

Nos. 08-1245 and 08-1300

**UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SAN MIGUEL HOSPITAL CORPORATION
d/b/a ALTA VISTA REGIONAL HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital, the petitioner/cross-respondent herein, was a respondent in the case before the National Labor Relations Board (“the Board”). The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board. The National Union of Hospital and Health Care Employees, District 1199NM was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board’s Decision and Order issued on June 30, 2008, and reported at 352 NLRB No. 100.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases pending before, or about to be presented before, this Court or any other court.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital (“the Hospital”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Hospital. The Board found that the Hospital unlawfully refused to bargain with its employees’ duly elected collective-

bargaining representative, the National Union of Hospital and Health Care Employees, District 1199NM (“the Union”).

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(a), as amended (“the Act”). The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). (A 246, 248 n.2.)¹

The Board’s Decision and Order issued on June 30, 2008, and is reported at 352 NLRB No. 100, 2008 WL 2616489. (A 246-49.)² The Hospital filed its petition for review on July 11, 2008. The Board filed its cross-application for

¹ In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See *Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). This issue is currently before this Court in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 & 08-1214, argued December 4, 2008, before Judges Sentelle, Tatel, and Williams.

² “A” references are to the joint appendix. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

enforcement on September 15, 2008. The petition and the cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

As the Board's Order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 28-RC-6518), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d), however, does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act, as well as Section 103.30 of the Board's Rules and Regulations and Section 11396.2 of the Board's Casehandling Manual, (Part Two), Representation Proceedings, are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

After the Union won a representation election, the Hospital refused to bargain with the Union and filed objections to the election arguing that the certified bargaining unit was inappropriate. Therefore, the issue before the Court is: Did the Board abuse its discretion in overruling the Hospital's objections to the election and certifying a combined bargaining unit of all professional and all nonprofessional employees? If not, then the Board properly found that the Hospital violated the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

This case involves the Hospital's refusal to bargain with the Union after the Hospital's employees expressed their desire for union representation in a Board-conducted representation election. The Board found that the Hospital's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (A 246-47.)

The Hospital does not dispute its refusal to bargain. (Br. 18.) Instead, it contends that the Board erred in the underlying representation case by complying with its 20-year-old, court-approved rule governing unit determinations in the health care industry, by applying that rule in this case, and by following its established procedure for processing cases. The Board's findings in the representation and unfair labor practice proceedings are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

1. The Union petitions for an election in a combined unit of all professionals and all nonprofessionals; the Board finds this unit to be an appropriate unit for collective bargaining

The Hospital is an acute-care hospital in Las Vegas, New Mexico. (A 79; A 52.) On April 10, 2007, the Union filed a petition with the Board, seeking to represent a unit of professional and nonprofessional employees at the Hospital. (A 77; A 15, 22-24, 44-47, 53-54.) The professional employees would either constitute a separate bargaining unit or be included in the unit of nonprofessional employees, depending on the results of the election.³ (A 77; A 22-23.)

At a hearing before a Board hearing officer on the scope of the appropriate bargaining unit, the Hospital claimed that the petitioned-for combined unit was inappropriate. (A 77; A 50-51.) To support this claim, the Hospital argued that 29 C.F.R. § 103.30, Appropriate Bargaining Units in the Health Care Industry (“the Rule”) – which established the units appropriate for collective bargaining in the health care industry – is invalid because it violates Section 9(c)(5) of the Act, 29

³ This type of election, called a *Sonotone* election, is in accordance with Section 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1), which states that the Board may include professional employees in a unit with nonprofessional employees only if “a majority of such professional employees vote for inclusion in such unit.” *See generally Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

U.S.C. §159(c)(5).⁴ (A 78; A 46, 60-63.) In addition, the Hospital claimed that the petitioned-for units were coextensive with the Union's organizational efforts, and that the Union should have been required to demonstrate extraordinary circumstances in order to combine units under the Rule. (A 77; A 46-48.)

Following the hearing, the Board's Regional Director issued a Decision and Direction of Election, finding the two units to be appropriate and ordering a secret-ballot election to be conducted in two voting groups. (A 77-108.) Voting Group A comprised all full-time, part-time, and per diem (averaging four or more hours of work per week) nonprofessional employees; Voting Group B comprised all full-time, part-time, and per diem professional employees. (A 104-07.) The two voting groups excluded job classifications prohibited from the units by statute, such as guards and supervisors. (A 82-82, 104-07.) In addition, the Hospital and the Union agreed that the Hospital's physicians, whom it employs only at off-site clinics, did not properly belong in the units. (A 82; A 59, 62.) Under the Regional Director's decision, the nonprofessionals in Voting Group A would be asked only to vote for or against union representation. The professionals in Voting Group B would be asked whether they wanted to be included in a unit with nonprofessionals

⁴ Section 9(c)(5) states that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

for collective-bargaining purposes, and, if so, whether they wanted the Union to represent them. (A 104-07.)⁵

The Hospital filed with the Board a timely request to review the Regional Director's Decision and Direction of Election. In addition, the Hospital filed three Representation-Management ("RM") petitions.⁶ The Regional Director consolidated the Hospital's RM petitions with the Union's petition and transferred the consolidated case to the Board. (A 149-52.) The Board (Chairman Battista and Members Kirsanow and Walsh) denied the Hospital's request for review of the Regional Director's Decision and Direction of Election, which "necessarily resolve[d] the RM cases and result[ed] in dismissal of the RM petitions." (A 153 n.1.)

