Ogletree Deakins

IMPLICATIONS OF THE NLRB'S "QUICKIE ELECTIONS" RULES AND "MICRO-UNIT" DECISIONS IN THE CONSTRUCTION INDUSTRY

WHAT IS THE EARLY IMPACT OF THE NEW ELECTION RULES?

WHO IS ELIGIBLE TO VOTE? HOW THE NLRB'S NEW BARGAINING UNIT ANALYSIS MAY APPLY IN THE CONSTRUCTION INDUSTRY

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WHAT IS THE EARLY IMPACT OF THE NEW ELECTION RULES?

I. INTRODUCTION

On December 12, 2014, the National Labor Relations Board implemented the long-anticipated "quickie" or "ambush" union representation election rules. The rules took effect on April 14, 2015. In a 3-2 vote the rules were approved by Board Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa and Nancy Schiffer; Board Members Philip A. Miscimarra and Harry I. Johnson, III, dissented. The rules include detailed explanations regarding the rules' impact on current procedures and the views of the majority and dissenting members.

Chairman Pearce said, "I am heartened that the Board has chosen to enact amendments that will modernize the representation case process and fulfill the promise of the National Labor Relations Act. Simplifying and streamlining the process will result in improvements for all parties. With these changes, the Board strives to ensure that its representation process remains a model of fairness and efficiency for all."

The Board believes the rule will enable it to more effectively administer the Act by using modern technology, making its procedures more transparent and uniform across Regions, and eliminating unnecessary litigation and delay. With these amendments, the Board claims it will be better able to fulfill its duty to protect employees' rights by fairly, efficiently and expeditiously resolving questions of representation.

The most notable changes to the NLRB's election procedures are outlined below.

II. THE RULES

A. Petition

The new election rules have altered several aspects of a union's petition for election and the petition process. The new rules allow (but do not require) petitions to be filed electronically – a departure from the current requirement of in-person filing or filing by facsimile. The new rules require that the petition be served "on all other interested parties" including the employer. This requirement will ensure the earliest possible notice of the petition to all interested parties, and, once served by the Region, start the clock for the accelerated elections process.

The required contents for a petition are also modified slightly. The new rules require the petitioner to designate the individual who will serve as the petitioner's representative (*e.g.*, for service of papers) and require the petitioner to state the following in the petition:

- Type of election requested (*e.g.*, manual, mail, or mixed manual/mail);
- Date(s) of election;
- Time(s) of election; and
- Location(s) of election.

Requiring more details will likely result in a considerable advantage for petitioning unions because the union will essentially have a rebuttable presumption that all their requested specifics of the election are proper. These election specifics can be manipulated by the union to provide them with a considerable advantage (*i.e.*, scheduling voter times in a manner that make it more difficult for employer supporters to reach the polls, etc.).

The new rules also require the petitioner to file its showing of interest (signed authorization cards/petitions) with the election petition which replaces the current 48-hour requirement. Interestingly, the majority opened the door for the future use of electronic signatures as evidence for a showing of interest – electronic signatures have long been on the unions' wish list. The Board has specifically tasked the NLRB General Counsel with determining whether, when, and how electronic signatures can be accepted as evidence of showing of interest. The General Counsel is expected to issue guidance on this issue in the future.

B. Notice Posting

The rules require employers to post a "Notice of Petition for Election" following a union's petition. The notice will provide employees with notice that the petition has been filed, the name of petitioner, the type of petition, the proposed unit, the basic election procedures, a summary of basic rights of employees, and the NLRB's website address. The posting will be mandatory (unlike current Form 5492, which is similar to the new required notice posting, but posting Form 5492 is not mandatory). The rules require the notice to be posted in conspicuous places. Employers who "customarily communicate" with employees using electronic forms of communication will be required to distribute this notice electronically. The notice must be posted within two (2) business days after service of the Notice of Hearing. The failure to timely post can be a valid basis for objections to an election. The employer is required to maintain the posting until the petition is dismissed, withdrawn, or the Notice of Petition is replaced by the Notice of Election.

C. Voter List

The rules expand the voter information that must be provided by the employer in the *Excelsior* List. The rules make the *Excelsior* list due sooner - 2 business days (not 7) after the Regional Director's approval of an election agreement or issuance of a Decision and Direction of Election. The rules require the employer to furnish the list to the NLRB Regional Director, as well as directly to the union. Previously, the employer was simply required to send the voter list to the Region. The Region would then send the list to the union. The rules require the employer to file a Certificate of Service with the Regional Director when the *Excelsior* list is furnished to the union. The list must be served on the union and filed with the Region in an electronic format (unless the employer certifies it does not have the capacity to do so).

Under the previous rules, the employer was only required to provide the names and addresses of eligible voters. The new rules drastically expand this requirement to include each eligible voter's:

- Full name
- Home address
- Personal (not work) email address (if available)
- Available home and personal cellular telephone numbers (if available)
- Work locations
- Shifts
- Job classifications

If the employer does not maintain personal email and/or home/mobile phone numbers, the employer is not required to ask employees for them. If the employer has personal email and home/mobile phone numbers for some, but not all, employees, the employer must provide the information that it does possess. The rules do not require work email or work phone number.

The employer is also required to provide all of the same information for individuals voting subject to challenge. The rules describe the above as a minimum to be produced, leaving open the possibility that future Boards may require more or different forms of contact information (based on peculiar circumstances) by adjudication or rule making (examples could include social media contact information – Facebook, Instagram, Tumblr, etc.).

