

# TROUBLE WITH THE TRUTH:

*Specialty Healthcare and the Spread of Micro-Unions*



**NATIONAL  
LABOR  
RELATIONS  
BOARD**



**U.S. CHAMBER OF COMMERCE**

# TROUBLE WITH THE TRUTH:

## *Specialty Healthcare* and the Spread of Micro-Unions

### I: INTRODUCTION

On August 30, 2011, the National Labor Relations Board (NLRB or Board) issued a 3-1 decision in a case called *Specialty Healthcare and Rehabilitation Center of Mobile*.<sup>1</sup> This controversial ruling created a new standard for determining the composition of bargaining units suitable for a union certification election.

Using the new criteria established in *Specialty Healthcare*, unions can form very small “micro” bargaining units that exclude employees who, under previous law, would likely have been included. This outcome was effectuated by the “overwhelming community of interest” test articulated in the decision, which has the practical effect of making it nearly impossible for an employer to include additional employees into a proposed “micro” bargaining unit suggested by a union.

In practice, the *Specialty Healthcare* decision means that the NLRB will approve almost *any* proposed bargaining unit a union recommends, regardless of how small or fragmented. Many practitioners of labor law, including the dissent in the case, have argued that the Board’s ruling effectively allows unions to petition for bargaining units that reflect little more than the extent to which they have already recruited supportive employees, in violation of Section 9(c)(5) of the National Labor Relations Act (NLRA or Act).<sup>2</sup>

This has real world implications for employers and workers because a union can populate a prospective bargaining unit with those more

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<sup>1</sup> *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

<sup>2</sup> National Labor Relations Act of 1935 (49 Stat. 449) 29 U.S.C. § 151–169.



inclined to accept representation and thus increase the odds that it will win the election. Thus, these micro-units mean that unions can use *Specialty Healthcare* to gain a foothold at a business even if a majority of workers do not support unionization.

Regardless of how one feels about the merits of the case, the NLRB's public description of its decision should be a particular cause for concern. When *Specialty Healthcare* was announced, the agency stated in a press release that it had established a "new approach" to the formation of bargaining units only in the non-acute health care setting. The Board specifically denied that it had created new criteria for other industries.

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Yet that assurance has proven to be false. In fact, the micro bargaining units enabled by *Specialty Healthcare* have surfaced in industries as varied as retail, manufacturing, rental cars, delivery services, and telecommunications. The downplaying of a significant policy change is

similar to what occurred when the Board established a new joint employer standard in the *Browning Ferris* case and when it issued a new rule on election procedures.

The obfuscation is especially worrying as the agency considers a range of new issues during the final months of the Obama presidency. Additional regulatory actions related to joint-employment, so-called "captive audience" meetings, and the definition of independent contractor may be on tap. Given the potentially controversial nature of these issues, the public should be able to have confidence that, even if the NLRB is no

# TROUBLE WITH THE TRUTH: *Specialty Healthcare* and the Spread of Micro-Unions

longer the neutral arbiter envisioned by the NLRA, it will at least represent its actions truthfully.

Unfortunately, that confidence has been compromised, and when analyzing any NLRB

actions during the remainder of the administration, labor practitioners and the public would be well served to read the fine print. The widespread application of the *Specialty Healthcare* standard, despite the NLRB's initial assurances, should also encourage Congress to use the powers at its disposal to overturn the decision and restore common sense to the NLRA, a law whose boundaries the current Board has expanded dramatically.

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## II. BACKGROUND OF *SPECIALTY HEALTHCARE*

Congress passed the NLRA in 1935 in the face of what it called “strikes and other forms of industrial strife or unrest” that had the “intent or the necessary effect of burdening or obstructing commerce[.]”<sup>3</sup> The Act established the NLRB and charged it with conducting union certification elections and prosecuting unfair labor practice charges. Procedures for conducting hearings and investigations were established and the Board was intended to act as a neutral arbiter in administering and enforcing the NLRA.<sup>4</sup>

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<sup>3</sup> *Ibid.*, Section 1.

<sup>4</sup> Staff Report to the U.S. House of Representatives Committee on Oversight and Government Reform, December 13, 2012. Retrieved from <https://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf>.

For the first several decades after passage of the NLRA, the Board tended to act in the manner Congress intended, although there were policy swings reflective of periods of Republican and Democratic rule. Those swings, however, have become far more dramatic in recent years. The Obama-era Board in particular has shifted labor policy in a sharply anti-employer direction with numerous reversals of well-settled precedent and the issuance of new regulatory directives.<sup>5</sup>

One of the most dramatic policy shifts relates to the composition of bargaining units. The key driver of this shift is a case called *Specialty Healthcare and Rehabilitation Center of Mobile*.<sup>6</sup> The case arose in 2009 when the Regional Director of NLRB Region 15 ordered an election among a proposed bargaining unit of certified nursing assistants at a nursing home in Alabama. The unit in question had been suggested by the United Steelworkers Union. Relying on NLRB precedent in a case called *Park Manor Care Center*, the employer objected, arguing that the appropriate bargaining unit should include a number of other employees.<sup>7</sup>

After additional legal proceedings, the Board itself decided to take up the case, and in December 2010 it issued a request for briefs. The request made for ominous reading. It made clear that the Board was not only looking to overturn *Park Manor Care Center*, which applied exclusively to the non-acute health care industry, but was also considering a new standard for bargaining unit determinations across all industries subject to its jurisdiction.<sup>8</sup>

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<sup>5</sup> Swanton, Mary, "Pro-Union NLRB Alarms Employers," *Inside Counsel*, August 1, 2011, Retrieved from <http://www.insidecounsel.com/2011/08/01/pro-union-nlr-alarms-employers>.

