

# D.C. Circuit Remands Hotel Certification Decision and Reminds Board to Explain Its Reasoning

**Labor Relations Update Blog** on December 2, 2020

On October 23, 2020, the D.C. Circuit granted Davidson Hotel Company’s petition for review of unfair labor practices resulting from its refusal to bargain with two newly-certified bargaining units, and denied the NLRB’s cross-petition for enforcement of an order to engage in collective bargaining with those units.

The Circuit also remanded the underlying unit certification decision to the Board, noting that the NLRB failed to persuasively distinguish relevant precedent presented by the employer and otherwise address the employer’s valid arguments.

## ***Background***

The Union initially petitioned the Regional Director to certify a single bargaining unit of hotel employees comprised of housekeeping and food and beverage employees—but excluding front desk employees. The Regional Director first considered whether the employees in the petitioned-for unit share a “community of interest,” and then if so, whether the proposed unit “share[s] a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit[.]” The traditional “[community-of-interest factors](#)” include consideration of, among other things, [job functions of the employees in question, department organization and terms and conditions of employment](#).

Under this standard, the Regional Director declined to certify the petitioned-for-unit, finding that the front desk employees were not sufficiently distinct from the other employees to warrant a separate unit. However, in his conclusion, the Regional Director briefly suggested that separate units would be appropriate.

Taking the cue from the Regional Director's suggestion regarding separate units, the Union filed two new petitions the next day to certify a unit of housekeeping employees and a separate unit of food and beverage employees. As before, the Union excluded front desk employees altogether. The Regional Director again applied the "community-of-interest" standard to the newly-proposed units, and certified the two units as appropriate and directed elections. Shortly thereafter, the employees in each unit voted in favor of the Union.

The employer refused to bargain with the newly-certified units, and the Union filed a refusal to bargain unfair labor practice charge against the employer. In response to the charge, the employer objected to the certification, arguing that the Regional Director departed from several prior Board decisions rejecting separate bargaining units in the hotel context, as well as the precedent established by the RD in the first unit decision in this case—namely, that the RD's decision counseled against excluding the front desk employees from the first decision, but not in the second. The Board rejected the petition without explaining its reasoning or attempting to distinguish the precedent relied on by the employer in a 2-1 vote.

On appeal to the D.C. Circuit, the Court admonished the Board for its lack of analysis, noting the employer presented the Board with precedent that was directly analogous, holding that separate bargaining units in the hotel context were inappropriate. The Board failed to engage in any application to the facts at hand and distinguish those cases from the present.

### ***Takeaways***

This decision reinforces D.C. Circuit precedent—which is important for any practicing labor law attorney, employer, union or employee, as any NLRB decision may be appealed to the D.C. Circuit—that the Board must explain its reasoning when certifying bargaining units. Fatal to the Board's decision here was that it failed to reconcile the Regional Director's initial decision (which found that excluding front desk employees was inappropriate) with the subsequent decision (which concluded that front desk employees need not be included in the unit), and did not even attempt to distinguish the arguably on-point Board precedent from the hotel industry.

When remanding the case, the D.C. Circuit noted that “We should not be understood as requiring the Board to distinguish every case cited to it by a party...To say otherwise would be to hold the Board to a higher standard than we hold ourselves.... We simply reiterate that when faced with contrary precedent directly on point, the Board must distinguish it.”

Lurking in the background of this case is the Board standard for evaluating bargaining units. Several years ago the Board changed the traditional of community of interest standard, which also relied heavily on precedent in the particular industry, in favor of the so-called “micro unit standard.” Undoubtedly, the two separate units would be found to be appropriate under this standard. In recent years, as political winds changed, the Board abandoned the micro unit standard in favor of the more traditional analysis. This traditional analysis made the employer’s citation to industry precedent not only important, but fundamental to the Court’s determination.

Political winds recently shifted and so may the Board’s standard for evaluating bargaining units.

We will keep you posted!

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