PCC Structurals, Inc., 365 N.L.R.B. No. 160 (Dec. 15, 2017)

The Employer requests review of the Regional Director's Decision and Direction of Election, in which the Regional Director found that a petitioned-for unit of approximately 100 full-time and regular part-time rework welders and rework specialists employed by the Employer at its facilities in Portland, Clackamas, and Milwaukie, Oregon, comprise a unit appropriate for collective bargaining. The Employer contends that the smallest appropriate unit is a wall-to-wall unit of 2565 production and maintenance employees in approximately 120 job classifications. For the reasons stated below, we grant review, clarify the applicable standard, and remand this case to the Regional Director for further appropriate action consistent with this Order.

Today, we clarify the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. In so doing, and for the reasons explained below, we overrule the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) and we reinstate the traditional community-of interest standard as articulated in, e.g., *United Operations, Inc.*, 338 NLRB 123 (2002).[3]

Background

The Employer manufactures steel, superalloy, and titanium castings for use in jet aircraft engines, airframes, industrial gas turbine engines, medical prosthetic devices, and other industry markets. The Employer's operation in the Portland, Oregon area consists of three "profit and loss centers" located within approximately a 5-mile radius of one another. Petitioner and Employer agree that these three centers comprise the entire Portland operation. As described by the Regional Director, the manufacturing process is the same at all three facilities. That process involves two stages. The first or "front end" stage involves creation of the casting. In this stage, production employees create a wax mold of the customer's product, "invest" the mold by alternately dipping it into a slurry and into sand until a hard ceramic shell is formed around the wax, and then melt the wax away to leave the empty ceramic shell, into which liquid metal is poured to create the casting. The second stage (sometimes referred to as "back end") involves inspecting and reworking the casting. The employees in the petitioned-for unit are welders who work in the "back end" stage of the production process, primarily repairing defects in the metal castings. The exception is the one rework specialist/crucible repair employee, who appears to work in the "front end" or casting portion of the manufacturing process.

To determine the appropriateness of the petitioned-for unit, the Regional Director applied the standard set forth in *Specialty Healthcare*. As a Board majority explained its standard in that decision, when a union seeks to represent 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" for bargaining. If the petitioned-for unit is deemed appropriate, the burden shifts to the proponent of a larger unit (typically

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[3] Additionally, for the reasons stated by former Member Hayes in his dissenting opinion in *Specialty Healthcare*, we reinstate the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining appropriate bargaining units in nonacute healthcare facilities. [Eds: *Park Manor* used a wide set of factors, including those gleaned from the NLRB's experience in promulgating a regulation for acute health care facilities].

the employer) to demonstrate that the additional employees the proponent seeks to include "share 'an overwhelming community of interest'" with the petitioned-for employees, "such that there 'is no legitimate basis upon which to exclude certain employees from'" the petitioned-for unit because the traditional community-of-interest factors "'overlap almost completely."

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Discussion

A. The Board's Role in Determining Appropriate Bargaining Units

The National Labor Relations Act (NLRA or Act) and its legislative history establish three benchmarks that must guide the Board in making determinations regarding appropriate bargaining units.

First, Section 9(a) of the Act provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*." Thus, questions about unit appropriateness are to be resolved by reference to the "purposes" of representation, should a unit majority choose to be represented--namely, "collective bargaining."

Second, Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation. Section 9(b) states: "The Board shall decide *in each case* whether, in order to *assure to employees the fullest freedom* in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Referring to the "natural reading" of the phrase "in each case," the Supreme Court has stated that

> whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. Under this reading, the words "in each case" are synonymous with "whenever necessary" or "in any case in which there is a dispute." Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision "in each case" in which a dispute arises is to be made by the Board.

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In the final enacted version of the Wagner Act, Section 9(b) stated that the Board's unit determinations "in each case" were "to insure to employees *the full benefit* of their right to self-organization, and to collective bargaining, and otherwise to effectuate the policies of this Act."