<sup>6</sup> *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83.

<sup>7</sup> *Park Manor Care Center*, 305 NLRB No. 135.

<sup>8</sup> Brief of Amicus Curiae submitted by the Chamber of Commerce of the United States, Case No. 15-RC-8773, March 8, 2011. Retrieved from: [http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Specialty%20Healthcare%20and%20Rehabilitation%20Center%20of%20Mobile,%20et%20al.%20\(NCLC%20Brief\).pdf](http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Specialty%20Healthcare%20and%20Rehabilitation%20Center%20of%20Mobile,%20et%20al.%20(NCLC%20Brief).pdf)



### III. THE DECISION IS ISSUED

#### A) The Board's Ruling

On August 26, 2011, the NLRB issued its decision. It consisted of three parts. First, the Board overturned *Park Manor Care Center*, claiming that the *Park Manor* approach to determining bargaining units in nursing homes “has become obsolete, is not consistent with our statutory charge, and has not provided clear guidance to interested parties or the Board.”<sup>9</sup> Instead, the Board explained that it would use the “community of interest” standard when determining the appropriateness of bargaining units in the non-acute health care setting.

In other words, the Board was stating that while the extent to which unions had organized was not a determinative factor in this specific case, it could be the determinative factor in future cases.

Secondly, the Board articulated how it intended to make bargaining unit determinations more generally. In this section of

the decision, the Board stated that having a community of interest, as evidenced by the employees being organized in a separate department, having distinct skills and training, being functionally integrated with other employees, and separately supervised, was a critical factor. However, it also made clear that it would look to other factors as well. Importantly, it stressed that “one factor” in determining an appropriate bargaining unit would be the “extent to which employees have organized.”<sup>10</sup> Specifically the Board stated: “We thus consider the employee’s wishes, as expressed in the petition, a factor, although not a

<sup>9</sup> *Specialty Healthcare*, Note 6 *supra*.

<sup>10</sup> *Ibid*.

# TROUBLE WITH THE TRUTH: *Specialty Healthcare* and the Spread of Micro-Unions

determinative factor *here*.<sup>11</sup> In other words, the Board was stating that while the extent to which unions had organized was not a determinative factor in this specific case, it could be the determinative factor in future cases.

The third part of the decision addressed how the NLRB would henceforward look at situations



where an employer wished to add additional employees to a unit suggested by a union. First, the Board noted that it was not looking for the *most* appropriate bargaining unit, but only *an* appropriate unit. Specifically, it stated that a proposed unit would not be rejected “simply because it is small.”<sup>12</sup> Second, the Board explained that to expand the size of a proposed unit, an employer would now have to demonstrate that any employees it wished to add shared an “overwhelming community of interest” with the initial group of employees.<sup>13</sup>

To avoid the impression that it had, for all practical purposes, created a new standard, the majority sought to tie this third section of its ruling to precedent. However, it was forced to admit that existing precedent was not completely on point: “We acknowledge that the Board has sometimes used different words [other than overwhelming community of interest]

<sup>11</sup> *Ibid.* Emphasis added.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*





to describe this standard ... Nevertheless, the Board has repeatedly used words that describe a heightened standard.”<sup>14</sup> And with regard to requiring the employer to be the party with the burden of proof, one had to read the fine print buried in a footnote to find that, again, precedent was lacking: “prior Board decisions do not expressly impose the burden of proof on the party arguing that the petitioned for unit is inappropriate[.]”<sup>15</sup>

Combined, the three parts of *Specialty Healthcare* amounted to a fundamental rewrite of the NLRB’s traditional bargaining unit standard. But, one would have never known that from reading the agency’s press release.

## B) Downplaying the Decision

When it announced *Specialty Healthcare*, the NLRB issued an anodyne press release downplaying the decision’s significance. The headline of the release stated blandly: “Board issues decision on appropriate units in non-acute health care facilities” without any suggestion that far more had occurred.<sup>16</sup>

With regard to overturning the 20-year precedent in *Park Manor Care Center*, the press release said in understated fashion that the Board had adopted a “new approach” to determine what would constitute “an appropriate bargaining unit in health care facilities other than acute care hospitals.”<sup>17</sup> It then went on to say that it had merely “clarified” the criteria used in cases “where a party argues that a proposed bargaining unit is inappropriate

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> NLRB, Office of Public Affairs, “Board Issues Decision on Appropriate Units in Non-Acute Health Care Facilities,” Press Release, August 30, 2011. Retrieved from <https://www.nlr.gov/news-outreach/news-story/board-issues-decision-appropriate-units-non-acute-health-care-facilities>.

<sup>17</sup> *Ibid.*

# TROUBLE WITH THE TRUTH: *Specialty Healthcare* and the Spread of Micro-Unions

because it excludes certain employees.”<sup>18</sup> Finally, in a definitive statement, the press release emphasized that the Board “did not create new criteria for determining appropriate bargaining units outside of health care facilities.”<sup>19</sup>

Major news outlets picked up on the Board majority’s soothing tone. For example, the *Wall Street Journal* reported: “In their written decision, the board’s majority suggested that while they were setting a new approach at many health-care facilities, they were simply clarifying longstanding policy in other industries.”<sup>20</sup>

In the days that followed, the downplaying of the ruling’s significance continued. In response to a congressional hearing on the NLRB, Chairman Mark Pearce issued a statement declaring that all the Board had done was “clarified a confusing standard.”<sup>21</sup> Even a year later, Chairman Pearce maintained that the decision was not a big deal, saying in an interview that “*Specialty Healthcare* was not designed to create any difference in the size of bargaining units.”<sup>22</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Trottman, Melanie, “Business Irked as Labor Board Backs Unions,” *The Wall Street Journal*, August 31, 2011.

