CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

CLIENT BULLETIN

BOARD GIVES SPECIAL TREATMENT TO UNION ORGANIZING

Unions may organize employers piecemeal by proliferating small units

By David Phippen
Fairfax, VA

In another thinly-veiled effort to open the floodgates to union victories in representation elections, the National Labor Relations Board's three-member Democrat majority has overruled a long-standing standard for determining bargaining unit appropriateness in the non-acute health care industry. In ***Specialty Healthcare and Rehabilitation of Mobile***, the majority of the Board ruled that a petitioned-for unit comprised solely of Certified Nursing Assistants was appropriate where the employees shared a "community of interest." Although the Board has never previously approved a CNA-only unit, it has now found the job-based unit classification to be presumptively appropriate. It also held that, in order to overcome the presumption, a challenging party would bear the burden of proving that excluded employees shared an "overwhelming community of interest" with the employees in the petitioned-for unit. This constitutes a significant – and far-reaching – departure from the established law.

For more than 20 years, the Board had held that in the non-acute health care industry concerns about a proliferation of small bargaining units warranted special rules and that the Board should consider unit appropriateness factors beyond the traditional "community of interest." This was based on the Board's ruling in ***Park Manor Care Center***, as well as the admonitions of Congress in enacting the Health Care Amendments to the NLRA. Accordingly, a heightened standard has consistently been applied to non-acute care facilities, in an effort to balance an employee's right to unionize with the facility's interest in minimizing the number of bargaining units in a health care setting. The *Specialty Healthcare* decision abrogates 20 years of consistent precedent in this regard, and eliminates any protections against unit proliferation in these facilities.

Brian Hayes, the lone Republican appointee to the Board, pointed out in a dissent that the Board had historically not used the traditional "community of interest" standard alone in its unit determinations, but had appropriately proceeded "to a further determination of whether the interests of the group sought [that is, the petitioned-for unit] are sufficiently distinct from those of the other employees to warrant the establishment of a separate unit." He criticized the majority for adopting a test that would encourage unions to engage in incremental organizing of small units and a fragmentation of workforces for collective bargaining purposes, jeopardizing labor relations stability.

August 31, 2011

Specialty Healthcare is likely to affect other industries, as well. The Board's new standard could easily be expanded to apply to *all* bargaining unit determinations, allowing bargaining units based on individual job classifications at any stand-alone facility, and thus a proliferation of small units almost unchecked by any reasonableness considerations.

The upshot of the decision is this -- it will allow unions to win more elections in small groups when they lack broader support in the workforce. Unions will be able to target small employee groups to organize and gain beachheads in their organizing of larger workforces.

For example, where a union finds a group of employees – no matter how small – in a job classification with a "community of interest," it will be able to petition the Board for an election based simply on the "community of interest" the employees have and a showing of representation interest in that group. At the petition stage, there will be no consideration of other factors the Board has historically applied; meanwhile, the party opposing the unit will face an uphill battle trying to show that excluded employees should be included in the unit based on the "overwhelming community of interest" standard. With *Specialty Healthcare* as the guide, the single job classification bargaining unit is presumptively appropriate. Unions will be able to organize and win elections in piecemeal fashion, and can leverage power in a small group with a potential to cause disruption across a larger workforce they could not successfully organize under prior Board standards.

This is a dramatic shift in Board law, and the repercussions will be felt far beyond the health care industry. Unfortunately, it is only one of many significant changes undertaken in the eleventh hour of the Liebman Board. To learn more about how these changes can affect your workforce, or to ensure that your company is in compliance with the quickly-expanding Board rules, please contact your Constangy attorney.