In 1947, in connection with the Labor Management Relations Act (Taft-Hartley Act or LMRA), Congress devoted further attention to the Board's unit determinations. The LMRA amended Section 7 so that, in addition to protecting the right of employees to engage in protected activities, the Act protected "the right to *refrain from* any or all of such activities." The LMRA also added Section 9(c)(5) to the Act, which states: "In determining whether a unit is appropriate . . . *the extent to which the employees have organized shall not be controlling*.". . .

Finally, the LMRA also amended Section 9(b) to state--as it presently does-- that the Board shall make bargaining unit determinations "in each case" in "order to assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."

This legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would not be perfunctory. In the language quoted above, Section 9(b) mandates that the Board determine what constitutes an appropriate unit "in each case," with the additional mandate that the Board only approve a unit configuration that "assure[s]" employees their "fullest freedom" in exercising protected rights. Although more than one appropriate unit might exist, the statutory language plainly requires that the Board "in each case" consider multiple potential configurations--i.e., a possible ""employer unit," "craft unit," "plant unit" or "subdivision thereof."

It is also well established that the Board may not certify petitioned-for units that are "arbitrary" or "irrational"--for example, where functional integration and similarities between two employee groups "are such that neither group can be said to have any separate community of interest justifying a separate bargaining unit." However, it appears clear that Congress did not intend that the petitioned-for unit would be controlling in all but those extraordinary cases when the evidence of overlapping interests between included and excluded employees is overwhelming, nor did Congress anticipate that every petitioned-for unit would be accepted unless it is "arbitrary" or ""irrational." Congress placed a much higher burden on the Board "in each case," which was to determine which unit configuration(s) satisfy the requirement of assuring employees their "fullest freedom" in exercising protected rights.

B. The Board's Traditional Community-of-Interest Test is an Appropriate Framework for Unit Determinations

To ensure that the statutory mandate set forth above is met, the Board traditionally has determined, in each case in which unit appropriateness is questioned, whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit. Throughout nearly all of its history, when making this determination, the Board applied a multi-factor test that requires the Board to assess

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, Inc., supra, 338 NLRB at 123.

Thus, in *Wheeling Island Gaming*, where the Board applied its traditional community-of-interest test, the Board indicated that it

> never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests "in common." Our inquiry--though perhaps not articulated in every case--necessarily proceeds to a further

determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.

The required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or "fractured"--that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 rights of excluded employees who share a substantial (but less than "overwhelming") community of interests with the sought-after group are taken into consideration.

C. The Specialty Healthcare Standard Improperly Detracts from the Board's Statutory Responsibility to Make Appropriate Bargaining Unit Determinations

The Board majority in *Specialty Healthcare* described its decision as a mere clarification of preexisting standards for determining appropriate bargaining units. However, we believe the majority in *Specialty Healthcare* substantially *changed* the applicable standards. . . . [T]he Board majority in *Specialty Healthcare* did three things that have affected the Board's bargaining-unit determinations since *Specialty Healthcare* was decided.

First, in *Specialty Healthcare*, the majority overruled *Park Manor Care Center*, which set forth the standard for determining appropriate bargaining units in non-acute healthcare facilities.

Second, the majority in *Specialty Healthcare* established that the ""traditional community-of-interest approach" would thereafter apply to unit determinations in such facilities rather than the so-called "pragmatic" test described in *Park Manor*.

Third and most significantly, although the majority in *Specialty Healthcare* nominally was considering unit questions specific to non-acute healthcare facilities, the *Specialty Healthcare* decision applied to *all* workplaces (except acute care hospitals) whenever a party argues that a petitioned-for unit improperly excludes certain employees. Although the majority purported to apply the traditional community-of-interests standard as exemplified in *Wheeling Island Gaming*, the *Specialty Healthcare* standard discounts--or eliminates altogether--any assessment of whether shared interests among employees *within* the petitioned-for unit are sufficiently distinct from the interests of *excluded* employees to warrant a finding that the smaller petitioned-for unit is appropriate. . . .

