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**Specialty Healthcare: The NLRB's Answer to
Organized Labor's Struggle for New Members**

Peter D. Conrad, Esq.
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
212.969.3020 (tel)
212.969.2900 (fax)
pconrad@proskauer.com

Introduction

On December 22, 2010, the National Labor Relations Board issued a “Notice and Invitation to File Briefs” in *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 56 (2010), a case involving appropriate units in nursing homes and other nonacute health care facilities. The Notice clearly signaled that with the demise of the Employee Free Choice Act, the Board was looking at other ways to facilitate and extend collective bargaining under the NLRA.

Among the questions that interested parties were invited to address in *Specialty Healthcare* was the following: “Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in non-acute healthcare facilities.” 356 NLRB No. 56 at 2. Another question posed was: “Should the Board find a proposed unit appropriate if . . . the employees in the proposed unit are ‘readily identifiable as a group whose similarity of function and skills create a community of interest.’” *Id.*

On August 26, 2011, the Board responded to those questions in the affirmative, issuing what today stands out as one of the most controversial rulings of the NLRB since it achieved a three-member quorum after functioning for over two years without one. *Specialty Healthcare and Rehabilitation Center of Melville*, 357 NLRB No. 83 (2011).

Although *Specialty Healthcare* involved members of the nursing staff at a long term care facility, the NLRB’s holding in that case extends far beyond the healthcare industry. As the decisions discussed below plainly demonstrate, the Board’s ruling in *Specialty Healthcare* has made it significantly easier for unions to organize by allowing them to seek certification in what have come to be known as “micro-units,” which may consist of employees in just a single classification within a department, irrespective of whether those employees share an indisputable community of interest with other employees working by their side.

In doing so, the Board has largely ignored Section 9(c) (5)’s admonition that “[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159 (c) (5). At the same time, the *Specialty Healthcare* rule has effectively negated the employer’s ability to demonstrate the inappropriateness of the union’s proposed unit.

What Congress was unable to achieve in the Employee Free Choice Act, the Board was able to at least partially accomplish in the results-oriented test of bargaining unit appropriateness articulated in *Specialty Healthcare*. It is

axiomatic that the smaller the unit, the higher the union win rate in NLRB elections. And that is what *Specialty Healthcare* is all about.

The Specialty Healthcare Rule

Specialty Healthcare involved an organizing campaign at a nursing home and rehabilitation center in Mobile, Alabama. The union sought to represent a unit limited to 53 certified nursing assistants (“CNAs”). The employer opposed that unit configuration, arguing that the appropriate unit included a total of 86 nonsupervisory, nonprofessional employees, including the CNAs, *i.e.*, a unit comprised of all service and maintenance employees at the home. There was no collective bargaining history among any of the home’s employees.

The Regional Director found that a unit of CNAs was appropriate under a traditional community-of-interest analysis. That finding was based on the CNAs’ distinct training, certification, supervision, uniforms, pay rates, work assignments, shifts and work areas, in addition to the fact that all occupied the same job classification.

On review, the NLRB (Chairman Liebman and Members Becker and Pearce) agreed with the Regional Director, pointing to many of the same factors, and in addition emphasizing that (a) “[t]he primary duty of the CNAs, unlike all other employees, is the direct, hands-on care of facility residents;” (b) the CNAs “experience unique risks and are subject to unique requirements” including “expos[ure] to blood and other bodily fluids”; (c) the CNAs “routinely perform the physically demanding tasks of assisting residents with repositioning and ambulation;” and (d) “CNAs, unlike the other employees, must also undergo periodic training in order to maintain their certification,” a requirement for continued employment. 357 NLRB No. 83 at 9-10.

On the basis of that evidence, the Board found that the CNAs were clearly identifiable as a group and shared a community of interest. It then turned attention to the showing “required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees.” 357 NLRB No. 83 at 10.

