simply that groups of employees in the same bargaining unit “share a community of interests sufficient to justify their mutual inclusion in a single bargaining unit.”<sup>6</sup>

The “community of interest test” includes the following five factors” “(1) similarity in skills, interests, duties and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer’s organization and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees.”<sup>7</sup>

In *Specialty Healthcare*, the employer challenged the Board’s decision claiming primarily that the Board abused its discretion in its adoption of a new “appropriate bargaining unit” approach, that of the “overwhelming community of interest test”.<sup>8</sup> In its decision ruling against *Specialty Healthcare*, the Board stated that:

“we reiterate and clarify that, in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.”<sup>9</sup>

*Specialty Healthcare* argued that this “overwhelming community of interest test” represented a material change in the law. The Court was not convinced by this argument and upheld the Board’s power to adopt such a test.<sup>10</sup>



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Specialty Healthcare also objected to the allocation of the burden of proof on the party arguing that the petitioned-for unit was inappropriate. However, the Court also dismissed this argument finding that “[w]hile prior Board decisions did not expressly impose the burden of proof on the party arguing that the petitioned-for unit is inappropriate because the smallest appropriate unit contains additional employees, allocating the burden in this manner is appropriate for several reasons which were set forth in the Board’s decision.”<sup>11</sup>

The first reason set forth by the Board was that “it is well established that ‘the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board’s inquiry ends’ *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2, the Board should find the proposed unit to be an appropriate unit under the circumstances here unless the employer both contends and proves that a larger unit is the smallest appropriate unit.”<sup>12</sup> The second reason set forth by the Board was that “when the petitioned-for unit is presumptively appropriate, after there has been a showing that the petition describes employees who are readily identifiable as a group and share a community of interest, the Board can and should find the proposed unit to be an appropriate unit unless an opposing party proves otherwise.”<sup>13</sup> And the final reason set forth by the Board was that “the allocation of the burden is appropriate because the employer is in full and often near-exclusive possession of the relevant evidence.”<sup>14</sup> For these reasons, the Board has adopted as the standard, and the Court in *Specialty Healthcare* has approved, the allocation of the burden of proof on the employer in defining the scope of the appropriate bargaining units, both pre- and post-elections.

While the underlying Board Decision in *Specialty Healthcare* was initially decided in August of 2011, the full effect of “*micro bargaining*” units or “*micro unions*” and union efforts to create such units/unions is still relatively unknown. However, now that the NLRB is at full strength for the first time in years, the Board could be ready to expand the rationale in *Specialty Healthcare* to eliminate other long standing special industry and occupation rules in order to encourage the formation of such “*micro bargaining*” units. Of particular concern to employers would be a change by the Board to the long standing requirement in the retail sector of a single store requiring a “wall-to-wall unit” at a single location.<sup>15</sup>

The dissent of NLRB Member Brian E. Hayes in *Specialty Healthcare* also echoes the concern that employees may face an avalanche of “*micro bargaining*” or “*micro unions*” in the future. Specifically, Member Hayes wrote that “Make no mistake. Today’s decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board’s jurisdiction.”

As a final note, while the decision in this case may be troubling for employers across the country, employers in Tennessee, Kentucky, Ohio and Michigan should be especially concerned in that the U.S. Sixth Circuit is responsible for hearing Federal Court appeals from these states. As such, this case will be controlling precedent for any litigation before this Court.

*John R. LaBar and the attorneys at Henry & McCord are available to consult with employers regarding the best course of action.*

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<sup>1</sup> *Kindred Nursing Centers East, LLC fka Specialty Healthcare and Rehabilitation Center of Mobile v. National Labor Relations Board*, Case No. 12-1027/1174 (6th Cir. 2013).

<sup>2</sup> While Kindred Nursing Centers East, LLC is now the legal owner of Specialty Healthcare and Rehabilitation Center of Mobile, for ease of reference with the underlying Board decision, we will refer to the employer as “*Specialty Healthcare*”.

<sup>3</sup> *Specialty Healthcare and Rehab. Ctr of Mobile and United Steelworkers, District 9, Petitioner*, Case 15-RC-8773 (August 26, 2011), 357 N.L.R.B. N. 83, 2011 WL 3916077.

<sup>4</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169 (the “NLRA” or the “Act”).

<sup>5</sup> *Kindred* at 11; citing *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985).

<sup>6</sup> *Id.*; citing *NLRB v. ADT Security Servs., Inc.*, 689 F.3d 628, 633 (6th Cir. 2012).

<sup>7</sup> *Id.*; citing *Bry-Fern Care Ctr., Inc. v. N.L.R.B.*, 21 F.3d 706, 709 (6th Cir. 1994).

<sup>8</sup> While the union petitioned to represent a “bargaining unit” of 53 full-time and regular part-time CNA’s, the employer sought to include an additional 86 non-supervisory, non-professional service and maintenance employees. After Region 15’s Regional Director found the proposed “bargaining unit” of 53 employees as an appropriate unit in which to conduct an election, an election was held, and the union won.

<sup>9</sup> *Specialty Healthcare* at \*1.

<sup>10</sup> After the Board’s decision, Specialty Healthcare refused to bargain. The union then filed an unfair labor practice charge and the Board found that Specialty Healthcare violated the NLRA. Specialty Healthcare’s refusal to bargain was a required legal step in that an employer cannot get direct judicial review of the Board’s bargaining unit determination, but rather, must instead first refuse to bargain with the union and then raise the issue of the unit’s appropriateness in a subsequent unfair labor practice proceeding.

<sup>11</sup> *Specialty Healthcare* at \*20, n.28.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; citing *Allen Health Care Services*, 332 NLRB 1308, 1309 fn. 3 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> See *Home Depot USA*, 20-RC-067144 (Nov. 18, 2011).