<sup>21</sup> NLRB Office of Public Affairs, September 22, 2011. Retrieved from <https://www.nlr.gov/news-outreach/news-story/nlr-chairman-pearce-issues-statement-congressional-hearing-about-board>.

<sup>22</sup> “NLRB Chair Says Micro-Unions Ruling Not Shrinking Units,” *Law360*, October 26, 2012.



## C) Beyond the Spin

Despite the NLRB’s reassuring statements, the reality of the decision was not lost on most observers of labor policy. First among these was the lone dissenter on the Board, Brian Hayes. In his strenuous dissent, Hayes stated emphatically that *Specialty Healthcare* constituted a dramatic change in policy: “Today’s decision fundamentally changes the standard for determining whether a petitioned for unit is appropriate in any industry subject to the Board’s jurisdiction.”<sup>23</sup> Hayes pointed out that the new overwhelming community of interest standard would make “the relationship between petitioned-for unit employees and

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excluded coworkers irrelevant in all but the most exceptional circumstances.”<sup>24</sup> He described it as a “strikingly new unit determination standard within or outside of the health care industry.”<sup>25</sup> In addition, he noted that courts had already shot down an earlier effort by

the Board to give deference to units suggested by a union in a case called *Lundy Packing*, pointing out that the judges called the criteria in that case a “novel legal standard.”<sup>26</sup>

The attempt by the Board to implicitly sanction units reflective of little more than the extent to which unions had already recruited supportive

<sup>23</sup> *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

workers was, as Hayes noted, one of the most galling aspects of *Specialty Healthcare*. In fact, such units are specifically outlawed by Section 9(c)(5) of the NLRA, which states: “In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.”<sup>27</sup>

Aside from Member Hayes, other practitioners of labor law also criticized the decision. In a client bulletin, one law firm wrote: “Significantly, the Board did not, as it could have done, limit the new standard to non-acute healthcare facilities. The practical effect of this decision is that, in the not uncommon situation where a union is unable to garner widespread support, unions in all industries will be encouraged to organize the smallest units of employees possible.”<sup>28</sup> Another firm warned: “Employers should take no stock in some press suggestions that this decision has limited application to the health care industry.”<sup>29</sup>

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<sup>27</sup> National Labor Relations Act, Note 2, *supra*.

<sup>28</sup> Polli, Anita and Torrence, Carie, “NLRB Defines New Standard for Determining Appropriate Bargaining Units,” Littler Mendelson Client Bulletin, September 7, 2011. Retrieved from <http://www.littler.com/nlrb-defines-new-standard-determining-appropriate-bargaining-units>.

<sup>29</sup> Carter, Mark, “NLRB Permits Micro-Units in Specialty Healthcare Decision,” Dinsmore & Shohl LLP, September 8, 2011. Retrieved from [http://www.dinsmore.com/nlrb\\_permits\\_micro\\_units/](http://www.dinsmore.com/nlrb_permits_micro_units/).



## IV: APPLICATION OF SPECIALTY HEALTHCARE IN OTHER SECTORS

### First Aviation

It did not take long for the reasoning behind *Specialty Healthcare* to spread from non-acute health care to additional industries. Within a few weeks of *Specialty Healthcare*, an NLRB Regional Director (RD) applied the new standard to a general aviation service business at the Teterboro, NJ, airport.<sup>30</sup> The company, First Aviation Services, caters to private aviation customers, and its employees perform a variety of duties including customer service, maintenance, marshalling, fueling, towing, and cleaning private aircraft 24 hours a day, which is not very similar to the non-acute healthcare industry to say the least.



Among First Aviation's 110 employees, there are several categories of job duties with particular groups of employees hired to perform them, but because it is a small operation, there is significant overlap in filling many duties, such as taking orders from customers or "wing walking" planes as they are being pushed out to the ramp. As is often the case in small businesses, all employees work closely together and share responsibilities when the circumstances warrant it.

However, the International Association of Machinists & Aerospace Workers (IAM) entered the picture and sought to represent 34 "line service"

<sup>30</sup> *First Aviation Services – Teterboro*; Case 22-RC-061300.

employees, rather than the entire workplace. Understanding the heavy overlap of duties among its employees, First Aviation sought, logically, to include the other workers in the proposed bargaining unit. However, the Regional Director ruled against the company saying, “their community of interest with the Employer’s other employees is not so overwhelming as to mandate their inclusion.”<sup>31</sup> In a 2-1 decision, the NLRB declined to review the company’s appeal of the decision, with Member Hayes reiterating his objection to the *Specialty Healthcare* precedent.

## **Odwalla, Inc.**

Not long after *First Aviation*, the beverage company Odwalla, Inc. found itself in a similar predicament.<sup>32</sup> An election was held at a company facility in California where the bargaining unit consisted of route sales drivers, relief drivers, warehouse associates, and cooler technicians. The dispute in the case was whether, as the employer contended, merchandisers should be included in the unit as well.

More interesting than the details of the proposed unit was the fact that the Board relied on *Specialty Healthcare* in making its decision: “Applying our recent decision in *Specialty Healthcare & Rehabilitation Center of Mobile* ... we conclude that the merchandisers share an overwhelming community of interest with the employees the parties agreed should be in the unit[.]”<sup>33</sup> As noted by one law firm:



<sup>31</sup> *Ibid.*

<sup>32</sup> *Odwalla, Inc.*, 357 NLRB No. 1608.