The Board majority reviewed, but rejected, privacy concerns that were articulated by many during the comment period (*e.g.*, harassment). The Board simply declared that if such problems arise, they will provide an appropriate remedy. The NLRB addressed privacy concerns by restricting how this contact information may be used by the union.

D. Hearing

The pre-election Representation Case Hearing has been the accepted method for resolving the numerous issues that arise in the petition and election process (*e.g.*, eligible voters, supervisory issues, multi-facility issues, etc.). Under the new rules, most disputes over voter eligibility and bargaining unit inclusion/exclusion will not be resolved until *after* the election. The NLRB's "Representation Case Fact Sheet" states:

> *Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. A regional director may defer litigation of eligibility and inclusion issues affecting a small percentage of the appropriate voting unit to the post-election stage if those issues do not have to be resolved in order to determine if an election should be held. In many cases, those issues will not need to be litigated because they have no impact on the results of the election.*[i]

Leaving important issues unresolved, such as supervisory status and whether certain employees are part of the voting unit, undermines the ability of employees to make an informed decision and hinders all employers' ability to present an effective campaign.

Under the new rules, a hearing on unit and voter eligibility will typically be set to open eight (8) days after service of the Notice of Hearing unless the case presents unusually complex issues. The rules state that the Regional Director will serve notice of the hearing as "soon as is practicable" but do not provide a specific time requirement. If the Notice of Hearing is served on the same day that the union's petition is filed, the hearing will open on the 8th day following service by the Region. The Regional Director retains the unilateral discretion to postpone the hearing beyond the 8th day without motion if the Regional Director identifies complex issues. Also, the Regional Director may postpone the opening of the hearing for two (2) days based on a moving party's showing of "special circumstances." The rules do not specifically provide examples of what may constitute special circumstances. The rules state that the Regional Director may only postpone for longer than two (2) days based on "extraordinary circumstances" for which the Regional Director has complete discretion. The rules fail to specifically provide examples of what may constitute extraordinary circumstances.

E. Statement of Position

The new rules impose a significant new requirement on employers. Employers must file a Position Statement with the Regional Director and serve it on all parties by noon on the business day before the hearing is set to open. The Regional Director may require the Position Statement to be filed earlier than the day before if the hearing is set to start more than eight (8) days after service of the Notice of Hearing. According to the Board, the purpose of the Statement of Position is to facilitate an election agreement and narrow the scope of any hearing issues.

If the employer takes the position that the unit proposed by the union is not an appropriate unit, the employer will be required to set forth in the Position Statement:

- The basis for that contention (state the precise objections to the appropriateness of the proposed unit); and
- A list of prospective voters, their job classifications, shifts and work locations.

If the employer does not take a position on the appropriateness of the union's requested unit, the petitioner will be allowed to present evidence on that point (without opposition from the employer). The employer would not be allowed to offer evidence or cross-examine witnesses.

The employer must identify any individuals in classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest. Additionally, the employer must outline all other issues the employer intends to raise at the hearing.

One advantage for unions will be the Board's new requirement that the employer include a list containing the full names, work locations, shifts, and job classifications of all employees in the union's proposed unit and all employees that the employer contends must be included/excluded in any appropriate unit. Failure to provide this information will limit the

employer's ability to litigate certain issues and any inaccuracies in the information may be a basis to file objections to an election.

Another important component of the Position Statement is the Board's requirement that the employer take a position on the election details including: (1) the type of election (manual, mail, or mixed); (2) the date(s) the election should be held; (3) the election time(s); and (4) the location(s) where the election should be held. The union has the first opportunity in the petition itself to state its preference on these issues. This requirement for the Position Statement is the employer's opportunity to rebut the union's preferences.

Perhaps most importantly from an employer's perspective is that any issue not identified in the Position Statement will be waived, except the Board's statutory jurisdiction.

III. ANTICIPATED IMPACT OF THE NEW RULES

With the implementation of the new election rules looming from the Board's adoption of the rules in December 2014 through the effective date of April 14, 2015, there was a fair amount of informational education on the part of the Board, and a tremendous amount of prognostication on the part of representatives of labor and management alike. Many predicted that the perceived tilting of the playing field in favor of labor would trigger a surge in organizing activity, and that the 4-month delay in the implementation of the rules following enactment would cause labor organizations to defer organizing activity, such that labor would "save their bullets" to be used under the new rules.

Additionally, in looking at the minimum timelines allowable under the new rules, many predicted that the time period from petition-filing to election would be reduced from the traditional limit of 42 days to as little as 17 to 21 days, or perhaps even less.

Due to the new requirements placed upon employers by the rules, many predicted additional legal pitfalls would plague employers seeking to respond to organizing activity. The requirements such as the initial election posting, preliminary voter lists, the preclusive effect of the potential failure to include important issues in the prehearing position statement, as well as potential inadvertent failures to provide employee home phone numbers and private e-mail addresses in voter eligibility lists, were predicted to lead to new categories of objectionable/ interfering conduct and reversal of employer victories in elections.

As the implementation of the new rules approached, various Regional Offices held training and informational sessions regarding the implementation of the new rules, in which they shared their views regarding the impact of the rules on the election timeline. Of particular interest to employers, many of the Regional Offices indicated a general intent that the timeline for stipulated elections would not necessarily be changing so drastically. Prior to the new rules, Regional Directors would traditionally approve any election date within 42 days of the filing of the Petition. (There were some exceptions, such as in Region 28, where Regional Directors already were requiring election dates earlier than 42 days in order to approve stipulations.) The general feedback provided in the training sessions and in "off the record" conversations, many of the Regions indicated that the traditional 42 days would no longer be available, but the shortening of the timeline in stipulated elections may not be as dramatic as employers feared.

