American Steel Construction, Inc. *and* Local 25, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO, Petitioner. Case 07–RC–269162

December 7, 2021

ORDER GRANTING REVIEW AND NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

On November 18, 2020, Local 25, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO ("the Union") filed a petition seeking to represent a unit of the Employer American Steel Construction, Inc.'s full-time and regular part-time journeyman and apprentice field ironworkers. The Employer asserted that the petitioned-for unit was inappropriate and that the appropriate unit should include its fabrication shop employees, painters, and drivers. In essence, the Employer argued that a plantwide unit was the only appropriate unit. Following a hearing, on January 4, 2021, the Regional Director issued a Decision and Order dismissing the petition on the basis that the petitioned-for unit of field employees was not appropriate.[1]

Applying *PCC Structurals, Inc*., 365 NLRB No. 160 (2017), and *Boeing Co.,* 368 NLRB No. 67 (2019), the Regional Director found that although field employees share an internal community of interest, it was not "sufficiently distinct" from the interests of the fabrication shop employees, painters, and drivers whom the Union proposed to exclude from the unit. Accordingly, she dismissed the petition.

The Union timely filed a request for review with the Board, and the Employer filed a brief in opposition. The Union contends that the petitioned-for unit is appropriate and that the Regional Director misapplied *PCC Structurals* and *Boeing*, supra, and ignored applicable Board precedent, including *McCann Construction Co.*, 179 NLRB 635 (1969) (rejecting argument that petitioned-for unit must include both shop and field employees). More specifically, the Union contends that the Regional Director erred in finding that the degree of interchange and functional integration between field and shop employees supports finding that the two groups do not have a sufficiently distinct community of interest from one another.

[1] Dismissal was appropriate because the Union indicated that it had no desire to represent a broader unit.

PCC Structurals overruled the Board's prior standard for determining if a proposed bargaining unit is an appropriate unit, set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). In *Specialty Healthcare*, the Board held that:

> [W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

357 NLRB at 945–946 (footnotes omitted).[2]

In *PCC Structurals,* the Board majority stated that, in weighing the "shared *and* distinct interests of petitioned-for and excluded employees . . . , the Board must determine whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.'" Id., slip op. at 9 & 11 (emphasis in original) (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (court's emphasis)). In *Boeing*, the Board attempted to clarify *PCC Structurals*, stating that the analysis entails examining whether the petitioned-for group of employees shares a community of interest, whether the excluded employees have meaningfully distinct interests, and Board decisions on appropriate units in the particular industry involved. 368 NLRB

[2] As cited in *Specialty Healthcare*, the community-of-interest factors include:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, supra at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

No. 67, slip op. at 3–4 (2019). The Board also stated that "[i]f those distinct interests do not outweigh the similarities, then the unit is inappropriate." Id., slip op. at 4.

In both *PCC Structurals* and *Boeing*, the Board issued its decisions without notifying the public that it was reconsidering the applicable standard, inviting amicus briefs or other public input, or allowing the parties an opportunity to brief the case after granting review.

We find that the Union has raised substantial issues warranting review of the Regional Director's conclusion that the petitioned-for unit is inappropriate without the inclusion of the shop employees and drivers. Accordingly, we grant review on that question.[3] To aid in the consideration of this issue, the Board invites the filing of briefs in order to afford the parties and interested amici the opportunity to address the following questions:

1. Should the Board adhere to the standard in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), as revised in *The Boeing Company*, 368 NLRB No. 67 (2019)?

2. If not, what standard should replace it? Should the Board return to the standard in *Specialty Healthcare*, 357 NLRB 934 (2011), either in its entirety or with modifications?

Briefs not exceeding 20 pages in length may be filed with the Board in Washington, DC on or before January 21, 2022. The parties (but not amici) may file responsive briefs on or before February 7, 2022, which shall not exceed 30 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at http://mynlrb.nlrb.gov/efile and are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/07–RC–269162 under the heading "Service Documents." If assistance is needed in E-filing on the Board's website at http://mynlrb.nlrb.gov/efile, please contact the Office of the Executive Secretary at 202-273-1940 or Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C. December 7, 2021

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN and RING, dissenting.

