UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 97 | Number 2 Article 6

1-1-2019

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INTRODUCTION

In the United States, organized labor is a shell of its former self.[1] Unions currently represent only 10.7% of American workers, compared to roughly 33% in the 1950s.[2] In the private sector, only 6.5% of workers are union members.[3] Yet, despite the lack of union membership in the American workforce, 60% of Americans view labor unions favorably.[4] The steady decline of organized labor is due to many economic and industrial factors beyond the scope of this Recent Development.[5] Nonetheless, an awareness of the vitality of organized labor provides a useful context to any discussion involving the National Labor Relations Board ("NLRB" or "the Board"). This context is important because the policies and rulings of the NLRB, the agency tasked with enforcing the National Labor Relations Act[6] ("NLRA" or "the Act"), play a significant role in the existence of organized labor and unions.[7] With organized labor in decline, there

1. *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members – 2017 (Jan. 19, 2018), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/SY62-TSQ3] (noting that the union membership rate was 10.7% in 2017, compared to 20.1% in 1983). For an overview on the public's opinion of unions, see generally Shiva Maniam, *Most Americans See Labor Unions, Corporations Favorably*, PEW RES. CTR. (Jan. 30, 2017), http://www.pewresearch.org/fact-tank/2017/01/30/most-americans-see-labor-unions-corporations-favorably/ [https://perma.cc/B7RE-CFD4].

2. Jordan Yadoo, *Union Membership Rate in U.S. Held at Record Low of 10.7% in 2017*, BLOOMBERG (Jan. 19, 2018), https://www.bloomberglaw.com/product/blaw/document/P2TJSZ6JIJUP [https://perma.cc/4DZW-Z4TS (dark archive)].

3. *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry, 2016-17 Annual Averages (Jan. 19, 2018), https://www.bls.gov/news.release/union2.t03.htm [https://perma.cc/M878-FLRX].

4. *See* Maniam, *supra* note 1.

5. *See* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 94 (1987) (identifying several culprits of organized labor's decline, including the movement of industry from the Frostbelt to the Sunbelt, the change of the U.S. economy from industrial to service-oriented jobs, the decline in blue-collar jobs, changes in the composition of the workforce, and the downsizing of plants).

6. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

7. *See* STEPHEN I. SCHLOSSBERG & JUDITH A. SCOTT, ORGANIZING AND THE LAW 1 (4th ed. 1993) ("[T]he law that governs union organizing[] is state and federal law, statutory and case law. By far the most significant statutory law is the federal National Labor Relations Act. Likewise, the most important labor case law is made by the National

should be an increased focus on how the NLRB enforces the provisions of the NLRA.[8]

Among its many responsibilities, the NLRB conducts elections in which employees vote whether to certify a union as their bargaining representative.[9] Union elections are an integral part of the unionization process and heavily depend on the NLRB's policies.[10] As important as elections can be, the makeup of the voting unit largely determines the outcome.[11] In order to vote in a union election, an employee must have a job that is within an approved unit of workers.[12] Typically, a unit is formed as follows: A union organizer begins to build support among employees in a workplace to seek union representation.[13] The union organizer often targets a subset of the workforce to build initial support for union representation.[14] Though not all employees in the subset may support union representation, the union will proceed toward an election when it determines that a majority of the employees in a unit[15] want the union to represent them in collective bargaining.[16] If the union and the employer cannot agree on the size of the unit that will hold an

Labor Relations Board (NLRB), which administers the Act, and by the federal courts. The federal law plays the paramount role . . . because of . . . preemption . . . .").

8. National Labor Relations Act § 1, 29 U.S.C. § 151 (2012).

9. *See* Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L.J. 1647, 1651–52 (2015) (discussing certification elections generally).

10. *See* SCHLOSSBERG & SCOTT, *supra* note 7, at 214–15 (discussing the complicated procedure of organizing and suggesting a need to retain counsel to navigate NLRB representation cases).

11. *See* PAUL M. SECUNDA, JEFFREY M. HIRSCH & MICHAEL C. DUFF, LABOR LAW: A PROBLEM-BASED APPROACH 364–65 (2d ed. 2017) (describing the process of determining an "appropriate bargaining unit"); *see also* JOHN E. ABODEELY, RANDI C. HAMMER & ANDREW L. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT 3 (rev. ed. 1981) ("Attaining a favorable delineation of the size of the bargaining unit is often the focus of dispute between competing unions and between union and management.").

12. Richard A. Kaminsky, *Overview of the Law, and the Basic Manufacturing Unit*, *in* APPROPRIATE UNITS FOR COLLECTIVE BARGAINING 1, 1 (Peter G. Nash & George P. Blake eds., 1979).

13. *See* ROBERT LEWIS & WILLIAM A. KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS 27 (2d ed. 1979) ("A union commences an organizing campaign by assigning an individual to the company. He may have any one of a number of titles: organizer, business agent or representative.").

14. *See id.* at 28–29.

15. *See* SCHLOSSBERG & SCOTT, *supra* note 7, at 216 ("The bargaining unit is that group of employees that is represented by the union in collective bargaining."). The size of a unit will vary, but this Recent Development focuses on "micro-units," where the petitioned-for unit does not encompass all employees.