Most Regions indicated that, despite the dire predictions of elections in 17 days or less, they would be likely to approve stipulated elections in the 25-28 day range, and that many if not most would consider something in the 30-35 day range to be reasonable. This seems to indicate an understanding that a major goal of the rules was to reduce the likelihood of substantial delays in the conducting of elections due to pre-election litigation, but not necessarily to require that stipulated elections occur on a much faster timeline than in the past.

IV. EARLY RETURNS – WHAT HAS HAPPENED SINCE APRIL 14?

As of the date of printing of this white paper, there are approximately two weeks of "ambush election" rule experience to evaluate. Did our dire predictions come true?

A. Surge In The Number of Petitions Filed?

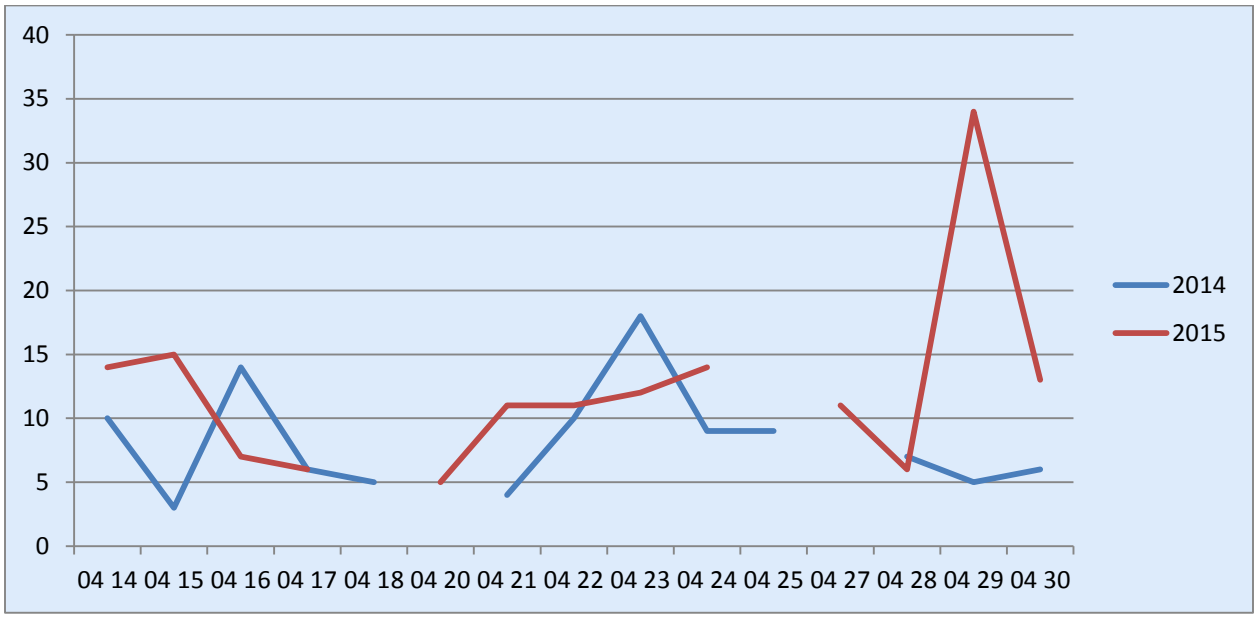
With approximately two weeks' worth of "ambush election" era data avaialable as of the date of this paper, it is clear that we have seen an increase in petitions over the same period from 2014. It appears that new RC petitions are up in the neighborhood of 25% to 30% for the month of April and 50% since the rule was implemented. It will be interesting to observe whether this increased activity is sustained, wanes, or increases on a more active trajectory.

RC Petitions Filed April 14-30, 2014 v. April 14-30, 2015

RC Petitions	**Year**	
Month Year	2014	2015
4/14	10	14
4/15	3	15
4/16	14	7
4/17	6	6
4/18	5	0
4/20	0	5
4/21	4	11
4/22	10	11
4/23	18	12
4/24	9	14
4/25	9	0
4/27	0	11
4/28	7	6
4/29	5	34
4/30	6	13
Grand Total	**2120**	**2174**

(*Source*: NLRB).

RC Petitions Filed April 14-30, 2014 v. April 14-30, 2015 by Date



(*Source*: NLRB).

B. Dramatically Shortened Timelines?

1. Contested hearing cases

As of the date of this white paper, we are unaware of any Decision & Direction of Election being published in a representation case involving a petition filed on or after April 14, 2015.

Anecdotally, it has been reported that Regional Directors are using the "threat" of ordering an election in as little as 15 to 21 days from the date of the petition as an encouragement to stipulate to an election (at a later date). Whether the Regional Directors will order such rapid election schedules in contested cases remains to be seen.

2. Stipulated elections

In addition to information available from the NLRB's website and public records, we have received a number of anecdotal reports of stipulated election agreements in the early days of the "ambush election" era indicating that, at least in stipulated elections, the Regional Directors generally are willing to approve longer election periods than feared.

To keep this in the proper context, in many of these cases we do not know whether the Regional Director refused to approve a longer timeline, or if the employer simply agreed to the election date for its own reasons.