Focusing first on what would not suffice, the Board noted that the Act requires only *an* appropriate unit, adding that the fact that employees in the proposed unit also share a community of interest with other employees outside that unit does not render the smaller unit inappropriate. In other words, that there may be other appropriate units, and even other more appropriate units, is not enough if the employees in the petitioned-for unit share a community of interest. *Id.*

Quoting from the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008), the Board emphasized "[t]hat the excluded employees share a community of interest with the included employees does not, however, mean that there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit." *Id.* Nor is a unit inappropriate simply because it is small. "The fact that a proposed unit is small," the Board said, "is not alone a relevant consideration, much less a sufficient ground for finding a unit in which employees share a community of interest nevertheless inappropriate." *Id.*

While acknowledging that different terminology has been used over the years to describe the applicable standard and recognizing as well that its rulings have not always articulated a clear standard, the Board stated that "[w]hen the proposed unit describes employees readily identifiable as a group and when consideration of the traditional factors demonstrates that the employees share a community of interest, . . . a heightened showing [is necessarily required] to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees." 357 NLRB No. 83 at 11. Typically, "a showing that the included and excluded employees share an overwhelming community of interest has been required." *Id.*

With that as the backdrop, the Board went on to announce a rule that in the last year has been the basis for numerous "micro" unit findings in various industries:

Absolute precision and predictability, of course, are not possible in this highly fact-specific endeavor engaged in with regard to diverse workplaces. However, the use of slightly varying verbal formulations to describe the standard applicable in this recurring situation does not serve the statutory purpose "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act." Nor does it permit employers to order their operations with a view toward productive collective bargaining should employees choose to be represented. We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit,

despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

357 NLRB No. 83 at 12-13.

There are limits, however, to the Board's holding in *Specialty Healthcare*. The question is whether they have been properly observed. The ruling makes clear that "[a] petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit." 357 NLRB No. 83 at 13. The Board defines a "fractured" unit as one where the "combinations of employees are too narrow in scope or that have no rational basis." *Id.* For example, the Board acknowledged that if the proposed unit in *Specialty Healthcare* consisted only of selected CNAs -- e.g., CNAs working only on the night shift or only on the first floor of a facility -- it might amount to a fractured unit and not be eligible for certification. *Id.*¹

Dissenting, Member Hayes wrote that the majority's ruling in *Specialty Healthcare* "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." 357 NLRB No. 83 at 15. He criticized the majority's adoption of the "overwhelming community of interests test," accurately predicting that it "will make the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances." *Id.* Member Hayes then opined that "by looking only at whether a group of employees share a community of interest among themselves . . . [will] make it virtually impossible for a party opposing this unit to prove that any excluded employees should be included." 357 NLRB No. 83 at 19.

Subsequent decisions have confirmed the dissent's prediction that the *Specialty Healthcare* rule "will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units." *Id.*

¹ The Board also noted that it "has developed various presumptions and special industry and occupation rules in the course of adjudication" and that its holding was "not intended to disturb any rules applicable only in specific industries other than the rule announced in *Park Manor*." 357 NLRB No. 83 at 13, n.29. (The *Park Manor* rule referred to by the Board governed bargaining unit determinations in nonacute healthcare facilities prior to *Specialty Healthcare*. See *Park Manor Care Center*, 305 NLRB 872 (1991).)

The Board's Application of the *Specialty Healthcare* Rule

As of the date of this paper, the NLRB has applied the *Specialty Healthcare* rule in three officially reported representation cases. In two of those cases, the Board approved the petitioned-for unit. In the third, it found a fractured unit and included additional employees.

1. ***Odwalla, Inc.*, 357 NLRB No. 132 (2011)** – In *Odwalla*, the Union petitioned to represent a bargaining unit of route salesmen, relief drivers, warehouse assistants and cooler technicians. The employer, a producer of fruit drinks and energy bars, took the position that the unit also should include merchandisers. The Union disagreed, but entered into a Stipulated Election Agreement providing that the merchandisers would vote subject to challenge.

Following a post-election hearing on challenged ballots, the hearing officer sustained the union's challenge to the merchandisers, finding that as a group they lacked a sufficient community of interest with the unit employees. The Board disagreed and found that without the merchandisers the unit would be a "fractured" unit, *i.e.*, there was no rational basis for their exclusion. 357 NLRB No. 132 at 5. The employees in the petitioned-for unit did not share a community of interest with each other that was not also shared by the merchandisers. *Id.*

The Board emphasized that the unit did not track any lines of demarcation drawn by the employer, such as classification, department or function, nor was it structured along lines of supervision or methods of compensation. *Id.* In directing the Regional Director to open and count the ballots of the merchandisers who voted in the election, the Board "conclude[d] that the Employer had carried its burden of proving that the merchandisers share an overwhelming community of interest with the employees in the recommended unit because none of the traditional bases for drawing unit boundaries used by the Board supports excluding the merchandisers while including all the remaining employees." 357 NLRB No. 132 at 6.