16. *See id.* at 216–17 ("The union will normally urge the appropriateness of a unit in which it feels it has a good chance to win a majority.").

election, the union must petition the NLRB to approve the unit.[17] When there is a union petition, the employer will usually contend that the unit should not be approved for an election.[18]

When petitioning the NLRB, the union usually proposes small bargaining units because it is easier to build majority support for a union among fewer, more similarly situated employees.[19] In contrast, the employer traditionally argues for larger units so that it can bargain with a greater number of employees, and because a larger unit is less likely to produce a consensus for unionization.[20] Because both the union and the employer know that the size of the unit can determine the outcome of an election, unit determination is a heavily litigated and contentious issue.[21] In such cases, the employees or an organization acting on their behalf files the petition,[22] and the NLRB must decide whether the proposed unit is appropriate for collective bargaining.[23]

The NLRB's authority to determine whether a unit is appropriate comes from the NLRA.[24] Section 9(b) of the Act provides 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 this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[25] The "rights" referred to in section 9(b) are found in section 7 and include the right to self-organize, to join labor organizations, to bargain collectively through representatives, and to

17. *See id.*; *see also* Kaminsky, *supra* note 12, at 1 (explaining that a petition is needed when the employer and the union fail to agree on the appropriate size of a unit).

18. SCHLOSSBERG & SCOTT, *supra* note 7, at 216 ("The employer will often approach the question of appropriateness with an eye toward defining a unit in which the union cannot achieve a majority.").

19. *See id.*; *see also* SECUNDA ET AL., *supra* note 11, at 365 (describing tension between unions and employers as to the size and type of bargaining units). In addition, data supports the theory that a smaller unit has a greater likelihood of winning an election. *See* Gordon R. Pavy, *Winning NLRB Elections and Establishing Collective Bargaining Relationships*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 110, 116–18 (Sheldon Friedman et al. eds., 1994).

20. SCHLOSSBERG & SCOTT, *supra* note 7, at 217.

21. *See id.* at 216–17; *see also* Kaminsky, *supra* note 12, at 1 ("The determination of the appropriate unit is critically important, because it is only the group of employees within that unit that will be permitted to vote in an election to determine whether a particular union shall be the collective bargaining representative.").

22. National Labor Relations Act § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (2012).

23. *Id.* § 9(b).

24. *Id.* §§ 1–19.

25. *Id.* § 9(b) (emphasis added).

engage in other concerted activities for mutual aid or protection, as well as the right to refrain from any or all of such activities.[26]

The NLRB's standard to determine whether a petitioned-for unit is appropriate has recently changed on two occasions. In 2011, the NLRB reformulated old standards to develop the "overwhelming community-of-interest" test in *Specialty Healthcare and Rehabilitation Center of Mobile*.[27] In 2017, the NLRB overturned *Specialty Healthcare* when it returned to the "community-of-interest"[28] test in *PCC Structurals, Inc.*[29]

With the NLRB changing its standard twice in just six years, three observations can be made. First, the change from the *Specialty Healthcare* standard to the *PCC Structurals* standard may appear subtle, but its consequences are enormous.[30] *PCC Structurals* is undoubtedly a pro-employer standard because it abandons the *Specialty Healthcare* deference given to petitioned-for units.[31] Second, both the overwhelming community-of-interest test and the community-of-interest test adhere to the principles of section 9 of the NLRA. In other words, both tests are legally permissible.[32] Third, the

26. *Id.* § 7 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .").

27. *See generally* Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 934 (2011), *overruled by* PCC Structurals, Inc., 365 N.L.R.B. No. 160 (Dec. 15, 2017).

28. A "community of interest" is a group that has "similar interests in wages, hours, and other conditions of employment."*See* Kaminsky, *supra* note 12, at 3.

29. *See generally* PCC Structurals, Inc., 365 N.L.R.B. No. 160, at 1 (Dec. 15, 2017).

30. The reactions to either test are often visceral. *See, e.g.*, David Pryzbylski, *NLRB Continues to Cite Its Infamous* Specialty Healthcare *Decision When Affirming Funky Bargaining Units*, LEXOLOGY: LAB. REL. (Apr. 4, 2016), https://www.lexology.com/library/detail.aspx?g=fb41a2c9-242e-4707-bf0d-7084fd22c5a2 [https://perma.cc/YA2D-VB25]. *But see* Michael J. Lebowich & Lee C. Douthitt, *"Micro-Units" Eliminated: NLRB Overturns* Specialty Healthcare, NAT'L L. REV. (Dec. 16, 2017), https://www.natlawreview.com/article/micro-units-eliminated-nlrb-overturns-specialty-healthcare [https://perma.cc/UU44-8NJK] (reporting on the overruling of *Specialty Healthcare*). Also, because one standard is pro-employer and the other is pro-employee, the chances that the NLRB will swing back and forth between the two with every political change in the executive branch are high. Because unit determination is such an important stage in unionizing, an ever-changing standard would be unduly frustrating.

31. *See* Danielle Garcia, *The End of Union-Dictated Micro-Units: NLRB Overturns* Specialty Healthcare, SHEPPARDMULLIN: LAB. & EMP. L. BLOG (Dec. 18, 2017), https://www.laboremploymentlawblog.com/2017/12/articles/national-labor-relations-act/nlrb-overturns-specialty-healthcare/ [https://perma.cc/ZD9Z-X2ML] ("On the eve of Chairman Phillip Miscimarra's departure from the NLRB, he gave one final gift to employers: the overturning of *Specialty Healthcare* . . . .").