Stipulations available/reported:

- Region 1 (Boston) – 23 days approved
- Region 2 (New York) – 30 days approved
- Region 4 (Philly) – 24 days approved
- Region 5 (Baltimore) -29 days approved
- Region 6 (Pittsburgh) – 27 days approved
- Region 7 (Detroit) – 24 days approved
- Region 8 (Cleveland) – 25 days rejected, 21 days approved (small unit)
- Region 12 (Tampa) – 30 days approved
- Region 19 (Seattle) – 26, 28, 29 days approved
- Region 27 (Los Angeles) – 31 days approved
- Region 28 (Phoenix) – 23 days, 25 days approved
- Region 32 (Oakland) – 24 days approved
- Unsubstantiated rumor – Region 31 approved a 35-day stipulation, and was chastised by NLRB Operations for so doing.

WHO IS ELIGIBLE TO VOTE? HOW THE NLRB'S NEW BARGAINING UNIT ANALYSIS MAY APPLY IN THE CONSTRUCTION INDUSTRY

The formal process leading to a vote on the question of union representation typically starts when the union files a representation-case petition with the appropriate regional office of the National Labor Relations Board ("NLRB"). Among the information contained in that petition is a description of what the union contends is the appropriate bargaining unit. In that bargaining unit description, the union will typically identify the categories of employees the union seeks to "include" in the unit and those the union contends should be "excluded." This is obviously a critical determination since it defines those employees eligible to vote on the issue of union representation (and who will be represented should the union win the election) and those who will not be allowed to cast a vote on this critical decision.

Whether resolved pre-election (which is still possible but much more difficult under the Ambush rules) or after the election, the following are the rules applicable to resolving most bargaining unit disputes.

A. The Statutory Guidance

The statutory guidance is fairly limited. Section 9(a) of the National Labor Relations Act ("NLRA") requires only that the bargaining unit be appropriate:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees **in a unit appropriate for such purposes** shall be the exclusive representative of all employees in such unit….

Section 9(b) then provides the only statutory guidance into how the NLRB should make that "appropriate unit" determination:

> 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…

(emphasis added) That is the full extent of the statutory guidance. The Board must simply determine in each case if the unit is "appropriate." To do so, the Board must only consider what will "assure to employees the fullest freedom in exercising the rights guaranteed by the Act" (i.e. the rights of self-organization and collective bargaining) and the only options identified by the statute are:

- The employer wide unit;
- a craft unit;
- a plant/facility unit; or
- a subdivision thereof.

Each option is considered presumptively "appropriate." In other words, an employer seeking to oppose one of those presumptively appropriate units will have the burden of proof.

While the NLRB has the authority to issue regulations defining appropriate bargaining units, they have only done so once and that involved bargaining units in acute care hospitals. In most cases, the NLRB has historically resolved bargaining unit disputes on a case-by-case basis through individual case adjudication. Resolution of these individual cases is fact-specific and often turns on the unique combination of facts in a given case. These cases, however, have produced a few broad principles which are relevant to resolving most bargaining unit disputes.

B. Guidance from Case Decisions

1. The Bargaining Unit Must Only be Appropriate, Not the Most Appropriate

First, the NLRB has long held that "there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be appropriate." *Morland Bros. Beverage Co.,* 91 NLRB 408, 418 (1950); *DTG Operations, Inc.* 257 NLRB No. 175 (2011). In other words, the Board must only find that the unit is "an" appropriate unit; that legal conclusion is not undercut by the fact that other appropriate units, even other units that are more appropriate, exist. "Because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the

proposed unit plus other employees is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate." *Specialty Healthcare & Rehab. Ctr. of Mobile,* 357 NLRB No. 83 (2011). It is this rule that forms the basis for many of the NLRB's recent micro-unit decisions.

Multiple appropriate bargaining units often exist in each workplace. The union must simply identify one that is appropriate. "The NLRB examines that petitioned for unit first. If that unit is an appropriate unit, the Board proceeds no further." 357 NLRB at 8. "The Board looks first to the unit sought by the petitioner and if it is an appropriate unit, the Board inquiry ends." *Wheeling Island Gaming, Inc.,* 355 NLRB No. 127 (2010).

Conversely, if the petitioned-for unit is not appropriate, "the Board may examine alternatives suggested by the parties, and also has discretion to select an alternative unit that is different from the alternative proposals of the parties. The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classification." *Overnite Transportation Co.,* 331 NLRB 85 (2000).

2. Community of Interest Factors

Historically, employers have typically argued that the unit requested by the union is not appropriate because it seeks to exclude employees who share a "community of interest" with the employees included in the unit. "In making the determination of whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a community of interest." 357 NLRB at 9.

"The community of interest analysis is extremely fact intensive and can appear subjective." "The ultimate determination much more often depends on detailed factual analysis on a case by case basis than on the application of rules of law." The Developing Labor Law at 644. Nonetheless, the following factors are considered most relevant to establishing the existence (or not) of a community of interest among two groups of employees:

- Wages/hourly rate/compensation same or different;
- Benefits (401(k), healthcare coverage/costs, PTO, holiday, tuition reimbursement, etc.) same or different;
- Policies/handbook/work rules same or different;
- Performance evaluation process same or different;
- Hours of work same or different;
- Shifts, same or different;
- Similarity or difference in working conditions;
- Uniforms same or different;
- Same department/different department;
- Supervision same or different/at what level do these employees share managers/supervisors;

- Job function/duties same or different;
- Similarity of skills used in jobs or are skills required different;
- Similarity of required qualifications;
- Similarity of required training or is training different;
- Similarity of required certifications;
- Amount and type of job overlap between classifications;
- Functional integration of jobs;
- Frequent contact/lack of contact between employees in jobs;
- Frequent interchange/lack of interchange;
- Existence (or not) of temporary and/or permanent transfers between the jobs; and
- Bargaining history.

