CONTRIBUTED CONTENT & PRESENTATIONS

D.C. Circuit Provides Additional Support For Specialty Healthcare, Union-Friendly Micro-Units

AUGUST 18, 2017

Authors: W. Eric Baisden

The U.S. Court of Appeals for the D.C. Circuit has sided with the National Labor Relations Board in affirming the union-friendly practice of "micro-unit" organizing. The D.C. Circuit's opinion issued in *Rhino v. NLRB* is unwelcome news for employers who were hoping the federal appellate court would reject the organizing practice made possible in 2011 when the Board issued its controversial *Specialty Healthcare* decision.

Rhino represents the second high-profile victory for the union-friendly practice this summer. The first came in June, when the United States Supreme Court surprised many by declining to review *Macy's v. NLRB*, a closely watched Fifth Circuit case which presented the Court with an opportunity to address *Specialty Healthcare* and resolve an arguable split in authority between federal appellate circuits.

As we explained in the wake of the Supreme Court's June decision, the Board's 2011 *Specialty Healthcare* decision created a seismic shift away from the previously-well-settled rules governing union organizing. Before *Specialty Healthcare*, decades of entrenched precedent required that a union seeking to organize a workforce properly include all employees sharing a "community of interest" within the proposed bargaining unit. Typically, this meant that a union seeking to enter a workplace would have to organize all-inclusive "wall to wall" units consisting, for example, of all production and maintenance employees working at a location.

From the perspective of a union seeking entrance to an employer's facility, organizing a "wall to wall" unit presents the practical challenge of campaigning for, and obtaining, the approval of a larger group of workers. Under the old framework , a union intending to organize an employer could not rely on the support of *some* of the workforce; the union would have to work to convince the *majority* of the *entire* workforce to vote for the union to succeed.

Specialty Healthcare rewrote the standard, drastically lowering the barrier to entry for unions. Now, a union can organize any "readily identifiable group sharing a community of interest," even if other employees also shared a community of interest with the group targeted by the union. An employer can only successfully challenge the group the union identifies if it meets the heavy burden of showing that other employees outside of the petitioned-for unit share an "overwhelming community of interest" with the included workers. For the employer, this is no easy task.

Thus, *Specialty Healthcare* offered a helping hand to organized labor by paving the way for unions to focus on smaller groups of workers. By permitting unions to organize "micro-units" (undoubtedly comprised of workers known to be friendly to the union), a union that previously found itself on the outside of an employer's facility could now more easily get its foot in the door. Of course, after a

“micro-unit” foothold is established, the union is in ideal position to strategically work to organize the rest of the workforce from inside the employer’s four walls.

Rhino is an example of a union taking advantage of this very strategy. In *Rhino*, a chapter of the International Alliance of Theatrical Stage Employees (the “Union”) targeted Rhino Northwest, LLC (“Rhino”)-a company that assembles equipment for concerts, festivals, and other such events. Rather than organizing the entire workforce, the Union hand selected its bargaining unit to include only “riggers,” that is, those workers who were responsible for using motors to suspend and remove objects overhead before and after events. All other employees, even those also involved in event assembly and disassembly, were excluded from the bargaining unit.

Rhino challenged the Union’s hand-selected unit, arguing that the riggers shared an overwhelming community of interest with the so-called “non-riggers” who also assisted in the setup and teardown of events. Nevertheless, the D.C. Circuit rejected Rhino’s argument and affirmed the cherry-picked bargaining unit, deferring to the Board’s *Specialty Healthcare* precedent. In so doing, the D.C. Circuit joined seven other federal appellate circuits which have similarly deferred to the NLRB’s broad discretion in setting the guidelines for union organizing and collective bargaining.

Rhino illustrates that *Specialty Healthcare*-and the “micro units” that come with it-will in all likelihood continue to be the law of the land until the Board itself decides otherwise. Since the makeup of the Board is currently in flux, conditions may soon be right for the Board to do just that. *Specialty Healthcare* was decided by a labor-friendly Board majority appointed by President Barack Obama. President Trump has nominated Republicans Marvin Kaplan and William Emanuel to fill two currently-vacant Board positions. The U.S. Senate confirmed Kaplan’s nomination on August 2, but Emanuel’s nomination remains pending. Once both nominees are confirmed and seated, the NLRB will have a 3-2 Republican majority: its first since Peter N. Kirsanow’s term expired on December 31, 2007.

Although it is widely expected that a forthcoming Republican-majority Board would reconsider *Specialty Healthcare*, no reconsideration is possible until the Board has an appropriate case upon which it can address the issues of micro-units. There is no way of knowing how long it will take for such an opportunity to arrive. In other words, *Specialty Healthcare* remains good law, and will remain so for at least the immediate future.

Accordingly, employers must continue to live with the consequences of micro-units, and must stand prepared to defend themselves from organizational activity on an uneven playing field. Employers desiring to maintain a union-free environment are reminded of the importance of a well-structured and robust communication plan to deliver the union-free message.

For more information on this topic, please contact a member of the firm’s Labor & Employment Practice Group.

Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.