Pennsylvania Conference of Teamsters

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William Hamilton, President & Eastern PA Legislative Coordinator – Joseph Molinero, Sec.-Treasurer & Western PA Legislative Coordinator – Tim O'Neill, Consultant – Dan Grace, Trustee & Legislative Advisor – Robert Baptiste, Esq. Legal Advisor

LEGISLATIVE ACTION ALERT

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Contact: publicinfo@nlrb.gov
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Board Overrules *Specialty Healthcare*, Eliminates "Overwhelming Community of Interest" Standard

Washington, D.C.—In a 3-2 decision involving PCC Structurals, Inc., the National Labor Relations Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. The National Labor Relations Act provides that the Board must decide in each case whether the group of employees a union seeks to represent constitutes a unit that is "appropriate" for collective bargaining.

Under *Specialty Healthcare*, if a union petitioned for an election among a particular group of employees, those employees shared a community of interest among themselves, and the employer took the position that the smallest appropriate unit had to include employees excluded from the proposed unit, the Board would not find the petitioned-for unit inappropriate unless the employer proved that the excluded employees shared an "overwhelming" community of interest with the petitioned-for group.

The Board has now abandoned the "overwhelming" community-of-interest standard. In today's decision, the Board stated that "there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an 'overwhelming' community of interests."

Today's case was before the Board on the employer's request for review of a Regional Director's Decision and Direction of Election. The Regional Director found that a petitioned-for unit of approximately 100 welders was appropriate for collective bargaining. Applying *Specialty Healthcare*'s "overwhelming

community of interest" standard, he rejected the employer's contention that the smallest appropriate unit was a wall-to-wall unit of 2,565 employees. Expressing no opinion as to whether the petitioned-for unit was appropriate, the Board remanded the case to the Regional Director for further appropriate action consistent with its order.

Chairman Philip A. Miscimarra was joined by Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Members Mark Gaston Pearce and Lauren McFerran dissented.

NLRB Clarifies Duty to Bargain over "Changes" That Are Consistent with Past Practice, Overruling DuPont

Washington, D.C. — The National Labor Relations Board, in a 3-2 decision involving Raytheon Network Centric Systems, issued a ruling today affecting bargaining obligations that are required before implementing a unilateral "change" in employment matters. Consistent with other Board cases dating back to 1964, the Board held that actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. The Board also held this principle applies regardless of whether (i) a collective bargaining agreement (CBA) was in effect when the past practice was created, and (ii) no CBA existed when the disputed actions were taken. Finally, the Board ruled such actions consistent with an established practice do not constitute a change requiring bargaining merely because they may involve some degree of discretion.

Today's decision overruled a case decided last year—*E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*)—where a divided Board held that actions consistent with an established past practice constitute a change, and therefore require the employer to provide the union with notice and an opportunity to bargain prior to implementation, if the past practice was created under a management-rights clause in a CBA that has expired, or if the disputed actions involved employer discretion.

In the Board's ruling today, the Board concluded that the employer's changes to employee healthcare benefits in 2013 were a continuation of Raytheon's past practice involving similar unilateral changes made at the same time every year from 2001 to 2012. Therefore, the Board found the company did not violate the National Labor Relations Act by failing to give its union advance notice and the opportunity for bargaining before making the 2013 changes.

Chairman Philip A. Miscimarra was joined by Member Marvin E. Kaplan (who also separately concurred) and Member William J. Emanuel in the majority opinion. Members Mark Gaston Pearce and Lauren McFerran dissented in the case.