<sup>33</sup> *Ibid.*



This case starts off by answering an important question that management had following *Specialty Healthcare* — that is, does *Specialty Healthcare* apply outside the non-acute healthcare setting? ... *Odwalla* answered that question: ***Specialty Healthcare* applies everywhere.** *Odwalla* involves a juice and fruit bar company in California. It could not be a more different work setting than a nursing home.<sup>34</sup>

In this instance, the NLRB actually found that the unit suggested by the union was inappropriate, which may have caused some relief among employees. However, that relief would be short-lived.

## T-Mobile

The telecommunications company T-Mobile found itself as another one of the “early adopters” of the *Specialty Healthcare* precedent when a union sought to represent 16 of the company’s field and switch technicians working on Long Island.<sup>35</sup> T-Mobile contended that its New York

City market included the four boroughs of New York City, as well as the two counties of Long Island (Nassau and Suffolk) and that a bargaining unit of just its Long Island employees was inappropriate. The union argued that the Long Island market was separate from New York.



<sup>34</sup> O’Keefe, Bryan M., “Specialty Healthcare Watch: Odwalla, Inc.,” *The Labor and Employment Report*, Shawe Rosenthal LLP, February 14, 2012. Retrieved from <http://www.laboremploymentreport.com/2012/02/14/specialty-healthcare-watch-odwalla-inc/>.

<sup>35</sup> *T-Mobile USA, Inc.*, Case 29-RC-012063.

After hearing testimony from several employees, the NLRB's Regional Director concluded that "the record is ambiguous at best regarding whether the Employer's organizational structure combines Long Island and the four boroughs into a distinct 'New York City market'" and agreed to allow an election for the petitioned-for bargaining unit. Surprisingly, however, the union lost that election by a vote of 10-6.<sup>36</sup>

## DTG Operations

On December 30, 2011, the NLRB issued a decision in *DTG Operations*, which involved a rental car facility at the Denver airport.<sup>37</sup> In it, the Board overruled a Regional Director's decision and found that a unit of 31 employees, consisting of rental service agents (RSAs) and lead rental service agents (LRSAs), was appropriate for an election. The RD had found that the smallest appropriate unit was a "wall-to-wall" unit, which would have included all of the employer's 109 employees.



As with the cases above, the NLRB explicitly relied on *Specialty Healthcare* to find "that the RSAs and LRSAs share a community of interest and, second, that the Employer failed to demonstrate that the additional employees it seeks to include share an overwhelming community of interest."<sup>38</sup>

<sup>36</sup> *Ibid.*, Tally of Ballots.

<sup>37</sup> *DTG Operations*, 357 NLRB No. 2122.

<sup>38</sup> *Ibid.*





## Macy's

In July 2014, the NLRB upheld an Acting-Regional Director's decision to permit a bargaining unit consisting of only the cosmetic and fragrance salespersons at a Macy's department store in Saugus, Massachusetts, that employs approximately 150 individuals.<sup>39</sup> Of those employees, approximately 120 are sales associates in various departments throughout the store.



The case started in March 2011, when the United Food & Commercial Workers (UFCW) filed a petition with the NLRB to represent all of the sales associates as a traditional "wall-to-wall" bargaining unit, which at the time was the well-established standard in retail department stores. The NLRB accepted the wall-to-wall unit, and a representation election took place on May 20, 2011. However, the UFCW lost that election.<sup>40</sup>

In October 2012, the UFCW filed a second representation petition seeking to represent just the 41 cosmetics and fragrance sales representatives at the same store. Using *Specialty Healthcare* as the guiding precedent, the RD certified the newly-proposed bargaining unit and ordered the election to proceed. Macy's appealed that decision to the Board, citing the NLRB's nearly half-century precedent covering the

<sup>39</sup> *Macy's*, 361 NLRB No. 4.

<sup>40</sup> *Macy's*, Case No. 01-RC-022530. See also *Macy's*, Note 39, *supra*, at 22, Member Philip A. Miscimarra, dissenting.

retail industry, in which the Board affirmed that a storewide bargaining unit in the retail setting is “presumptively appropriate.”<sup>41</sup>

Upholding the RD’s decision, the NLRB essentially confirmed that it intends to apply the *Specialty Healthcare* standard across the economy, saying: “Board precedent regarding retail department stores has evolved away from any presumptions favoring storewide units, and the current standard for determining whether a less-than-storewide unit comports with, and is in fact complementary to, the framework articulated in *Specialty Healthcare*.”<sup>42</sup>

## **Bergdorf Goodman**

Another micro-union case in the retail industry arose at the Bergdorf Goodman store in New York City, which employs hundreds of workers in eighteen different departments.<sup>43</sup> Local 1102 of the Retail, Wholesale Department Store Union proposed a bargaining unit with about forty-five employees composed of just women’s shoes sales associates on the Second Floor Salon Shoes Department and the Fifth Floor Contemporary Footwear Department.

The RD’s analysis of the store’s operations noted the fact that the housekeepers and alterations employees at Bergdorf Goodman’s



<sup>41</sup> *Sears Roebuck & Co.*, 184 NLRB No. 343.

<sup>42</sup> *Macy's*, Note 39, *supra*. In June 2016, the NLRB’s decision in *Macy's* was upheld by the United States Court of Appeals for the Fifth Circuit. *Macy's, Incorporated v. NLRB*; No. 15-60022, F.3d (5th Cir. 2016).