32. *See, e.g.*, Rhino Nw., LLC. v. NLRB, 867 F.3d 95, 100–01 (D.C. Cir. 2017) (upholding *Specialty Healthcare*); Kindred Nursing Ctrs. E., LLC. v. NLRB, 727 F.3d 552,

most complete way to differentiate the two tests is to analyze which test "assure[s] to employees the fullest freedom in exercising the rights guaranteed by [the Act]," pursuant to the section 9(b) mandate of the NLRA.[33]

This Recent Development explores a third observation—that the best method for deciding which test the NLRB should follow is to compare how they assure to employees their "fullest freedom" under the NLRA. If the NLRB must decide whether a petitioned-for unit is "appropriate" pursuant to section 9(b) in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, then the "freedom" given to employees in section 7 deserve a workable framework.[34] Analyzing the effects on employee freedom in unit determination is especially important considering that unit determination cases create tension between employees and the rights they want to exercise.[35] In short, this Recent Development thoroughly analyzes how a section 9(b) standard affects the freedom of employees, something the NLRB failed to do in *PCC Structurals*.

This Recent Development proposes a hierarchy of "Section 7 Stakeholders" as a framework in deciding which test—*Specialty Healthcare*'s overwhelming community-of-interest standard or *PCC Structurals*'s community-of-interest standard—better fulfills the goals of the NLRA. It will proceed in three parts. Part I provides a more thorough background of *PCC Structurals* and the history of the section 9(b) standards the NLRB has used. Part II proposes a hierarchy of Section 7 Stakeholders and explains why such a framework is necessary for the NLRB to fulfill its section 9(b) duty of determining whether a unit is appropriate for collective bargaining. Part III then explores how the framework should be used to compare the two standards.

I. BACKGROUND TO *PCC STRUCTURALS, INC.*

In *PCC Structurals*, the NLRB reviewed a "Regional Director's Decision and Direction of Election" finding that a petitioned-for unit

564–65 (6th Cir. 2013) (upholding *Specialty Healthcare*). In addition, federal courts only reverse a unit determination when they find an "abuse of discretion." *See* Kaminsky, *supra* note 12, at 2.

33. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (2012). In *PCC Structurals*, the NLRB attempted to perform this analysis but did so incompletely. *See PCC Structurals*, 365 N.L.R.B. at 5. The "rights" given to employees under the NLRA are found in section 7. National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

34. The NLRB has not fully addressed how either standard affords employees their fullest freedom under the Act.

35. *See infra* Part II.

of approximately 100 welders and rework specialists was appropriate for collective bargaining.[36] The employer disagreed with the Regional Director's determination that the unit of welders and rework specialists was appropriate.[37] Instead, the employer asserted that the smallest appropriate unit for collective bargaining was all 2565 production and maintenance employees.[38] The NLRB granted review to clarify the applicable standard for determining whether a petitioned-for unit is appropriate for collective bargaining.[39]

The NLRB's authority to "clarify the correct standard"[40] comes from section 9(b) of the NLRA.[41] Section 9(b) grants the NLRB sole discretion to choose a unit appropriate for the purposes of collective bargaining.[42] In addition, the goal of the NLRB's decision is to give employees their fullest freedom to exercise their rights under the NLRA.[43]

In its review, the NLRB overturned *Specialty Healthcare*.[44] To understand the rule from *PCC Structurals*, it is important to first understand the standard established in *Specialty Healthcare* that the Board overturned. Under *Specialty Healthcare*, the NLRB first determines whether the employees within the petitioned-for unit share a community of interest together.[45] Second, the NLRB analyzes whether the excluded employees[46] share an overwhelming community of interest with the unit.[47] If the NLRB finds that the excluded

36. *PCC Structurals*, 365 N.L.R.B. at 1.

37. *Id.*

38. *Id.* The 2565 employees spanned approximately 120 different job classifications. *Id.*

39. *Id.*

40. *Id.*

41. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (2012); *cf.* SECUNDA ET AL., *supra* note 11, at 364 (explaining that for the purpose of NLRB unit determination, a unit consists of job classifications rather than particular workers.).

42. § 9(b); *see also id.* § 9(c)(5) ("[T]he extent to which the employees have organized shall not be controlling."); SECUNDA ET AL., *supra* note 11, at 365 (stating that the NLRB must decide only on *an* appropriate unit, not *the* most appropriate unit).

43. § 9(b).

44. *PCC Structurals*, 365 N.L.R.B. at 1 ("Today, we clarify the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. In so doing, and for the reasons explained below, we overrule the Board's decision in *Specialty Healthcare* . . . .").

45. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 947 (2011), *overruled by* PCC Structurals, Inc., 365 N.L.R.B. No. 160 (Dec. 15, 2017).

46. "Excluded employees" are those employees who are not in the petitioned-for unit but are among the employees in the unit proposed by the employer. *See PCC Structurals*, 365 N.L.R.B. at 1.

