



## MANUFACTURERS' ASSOCIATION OF SOUTH CENTRAL PENNSYLVANIA

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### NLRB AND MICRO- BARGAINING UNITS

In an August 2011 decision, i.e., *Specialty Healthcare*, the National Labor Relations Board (NLRB or Board) determined a petitioned-for unit will be deemed appropriate so long as that unit consists of a clearly identifiable group of employees. And, if an employer argues that the unit should include additional employees, the employer must demonstrate that employees in a larger unit share an "*overwhelming*" community of interest with those in the petitioned-for unit. Applying this standard, the Board found that the union's petitioned-for unit, which consisted solely of "Certified Nurses Aides", was an appropriate unit.

Many employers expressed immediate concern that this decision will result in much smaller "*micro*" bargaining units that are easier to organize and more difficult for employers to administratively manage. In fact, one Labor Attorney was quoted after the Specialty Healthcare decision became public, "It's the most important decision from the labor board in at least the past 10 years". What was significant in the Specialty Healthcare case is the Board did not, as it could have done, limit its decision, i.e., the new standard, to non-acute healthcare facilities. The effect of the decision was that where a union is unable to gain widespread support with a wall-to-wall facility, i.e., an entire plant or location, the union will now be encouraged to organize the smallest units of employees possible. Employers, meanwhile, will be forced either to accept the appropriateness of a mini-unit or take on the difficult and costly task of proving that other employees belong in the unit. So, once the union is able to organize a small unit of employees and gains a toehold, a domino effect may take place, whereby, one unit after another is organized, resulting in negotiations with multiple bargaining units.

Fast forward to December 11<sup>th</sup>, and we now have another NLRB case, *Odwalla, Inc* (parent company is Coca-Cola), that was decided by the board, basing its decision on its "overwhelming" community of interest precedent. Now we have a second case, reinforcing *Specialty Healthcare* and the stage is set for unions to move forward more aggressively to unionize micro units (or departments of a facility rather than wall-to-wall campaigns).

The union requested to organize "only" the Odwalla delivery operations, so the employer (Odwalla) had the burden of proving that the larger unit shared an "overwhelming community of interest" with employees in the delivery operations. The NLRB did not agree with the employer's contention that its operation is so "fully integrated" that only a wall-to-wall unit "which includes all employees involved in bringing the employer's products to market" would be appropriate. They did agree, however, that such a wall-to-wall unit could be *an* appropriate unit. (I know...confusing isn't it!)

In the Odwalla case, NLRB Member Brian Hayes adhered to his dissenting position he put forth in *Specialty Healthcare*, and disagreed with the board on imposing on the employer, who may be a proponent of a larger-than-petitioned-for unit, the burden of demonstrating that any additional employees sought to be included must share an "overwhelming community of interest" with the employees in the petitioned-for unit. However, the two-to-one decision was made and the precedent is now firmly in place.

These recent NLRB decisions clearly delineate the "overwhelming community of interest" burden of proof applies to all employers, not just healthcare. The concern now is union organizing has become easier, as unions can target smaller groups of employees to organize; and, if successful in organizing one small group of employees, the union may then try to influence other groups of employees to organize.

#### ***So, which employers are impacted by this decision?***

***Virtually all***, including the great majority of small businesses in the US, since it applies to employers with gross volumes of business over \$500,000 and employers with \$50,000 or more in annual gross revenues from interstate sales or purchases of goods are targets for unions, including non-supervisory salaried employees.

I guess the message now is, "Stay Vigilant" and train your management/supervisory team how to remain union-free. If you want to discuss how we (MASCPA) can assist, I encourage you to contact me.

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