Two groups of employees share a community of interest if there is "substantial similarity" when these, and other similar factors, are analyzed. Historically, employers have been very successful in getting NLRB Regional Directors to add employees to the bargaining unit as defined by the union based on a showing that those employees share a community of interest with the employees included in the unit. As set forth in the micro-unit section below, the NLRB's *Specialty Healthcare* decision has made that much more difficult to do.

3. Presumptively Appropriate Units

In the course of issuing bargaining unit decision, the NLRB has also created various "presumptively appropriate bargaining units," a "production and maintenance unit in manufacturing being a prime relevant example. If a union petitions for a presumptively appropriate unit, the employer will have a high standard to meet in overcoming that presumption. The converse is not true. As the Board pointed out in *Specialty Healthcare*, "a party petitioning for a unit other than a presumptively appropriate unit… bears no heightened burden to show that the petitioned for unit is also an appropriate unit. The existing presumptions are thus consistent with the statutory requirement that the proposed unit need only be an appropriate unit, because they merely shift the burden to the party arguing that a petitioned for and presumptively appropriate unit is inappropriate." 357 NLRB No. 83 at 8.

4. Extent of Organizing

Finally, while this is also a statutory limitation, it is worth noting that Section 9(c)(5) of the Act provides that:

> In determining whether a unit is appropriate for the purposes specified in subsection 9(b), the extent to which the employees have organized shall not be controlling.

In other words, a union should not be allowed to petition for an election including only those employees who support unionization. Obviously, any time a union seeks to exclude certain

individuals from a unit, it is safe to assume that, on balance, those excluded don't support unionization. That is certainly what unions appear to be doing when they petition for micro-units. It would seem, therefore, that Section 9(c)(5) would be a basis upon which to object to a micro-unit. The majority in *Specialty Healthcare* rejected that argument citing old authority from the U.S. Supreme Court. After noting that "the extent to which employees have organized cannot be controlling," the majority reasoned that "the extent of organizing may be consider[ed]…as one factor in determining if the proposed bargaining unit is an appropriate unit." 357 NLRB at 9. That factor violates Section 9(c)(5), according to the majority, when it is the "only" factor supporting the unit's appropriateness. When other factors support the appropriateness of the unit, that the extent to which the union has support forms a basis upon which the union has configured the bargaining unit will not render the unit inappropriate under Section 9(c)(5).

C. The Impact of *Specialty Healthcare*

The NLRB's long-standing approach to bargaining unit analysis was fundamentally changed by their decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011). *Specialty Healthcare* gave rise to the concept of "micro-bargaining units." This case involved a nursing home and the union's effort to have an election involving only Certified Nursing Assistants ("CNAs") excluding other similarly-skilled employees working in the same facility (e.g. nonprofessional service employees like food and nutrition workers and environmental service employees)(employees who under historic principles would have normally been included in the unit). Rejecting the employer's effort to add these additional employees based on their shared community of interest, the NLRB articulated a new analytical standard for evaluating the appropriateness of bargaining units when an employer claims that additional employees or classifications must be added for the bargaining unit to be appropriate.

1. "Readily identifiable as a group"

Specifically, in determining whether a petitioned-for bargaining unit is appropriate, the Board will first ask whether the employees included in the unit by the union are "readily identifiable as a group." In conducting that analysis, the Board will consider the following factors:

- Job Classifications;
- Departments;
- Functions;
- Work Locations;
- Skills; and
- Similar Factors

If the Board concludes that the employees are readily identifiable based on these factors, they will next consider whether those employees share a community of interest using the factors identified in section B(2) above. If the Board finds that the employees are readily identifiable as a group and that they share a community of interest, the Board will find that unit to be "an appropriate unit." As noted above, once a unit is found to be appropriate "the Board proceeds no further." 357 NLRB No. 83, slip op. at 8.

2. Overwhelming Community of Interest

The Board majority then addressed this question: "what showing is 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, slip op. at 10. The Board first addressed what is not sufficient.

In that regard, the Board said that a unit is not inappropriate simply because the employees included in the unit share a community of interest with the employees who will be excluded. "The Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate." Id. Likewise, "because a proposed unit need only be an appropriate unit, and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even more appropriate, is not sufficient to demonstrate that the proposed unit is not appropriate." Id.

A unit is also not inappropriate simply because it is small. "The fact that a proposed unit is small 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. at 10. "A union is not required to request representation in the most comprehensive or largest unit of employees of an employer unless an appropriate unit compatible with that requested unit does not exist." Id.

In order to successfully expand a unit containing employees readily identifiable as a group who share a community of interest, the employer must show that the "included" and "excluded" employees share an "overwhelming community of interest." The Board characterized this as a "heightened showing" and said two groups have an "overwhelming community of interest" when the factors "overlap almost completely." Citing the Court of Appeals decision in *Blue Man Vegas, LLC v. NLRB, 529 F.3d 417 (D.C. Cir. 2008),* the Board said "that the proponent of the larger unit must demonstrate that employees in the more encompassing unit share an overwhelming community of interest such that there is no legitimate basis upon which to exclude certain employees from it." Id.

3. Fractured Unit

Finally, the Board majority in *Specialty Healthcare* noted that a union cannot successfully petition for a "fractured" unit. A unit would be fractured if employees inside and outside the requested unit "share an overwhelming community of interest" as discussed above. 357 NLRB No. 83, slip op.at 13. Stated another way, a bargaining unit would be fractured if it contains "an arbitrary segment" of what would be an appropriate unit or "a combination of employees that are too narrow in scope or that have no rational basis." Id. Looking at the facts in *Specialty Healthcare,* for example, a unit containing some Certified Nursing Assistants ("CNA") but not all CNAs, or CNAs working only the night shift or on the first floor would constitute a fractured unit. As another example based on the facts from *Wheeling Gaming,*[1] a request for a

[1] *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010) involved an election petition in which the union sought to represent only poker dealers at a West Virginia casino. In response, the employer

unit including some poker dealers but not all poker dealers or poker dealers and blackjack dealers but not all game dealers employed by the employer. The Board has implied that in those instances, there would be no "rational basis" for those unit configurations which would make them fractured.