47. *Specialty Healthcare*, 357 N.L.R.B. at 947.

employees share an overwhelming community of interest with the petitioned-for unit, then the NLRB rules that the petitioned-for unit is inappropriate.[48] The NLRB then creates a new unit by adding the employees who have an overwhelming community of interest, and this new unit proceeds to an election.[49] The NLRB in *Specialty Healthcare* recognized that its overwhelming community-of-interest test was a "heightened showing."[50] By requiring the other party (i.e., the employer) to show that the excluded employees had an overwhelming community of interest with the unit such that their exclusion made the petitioned-for unit inappropriate, the NLRB implicitly prioritized the freedom of the employees within the unit.

PCC Structurals abandoned the prioritization of petitioned-for unit employees and their section 7 rights over excluded employees. Instead, the NLRB reaffirmed that the traditional community-of-interest test should be applied to all employees—both inside and outside of the petitioned-for unit.[51] Under this standard, the NLRB determines, "in each case in which unit appropriateness is questioned, whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit."[52]

In *PCC Structurals*, the NLRB defended its decision to implement the community-of-interest test as the standard to use when determining the appropriateness of an employee unit pursuant to section 9(b) on multiple grounds. First, the NLRB explained that petitioned-for units should not be determinative and that the NLRB

48. *Id.* at 945–46.

49. *See id.*; *see also PCC Structurals*, 365 N.L.R.B. at 17 (Pearce, M., & McFerran, M., dissenting).

50. *Specialty Healthcare*, 357 N.L.R.B. at 944; *see also PCC Structurals*, 365 N.L.R.B. at 20. *Specialty Healthcare* essentially made a value distinction between employees petitioning the NLRB as a unit and those employees who were excluded from the unit.

51. *PCC Structurals*, 365 N.L.R.B. at 12 (majority opinion); *see also* ABODEELY ET AL., *supra* note 11, at 11–12 ("[The Board] has identified a number of factors that it examines on a case-by-case basis to determine if there exists the 'community of interests' necessary to make that unit appropriate.").

52. *PCC Structurals*, 365 N.L.R.B. at 5. Factors the Board considers are whether: (1) "the employees are organized into a separate department"; (2) "have distinct skills and training"; (3) "have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications"; (4) "are functionally integrated with the Employer's other employees"; (5) "interchange with other employees"; (6) "have distinct terms and conditions of employment"; and (7) "are separately supervised." *Id.* (quoting United Operations, Inc., 338 N.L.R.B. 123, 123 (2002)).

gives no deference to the unit that it is asked to review.[53] Second, the NLRB argued that the community-of-interest test prevents units from being "arbitrary, irrational, or 'fractured.'"[54] Third, the NLRB suggested that the test "ensures that the Section 7 rights of excluded employees . . . are taken into consideration."[55] The first and second reasons are succinctly explained in the *PCC Structurals* opinion.[56] However, the NLRB appropriately made its most pointed assertion by comparing the affected section 7 rights of employees under its community-of-interest test to *Specialty Healthcare*'s overwhelming community-of-interest test.[57] The NLRB's focus was appropriate because section 9(b) instructs the NLRB to make its decision on the basis of protecting the "fullest freedom[s]" of employees under the NLRA, which are the protections given under section 7.

Though the NLRB focused on the right issue, it fell short on its evaluation of both standards and how they address section 7 rights of all employees. The NLRB summarized its position by stating that

> we find that considering the interests of excluded employees along with those in the petitioned-for unit, without the 'overwhelming' community-of-interest requirement, better effectuates the policies and purposes of the Act, which requires the Board to 'assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.'[58]

But how? The NLRB in *PCC Structurals* failed to explain *why* the community-of-interest test is the better standard for effecting the purpose of the NLRA.

The NLRB's failure to fully examine whether its legal standard was aligned with the goals of the controlling statute—especially when it was overturning another legally valid standard—is unacceptable. This flaw leads to this Recent Development's proposed framework in

53. *Id.* ("The required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5) . . . .").

54. *Id.* (explaining that the standard used for unit determination prevents the grouping of employees who do not have distinct interests from those outside the unit).

55. *Id.*

56. *See, e.g.*, *id.* at 8 (explaining that section 9 of the NLRA favors the community-of-interest test because it does not give to the petitioned-for unit an "artificial supremacy" that would impede the NLRB's authority to determine the appropriateness of an employee unit).

57. *Id.* at 5–8.

58. *Id.* at 8 (alteration in original) (quoting National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (2012)).

Part II that eliminates the vagueness upon which the NLRB relies. The framework is a hierarchy of Section 7 Stakeholders, and it aims to supply the NLRB with an analytical tool to use whenever the NLRB re-evaluates its section 9(b) standard so that the standard actually assures to employees their fullest freedom under the Act.

II. A PROPOSAL FOR SECTION 7 STAKEHOLDERS

In unit determination cases, section 9(b) unequivocally grants the NLRB the authority to decide which employee unit is appropriate for collective bargaining with the employer.[59] In the statute, the word "appropriate" does not stand alone, but rather it is followed by "for the purposes of collective bargaining."[60] Additionally, the statute provides that the NLRB decision, in each case, is "to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act]."[61] Thus, any standard that assists the NLRB in making its decision must comply with two statutory requirements: (1) the authorized unit must be appropriate for collective bargaining purposes and (2) employees should have the fullest freedom in exercising their rights under the NLRA.