Odwalla appears to be the only reported NLRB decision, since *Specialty Healthcare* was decided, holding that the employer met its burden of establishing an overwhelming community of interest between the employees in the petitioned-for unit and the excluded employees.

2. ***DTG Operations, Inc.*, 357 NLRB No. 175 (2011)** – In *DTG*, the employer operated a car rental facility at a major airport. The union petitioned to represent a unit of the employer's 31 Rental Service Agents (RSAs) and Lead Rental Service Agents (LRSAs), excluding all other employees. The employer opposed the unit, taking the position that the smallest appropriate unit was wall-to-wall, including all 109 hourly employees at the facility.

In a Decision and Order issued before the Board's ruling in *Specialty Healthcare*, the Regional Director agreed that the RSAs and LRSAs shared an "overwhelming community of interest with the 78 other employees that the employer seeks to include in the bargaining unit," including lot agents, exit booth agents, return agents, service agents, lead service agents, fleet agent and shuttlers. 357 NLRB No. 175 at 5. Because the union had not agreed to proceed to an election in any other unit, the petition was dismissed. On review, the Board applied *Specialty Healthcare*, reversed the Regional Director and reinstated the petition.

The NLRB found that the RSAs and LRSAs shared a community of interest on virtually all factors, and that the employer had not demonstrated an overwhelming community of interest with the other employees at the facility, noting especially that: (1) RSAs and LRSAs worked separately from other employees and performed distinct sales tasks not performed by any other employees; (2) the RSAs and LRSAs alone were required to have at least nine months of car rental or sale experience; (3) RSAs and LRSAs participated in their own incentive compensation program; (4) there was little or no interchange or cross-utilization of RSAs and LRSAs and the other hourly classifications; and (5) RSAs and LRSAs were subject to separate supervision for purposes of scheduling, time off and other administrative tasks. 357 NLRB No. 175 at 5-7. In conclusion, the Board held:

[W]e find that the petitioned-for RSAs' and LRSAs' primary job functions and duties, skills and qualifications, uniforms, work areas, schedules, incentives, risks, and supervision are different from all other employees. RSAs/LRSAs, therefore, have employment interests that are materially different from the other employees that the Employer seeks to include in the bargaining unit. Accordingly, we reverse the Regional Director's finding that RSAs/LRSAs share an overwhelming community of interest with those other hourly employees and her resulting determination that a wall-to-wall unit is the only appropriate unit.

357 NLRB No. 175 at 7-8.

Member Walsh dissented from the majority's outcome-driven application of the *Specialty Healthcare* rule to reverse the Regional Director. His frustration was palpable:

As long as a union does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a particular classification,

department, or function, *i.e.*, a so-called fractured unit, it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible. The days of traditional all-inclusive production and maintenance units, technical units, or service and maintenance units – much less wall-to-wall plant units – are numbered. I adhere to the previously expressed view that giving the Board's imprimatur to this balkanization represents an abdication of our responsibility under Section 9 and may well disrupt labor relations stability by requiring a constant process of bargaining for each micro-unit as well as pitting the narrow interest of employees in one such unit against those in other units.

357 NLRB No. 175 at 8-9 (footnotes omitted).

3. ***Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011)** – In *Northrop Grumman*, the Union sought to represent a unit of approximately 225 radiological control technicians and other technical employees in the “E85 Radiological Control Department” at the Employer's shipyard, where approximately 18,500 employees constructed nuclear-powered submarines and aircraft carriers for the U.S. Navy.

The employer took the position that the only appropriate unit would include all 2400 technical employees at the shipyard. The RCTs (and RCT Trainees), who comprised approximately 90% of the unit, performed independent radiological oversight for nuclear work areas.