<sup>43</sup> *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, Case No. 02–RC–076954.



two stores were represented already by the Teamsters and UNITE-HERE, respectively. She opined that “there is little evidence of functional integration in the store,” and because not many other employees sold women’s shoes, the departments in question shared a community of interest. She further concluded that the rest of the sales associates did not share an overwhelming community of interest necessary to reject the petitioned-for bargaining unit.

An election took place, but the votes were impounded while the Board reviewed an appeal. In a rare reversal of a micro-union case, the NLRB unanimously overturned the Regional Director’s decision because the sales associates in question lacked a community of interest. The Board noted that “while the Salon shoes employees constitute the whole of their department, the petition carves the Contemporary shoes employees out of a second department, Contemporary Sportswear, excluding the other sales associates in that department.”<sup>44</sup>

The Board concluded that the departure from the store’s own organizational structure without sufficient reason to do so precluded the combination of these two sets of employees into one unit, which obviated the need to analyze the case further. However, what the Board also concluded was that the unit was inappropriate not because it was too small, but rather because it was too big and disconnected to have a true community of interest. In other words, the union should have gone for an even smaller and more fractured unit. Thus, the decision did not back away from *Specialty Healthcare* at all, but rather amplified it.

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<sup>44</sup> *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman and Local 1102 Retail, Wholesale Department Store Union*, 361 NLRB No. 11.

## Bread of Life (Panera)

The NLRB's *Bread of Life* case originated in Michigan, where a union sought to organize 17 out of 43 bakers working at six out of 17 Panera Bread cafés operated by a company called Bread of Life.<sup>45</sup> The bakers all had essentially the same jobs, had the same overall supervisor, and were available to work at any of the company's 17 stores in the company's west Michigan market. The employer actually agreed to let the bakers form their own bargaining unit, excluding other store employees such as cashiers, etc.



The only catch, though, was that the bargaining unit had to cover all 17 stores, but the union rejected that condition.

Applying the logic of *Specialty Healthcare*, the NLRB's Acting RD sided with the union, despite previous Board precedent that favored units

including workers at all of an employer's work sites in a given region. The Acting RD's decision observed that "it is undisputed that the employees in the West Michigan Market share the same job duties, terms and conditions of employment, and a bonus plan," but they do not share the "overwhelming community of interest" required by *Specialty Healthcare*.<sup>46</sup>

The NLRB issued a *pro forma* decision in *Bread of Life* on March 21, 2012, in which it rejected the employer's request for review.<sup>47</sup> After the employer refused to recognize the bargaining unit, the NLRB's Acting

<sup>45</sup> *Bread of Life, LLC d/b/a Panera Bread, Case 07-RC-072022.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*



General Counsel issued a complaint on October 2, 2012, alleging that the company had violated the NLRA. On November 21, 2012, the NLRB issued a Decision and Order against the employer.<sup>48</sup> It then reaffirmed that ruling in a December 16, 2014, decision made necessary by the Supreme Court's ruling in *Noel Canning*, which invalidated hundreds of decisions issued by an unconstitutionally constituted Board.<sup>49</sup>

As of September 2016, the *Bread of Life* case was being appealed to the United States Court of Appeals for the District of Columbia Circuit with oral arguments scheduled for October 2016, but the NLRB notified the Court that "serious settlement discussions" were underway, so the oral arguments were postponed.<sup>50</sup>

### **Nestle Dreyer's**

In a case involving a Dreyer's ice cream manufacturing plant in Bakersfield, California, a local of the International Union of Operating Engineers sought to represent about 113 maintenance workers in a bargaining unit that excluded 578 production workers at the same facility.<sup>51</sup> Dreyer's objected to the proposed unit, arguing that it should also include production employees, but the NLRB's Regional Director approved the unit of maintenance workers.



<sup>48</sup> *Bread of Life, LLC d/b/a Panera Bread*, 359 NLRB No. 24

<sup>49</sup> *Bread of Life, LLC d/b/a Panera Bread*, 361 NLRB No. 142.

<sup>50</sup> *Bread of Life, LLC v. NLRB*, No. 15-1179 (D.C. Cir.). See Letter [1626925] filed by NLRB in 15-1179, 15-1220 Letter Notifying Court of Settlement Negotiations; July 26, 2016.

<sup>51</sup> *Nestle Dreyer's Ice Cream*, Case No. 31-RC-066625.

Dreyer's requested that the Board review the Regional Director's decision, which it declined to do saying, "it raises no substantial issues warranting review," and the maintenance employees voted in favor of union representation by a vote of 56-53.<sup>52</sup>

The case ended up in federal court, where Dreyer's appealed the application of the *Specialty Healthcare* standard. In April 2016, the U.S. Appeals Court for the Fourth Circuit ruled in favor of the NLRB, saying that the Board "reasonably explained" its rationale for an overwhelming community of interest test in *Specialty Healthcare*.<sup>53</sup>

## Volkswagen

With an investment of more than \$1 billion, the car manufacturer Volkswagen (VW) opened a manufacturing plant in Chattanooga in 2011 with over 2,400 employees.<sup>54</sup> Unlike its plants around the world, however, the Chattanooga plant did not include a so-called works council, which is a board of VW employees who are elected to meet regularly with management on a range of issues, including labor rules, working conditions, training, safety, etc.<sup>55</sup>

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Nestle Dreyer's Ice Cream Company v. NLRB and International Union of Operating Engineers, Intervenor*, No. 14-2222, 821 F.3d 489 (4th Cir. 2016).