Employee rights are found in section 7 of the NLRA.[62] As the NLRB noted in *PCC Structurals*, section 7 gives employees the right to engage in an assortment of concerted activities, as well as the right to refrain from any such activity.[63] Thus, in a unit determination case, there are naturally four categories of Section 7 Stakeholders: (1) employees who are within the petitioned-for unit and wish to exercise their section 7 right to concerted activity; (2) employees who are within the petitioned-for unit and wish to exercise their right to refrain from concerted activity; (3) employees who are outside of the petitioned-for unit and wish to exercise their section 7 right to concerted activity; and (4) employees who are outside of the petitioned-for unit and wish to exercise their right to refrain from concerted activity. Quite simply, a Section 7 Stakeholder is an employee with protected section 7 rights that are implicated differently than the rights of other employees when the NLRB determines an appropriate unit.

For example, consider the facts in *PCC Structurals*. In that case, a union vying to represent a unit of approximately 100 welders and

59. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (2012).
60. *Id.*
61. *Id.*
62. *Id.* § 7.
63. *PCC Structurals*, 365 N.L.R.B. at 4; *see also* § 7.

rework specialists petitioned the NLRB to recognize the group as an appropriate unit to collectively bargain with the employer.[64] The employer contended that the unit should include all 2565 plant employees.[65] Thus, for purposes of this Recent Development, *PCC Structurals* includes 2565 Section 7 Stakeholders, all of whom fall into one of the four categories described above.

"Category 1" consists of employees who are within the petitioned-for unit of 100 welders and rework specialists and want to exercise their section 7 right to collectively bargain. These are the welders and rework specialists who, after the NLRB approves their unit, would vote "yes" to union representation.

"Category 2" is comprised of employees who are also within this unit, but want to refrain from concerted activity. These are welders or rework specialists who would vote "no" to union representation and refrain from union membership if the union won the vote.

"Category 3" includes employees who are outside of the petitioned-for unit but want to exercise their section 7 right to concerted activity. These employees may wish to join the petitioned-for unit of welders and rework specialists, or they may wish to create their own collective bargaining unit.

"Category 4" refers to employees who are outside of the petitioned-for unit but want to refrain from concerted activity. They are the employees who, if the NLRB found that the employer-proposed unit of 2565 employees is the appropriate unit, would vote "no" to unionization at the plant. They would never engage in union membership.

Given that section 9(b) instructs the NLRB to afford to *all* employees their fullest freedom in their section 7 rights, any standard that fails to anticipate the effects of an NLRB unit determination on each Section 7 Stakeholder is inadequate.[66] What makes unit determination cases unique is that they pit the section 7 rights of employees against each other.[67] Thus, if the NLRB is to achieve the section 9(b) aim to provide the fullest freedom to all employees, then it must concede that a hierarchy of Section 7 Stakeholders allows it to prioritize the rights of employees, and it must assess the implications

64. *PCC Structurals*, 365 N.L.R.B. at 1.

65. *Id.*

66. *See id.* at 13 (Pearce, M., & McFerran, M., dissenting) ("It is a foundational principle of United States labor law that . . . the Board in overseeing this process should be conducted with the paramount goal of ensuring that employees have 'the fullest freedom in exercising the rights guaranteed by' the Act.").

67. *See id.* at 8 (majority opinion).

of a unit determination on every type of employee. Without it, the NLRB is susceptible to continuing the questionable, conclusory reasoning exemplified in *PCC Structurals*.[68] Therefore, this Recent Development suggests a hierarchy of Section 7 Stakeholders that can create a workable framework for the NLRB.

A. Category 1 Employees Should Receive the Highest Priority

As described above, Category 1 refers to those employees who are within a petitioned-for unit and want to exercise their section 7 right to join a labor organization and collectively bargain. When reviewing the appropriateness of a unit, the NLRB should prioritize the fullest freedom of Category 1 employees for the following reasons.

First, Category 1 employees should receive the highest priority because their desire to collectively bargain is consistent with the spirit and purpose of the NLRA. The NLRA was passed in 1935 as part of the New Deal with "the policy" of eliminating obstacles to the "free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."[69] Congress passed the NLRA with pro-employee, pro-collective-bargaining intentions.[70] Though the Taft-Hartley Amendments of 1947 added the "right to refrain" to section 7,[71] the goal of the NLRA is still to protect employees' right to engage in concerted activity.[72]

68. *See, e.g.*, *id.*

69. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

70. *See* SECUNDA ET AL., *supra* note 11, at 20 ("The Wagner Act was a conscious, carefully thought out program . . . [with a] concern exclusively with employer wrongdoing, not union wrongdoing . . . .").

71. Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 7, 61 Stat. 136, 140 (1947) (codified at 29 U.S.C. § 157 (2012)); *see also* SECUNDA ET AL., *supra* note 11, at 21 ("Section 7 was also modified to give employees the right to refrain from organizing, collective bargaining, and engaging in concerted activities for mutual aid and protection.").

72. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (2012) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating terms and conditions of their employment or other mutual aid or protection."); *see also* Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 29

Second, section 9(b) expressly describes "appropriate" as applying to "the purposes of collective bargaining."[73] Thus, the reason the NLRB decides on an appropriate unit is to create a unit that will eventually engage in collective bargaining. The point at which unit determination occurs in the unionization process is key. Elections take place after unit approval,[74] which is why the size of the unit is a contentious battle—it can affect whether the vote to unionize is affirmative or negative.[75] Rather than ignoring the obvious fact that unit litigation is more about the parties positioning themselves for a favorable election than their earnest belief in what is most appropriate, the NLRB should factor this reality into its decision making. This fact need not be a major influence, but considering whether the employees in a unit will actually engage in collective bargaining seems to fit the mandate of section 9(b). In addition, Category 1 employees are the ones who want to exercise this right.[76]

The first two reasons fail to differentiate Category 1 and Category 3 employees. Yet there is an additional consideration in granting Category 1 employees the highest priority in exercising their section 7 rights. Plainly, Category 1 employees should be rewarded for creating a petitioned-for unit that brings their section 7 rights to the cusp of being exercised.[77] The counterargument to this preferential treatment is that section 9(c)(5) provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling."[78] Thus, it would appear that

("[S]tatutory text and legislative history confirm that the 'right to refrain'—or any of its metamorphosed 'free choice' versions—is neither a replacement for the primary and statutorily described 'policy of the United States [of] encouraging collective-bargaining' nor a statutory coequal of that policy." (second alteration in original) (footnote omitted) (quoting 29 U.S.C. § 151 (2006))).

73. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (2012).

74. *See* SCHLOSSBERG & SCOTT, *supra* note 7, at 216 ("Although there is, naturally, little talk of it in either the parties' arguments or in the Board's decisions, what is most basically at stake in contested bargaining-unit determinations is the likelihood of election victory.").

75. *Id.*

76. To illustrate again under *PCC Structurals*, these are the welders and rework specialists whose apparent support of the union would lead to a petitioning of the NLRB. *See* PCC Structurals, Inc., 365 N.L.R.B. No. 160, at 1 n.1 (Dec. 15, 2017).The election that took place had a tally of fifty-four to thirty-eight for the petitioner. *Id.*

77. Petitioned-for units do not appear out of thin air. They are a product of petitions showing support of a union, investigations, and negotiations. *See Conduct Elections*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/what-we-do/conduct-elections [https://perma.cc/9PJA-SKN8].

78. National Labor Relations Act § 9(c)(5), 29 U.S.C. § 159(c)(5) (2012).

giving deference to the proposed unit is inconsistent with the NLRA. Yet granting some deference is different than allowing a proposed unit to be "controlling."[79] Moreover, there can be multiple unionized units in a workforce.[80] Therefore, Category 3 employees continue to have their own right to seek unionization even if the petitioned-for unit is approved.

B. Category 2 Employees Should Receive the Second-Highest Priority

As discussed, Category 2 employees are inside the petitioned-for unit and do not want to exercise their section 7 right to join a labor organization and collectively bargain. When reviewing the appropriateness of a unit, the NLRB should give the second-highest priority to the fullest freedom of Category 2 employees.

The placement of Category 2 employees in the hierarchy of Section 7 Stakeholders comes down to a fundamental question: Does a unit determination by the NLRB affect the ability of Category 2 employees to refrain from concerted activity more than it affects the ability of Category 3 employees to engage in concerted activity? The answer is that it does.

First, the right to refrain from concerted activity is more than the freedom to vote "no" in a union election.[81] It is a freedom not to engage in certain organized activities.[82] However, when a union represents a group of employees, it must represent every single employee within the unit.[83] Therefore, being included in an employee unit will subject Category 2 employees to union representation if the unit ultimately votes for the union. Given that the result of the election is largely determined by the size and makeup of the

79. *See* Kaminsky, *supra* note 12, at 4–5 ("[T]he Supreme Court in *NLRB v. Metropolitan Life Insurance Co.* held that the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in a unit determination.").

80. *Id.* at 5.

81. H.R. REP. NO. 80-245, at 27 (1947) ("[T]he Board will be prevented from compelling employees to exercise such rights against their will, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.").

82. Morris, *supra* note 72, at 32 (describing how the provision's "limited scope" nonetheless protects employees against coercion from unions to participate in a strike).

83. MARTIN H. MALIN & LORRAINE A. SCHMALL, INDIVIDUAL RIGHTS WITHIN THE UNION 376 (1988) ("A union serves as exclusive bargaining representative for all employees in the bargaining unit regardless of whether they are union members.").

employee unit,[84] there is a big difference for Category 2 employees in whether the overwhelming community-of-interest test or the community-of-interest test is used. If *Specialty Healthcare* governs, then the petitioned-for unit in which Category 2 employees find themselves has a greater likelihood of being approved, which would result in a lesser chance of Category 2 employees exercising their freedom to refrain from concerted activities and union representation.

Second, Category 2 employees have a temporal consideration that Category 3 employees do not have. Once a unit is formed and a union is elected as the bargaining representative, the union typically lasts for the life of the collective bargaining agreement.[85] Under the NLRA, there can be no minority union, meaning that the union that represents the unit represents *all* employees within that unit, and the members who are dissatisfied with the representation cannot form another union for minority representation.[86] However, there can be multiple employee units that bargain with the employer.[87] If Category 3 employees are left out of the petitioned-for unit, they would have the right under the NLRA to create their own unit and seek to collectively bargain separately from the unit that already exists. This temporal consideration implicates Category 2 employees more than Category 3 employees in unit determination cases.