Insightful guidance on this fractured unit analysis can be found in *Odwalla, Inc*., 357 NLRB No. 132 (2011). That case involved a stipulated election agreement in which the parties agreed to a unit including: Route Service Representatives (sales and delivery drivers for juice drinks), warehouse associates, "swing reps" (who functioned both as relief drivers and warehouse workers) and cooler technicians (who repair juice coolers). In dispute were merchandisers who did not work at the same location and who voted subject to challenge (the union wanted to exclude them and the employer wanted them included). They voted by challenge and became the determinative votes.

At the regional level, a hearing officer concluded that the merchandisers lacked a sufficient community of interest with the other employees and excluded them from the stipulated unit. The NLRB (Pearce, Becker and Hayes) disagreed. They held instead "that the merchandisers share an overwhelming community of interest with the employees the parties agreed should be in the unit, and therefore a unit excluding the merchandisers is not an appropriate unit." 357 NLRB No. 132 (2011).

In analyzing this issue, the Board assumed, without expressly discussing that the stipulated unit (including route service representatives, warehouse associates, swing reps and cooler technicians) included employees who were readily identifiable as a group and that they shared a community of interest. In their analysis, however, the Board focused on whether the merchandisers shared an overwhelming community of interest with all the employees already included in the unit agreed to by the union and the employer.

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argued that the smallest appropriate unit should also include craps, roulette, and blackjack dealers, with which the NLRB majority (Liebman and Schaumber, a Democrat and a Republican) agreed. The dissent by then Board Member Becker, however, is what is more insightful. Specifically, Becker noted that the petitioned-for unit contains all employees who do the same job at the same location. Becker observed that these employees perform the same duties (all having identical duties), work in the same location (physically separated from the other dealers), under common separate supervision, have a unique compensation system (direct tips instead of pooled tips), with unique training and certification. Because these employees are all in the same job and because they necessarily share a community of interest – indeed "virtually identical terms and conditions of employment" – they are an appropriate unit. Becker said "From the perspective of employees, this is one of the most logical and appropriate units within which to organize for the purpose of engaging in collective bargaining." 355 NLRB No. 127 slip op. at 1. The fact that poker dealers share a community of interest with the other dealers was irrelevant to Mr. Becker. "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be 'appropriate'" Id. at 2. "One clearly rational and appropriate unit is all employees doing the same job and working in the same facility." Id. While Becker's position was not sufficiently persuasive to the majority in *Wheeling Gaming*, he was apparently more persuasive in *Specialty Healthcare*, in which the majority adopted Becker's *Wheeling Gaming* dissent, albeit in slightly different terms.

In finding that the merchandisers shared an overwhelming community of interest, the Board focused on this analysis: the agreed upon bargaining unit is not configured by job classification, department or function. Rather, that unit aggregates various classifications, departments and functions. The agreed upon unit also did not include employees all supervised by the same supervisor. The employees included in the unit report to various supervisors (not just one) and some employees included in the unit (the route service representatives) have more supervisors in common with the excluded merchandisers than with some of the other included employees. Finally, the unit was not drawn along lines of compensation. There were multiple forms of compensation among some of the included employees and the excluded merchandisers. Likewise, the excluded merchandisers had similar compensation to the warehouse workers and the cooler technicians, both included in the unit. The Board also noted that the factors which distinguished the route service technicians from the merchandisers, also distinguished the route service technicians from the other employees in the agreed upon unit.

Based on these facts, the Board concluded that the unit, excluding the merchandisers, was fractured and lacked a logical basis. The following reasoning is a bit complicated but critical to applying the fractured unit analysis. While none of the categories of employees included in the unit had an overwhelming community of interest with each other – all the employees in the stipulated unit shared a community of interest which the merchandisers shared equally. That is, the community of interest factors that did exist "overlapped almost completely." As a result, the merchandisers shared an overwhelming community of interest with the other employees in the unit. Thus, exclusion of the merchandisers would be arbitrary and lack a rational basis. This reasoning will be applicable when a union petitions for employees in more than one job classification but not all arguably related job classifications.

4. Recent Micro-Unit Decisions

Two recent micro-unit decisions from the NLRB, *Macy's, Inc.* and *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, provide a little additional insight into how the Board majority intends to approach this issue. While both of these cases arose in the context of a retail store, the principles articulated apply generally.

In *Macy's*, the United Food and Commercial Workers Union ("UFCW") filed a petition seeking to represent a bargaining unit of fragrance sales employees – specifically, "employees working on the first floor in cosmetics and women's fragrances and those employed on the second floor selling men's fragrances." This group constituted approximately 41 of 150 total Macy's employees working at this store in Saugus, Massachusetts. In response, Macy's argued that the smallest appropriate unit would include all 150 store employees working in 11 departments, or, alternatively, all sales employees at the store. It was undisputed these employees shared almost identical terms and conditions of employment including their policy handbook, fringe benefits, time clock system, break room, and performance evaluation process. Critically, however, employees in this department were separately supervised and there were few documented instances of employee interchange between the 11 departments.

