Legal Update Article

Labor Board to Revisit Standard for Determining Appropriate Unit for Bargaining

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The National Labor Relations Board (NLRB) has announced that it is considering adopting a more union-friendly approach in determining the appropriate voting unit when a union petitions for an election. ***American Steel Construction Inc. and Iron Workers Local 25*** 370 NLRB No. 41 (Dec. 7, 2021).

The NLRB's eventual rule could have a significant impact on union organizing in the construction industry.

The importance of the potential rule change is well-illustrated by the history of the *American Steel Construction* case. The company was in the structural steel business. It employed fabricators, welders, and painters in its fabrication shop, truck drivers who delivered the fabricated product to job sites, and field employees who performed the installations at the construction sites. Local 25 sought to represent only the field employees and filed a petition requesting the Board conduct an election among that group. The company objected, arguing that the high level of integration of the company's operations require a "wall-to-wall" or company-wide unit.

Under current standards, the non-field employees would be excluded from the unit only if they had "meaningfully distinct interests in the context of collective bargaining which outweigh the similarities" with the unit of field employees proposed by the union. The NLRB's Regional Director concluded that, because of the integration of operations, the distinctions did not outweigh the similarities and, therefore, the company-wide unit was appropriate. The practical effect of the decision was that the election did not go forward because Local 25 was unwilling to represent the broader unit.

The union appealed the Regional Director's decision. In that appeal the NLRB invited the public to submit briefs on the question of whether the Board should return to the Obama-era rule on unit determinations, known as the *Specialty Healthcare* standard.

Under that standard, if the employees the union proposes to represent are "readily identifiable as a group," then that group will be deemed appropriate, even if there is a broader group with shared interests. Under that rule, the outcome in the *American Steel Construction* case almost certainly would be in favor of Local 25's proposed unit, because field employees are a "readily identifiable" group. Their close integration with other employees would not be a factor.

A return to the *Specialty Healthcare* appears to be in the offing, given the NLRB's announcement. By permitting an organizing union to target small groups of a workforce, the chances of the union's ultimate election victory increase. Such a scenario also raises the specter of the operational difficulties that come from a divided workforce with some union and some non-union segments.

Jackson Lewis attorneys are available to answer inquiries regarding this and other developments.