C. Category 3 Employees Should Receive the Third-Highest Priority

As previously noted, Category 3 employees are those employees who fall outside of the petitioned-for unit and want to exercise their section 7 right to join a labor organization and collectively bargain. When reviewing the appropriateness of a unit, the NLRB should give the third-highest priority to the fullest freedom of Category 3 employees.

Category 3 employees should receive the third-highest priority because they share similar traits to Category 1 employees: the desire to collectively bargain and to organize for the purpose of improving working conditions, which are both in line with the spirit and purpose

84. *See* SCHLOSSBERG & SCOTT, *supra* note 7, at 216.

85. *See* Madison Alder, *'Micro-Unit' Reversal Could Weaken Health Worker Unions' Clout*, BLOOMBERG LAW (Aug. 1, 2017), https://www.bna.com/microunit-reversal-weaken-n73014462572/ [https://perma.cc/65YW-3FMS].

86. *See* Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 ABA J. OF LAB. & EMP. L. 1, 1–2 (2011).

87. Kaminsky, *supra* note 12, at 5–6.

of the NLRA.[88] Though the freedom that Category 3 employees want to exercise are aligned with the purpose of the NLRA, there is nothing in a unit determination that prevents them from exercising these rights. It may be preferable to join a petitioned-for unit but being excluded from the unit does not preclude Category 3 employees from creating their own unit of workers and building union support among them.[89]

Moreover, it is less clear which test Category 3 employees would prefer. Under *PCC Structurals*, they have a greater chance of being included in the petitioned-for unit, but their presence—along with that of Category 4 employees—may not guarantee that the union wins the election. But, under *Specialty Healthcare*, they would have to show an overwhelming community of interest to join the unit, so their odds of inclusion would be low under this standard. Therefore, though Category 3 employees have rights under section 7 like all employees, a unit determination does not affect their rights as greatly as employees in the first two categories.

D. Category 4 Employees Should Receive the Lowest Priority

Category 4 employees are those who are excluded from the petitioned-for unit and wish to refrain from engaging in concerted activity. Their right to refrain from concerted activity and general desire to avoid union representation is protected if they are excluded from the unit. Also, those employees' right to refrain from concerted activity is unlikely to be implicated if they are included in the unit because the vote to unionize would likely result in a "no" for union representation.[90] There is an argument that the risk of being included in a unit that ultimately votes "yes" to unionization is enough to implicate Category 4 employees more than Category 3 employees. However, the risk is relatively low, and the purpose of the NLRA should still matter. Though section 7 protects employees' right to refrain from concerted activity, the NLRA as a whole does not exist as a "protection" for workers to avoid working collectively toward

88. *See* CHARLES J. MORRIS, THE BLUE EAGLE AT WORK 97–100 (2005) ("When the Supreme Court recognized that 'the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . is a *fundamental right*,' it was correctly characterizing congressional intent . . . ." (emphasis added) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937))).

89. *See id.* at 99.

90. *See* SECUNDA ET AL., *supra* note 11, at 365 (explaining that employers prefer larger units because it is harder for unions to garner a majority support); *see also* Pavy, *supra* note 19, at 116–18 (using data from 1970, 1982, and 1987 to show that smaller units are more likely to succeed in votes to unionize).

improved working conditions.[91] Thus, when some employees desire to engage in concerted activity and others hope to refrain from such activity, the tie should go to those who want to collectively organize when they are both outside of the petitioned-for unit.[92]

Overall, the Section 7 Stakeholder hierarchy reveals that a unit determination affects the section 7 rights of different employees at different magnitudes. The next section explains how this framework can influence the NLRB in establishing the proper standard for unit determination cases going forward.

III. HOW THE SECTION 7 STAKEHOLDER FRAMEWORK CAN INFLUENCE THE SECTION 9(B) STANDARD

Establishing a Section 7 Stakeholder framework with prioritized stakeholders still does not complete the analysis of how the NLRB should determine the appropriateness of an employee unit. Ultimately, the Section 7 Stakeholder framework should be used to support either the overwhelming community-of-interest test established by *Specialty Healthcare*[93] or the community-of-interest standard clarified by *PCC Structurals*[94] as the unequivocal standard for unit determination. Though each standard is legally permissible, only one test accomplishes the difficult task of assuring to employees their "fullest freedom" under the NLRA in a more complete way. For this reason, *Specialty Healthcare* is the more complete standard.

Undoubtedly, Category 1 employees would prefer *Specialty Healthcare* and its overwhelming community-of-interest standard. These employees want their unit to be approved immediately, believing that they have the requisite union support to succeed in a union election. Under *Specialty Healthcare*, they would only have to show that they themselves share a community of interest together.[95] The burden of arguing that other employees should be allowed in the unit would fall on the employer—and the employer would then need to show that those excluded employees have an *overwhelming*

91. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (2012); *see also* Morris, *supra* note 72, at 29.

92. The legislative history of the "right to refrain" shows that the protection is more against compulsion than it is a stand-alone right to refrain. H.R. REP. NO. 80-245, at 27 (1947) ("A committee amendment assures that when the law states that employees are to have the rights guaranteed in Section 7, the Board will be prevented from compelling employees to exercise such rights against their will . . . .").

93. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 944 (2011), *overruled by* PCC Structurals, Inc., 365 N.L.R.B. No. 160 (Dec. 15, 2017).