The majority here invites parties and amici to file briefs in advance of the likely departure from the Board's traditional community-of-interest standard, most recently articulated in *PCC Structurals, Inc.*[1] and *Boeing Co.*,[2] for assessing whether the petitioned-for bargaining unit is appropriate without the inclusion of additional employees. In this important area, we disagree with revisiting precedent that already best reflects the Board's duty to consider in each case the collective-bargaining rights of included *and* excluded employees and is consistent with the Board's treatment of the issue for decades before the brief, ill-considered departure a decade ago in *Specialty Healthcare & Rehabilitation Center of Mobile*.[3]

In cases where the appropriateness of the petitioned-for unit is disputed, the Board has traditionally examined (1) whether the employees in the petitioned-for unit have interests that are too different to form a community of interest within the unit,[4] (2) whether the interests of excluded employees are sufficiently distinct to warrant finding the smaller unit is appropriate,[5] and (3) whether the Board has framed guidelines for unit configurations in that specific industry.[6] Interests of included and excluded employees were assessed by applying the factors of departmental organization, skills and training, job functions, functional integration, contact, interchange among classifications, terms and conditions of employment, and supervision.[7] The Board's decisions in *PCC Structurals* and *Boeing* closely reflected the Board's traditional analysis, but brought it into sharper focus. Consistent with those decisions, the Board now applies the defined three steps of (1) applying the community-of-interest factors to determine if included employees share an internal community of interest, (2) applying the community-of-interest factors to conclude whether excluded employees "have meaningfully distinct interests in the

[3] We deny review of the Regional Director's finding that the field employees do not constitute a craft unit.

[1] 365 NLRB No. 160 (2017).

[2] 368 NLRB No. 67 (2019).

[3] 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[4] See, e.g., *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004); *Saks & Co.*, 204 NLRB 24, 25 (1973).

[5] See, e.g., *Texas Color Printers, Inc.*, 210 NLRB 30, 31 (1974); *Harrah's Club*, 187 NLRB 810, 812–813 (1971).

[6] See, e.g., *Colorado Interstate Gas Co.*, 202 NLRB 847, 848–849 (1973); *Stern's, Paramus*, 150 NLRB 799, 803 (1965).

[7] See, e.g., *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

context of collective bargaining that outweigh similarities with unit members," and (3) considering any industry-specific unit composition guidelines.[8]

Section 9 of the Act contemplates the Board taking an *active* role in assessing whether the petitioned-for bargaining unit is appropriate in each case where the unit composition is questioned. Section 9(a) establishes that bargaining units must be appropriate "for the purposes of collective bargaining," and Section 9(b) adds that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[9] Section 9(c)(5) further provides that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."[10] Moreover, the bargaining unit cannot be arbitrary or irrational.[11] A bargaining unit need not be "*the* single most appropriate unit,"[12] but the Board must consider the rights of included and excluded employees and the likelihood of a stable and productive bargaining relationship.[13] *PCC Structurals* and *Boeing* considered this statutory design in detail and correctly concluded that the Board's traditional approach properly implemented it.[14]

The majority here raises the prospect of returning to the standard in *Specialty Healthcare*, which departed from the traditional analysis described above. Under that standard, the Board would find any petitioned-for bargaining unit of employees with an internal community of interest appropriate unless the party contesting its appropriateness proves that "excluded employees share an overwhelming community of interest with the included employees" such that the interests of included and excluded employees "overlap almost completely."[15] In effect, this standard meant that the Board would accept the petitioned-for unit as appropriate in all but the rarest cases, i.e., those in which an objecting party, usually an employer, could meet the exceptionally heavy evidentiary burden of proving that excluded employees shared this overwhelming community of interest with included employees. This standard, inappropriately borrowed from the Board's analysis of whether employees can be accreted to an existing unit without an election,[16] led to numerous decisions at odds with the Board's responsibility to actively review in each disputed case whether the unit is appropriate, to give meaningful weight to the interests of excluded employees, and to not treat the extent of organization as largely controlling.[17]

We believe that the community-of-interest analysis reinstated by *PCC Structurals*, as further explained by

[8] *Boeing*, 368 NLRB No. 67, slip op. at 3–4 (internal quotation marks omitted).

