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# Can Mother Vote in the Union Election? The Board's Authority to Define the Appropriate Bargaining Unit: An Analysis of *NLRB v. Action Automotive, Inc.*

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## *Can Mother Vote in the Union Election? The Board's Authority to Define the Appropriate Bargaining Unit.*

by Barbara J. Fick

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### National Labor Relations Board

v.

### Action Automotive, Inc.

(Docket No. 83-1416)

To be argued October 29, 1984

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#### ISSUE

The issue presented in this case is a relatively narrow one: Can the National Labor Relations Board (Board) properly exclude from the bargaining unit an employee-relative of the owners/managers of a closely held corporation when that employee does not enjoy any special work benefits because of that relationship? This question is of limited significance to general employer-union relations as governed by the National Labor Relations Act (NLRA).

#### FACTS

Action Automotive, Inc. (AA) is a closely held corporation owned equally by the three Sabo brothers, operating automobile parts stores in Michigan. The mother of the Sabo brothers, Mildred Sabo, and the wife of one of the brothers, Diane Sabo, are both employed at AA. Mildred Sabo works as a cashier in one of the retail stores; Diane Sabo is a ledger clerk at AA's headquarters office.

During a union representation election held among AA's employees, both Mildred and Diane Sabo cast ballots. Their eligibility to vote was challenged by the union based on their close familial relationships with AA's owners. Although neither woman received any special job-related benefits or privileges different from those received by all employees, the board upheld the challenges to their eligibility based solely on their family relation.

The union won the election and was certified as the bargaining representative. AA refused to bargain with the union, claiming that the board's disqualification of Mildred and Diane Sabo was erroneous and therefore the certification of the union was invalid.

The board found AA's refusal to bargain violated the NLRA, and petitioned the Sixth Circuit Court of Ap-

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peals to enforce the bargaining order against AA. However, the court denied enforcement on the grounds that the board had no authority to exclude employees from a bargaining unit based solely on the employees' family relationship to the owners of the business.

#### BACKGROUND AND SIGNIFICANCE

Section 9 of the NLRA sets forth the procedures to be used by the board in handling employee representation matters, including union elections. A preliminary issue to be determined by the board in all union election cases is the scope and composition of the bargaining unit. This unit determination is important in two respects—it establishes which employees will be allowed to vote on the issue of union representation, and it defines the group of employees which will be covered by, and subject to, the terms of any negotiated collective bargaining agreement should the union win.

The general principle used by the board in making a unit determination is to group together those employees who share similar work problems and interests, *i.e.*, those employees who have a community of interests. This community of interests is based on similarities in employee skills, interests, duties, and working conditions and the nature of the employer's operation. The Supreme Court has recognized the broad discretion accorded to the board in making these unit determinations.

In applying this community of interest test, the board seeks to insure that employees whose interests are more closely aligned with management than with their co-employees are excluded from the bargaining unit. Thus, supervisory, managerial and confidential employees are routinely excluded from bargaining units. Also, employee-relatives of management who enjoy special work privileges because of their family relations are excluded from bargaining units. These latter exclusions have been accepted by the courts as appropriate.

In this case, the board seeks to defend its exclusion of employee-relatives of owner/managers in closely held corporations, even though they do not enjoy any special benefits or privileges. The Board says this exclusion is based on a determination that such employees' interests are aligned with management by virtue of their close family relationship. Under these circumstances, the visible evidence of alignment, *i.e.*, special work privileges, is not required to prove such alignment. The nature of the relationship is sufficient proof.

Moreover, these employee-relatives do not share the same interest as their fellow employees in gaining access to management through the device of a union. Employee-relatives, by definition, already have a direct pipeline to management by which they can voice their concerns, a pipeline not available to other employees.

Thus, the board concludes that exclusion of employee-relatives is necessary in order to protect the rights of other employees to choose a bargaining representative free from undue management influence as exercised by these employee-relatives, and to protect the union from infiltration by management-aligned employees.

AA contends that, in the absence of special privileges, employee-relatives share the same community of interests as all employees. Assuming such employees' interests are more closely aligned with management than with the other employees is unsupported by any evidence. It is a speculative conclusion at best. Therefore, excluding these employees from the bargaining unit deprives them of their freedom to choose whether they desire union representation in dealing with, and improving, their common employee working conditions.

As noted, the outcome of this case is of direct significance only in those situations where close relatives of management in a closely held corporation are employed as employees. This circumstance arises in a fairly limited number of cases. Whether this case has any long range impact depends to a great extent on the manner in which the Court decides this issue. If the Court uses this case as an opportunity to discuss and establish general guidelines to be followed in determining appropriate bargaining units or to discuss the general authority of the board in making unit determinations, these principles could shape the outcomes of unit determinations in all contested election cases and affect employer and union strategies in handling organizational campaigns among employees. However, considering the fairly narrow arguments advanced by the parties before the Court, it is doubtful whether any wide-ranging pronouncements would be made.

## ARGUMENTS

*For the NLRB (Counsel of Record, Carber G. Phillips, Assistant to the Solicitor General, Washington, D.C. 20530; telephone (202) 633-2217)*

1. Section 9(b) gives the board authority to determine appropriate bargaining units for collective bargaining. The board exercises this authority by grouping together those employees who share a community of interests. Employee-relatives' interests are identified with management, not with co-employees; therefore, they are properly excluded from the unit.
2. The purpose behind making the appropriate unit determination is to promote efficient collective bargaining and to protect employee rights to organize and to choose representation. The exclusion of employee-relatives serves this purpose.
3. Section 2(3), which defines the term employee for purposes of the coverage of the NLRA, does not address the issue of appropriate bargaining unit. It does not act as a restriction on the board's authority under section 9(b).

*For Action Automotive (Counsel of Record, Stewart J. Katz, 2900 Penobscot Building, Detroit, MI 48226; telephone (313) 965-7610)*

1. The community of interest test developed under section 9(b) is determined by looking at job-related factors—not private family relationships. Where employee-relatives have the same working conditions as other employees, they share a community of interest with those employees and should be included in the unit.
2. Excluding employee-relatives based solely on their family relationship undermines the board's neutrality in union election matters. The exclusion deprives employees of freedom of choice based on the belief that the employees would vote against the union.
3. Section 2(3) specifically excludes certain categories of employee-relatives from the NLRA's coverage and therefore from bargaining units. By attempting to exclude other categories of employee-relatives from bargaining units, the board is acting contrary to the congressional intent expressed in section 2(3).