94. PCC Structurals, Inc., 365 N.L.R.B. No. 160, at 1 (Dec. 15, 2017).

95. *Specialty Healthcare*, 357 N.L.R.B. at 934.

community of interest with Category 1 employees. This burden is difficult to meet.[96] In contrast, a *PCC Structurals* standard would lessen this burden, and excluded employees would need only a community of interest to be allowed in the unit.[97] And as unit determination cases go, allowing more employees in the unit usually results in a diluted vote that ultimately rejects union representation.[98] Thus, *Specialty Healthcare* prioritizes the freedom of Category 1 employees and provides them with the best opportunity to exercise them. The preference of Category 1 employees should matter because their section 7 rights are most affected in unit determination cases.[99]

Interestingly, Category 4 employees would likely favor *Specialty Healthcare*. These employees do not want to be represented by a union. Therefore, they would prefer *Specialty Healthcare*'s higher burden. Though Category 4 employees are the lowest in the Section 7 Stakeholder hierarchy, their preference matters because they are still employees with section 7 rights.

While Category 1 and Category 4 employees likely prefer *Specialty Healthcare*, Category 2 employees probably favor *PCC Structurals*. Category 2 employees would like a standard that allows other employees into the unit so that the union election would go in their favor. *PCC Structurals* and its community-of-interest standard do just that. Without question, a community-of-interest standard gives Category 2 employees their best chance of diluting the unit with other employees who are opposed to union representation.

Category 3 employees are more difficult to predict because it is uncertain whether their inclusion into a petitioned-for unit would result in an affirmative vote for union representation. Also, these employees may prefer to organize their own unit if they believe that their interests are different from those employees in the petitioned-for unit. Whether their chances of exercising their section 7 right to concerted activity are better within the petitioned-for unit or a separate unit organized at a later time is heavily fact dependent and could change in each case. However, at the moment the NLRB hears a unit determination case, it seems that Category 3 employees would generally prefer the *PCC Structurals* standard because they are more

96. *See, e.g.*, *id.* at 946 (illustrating a showing of an overwhelming community of interest where the petitioned-for unit is fractured, i.e., including some employees of a certain classification but arbitrarily excluding others within the same classification).

97. *PCC Structurals*, 365 N.L.R.B. at 13.

98. *See* SCHLOSSBERG & SCOTT, *supra* note 7, at 216.

99. *See supra* Section II.A.

likely to be included in the unit. This inclusion would at least give the employees the opportunity to vote in a union election.[100]

Clearly, there is tension not only between the employees in a unit determination case but also in the way the two standards afford to employees their fullest freedom under the NLRA. It would be reasonable to suggest that *PCC Structurals* provides employees with their fullest freedom because it caters to the interests of Category 2 and possibly Category 3 employees. However, the Section 7 Stakeholder hierarchy shows that Category 1 employees are most affected by unit determinations and that their interest in collective bargaining fulfills the goal of the NLRA. *PCC Structurals* discounts the effect that a unit determination case has on employees who have organized and are on the cusp of a union election. Employees in this position are attempting to exercise their rights to association and representation, which are the hallmark protections of the NLRA. Though legally permissible, such a standard falls short of the statutory aim to assure to employees their *fullest* freedom. Therefore, *Specialty Healthcare* is the standard that most truly adheres to section 9 and the NLRA as a whole.

CONCLUSION

This Recent Development recognizes that the NLRB has used two competing standards for unit determination cases in this decade and that both standards are legally permissible under the NLRA.[101] The analysis of which standard better fulfills the goal and mandate of the NLRA focuses on which standard assures to employees their fullest freedom under the NLRA. To conduct this analysis, this Recent Development proposes a Section 7 Stakeholder hierarchy as a method for assessing a unit determination's effect on employees' section 7 rights. Given that employees who are in the unit and want union representation are affected the most, *Specialty Healthcare* is the standard that better assures to employees their *fullest* freedom.

But what should the NLRB do? The controlling standard is *PCC Structurals*, and given its basis in NLRB precedent, it is certainly a permissible standard that will be upheld by the courts. However, this

100. *See* Kaminsky, *supra* note 12, at 1 ("The determination of the appropriate unit is critically important, because it is only the group of employees within that unit that will be permitted to vote in an election to determine whether a particular union shall be the collective bargaining representative.").

101. Moreover, this Recent Development suggests that the standards—given that one is pro-employer and the other is pro-employee—are likely to be adopted or discarded whenever the NLRB is ideologically capable of choosing its preferred standard.

Recent Development urges the NLRB to do more. Undoubtedly, unit determination litigation will persist. Moreover, the political makeup of the NLRB will continue to change. And with both of these realities comes the inevitability that the NLRB will hear challenges to *PCC Structurals* in the future. This Recent Development provides the NLRB and litigants with a workable framework for analyzing how each standard differs in its ability to provide to employees their fullest freedom under the NLRA. It also argues that *Specialty Healthcare* accomplishes this difficult task in a more complete way. No matter which standard the NLRB chooses to follow in the future, it should at least be held accountable for a complete effort in determining whether its standard assures to employees their fullest freedom under the NLRA.

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** I would like to thank Professor Jeffrey Hirsch, Emily Sorge, and all of the *North Carolina Law Review* Volume 97 Board of Editors and staff for their guidance and editing throughout the publication process. I am grateful to my wife Caroline, my parents, my siblings, and my entire family for their love and support in all that I do.