[9] The Supreme Court in *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610–614 (1991), confirmed that this language means the Board must decide whether a unit is appropriate "in any case in which there is a dispute."

[10] As the Board explained in *PCC Structurals,* 365 NLRB No. 160, slip op. at 4 (quoting H.R. Rep. 80–245, at 37 (1947), reprinted in 1 NLRB, Leg. Hist. LMRA, 1947) 328 (1948)), Congress added this provision to the Act in 1947 to "'strike[] at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time.'" The *PCC Structurals/Boeing* analysis respects this Congressional admonition, whereas *Specialty Healthcare* effectively subverted it.

[11] See, e.g., *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 793–795 (2d Cir. 2016).

[12] *American Hospital*, 499 U.S. at 610.

[13] See *Kalamazoo Paper Box Corp.,* 136 NLRB 134, 137 (1962):

> In making unit determinations, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

[14] See *Boeing*, 368 NLRB No. 67, slip op. at 2–4, 6–7; *PCC Structurals*, 365 NLRB No. 160, slip op. at 3–5.

[15] *Specialty Healthcare*, 357 NLRB at 934, 944.

[16] *E. I. Du Pont, Inc.*, 341 NLRB 607, 608 (2004); *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).

[17] See, e.g., *Yale University,* 365 NLRB No. 40 (2017) (allowing nine separate petitioned-for units of teaching fellows in nine different academic departments because, without due consideration of the interests all teaching fellows shared, they shared interests within each unit); *Volkswagen Group of America, Inc.*, Case 10–RC–162530, 2016 WL 1458535 (Apr. 13, 2016) (allowing the petitioned-for unit of only maintenance employees that shared an internal community of interest without careful scrutiny of the shared interests with excluded production and other employees); *DPI Secuprint, Inc.*, 362 NLRB 1407 (2015) (allowing the petitioned-for unit of all hourly employees except offset-print employees notwithstanding the interests the offset-print employees in the middle of the production process shared with included employees, recognized in traditional lithographic-unit precedent); *Macy's, Inc.*, 361 NLRB 12 (2014) (allowing the petitioned-for unit of only one of eleven retail sales departments, notwithstanding tradition of store-wide sales units under the longstanding community-of-interest test); *DTG Operations, Inc.*, 357 NLRB 2122 (2011) (allowing the petitioned-for unit of only rental service agents and lead rental service agents notwithstanding the interests all hourly employees shared at the same rental car facility); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015 (2011) (allowing the petitioned-for unit of a small subset of technical employees in the radiological control department without proper consideration of the interests they shared with all technical employees).

Boeing, represents the more reasonable policy choice in meeting the Board's statutory obligation to determine, in each case where appropriateness is disputed, what is an appropriate unit for collective bargaining. In light of repeated statements by the Chairman when dissenting from application of that analysis, we are not optimistic about the prospects for its retention. It seems more likely than not that the current Board majority will return to the one-sided analysis of *Specialty Healthcare*—assuming, that is, that they do not adopt a standard that veers closer still to putting Board law in direct conflict with the statutory prohibition against making extent of organization controlling in determining whether a petitioned-for unit is appropriate. Admittedly, granting review and soliciting briefs here is but a first step, and the outcome is not inevitable. Nevertheless, we would not take that step. Accordingly, we respectfully dissent.

Dated, Washington, D.C. December 7, 2021

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Marvin E. Kaplan, Member

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John F. Ring, Member

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