In these respects, *Specialty Healthcare* detracts from what Congress contemplated when it added mandatory language to Section 9(b) directing the Board to determine the appropriate bargaining unit "in each case" and mandating that the Board's unit determinations guarantee to employees the "fullest freedom" in exercising their Section 7 rights. . . . We believe *Specialty Healthcare* effectively makes the extent of union organizing "controlling," or at the very least gives far greater weight to that factor than statutory policy warrants, because under the *Specialty Healthcare* standard, the petitioned-for unit is deemed appropriate in all but rare cases. Section 9(b) and 9(c)(5), considered together, leave no doubt that Congress expected *the Board* to give careful consideration to the interests of all employees when making unit determinations, and Congress did not intend that the Board would summarily reject arguments, in all but the most unusual circumstances, that the petitioned-for unit fails to appropriately

accommodate the Section 7 interests of employees outside the "subdivision" specified in the election petition. . . .

Having reviewed the *Specialty Healthcare* decision in light of the Act's policies and the Board's subsequent applications of the "overwhelming community of interest" standard, we conclude that the standard adopted in *Specialty Healthcare* is fundamentally flawed. We find there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees--both those within and those outside the petitioned-for unit--without regard to whether these groups share an "overwhelming" community of interests. . . .

MEMBERS PEARCE AND MCFERRAN, dissenting.

It is a foundational principle of United States labor law that, when workers are seeking to organize and select a collective-bargaining representative, and have petitioned the Board to direct an election to that end, the role of the Board in overseeing this process should be conducted with the paramount goal of ensuring that employees have "the fullest freedom in exercising the rights guaranteed by" the Act. Thus, as numerous courts of appeals have acknowledged, the "initiative in selecting an appropriate unit [for bargaining] resides with the employees." *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016), quoting *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991). When workers seeking a representative have selected a bargaining unit in which they seek to organize, the role of the Board in reviewing that selection is to determine whether the selected unit is an appropriate one under the statute not the unit the Board would prefer, or the unit the employer would prefer. Part of ensuring workers the "fullest freedom" in exercising their right to organize is acknowledging that they can, and should--within the reasonable boundaries that the statute delineates--be able to associate with the coworkers with whom they determine that they share common goals and interests.

With these principles in mind, this case should present no difficult issues for the Board. The Union has filed a petition to represent a bargaining unit of 102 welders at an advanced manufacturing plant in the Portland, Oregon area. The welders are a group of highly-skilled, highly-paid employees performing a distinct function. These workers have gone through specialized training and certifications unique to their positions. They do not significantly interchange with other employees, but instead perform distinct work that no other employees are qualified to do. They are readily identifiable as a group and represent two clearly delineated job classifications within the Employer's organizational structure. The 102 workers in this unit would constitute a significantly larger-than-average bargaining unit when compared to other recently certified units.

Despite these largely uncontested facts, the Employer objected to the proposed unit, claiming that the *only* appropriate unit in which these workers should be able to choose a representative would have to include all 2,565 employees who work in production and maintenance at the petitioned-for facilities. The Regional Director correctly rejected the Employer's contention, and directed an election among the welders. The workers voted 54 to 38 for the Union, and the Employer sought review of the Regional Director's decision with the Board.

The Regional Director's decision was unquestionably correct--these 102 workers clearly share a community of interest under any standard ever applied by the Board.[1] Nonetheless, the majority nullifies the Direction of Election for the unit of welders and orders the Regional Director to

reconsider, under more favorable terms, the Employer's argument that welders should not be able to bargain collectively unless they can win sufficient support from all 2565 production and maintenance employees. Instead of performing its statutory duty to affirm these workers' choice to organize in an appropriate unit and allowing them to commence the collective-bargaining process with their employer, the Board's newly-constituted majority seizes on this otherwise straightforward case as a jumping off point to overturn a standard that has been upheld by every one of the eight federal appellate courts to consider it. The newly-constituted Board majority makes sweeping and unwarranted changes to the Board's approach in assessing the appropriateness of bargaining units when an employer asserts that the unit sought by the petitioning union must include additional employees. Without notice, full briefing, and public participation, and in a case involving a manifestly appropriate unit, the majority overturns *Specialty Healthcare*. In its place, the majority adopts an arbitrary new approach that will frustrate the National Labor Relations Act's policies of ensuring that employees enjoy ""the fullest freedom in exercising" their right to self-organization and of expeditiously resolving questions of representation. The majority's new approach will bog down the Board and the parties in an administrative quagmire--a result that the majority apparently intends. . . .