The NLRB concluded that the cosmetics and fragrances department employees were "readily identifiable" based on "classifications and functions." They represent all the

nonsupervisory employees in the department, a department that was organized by Macy's. Critically, it was "not a sub-department," of a larger department or "an arbitrary segment of a department." Employees in this department worked under the common supervision of a single department manager, had a similar pay structure (i.e. base wage plus a percentage of sales commission) and performed an integrated function with the shared purpose of selling cosmetic and fragrance products to customers in two "defined work areas" which were on two floors but connected by an escalator. Likewise, they shared a community of interest.

The NLRB majority then found that Macy's did not meet its burden of showing that these employees share an overwhelming community of interest with the larger group such that there is no legitimate basis upon which to exclude them. The employees sought to be added to the unit by Macy's worked in other entirely separate departments for different front-line supervisors. Other than a "brief" all employee morning meeting and "periodic inventory assistance," the daily interaction between those in the petitioned-for micro-unit and other store employees was only "incidental." No other store employees were assigned to sell cosmetic or fragrance products and the petitioned-for employees were not expected to sell products outside the cosmetics/fragrances department thus, the community of interest factors do not overlap almost completely.

In *Bergdorf*, the petitioned for unit included 35 employees working in the Salon Shoe Department on the second floor and 11 women's contemporary shoe sales employees who worked on the fifth floor as part of the larger "Contemporary Sportswear Department."

The NLRB (5-0) found that this two department unit was not appropriate because, on balance, these employees lacked a community of interest. Specifically, the two groups of employees were organized into two departments located on separate floors. Here, the NLRB found that the petitioned-for employees "share some community of interest factors," including "a common purpose, a common pay scheme as the only employees in the store to be paid on a draw vs commission basis," and they share, along with other employees, the same handbook, hiring criteria and evaluation process. Nonetheless, "the balance of the community of interest factors weigh against finding the petitioned-for unit to be appropriate." In reaching that conclusion, the NLRB emphasized that, unlike *Macy's*, here "the boundaries of the petitioned-for unit do not resemble any administrative or operational lines drawn by the employer." Likewise, the employees had little contact, were separately supervised and otherwise did not share sufficient interests to be grouped together for bargaining.

The NLRB noted that while the women's salon shoes was a separate department, the unit requested by the union attempted to carve out women's contemporary shoe sales employees from their larger contemporary sportswear department. The Board observed that while "[t]he petition's departure from any aspect of the [e]mployer's organizational structure might be mitigated or outweighed by other community-of-interest factors," such as if the petitioned-for employees "shared common supervision despite being located in different departments," which "would show that the departmental distinctions were relatively less important in the organization of the workforce," here "[n]o such facts" were present. *Id*. Instead, the petitioned-for women's salon and contemporary shoe sales employees worked under "different department managers, different floor managers, and even different directors of sales," with the only shared supervision between the two groups being at the highest level of store management – the General

Manager. *Id*. The Board also found there was not "significant interchange" between the salon and contemporary shoe sales employees in the petitioned-for unit; contact among the petitioned-for employees was "limited to attendance at storewide meetings and incidental contact related to sharing the same locker room, cafeteria, etc.;" and while the record reflected that the employer encouraged employees to sell merchandise outside their own department, referred to as "interselling," the Board noted this accounted for "less than one percent" of their overall sales. *Id*. at 4.

Under these circumstances, the Board unanimously concluded the factors that favored finding a community of interests were outweighed "by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the [e]mployer (such as departments, job classifications, or supervision). That, combined with the complete absence of any related factors that could have mitigated or offset that deficit, led the NLRB to find the unit to be inappropriate." *Id*.

5. Micro-Units In Construction – "Micro" When Micro Wasn't Cool?

In general, bargaining units in construction long have been somewhat narrower and more specialized than in manufacturing for example. Dating back to at least the 1960s, the Board has held that any "readily identifiable and homogeneous group with a community of interests separate and apart from other employees" is an appropriate unit for bargaining. *See R.B. Butler, Inc.*, 160 NLRB 1595 (1966). The factors applied have included wages, hours and other working conditions, common supervision, degree of skill, interaction and interchange with other employees and functional integration. However, in construction, the Board has resisted employer efforts to force broader bargaining units based upon the "fact that other employees perform some of the same tasks." *Charles H. Tompkins, Co.*, 185 NLRB 195 (1970). As a result, bargaining units in the construction industry have often been trade or skill-specific, even where different groups of employees work together on jobsites and perform tasks side by side. Much of this is based upon historical bargaining units established by craft-specific trade unions and the Section 8(f) agreements they have negotiated with employers and employer associations.

This leaves open the question of whether *Specialty Healthcare* will be applied in the construction industry and whether it even matters. The Board side-stepped an early opportunity to answer questions about the applicability of *Specialty Healthcare* in *Grace Industries*, as discussed below. In that case, the Regional Director expressly found that *Specialty Healthcare* did not apply to the case, and the Board, having already found the relatively "micro" unit appropriate under applicable construction bargaining unit principles, expressly declined to review the Regional Director's view regarding the non-applicability of *Specialty Healthcare*. *See Grace Industries, LLC*, 358 NLRB No. 62, 8, fn. 31 (2012).

In *Grace Industries, LLC* 358 NLRB No. 62 (2012), the NLRB considered whether different subspecialty groups of laborers working for the employer's paving operation could stand as independent units. The company was engaged in the business of asphalt paving, concrete paving and preparatory work on bridges, roads and airport runways in New York City. Laborers Local 1010 had petitioned for an election of employees including asphalt paving laborers and concrete paving laborers, and the Regional Director found that unit to be

appropriate. A rival union, United Plant and Production Workers, Local 175, concurrently filed a petition seeking to represent a bargaining unit of the asphalt paving laborers, and excluding the concrete paving laborers. The Regional Director rejected that unit as inappropriate, and Local 175 sought review.

