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FedEx Freight challenges the Community-of-Interest Test

The Seventh Circuit in *FedEx Freight, Inc. v. NLRB*, Nos. 16-1360 & 16-1395, 2016 WL 5929822 (7th Cir. Oct. 12, 2016), held that a drivers-only unit is appropriate for collective bargaining pursuant to 29 U.S.C.S. § 159(a). By doing so, it upheld the NLRB's decision to order the certification of the local union.

The Board found that the drivers-only unit was appropriate because the dockworkers and drivers did not share a community of interest. FedEx Freight disagreed. Judge Posner criticized the Board for "muddying the waters" with its "community of interest" term, which he regarded as unhelpful. Posner suggests that community of interest term be modified by the adjective "distinct" therefore clarifying any ambiguity.

From the record, the Seventh Circuit found that the dockworkers were second-class citizens of the employment force at the Stockton FedEx terminal. For example, the drivers worked full time, while the dock workers only worked part time. The dock workers earned about half of what the drivers made. The dock workers also had a more physically strenuous and dangerous job than the drivers. The drivers spent most of their work hours outside the terminal. The drivers had two or more weeks of paid vacation time plus seven paid holidays and half a dozen personal days, while the dockworkers had to use their personal days to cover illness, family emergencies, vacations, and holidays. Both groups could sign up for the same insurance plan and contribute to a 401(k), but the record did not reveal whether it was available to both part-time and full-time workers. As such, the Court found an "existence of *substantial* wage and benefits differences" between the two groups.

FedEx also argued that the burden of proof required by *Specialty Healthcare and Rehabilitation Center of Mobile (Specialty Healthcare)*, 357 N.L.R.B. 934, 934 (2011) was too heavy in a labor dispute. In *Specialty Healthcare*, the Board held that "a group who share a community of interest is nevertheless inappropriate [when] it does not contain additional employees [that also share the same community of interest]." FedEx had failed to establish that the "excluded employees share an *overwhelming* community of interest with the included employees." FedEx challenged the *Specialty Healthcare* community-of-interest test by arguing that the word "overwhelming" imposes too heavy a burden of proof. The Seventh Circuit was not sympathetic; it deferred to a long-standing list of NLRB and Circuit cases that treat the term "overwhelming" as a synonym for "inappropriate."

Ultimately, the Seventh Circuit denied FedEx's petition to decertify the union and enforced the NLRB's certification order.

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