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III.

The majority offers few factual and legal arguments in support of its decision. Most prominent is the unfounded assertion that the test articulated in *Specialty Healthcare* is somehow contrary to the National Labor Relations Act. . . .

[T]he majority's claims of statutory infirmity fail as they ignore authoritative Supreme Court precedent and misstate what *Specialty Healthcare* actually provides. The Supreme Court has already reviewed Section 9(b)'s ""sparse legislative history" and construed the statutory language, and has concluded that all Section 9(b) requires in relevant part is that when there is a dispute over the unit in which to conduct the election, the Board must resolve it. *American Hospital Assn. v. NLRB*, 499 U.S. at 611, 613. It certainly does not preclude the Board from evaluating the appropriateness of a unit pursuant to broadly applicable principles. . . .

The majority also claims that *Specialty Healthcare* contravenes Section 9(c)(5) by making the extent of organizing controlling. . . .However, the courts have uniformly rejected the majority's position. Section 9(c)(5) of the Act provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." The Supreme Court has construed this language to mean that although "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization, . . . the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442 (1965). In other words, as the Board noted in *Specialty Healthcare*, "the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit." . . .

Thus, contrary to the majority's unsupported assertions, the outcome of a unit determination under *Specialty Healthcare* is neither foreordained nor coextensive with the extent of organizing. Instead, the courts have uniformly found that the Board's approach correctly provides an individualized inquiry into the appropriateness of the unit, consistent with what the Act requires.

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V.

In lieu of *Specialty Healthcare*, the majority advocates that when the parties cannot agree on the unit in which to conduct an election, the Board should not focus on the Section 7 rights of employees who seek to organize in the petitioned-for unit, but must instead consider the statutory interests of employees *outside* the unit, as advanced by the employer. In the majority's view, in other words, the statutory right of employees to seek union representation, as a self-defined group, is contingent on the imputed desires of employees outside the unit who have expressed no view on representation at all--with the employer serving as their self-appointed proxy. Of course, the extent of employees' freedom of association (which, by definition, includes the freedom *not* to associate) is not a matter for *employers* to decide. As the Supreme Court has made clear, the Board is entitled to "giv[e] a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

As we show below, (A) the majority's approach is inconsistent with the statute and will frustrate the Act's policies; (B) *Specialty Healthcare* does not impair the Section 7 rights of employees outside the petitioned-for unit; and (C) the majority's approach will entangle the Board and the parties in an administrative quagmire.

A.

The majority's approach is plainly inconsistent with the statute and will frustrate the Act's policies. In Section 1 of the Act, Congress declared it to be the policy of the United States to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment[.]" The first and central right set forth in Section 7 of the Act is the employees' "right to self-organization." As the Board has explained, "A key aspect of the [Section 7] right to 'self-organization' is the right to draw the boundaries of that organization--to choose whom to include and whom to exclude." The majority's approach flies in the face of Section 9(a)'s instruction that representatives need be designated only by a majority of employees in "a unit appropriate" for collective bargaining, not in "the most appropriate" unit. The majority's approach breaches Section 9(b)'s command that the Board's unit determinations "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act, i.e., that of *self*-organization and collective bargaining.[15] The majority ignores the Supreme Court's authoritative interpretation of Section 9(c)(5) to the effect that the Board may consider the extent of organization in making unit determinations, so long as it is not the controlling factor. And its approach fails to acknowledge that pursuant to Section 9(c)(1), the unit described in the petition "necessarily drives the Board's unit determination." *Overnite Transportation Co.*, 325 NLRB 612, 614 (1998). . . .

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