Alert

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NLRB: After Boeing, Union Organizing Becomes Harder

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In 2011, in *Specialty Healthcare & Rehabilitation Center of Mobile*, an Obama-era majority of the National Labor Relations Board modified the traditional "community of interest" standard for deciding appropriate bargaining units and created a two-part test where it would first examine whether proposed members of a petitioned-for unit shared a community of interest (i.e., are they "clearly identifiable as a group"). If, however, an employer believed other employees belonged in the unit, it had to show that those excluded employees "shared an overwhelming community of interest with the petitioned-for group." That decision, and the new standard it created, was universally criticized by the business community accusing the Democratic majority of the NLRB of creating "micro units" in order to make union organizing easier, in contravention of the Act's prohibition of finding appropriate units based on the extent of a union's organizing efforts. The standard was upheld, however, by the Sixth Circuit Court of Appeals.

In 2017, in *PCC Structurals, Inc.*, a new Republican Board majority overruled *Specialty Healthcare* and "returned to the traditional and well-established community of interest standard." Under that standard, unlike *Specialty Healthcare*, the inquiry is whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the unit to warrant a separate appropriate unit. Under that more traditional test, the Board considers both the shared and the distinct interests of both petitioned-for and excluded employees. Now, in *The Boeing Company*, that Republican Board majority for the first time has applied that traditional community of interest standard articulated in *PCC Structurals*, and clarified it in such a way that will almost certainly make organizing more difficult.

Boeing manufactures commercial 787 aircraft at its facility in South Carolina. A representation petition was filed by the International Association of Machinist Union seeking an election in a unit of Flight-Line Readiness Technicians (FRT's) and quality inspectors called Flight-Line Readiness Technician Inspectors (FRTI's). The FRIs and FRTIs represented 178 members out of a total compliment of 2700 production and maintenance employees. These employees work on the Flight Line, which is separate from the main facility. On the Flight Line, the aircraft is fully powered for the first time. It is the responsibility of the FRIs and the FRTIs, along with a travel team of 10 or more technicians from Final Assembly, to finalize, test, and certify the aircraft for delivery to the customer.

In deciding whether the petitioned-for unit was appropriate, the Board majority noted that neither *PCC Structurals* nor the precedent on which it is based had clearly described how the shared and distinct interests should be weighed. Accordingly, they clarified that *PCC Structurals* requires a three-part test for determining whether a bargaining unit is appropriate. First, the proposed unit must share an internal community of interest. Second, the interest of those in the proposed unit and the shared and district interests of those excluded from the proposed unit must be compared and weighed. Finally, consideration must be given to decisions on appropriate units in the industry involved.

Applying this clarified standard to the facts in *Boeing*, the Board majority dismissed the petition filed on behalf of FRTs and FRTIs. The majority found there was no internal community of interest in the petitioned-for unit, noting that the FRTs and FRTI's had different interests in the context of

collective bargaining. They are in separate departments, do not share any common supervision in the management structure and have fundamentally different job functions. Further, the majority held that there were similarities between the petitioned-for unit and the excluded employees that were not outweighed by their differences, noting that there was a high degree of functional integration with the excluded employees including temporary interchange between the FRTs and FRTI's and other employees.

In her lengthy dissent, Member McFarren found that the petitioned-for unit was appropriate under the newly articulated test, adding that failing to do so "does real damage to employees' ability to exercise the freedom to organize under the Act. In the process, the majority disregards the Board's traditional community of interest standard … and is effecting a major change in the Board law and policy. That is not reasoned decisionmaking."

Going forward, this "clarification" of the traditional community of interest standard will almost certainly result in larger groupings of employees being found to be appropriate bargaining units. Quite simply, organizing large production and maintenance bargaining units is difficult, and this holding will hamper union organizing efforts in the smaller groupings of employees that *Specialty Healthcare* permitted.