NLRB Restores Obama-Era Bargaining Unit Test

On Dec. 14, 2022, the National Labor Relations Board (NLRB or Board) issued a decision that (again) modifies its standard for bargaining-unit determination cases where a labor union seeks to represent a unit that contains some, but not all, of the job classifications at a particular workplace. The decision, in *American Steel Construction, Inc.*, revives the Board's prior test governing such determinations set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), which was overruled in *PCC Structurals*, 365 NLRB No. 160 (2017), and *The Boeing Co.*, 368 NLRB No. 67 (2019).

In its 2011 *Specialty Healthcare* decision, the Board identified the elements to be satisfied if the proposed union was to be recognized. Among these were that the unit is "sufficiently distinct." If a party contested the petitioned-for unit on this ground – thereby arguing that certain employees not included in the proposed unit should have been – it would bear the burden of proving that there was an "overwhelming community of interest" between the petitioned-for employees and excluded employees in order to add the excluded employees to the petitioned-for unit. This was a difficult standard for employers to meet and widely recognized as a boon for union organizing. In the wake of *Specialty Healthcare,* unusual "microunits" were organized, including cosmetic and fragrance counter employees at a Macy's department store.

In its 2017 *PCC Structurals* decision, the Board overruled *Specialty Healthcare* and adopted a different test for the "sufficiently distinct" element: instead of the "overwhelming community of interest" test, the Board adopted a test whereby "the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed." This test therefore removed the burden from the employer challenging the composition of the unit and instituted a balancing test that did not explicitly begin with deference to the petitioned-for unit. The test gave employers far greater ability to oppose recognition of a unit consisting of some, but not all, of the employees within their workplace.

This week's decision in *American Steel* expressly overrules *PCC Structurals* **and** *Boeing* and reinstates the "overwhelming community of interest" standard of *Specialty Healthcare***.** The Board elaborated that this means that when there are only "minimal differences, from the perspective of collective bargaining… then an overwhelming community of interest exists, and that classification must be included in the unit." The Board indicated that meeting this standard would be akin to showing that "there is no rational basis for the exclusion." So long as the petitioned-for unit consists of a clearly identifiable group of employees with a shared "community of interest," the Board will presume the unit to be appropriate. The impact of this decision is to again empower unions and employees to organize along narrower lines of job classification. Even prior to *American Steel*, employers have seen a significant uptick in organizing activity in the last several years. This decision will likely further invigorate unions to again focus on "micro units" as a path to organizing workplaces, and employers again face the prospects of multiple distinct bargaining units among their employees.

If you have any questions or would like additional information regarding this decision, or other legal developments, please contact Peter Wiltenburg or any attorney in Bond's labor and employment practice.