The Regional Director concluded that the departmental unit was appropriate for purposes of collective bargaining, as it was “a functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining.” 357 NLRB No. 163 at 5. On review, the Board agreed. Applying *Specialty Healthcare*, it found that the employees in the petitioned-for unit were “readily identifiable as a group” being that they were all members of the same department and shared a unique function, *i.e.*, to provide independent oversight of radiation exposure. 357 NLRB No. 163 at 3. In addition, they shared a community of interest based on the fact that they work together in the same department and under the same supervisor, and their work as a group is integrated.

The employer did not dispute that employees in the E85 RADCON Department shared a community of interest. Rather, it argued that employees outside that department shared an “overwhelming community of interest” with the technical employees in the petitioned-for unit. 357 NLRB No. 163 at 3-4. However, the Board disagreed, concluding that the common salary structure, personnel policies and benefit plans were outweighed by the facts distinguishing the E85 RADCON technicians from the other technical employees, most notably that the RCT’s job function, *i.e.*, to ensure workplace safety and control radioactive contamination at the shipyard, was a task distinct from the production-oriented jobs of the technical employees outside the department. 357 NLRB No. 163 at 4. Again, Member Hayes dissented.

4. ***The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, Inc., Case No. 02-RC-076954 (5/4/12)*** – Regional Director found that a unit limited to the employees working in the store’s shoe departments satisfied *Specialty Healthcare’s* test of appropriateness and that the employer had not demonstrated that other store employees shared an overwhelming community of interest with the petitioned-for shoe sales employees. The case is currently pending before the Board on the employer’s request for review.

5. ***T-Mobile USA, Inc., Case No. 29-RC-012063 (12/5/11)*** – Regional Director found that a unit limited to 15 field technicians and switch technicians working in Nassau and Suffolk Counties -- a fragment of the employer’s New York Market, which also included Brooklyn, Queens, Manhattan and the Bronx -- constituted a “readily identifiable group” with a community of interest of their own, despite evidence that all 60 field and switch technicians throughout the Market performed identical work, were subject to common supervision, had frequent work contacts and otherwise shared a clear community of interest. Employer did not seek review of the Regional Director’s unit determination; union was unable to carry a majority even in the micro-unit.

Specialty Healthcare on Review

Following an election among the home’s CNAs in which the union received a majority of the votes cast, the employer refused to bargain to obtain judicial review of the Board’s unit determination. On December 30, 2011, on an unfair labor practice charge filed by the union, the NLRB found that the employer was simply seeking to relitigate the unit issue that had been fully litigated and decided in the underlying representation case. Accordingly, the Board granted the Acting General Counsel’s motion for summary judgment and issued a bargaining order directing the employer to recognize and deal with the union as the CNAs’ exclusive representative. *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174 (2011).

The employer has petitioned for review of the Board's order in the Court of Appeals for the Sixth Circuit. *Kindred Nursing Centers East, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Mobile, f/k/a Specialty Healthcare and Rehabilitation Center of Mobile v. National Labor Relations Board*, Nos. 12-1027 and 12-1174. Oral argument has not yet been scheduled.

In the Sixth Circuit, the employer has urged the court to grant review and deny enforcement of the Board's order based on the following arguments:

1. The Board abused its discretion by arbitrarily and irrationally changing its long-standing view that a unit limited to CNAs is not an appropriate unit for bargaining.
 - A. For more than forty years the Board never found a unit limited to CNAs to be an appropriate bargaining unit.
 - B. The Board offers no reasoned explanation for changing its long-held view that a unit limited to CNAs is inappropriate and that health care facilities are unique.
 - C. The Board's decision does not promote efficient bargaining and gives no weight to the legitimate interests of employees excluded from the unit or employers.
2. The Board abused its discretion and violated the Act by "clarifying" the law to require that employees not sought by the union share an "overwhelming community of interests" with the petitioned-for employees.
 - A. The Board historically has applied the "overwhelming" community of interests standard only in accretion cases. In initial unit determinations, it historically has included all employees who share a "close" community of interests with the petitioned-for employees. The two standards are dramatically different and produce opposite results.
 - B. The Board's decision runs afoul of Section 9(c)(5).
3. The Board's new analysis effectively delegates away the Board's obligation to determine the appropriate unit in each case.

4. The Board's decision making process constitutes an abuse of discretion.
5. The CNAs do not have distinctively different interests from other nonprofessional employees that would warrant separate representation.

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