It’s Back: NLRB Overturns Specialty Healthcare, Returns to Traditional Community-of-Interest Standard

Wednesday, December 27, 2017

On December 15, 2017, a divided National Labor Relations Board (NLRB) issued a significant decision in PCC Structurals, Inc., 365 NLRB No. 160, overturning the controversial “overwhelming community-of-interest” test from Specialty Healthcare and its progeny. PCC Structurals thus returns the Board’s “appropriate unit” policy to the traditional community-of-interest standard used for the majority of the NLRB’s history. As a result of overturning Specialty Healthcare, the Board will focus again on not only the commonality between individuals within a petitioned-for unit but also the commonality of those employees with others outside the petitioned-for unit. This focus will likely result in more findings that various narrowly-drawn units are not appropriate and thus lessen the number of “micro-units” ordered by the Board’s regional directors.

Facts of the Case

PCC Structurals has three “profit and loss centers” in the Portland, Oregon area. Each center has the same two-part manufacturing process. First, on the front end, employees create castings. Second, on the back end, employees inspect, rework, and finalize the castings for use. The employees in the petitioned-for unit included rework welders in the back end process of each profit and loss center. Additionally, one rework specialist/crucible repair employee from the front end was included in the petitioned-for unit.

An election was held on September 22, 2017, in which a majority of the petitioned-for employees voted for the union. PCC Structurals, however, argued to the regional director that the smallest appropriate unit was a wall-to-wall unit of approximately 2,565 production and maintenance employees, a number that encompassed the 120 job classifications petitioned-for by the union.

Applying Specialty Healthcare, the regional director concluded that the petitioned-for unit was appropriate and that PCC Structurals failed to show an overwhelming community of interest between employees in the petitioned-for unit and the excluded employees. Specifically, the director determined that the petitioned-for unit employees were “readily identifiable,” sharing similar skills, training, certification, and in-house training requirements. While the regional director acknowledged that the petitioned-for unit did not share an administrative grouping or department within PCC Structurals’s organizational structure and that the petitioned-for employees were scattered throughout numerous departments in the three operations, the regional director concluded that the employer failed to “carry its burden to establish that the smallest appropriate unit is a wall-to-wall production and maintenance unit” because the welders had distinct qualifications, were paid at a higher rate of pay, had different trainings and performance, engaged in limited contact with other employees, and lacked significant interchange across the proposed unit lines.

The Majority’s Decision
The 3-to-2 Board majority overturned *Specialty Healthcare* by finding it “fundamentally flawed.” To reach this conclusion, the Board analyzed its statutory role in determining appropriate bargaining units. Specifically, the Board recognized that Section 9 of the National Labor Relations Act (NLRA) makes it clear that the Board must determine unit appropriateness. The Board also held that the *Specialty Healthcare* standard undermined the fulfillment of the Board’s statutory duty under Section 7, pointing out that *Specialty Healthcare* discontinued and/or eliminated the assessment of whether shared interests among employees within the unit were sufficiently distinct from the interests of excluded employees to warrant a finding that the smaller unit was appropriate. As such, the Board held that the *Specialty Healthcare* standard “undermines [the] fulfillment of the Board’s responsibility to ‘assure’ to employees ‘in each case’ their ‘fullest freedom’ in the exercise of Section 7 rights.”

To replace *Specialty Healthcare*, the Board reinstated the traditional community-of-interest standard outlined in *United Operations, Inc.* Under this standard, the Board found that it is required to weigh both the shared and distinct interests of petitioned-for and excluded employees. In reaching this conclusion, the Board noted that at no point does the burden ever shift to the employer to show an overwhelming community of interest between the excluded and petitioned-for employees. As a result, the Board remanded the matter to the region for appropriate action under the traditional community-of-interest standard test.

### Immediate Guidance from the NLRB’s General Counsel

On Friday, December 22, 2017, the NLRB’s Associate General Counsel issued Memorandum OM 18-05, *Representation Case Procedures in Light of PCC Structurals, Inc.* This memorandum provides specific procedural guidance for regional directors and parties with respect to active representation cases decided upon *Specialty Healthcare*, as well as general guidance on how *PCC Structurals* could impact future unit issues and representation case procedure.

### Key Takeaways

The decision in *PCC Structurals* is expected to change the landscape of future representation cases and the impact thereof on employers and unions alike. Here is what employers can expect as a result of *PCC Structurals*.

- For cases currently at the regional or Board level, all parties—especially employers—may want to consider the impact of *PCC Structurals* to determine if the case posture and the Board’s procedures allow for reconsideration of a currently adverse unit decision. See OM-18-05.
- In general, unions will likely find it much more difficult to obtain elections in smaller employee units.
- Conversely, employers will likely find it easier to show that larger groupings of employees are the “smallest appropriate unit” in response to union petitions in small employee groups.
- Employers are also likely to find it much easier to structure their workplaces in ways to avoid “sufficiently distinct” communities of interest for smaller units than they did when trying to establish that excluded employees shared an “overwhelming community of interest” with smaller employee groups.
- One yet to be determined impact from *PCC Structurals* is how representation case litigation will evolve. This is especially true given that the representation case rules of today are very different than those that existed in the pre-*Specialty Healthcare* environment. See OM 18-05.
  - One possibility is an increase in employer leverage when negotiating stipulated election agreements.
  - Another is a decrease in unions pushing for the shortest election dates available, given that increased odds of unit expansion post-petition will often exist, depending on how the union initially structured its unit petition.
  - The number of representation case hearings actually making it “on the record” may rise, given the expected increase in factual and legal arguments against micro-units. In other words, regional directors may find it more difficult to quickly determine that a “question concerning representation” exists, which will in turn make it harder for a regional director to shut a hearing down and proceed quickly to an election.