The Board reversed the Regional Director and found that the petition for unit for asphalt pavers was appropriate as a stand-alone unit, finding that the laborers who "primarily perform asphalt paving" are readily available and identifiable as a group and have a community of interest separate from the concrete paving laborers. In so finding, the Board relied on the following factors:

- Distinct skills and functions for asphalt paving, including operating sensors on the paving machine and setting the grade to ensure water runoff.
- Asphalt worker wages were notably higher than the concrete laborers.
- Special working conditions involving hot asphalt.
- Utilization of distinct tools and equipment not used in concrete paving.
- Lack of "significant overlap" between the asphalt pavers and other crews.
- The asphalt laborers "not on asphalt" work was merely incidental and occasion by an absence of available asphalt paving work.
- Relevant bargaining history, including traditional 8(f) agreements maintaining separate units between asphalt pavers and concrete pavers for more than 70 years.

Again, as noted above, in the final footnote the Board expressly declined to address the Regional Director's finding that *Specialty Healthcare* did not apply to the case, because it had already found the relatively "micro" unit to be appropriate under standard Board construction industry standards.

6. Where Are We Headed?

In light of the current Board's receptivity to petitioned-for micro-units as evidenced by *Specialty Healthcare* as well as in liberal application of pre-existing Board standards as demonstrated in *Grace Industries*, it seems likely that the Board will continue to find units appropriate, even as unions seek narrower, easier-to-organize groups. Where might this trajectory lead?

a. Single jobsite units?

Through Section 8(f) pre-hire agreements providing "negotiated" bargaining unit scopes, the typical construction bargaining unit has been multi-employer, employer-wide, or at least covering all workers performing work within a geographical jurisdiction. This is due generally to the fact that construction workers, by nature, migrate from jobsite to jobsite as assigned, and generally are not amenable to a "single plant" stable complement.

"Project labor agreements" – applicable to a specific jobsite or project for the duration of specific work – have been common in the Section 8(f) pre-hire context. Given the Board's trend in accepting narrow units, it may be anticipated that unions will seek to organize employees on single jobsites only, eschewing the perhaps more difficult to locate and organize employer-wide groups of employees, or employees beyond the jobsite but still within the union's geographical jurisdiction. For example, in *Redi Solutions*, 28-RC-136834 (2014), the Regional Director approved a stipulated election agreement for a unit of mechanical insulators currently employed on a specific power plant construction site in Nevada – by definition a temporary jobsite for the employer involved.

Such a unit would seem more likely to meet with Regional Director approval with regard to single-sites that involve:

- Long-term construction projects;
- Stable workforces assigned to the jobsite exclusively for a long period;
- Remote sites to which employees relocate temporarily and are isolated from the rest of the employer's workforce.

Interestingly, in the *Redi Solutions* case, not only did the Regional Director approve the single-site unit as stipulated, but also approved the stipulated voter eligibility limitation to employees on the jobsite as of the standard voter eligibility date (payroll period ending date prior to the approval of the stipulation) rather than the broader *Daniel/Steiny* formula.

The *Daniel/Steiny* formula was established in response to the fluctuating nature and unpredictable duration of construction projects. See *Steiny and Company, Inc.*, 308 N.L.R.B. 1323 (1992). The Board recognizes that the construction industry is different from other industries in the way it hires, lays off, and otherwise utilizes employees. Employees in the construction industry may experience intermittent employment, be employed for short periods on different projects, or work for several different employers during the course of a year. To satisfy its objective of simplifying and expediting the election process and of assuring employees in the construction industry and other industries with intermittent employment patterns the right to express their desires regarding representation the Board created a numerical formula for election eligibility. Accordingly, the following voting formula is applicable to all construction industry elections:

> Those in the unit who are employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 or more days within the period of 24 months, immediately preceding the eligibility date for the election …

Daniel Construction Company, Inc., 167 N.L.R.B. 1078-79.

In *Steiny & Co.*, the Board footnoted that "the parties also are free to stipulate not to use the Daniel formula. Of course, all employees eligible under the Board's traditional eligibility standard also would be eligible." *Steiny & Co., id.* at footnote 16.

In most cases it would be easier for a union to reach and organize employees currently working a specific jobsite than it would be to garner support among a transitory workforce including employees on multiple jobsite as well as employees who have been laid off within the previous year. In today's era of *Specialty Healthcare*, in the absence of a stipulation, would the Board uphold a union's request for application of the standard "current employees only" voter eligibility rather than the *Steiny/Daniel* formula over the employer's objection?

b. Long-term maintenance job units?

The Board, in *Nestle-Dreyer's Ice Cream*, 31-RC-066625 (2011), has already demonstrated that it will find appropriate a "maintenance-only" unit excluding all production employees. It seems logical that the Board might approve a unit of construction trade employees engaged in servicing a long-term maintenance contract on a third-party employer's site. An example might be four electricians employed by an outside contractor, performing manufacturing plant maintenance work on a single, third-party site, in support of a multi-year maintenance contract.

c. Sub-specialties within trades?

Like the bargaining unit approved in *Grace Industries, LLC,* including asphalt paving laborers but excluding concrete paving laborers, the Board may be inclined to recognize sub-specialties within a trade.

- Employees on residential vs. commercial projects?
- Rough carpenters vs. finish carpenters?
- Journeymen vs. apprentices?