<sup>54</sup> See Volkswagen, *Volkswagen Builds Factory in Tennessee, USA* [Press release July 15, 2008]. Retrieved from [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/news/2008/07/US\\_Tennessee.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/news/2008/07/US_Tennessee.html).

<sup>55</sup> Under U.S. labor law, something like a works council is not legal, since traditional unions are the only lawful means of bargaining collectively over working conditions. See U.S. Chamber of Commerce, *A New Organizing Paradigm? Works Councils and the NLRA* (2015 Report). Retrieved from <https://www.uschamber.com/report/new-organizing-paradigm-works-councils-and-the-nlra>.



That fact did not escape the notice of the United Auto Workers (UAW), which decided to target the plant for organizing. The UAW started collecting authorization cards in 2013, but after nearly a year of campaigning, the union lost its representation election in February 2014 by a vote of 626-712.<sup>56</sup>



In a somewhat strange turn of events, a competing group calling itself the American Council of Employees (ACE) subsequently formed as a

rival to the UAW, prompting VW to adopt a “Community Organization Engagement” policy that used membership thresholds to determine which group(s) could meet for non-binding discussions with management.<sup>57</sup> The creation of ACE apparently eroded support for the UAW, which made the prospect of another plant-wide election a riskier proposition.

Not to be deterred, the UAW set about trying to organize a micro-union of just 152 maintenance workers (around 10% of the approximately 1,500 blue collar workers who voted in the previous election). In December 2015, the NLRB conducted a representation election, and these workers voted 108-44 in favor of the UAW.

<sup>56</sup> DePillis, Lydia, “Auto union loses historic election at Volkswagen plant in Tennessee,” *The Washington Post*, February 14, 2014. <https://www.washingtonpost.com/news/wonk/wp/2014/02/14/united-auto-workers-lose-historic-election-at-chattanooga-volkswagen-plant/>.

<sup>57</sup> See Volkswagen, *Community Organization Engagement* [2014 Memorandum]. Retrieved from [http://web.archive.org/web/20151006115501/http://op.bna.com/dlrcases.nsf/id/bpen-9qsnql/\\$File/Community%20Organization%20Engagement.pdf](http://web.archive.org/web/20151006115501/http://op.bna.com/dlrcases.nsf/id/bpen-9qsnql/$File/Community%20Organization%20Engagement.pdf).

In response to the election results, VW's management objected to the creation of such a small bargaining unit, saying in a statement, "We believe that a union of only maintenance employees fractures our workforce and does not take into account the overwhelming community of interest shared between our maintenance and production employees."<sup>58</sup>

The company appealed the RD's decision to hold the election to the members of the NLRB, arguing, "Volkswagen's Chattanooga plant does not have a separate maintenance department. Essentially, because the Union created a fictional department, the Regional Director disregarded Volkswagen's shop structure and invented a new maintenance department out of three different sub-groups embedded in Volkswagen's Body, Paint, and Assembly shops."<sup>59</sup> As one might expect, the Board declined to reverse the Regional Director's decision, and as of September 2016 the case was still working its way through federal court.<sup>60</sup>

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<sup>58</sup> Pare, Mike, "UAW wins 'historic' vote at VW," *Times Free Press*, December 4, 2015. Retrieved from <http://www.timesfreepress.com/news/business/aroundregion/story/2015/dec/04/vw-workers-vote-unionize-chattanooga-plant/339024/>.

<sup>59</sup> *Volkswagen Group of America, Inc.*, NLRB Case No. 10-RC-162530, The Employer's Request for Review of Regional Director's Decision and Direction of Election.

<sup>60</sup> *Volkswagen Group of America, Inc., v. National Labor Relations Board*, No. 16-1309 (D.C. Cir.).





## Constellation

The wine producer Constellation operates the Woodbridge Winery in Acampo, California, employing roughly 300 people, 100 of whom are management or administration and 200 of whom are production and maintenance employees. In 2014, Teamsters Local 601 (Cannery Workers Processors, Warehouse, and Helpers) filed a representation petition with the NLRB to represent a fragmented unit of cellar employees.<sup>61</sup> The Board's Regional Director detailed all of the different types of workers at the winery in a 44-page decision granting the Teamsters' petition.



In the cellar department, 46 cellar employees, 18 employees in barrel operations, five wine tracking employees, and four to six cellar services employees report up to the director of cellar operations. In addition, about 24 employees work in the facilities maintenance and engineering section, a little more than 100 work in various aspects of the bottling operation, 23 employees work in 'technical services' overseeing quality control, around 35 work in a warehouse, and nine are full-time winemakers.

From those various categories of employees, the union sought to form a bargaining unit of just the 46 cellar employees, not even the entire cellar department. After analyzing myriad factors of the winery's operations, job duties, and other elements, the Regional Director found that the proposed unit was appropriate, despite the fact that the employees in the cellar operations department work closely together. Citing *Macy's*, he

<sup>61</sup> *Constellation Brands, U.S. Operations, Inc., d/b/a Woodbridge Winery*; NLRB Case No. 32-RC-135779.

observed, “a unit is not fractured simply because a larger unit might also be appropriate, or even more appropriate.”<sup>62</sup>

In a footnote decision issued in February 2015, the NLRB refused to reconsider the Regional Director’s decision, saying, the employer’s appeal “raises no substantial issues warranting review.” As of September 2016, the employer’s case was in federal court, where the U.S. Court of Appeals for the Second Circuit was considering the merits of the issue.<sup>63</sup>

