Fox Rothschild LLP
ATTORNEYS AT LAW

August 2013

LABOR & EMPLOYMENT

ALERT

Sixth Circuit Decision May Impact Operations of Employers with Unions

By Charles O. Zuver, Jr.

The Sixth Circuit Court of Appeals in *Kindred Nursing Cntrs E., LLC v NLRB,* __F.3d__ (No. 12-1027/1174, August 15, 2013), affirmed the National Labor Relations Board's (the Board's) decision in *Specialty Healthcare (II)*, 357 NLRB No. 83 (2011), rejecting an employer's challenge that a petitioned-for unit containing a readily identifiable group of workers was under-inclusive and therefore inappropriate. The Sixth Circuit also affirmed the Board's holding that the burden in such cases is on the party contending the excluded employees share an "overwhelming community-of-interests" with the included employees in the petitioned-for unit.

In affirming the Board, the court noted that the Board has broad discretion when it comes to determining the appropriate bargaining unit, that here the Board did not abuse its discretion in adopting the "overwhelming community-of-interest standard," and that the Board explained its reasons for doing so. More specifically, the court concluded that the Board did not abuse its discretion in applying the overwhelming community-of-interest standard because the Board had utilized that standard at times in the past, citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), and that the Board "cogently explained" that it needed to clarify the law with respect to a party's argument that the petitioned-for unit should include additional employees. The court further found that the Board's new standard did not violate Section 9(c) (5) of the National Labor Relations Act (the Act) because the court interpreted that section of the Act to preclude the Board from finding a unit appropriate based solely on the extent of the union's organizing and not simply as an additional factor to consider where the Board finds that the employees in the petitioned-for unit share a community of interests. Finally, the court concluded that the Board did not abuse its discretion by adopting a generally applicable rule through adjudication rather than rulemaking as Supreme Court precedent permitted this.

This decision will severely hamper employers' operations by requiring employers to bargain with a number of different unions representing separate groups of employees in the same facility. Thus, employers will not only spend much more time and money bargaining with unions, but employers will have a far more difficult time operating. Employers will no longer be able to quickly respond to changes in customer demand necessitating changes in job descriptions or to technological changes, as different unions will claim the specific work potentially resulting in jurisdictional disputes with the unions.

Fortunately, other cases challenging the Board's new Specialty Healthcare standard are currently pending in the Fourth Circuit and before the Board. Should the Fourth Circuit or another circuit ultimately refuse to enforce the Board's order, this might persuade the U.S. Supreme Court to ultimately decide the issue. For now, employers should expect that unions will have greater latitude in shaping units, that employers will have little chance of altering the scope of the proposed bargaining unit, and that unions will have an easier time organizing as they will have far greater control in shaping units.

The key takeaway for employers is that they should be proactive and take steps to ensure that their operations or a particular facility are not susceptible to union organizing in the first place. This means taking action before a union is organizing your employees. To the extent it makes business sense, employers should consider structuring their operations such that the Board is more likely to find a larger unit of employees share an overwhelming community of interests. This could include reducing job classifications, cross-training employees so as to be able to perform different jobs, encouraging employees to alternate jobs, standardizing terms and conditions of employment, and increasing common supervision. Employers should also perform an audit to determine their susceptibility to union organizing. Experienced

labor counsel can assist employers in evaluating their susceptibility to and reduce their chance of being organized.

For more information about this alert or if you have any questions or concerns, please contact Charles O. Zuver, Jr. at 310.228.6997 or czuver@foxrothschild.com or any member of Fox Rothschild's Labor & Employment Department.

Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement