This Rocky Road Is Not Chocolate: NLRB Wins Again On Micro-Units

Labor & Employment Law Update

By Beverly Alfon on May 2, 2016

On April 26, the 4th Circuit of the U.S. Court of Appeals joined other federal circuits that have upheld NLRB approval of "micro-units." *See, Nestle Dreyer's Ice Cream Co. v. NLRB*, No. 14-2222 (4th Cir. Apr. 26, 2016). This is another boost for unions because micro-units ease their path into industries and business that have been difficult for them to organize in the past.

How do micro-units help unions and hurt employers? When a union files a petition with the NLRB to represent a group of employees, a larger unit is generally favorable for an employer because it is more difficult for the union to garner cohesive support and secure a win. Unions tend to favor smaller units because it is generally easier to gain majority support and win a representation election. Micro-units only further increase the union's chances of success, leading to a "foot in the door" with the company and exposure to other employees. Meanwhile, more micro-units can cause instability, inconsistency and administrative mires for a company.

In the good old days, when there was a dispute about the scope of a union's petitioned-for unit, the NLRB would consider arguments regarding the "community-of-interest" between the employees. Depending on the interrelationship between the employees in the context of operations, an employer could push for a broader unit of employees. However, in *Specialty Healthcare*, 357 NLRB No. 83 (2011), the NLRB imposed a new standard requiring an employer who seeks to expand the petitioned-for unit to demonstrate that those employees excluded from the union's petition have an "overwhelming community of interest" with those included in the union's proposed unit. Arguably, this high standard gives unions *carte blanche* to define the unit in its favor.

Employers have continued to attack the new standard, but the NLRB has now prevailed in the 6th, 8th and 4th circuits. In *Nestle Dreyer's Ice Cream Co.*, an NLRB regional office approved a petitioned-for unit for 113 maintenance workers, while excluding 578 production workers. The union won the election, but the company refused to recognize the union or bargain with it. The regional director entered an order directing the company to bargain. The company appealed to the Board in Washington, D.C. (which affirmed the order) and further appealed to

the 4th Circuit. The company argued that the NLRB abused its discretion by imposing this new standard and contradicted 4th Circuit precedent by blindly deferring to a union's proposed unit. Despite strong backing from national business associations, the appellate court unanimously rejected the company's arguments, affirmed the Board's approval of the unit and determined that the standard articulated in *Specialty Healthcare* was only a clarification of law – and therefore, not an abuse of discretion.

Bottom line: Union organization of micro-units remains in tact. Whether you have a union-free work force or only a portion of your workforce is organized – now is the time to consider (or revisit) management training regarding union organization, analyze your operations/management structure and consult with labor counsel regarding best practices in light of these developments.