## V: EFFORTS TO OVERTURN *SPECIALTY HEALTHCARE*

### A) Legislation

The business community has sought to overturn the effects of *Specialty Healthcare* through two principal avenues: by seeking a legislative remedy and through the courts.<sup>64</sup> In Congress, both the House of Representatives and Senate have had bills introduced since 2011 to revise the NLRA to define a “sufficient community of interest” in a way that would prevent the NLRB from allowing fractured units. One House version of this legislation known as the Workforce Democracy and Fairness Act (H.R. 3094) was introduced in October 2011, shortly after *Specialty Healthcare* was issued. That bill sought to reverse the decision as well as prevent the Board from pursuing its proposed ambush election rule; it was passed in the House but not the Senate.<sup>65</sup>

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<sup>62</sup> *Ibid.*, citing *Macy’s Inc.*, Note 39 *supra*, slip op. at 11 (citing *Specialty Healthcare*, Note 1 *supra*, slip op. at 13).

<sup>63</sup> *Constellation Brands, U.S. Ope v. National Labor Relations Board*, No. 15-2442 (2nd Cir.).

<sup>64</sup> See Devaney, Tim, “GOP plots offensive on labor,” *The Hill*, August 8, 2014. Retrieved from <http://thehill.com/regulation/labor/214425-gop-plots-offensive-on-labor>.

<sup>65</sup> See Govtrack.us. Summaries for the Workforce Democracy and Fairness Act. November 30, 2011. Retrieved from <https://www.govtrack.us/congress/bills/112/hr3094/summary>.



Subsequent legislation called the Representation Fairness Restoration Act (H.R. 2347-113<sup>th</sup> Congress; S.801-114<sup>th</sup> Congress) specifically targets the *Specialty Healthcare* decision and has been introduced in both the House and the Senate since 2011. The bill lays out eight factors that the NLRB must use to determine whether there is a sufficient community of interest in a proposed bargaining unit. It requires the Board to consider the similarity of wages, benefits, working conditions, skills, training, and job functions, as well as factors such as common supervision, the extent of interaction among employees, and the employer's organizational structure. The bill would prevent employees from being excluded from a proposed bargaining unit unless their interests are sufficiently distinct from the proposed unit. The latest version of the Representation Fairness Restoration Act was introduced in the Senate in March 2015, but it had not passed either house of Congress as of September 2016.<sup>66</sup>

In 2015, the Appropriations Committee of the U.S. House of Representatives released a draft appropriations bill that would have prevented the continued implementation of *Specialty Healthcare*, and a similar bill passed in the Senate Appropriations Committee.<sup>67</sup> However, despite these so-called appropriations riders in the draft legislation, the final appropriations bill for fiscal year 2016 did not include them.<sup>68</sup>

As of September 2016, efforts to block the *Specialty Healthcare* standard were once more underway. A House Appropriations subcommittee

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<sup>66</sup> S. 801, 114th Cong. (2015-6).

<sup>67</sup> See: United States Senate Committee on Appropriations, FY16 LHHS Full Committee Markup Bill Summary, June 25, 2015; Retrieved from <http://www.appropriations.senate.gov/news/minority/fy16-lhhs-full-committee-markup-bill-summary>.

<sup>68</sup> See United States Senate Committee on Appropriations, *Summary: Consolidated Appropriations Act of 2016*, December 16, 2015. Retrieved from <http://www.appropriations.senate.gov/news/minority/summary-consolidated-appropriations-act-of-2016>.

approved a bill that again contained a rider aimed at the micro-union issue, and the full committee subsequently passed the measure by a vote of 31-19.<sup>69</sup> Specifically, the bill stated that the NLRB could not use any of its appropriated funds to implement or enforce any bargaining unit standard other than the pre-*Specialty Healthcare* interpretation set out in *Wheeling Island Gaming Inc. and United Food and Commercial Workers International Union, Local 23*, which outlined a standard similar to that contemplated by the Representation Fairness Restoration Act.<sup>70</sup>

On the Senate side, an appropriations subcommittee passed a bill on June 7, 2016 that did not contain a rider addressing the *Specialty Healthcare* issue.<sup>71</sup> Ranking Democratic Senator Patty Murray hailed that fact, saying “I am especially proud that this bill doesn’t include a single new damaging policy rider.”<sup>72</sup> The Senate Appropriations Committee passed the measure two days later, clearing the way for consideration by the full Senate.

In a so-called “managers package,” the committee reportedly asked the NLRB to report on how micro-unions affect “employee professional

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<sup>69</sup> See: The U.S. House of Representatives Committee on Appropriations, *Appropriations Committee Releases the Fiscal Year 2017 Labor, Health and Human Services Funding Bill*, Press Release, July 6, 2016. See also *Appropriations Committee Approves the Fiscal Year 2017 Labor, Health and Human Services Funding Bill*, Press release, July 14, 2016.

<sup>70</sup> *Wheeling Island Gaming Inc. and United Food and Commercial Workers International Union, Local 23*, 355 NLRB 127 (August 27, 2010).

<sup>71</sup> See United States Senate Committee on Appropriations, *FY2017 Labor, HHS & Education Appropriations Bill Cleared for Senate Consideration*, Press Release, June 7, 2016. Retrieved from <http://www.appropriations.senate.gov/news/majority/fy2017-labor-hhs-and-education-appropriations-bill-cleared-for-senate-consideration>.

<sup>72</sup> Norman, Brett, “Subcommittee approves first bipartisan Labor-HHS funding bill in seven years,” *PoliticoPro*, June 7, 2016. Retrieved from <https://www.politicopro.com/health-care/story/2016/06/subcommittee-approve-first-bipartisan-labor-hhs-funding-bill-in-seven-years-118132>.



development and mobility” and to provide “any suggestions to ensure that cross-training and career advancement may continue between employees in departments who are represented by a union, and employees in departments who are not represented by the union.”<sup>73</sup> Whether or not the final appropriations bill for fiscal year 2017 will contain a provision to stop enforcement of *Specialty Healthcare* will depend on negotiations between the House and Senate.

## Litigation

As discussed elsewhere in this report, some employers have sought to challenge the NLRB’s use of *Specialty Healthcare* through litigation in federal courts. Unfortunately, the cases that have been brought so far have favored the NLRB.

The employer in the original micro-union case, Specialty Healthcare, changed its name to Kindred Nursing Centers East and filed a legal challenge under the new name in the U.S. Court of Appeals for the Sixth Circuit. In 2013, the Sixth Circuit decided the case and ruled in favor of the NLRB. The court disregarded arguments that the Board’s stance would allow virtually any bargaining unit of union’s choice, saying the NLRA “gives the board wide discretion to determine an appropriate bargaining unit.”<sup>74</sup>

On March 7, 2016, the U.S. Court of Appeals for the Eighth Circuit similarly upheld the NLRB’s *Specialty Healthcare* precedent in a

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<sup>73</sup> Mahoney, Brian, “NLRB changes rule on ‘mixed-guard’ units,” *Politico, Morning Shift*, June 10, 2016. Retrieved from <http://www.politico.com/tipsheets/morning-shift/2016/06/nlr-b-changes-rule-on-mixed-guard-units-tribal-labor-amendment-fails-cwa-faulted-for-decert-threat-214760>.

<sup>74</sup> *Kindred Nursing Ctrs. E., LLC v. National Labor Relations Board*. 727 F.3d 552 (6th Cir. 2013).

case involving FedEx.<sup>75</sup> In the case, two locals of the International Brotherhood of Teamsters sought to represent drivers at FedEx Freight shipping terminals in Pennsylvania and North Carolina. In addition to the drivers, both terminals also employed over 200 dockworkers combined, but the unions excluded them from the proposed bargaining unit. In its challenge before the NLRB, FedEx noted that drivers are often called upon to perform some of the same duties as dockworkers and “their exclusion is illogical and functionally unworkable.” However, citing a previous case, the Eight Circuit found that Section 9 of the NLRA “gives the Board the power to determine the unit appropriate for the purpose of collective bargaining” and denied FedEx’s appeal. The Third Circuit ruled similarly in a different case also involving FedEx drivers and dockworkers in August 2016.<sup>76</sup>

In addition to those rulings, in April 2016, the U.S. Appeals Court for the Fourth Circuit also sided with the NLRB in *Nestle Dreyer’s*, and the Fifth Circuit upheld the NLRB’s decision in *Macy’s* in June 2016.<sup>77</sup> With a total of five circuit courts having upheld the NLRB’s standard under *Specialty Healthcare*, the necessity of Congressional action has become paramount.

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<sup>75</sup> *Fedex Freight, Inc. v. NLRB*, No. 15-1999, 816 F.3d 515 (8th Cir. 2016).

<sup>76</sup> *Fedex Freight, Inc. v. NLRB*, No. 15-2712 15-2585, F.3d (3rd Cir. 2016).

<sup>77</sup> *Nestle Dreyer’s Ice Cream Company*, Note 53, *supra* and *Macy’s*, Note 42, *supra*.



## VI: CONCLUSION

As options to reverse the NLRB’s *Specialty Healthcare* precedent remain elusive, employers across numerous industries will continue to face the prospect of fragmented bargaining units. The most significant implication of this situation is that unions will be able to cherry pick which groups of employees they want to organize, even if the majority of employees at a workplace do not in fact want union representation. With smaller potential bargaining units more likely to be composed of supportive workers, unions will have better chances of winning an

election since fewer employees will need to be swayed to vote for representation.

As case after case has emerged, the NLRB has demonstrated that its public statements are not to be taken at face value—especially when they deny that the Board is implementing policies that favor organized labor.

When the NLRB issued *Specialty Healthcare*, the agency’s press release said “The Board did not create new criteria for determining

appropriate bargaining units outside of health care facilities,”<sup>78</sup> but that statement turned out simply to be false. Indeed, as then-Member Brian Hayes put it in his dissenting opinion, the “decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board’s jurisdiction.”<sup>79</sup> As case after case has emerged, the NLRB has demonstrated that its public statements are not to be taken at face value—especially when they deny that the Board is implementing policies that favor organized labor.

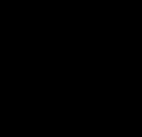
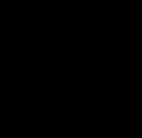
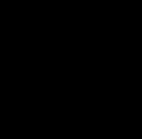
<sup>78</sup> Board issues decision on appropriate units in non-acute health care facilities, Note 16, *supra*.

<sup>79</sup> *Specialty Healthcare and Rehabilitation Center of Mobile*, Note 1, *supra*.

# TROUBLE WITH THE TRUTH: *Specialty Healthcare* and the Spread of Micro-Unions

Over the last several years, the NLRB has overturned many precedents, but the decision in *Specialty Healthcare* represents one of the more significant departures from longstanding practice. By fundamentally altering the threshold for defining bargaining units, the impact of *Specialty Healthcare* has rippled across multiple industries and will continue to do so until Congress, or a court, reverses the NLRB and restores stability to this area of the law.





**U.S. CHAMBER OF COMMERCE**