2. The Union prevails in the election, and the Board certifies it as the bargaining representative, over the Hospital's objections

In June 2007, the Board conducted an election pursuant to the Regional Director's Decision and Direction of Election. (A 209.) The professional

⁵ See generally *Sonotone Corp.*, 90 NLRB at 1240-42.

⁶ RM petitions can be filed by employers when a union demands recognition or when the employer has a good faith doubt as to an incumbent union's continuing majority status. 29 U.S.C. § 159(c)(1)(B). See also *Adams & Westlake, Ltd. v. NLRB*, 814 F.2d 1161, 1164 & n.2 (7th Cir. 1987). Here, the Hospital filed RM petitions in an attempt to suggest different bargaining units. 28-RM-605 and 28-RM-606 petitioned for bargaining units of business office clericals; 28-RM-607 petitioned for a unit of all professionals, excluding nurses and physicians.

employees, voting separately in accord with the Regional Director's decision, chose to be included in the unit with the nonprofessionals by a vote of 48 to 19. (A 154.) The professionals and nonprofessionals, collectively, voted for union representation by a vote of 121 to 73. (A 155.)

The Hospital filed objections to the election, which, among other things, reiterated its attacks on the validity of the Rule and the appropriateness of the bargaining unit. (A 156-69.) The Regional Director ordered a hearing on the objections and directed that any exceptions to the hearing officer's report be filed directly with the Board. (A 181-82.)

A Board hearing officer took evidence and heard arguments on the objections during a 1-day hearing and recommended that all the objections be overruled. (A 219.) The Hospital filed exceptions to the hearing officer's report with the Board, and, after considering those exceptions, the Board overruled them.⁷ (A 242.) The Board then certified the Union as the exclusive collective-bargaining representative of all full-time, regular part-time, and per diem professional and nonprofessional employees, employed by the Hospital at its hospital in Las Vegas, New Mexico. (A 242-43.)

⁷ The Hospital initially filed 24 objections to the election. (A 156-69.) Because the Hospital did not file exceptions regarding Objections 1, 2, 8-10, and 16-24, the Board adopted pro forma the hearing officer's recommendations that those objections be overruled. (A 242 n.3.)

B. The Unfair Labor Practice Proceeding: the Union Requests Bargaining, and the Hospital Refuses

Following its certification, the Union requested that the Hospital recognize and bargain with it. (A 244.) The next day, the Hospital notified the Union that it would not bargain and, since that time, the Hospital has failed and refused to bargain with the Union. (A 245.) Based on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint, alleging that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A 246.) The Hospital filed an answer admitting its refusal to bargain, but alleging that the Union was improperly certified in light of the Hospital's election objections. (A 246.)

The Board's General Counsel then filed a motion for summary judgment. The Board issued an order transferring the proceeding to the Board and a notice to show cause why the motion should not be granted. The Hospital filed a response reasserting its election objections. (A 246.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Schaumber and Member Liebman) issued its Decision and Order in the unfair labor practice case, granting the General Counsel's motion for summary judgment. The Board found that "[a]ll representation issues raised by [the Hospital] were or could have been litigated in the prior representation proceeding." (A 246.) The Board also found that the Hospital did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A 246.) Accordingly, the Board found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (A 247.)

The Board's Order requires the Hospital to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Board's Order requires the Hospital, upon request, to bargain with the Union, and to post a remedial notice. (A 247-48.)

SUMMARY OF ARGUMENT

The Hospital's employees chose the Union as their exclusive collective-bargaining representative. But the Hospital has admittedly refused to bargain with that representative, claiming that it has no obligation to do so because the unit should not have been certified by the Board. Specifically, the Hospital takes the stance that the unit is inappropriate because the Board gave controlling weight to the extent of organization, both in developing the Rule governing appropriate units in the health care industry and in this particular case.

To the contrary, the Board, following its 20-year-old rule, reasonably determined that the unit was appropriate for collective bargaining. That unit – all professional and nonprofessional employees – was determined by the Board, in accordance with the Rule, to be an “obviously [] appropriate” combination of the Rule's eight appropriate units. To successfully challenge the Board's determination, the Hospital would have to show that the combined unit was “truly inappropriate.” The Hospital makes no such showing.

Instead, the Hospital contends that extent of organization was the controlling factor considered by the Board in establishing the Rule (thus contravening Section 9(c)(5) of the Act) and that the Board improperly applied the Rule in this case. As the Rule makes clear, however, extent of organization was only one of several factors considered by the Board during the rulemaking process. Nor did the Board,

contrary to the Hospital's claims, give controlling weight to extent of organization in this case. In fact, extent of organization could not be considered here because the Union organized the entire facility and could not have organized a larger group of employees.

The Hospital's additional arguments also fail. The Regional Director followed established, written procedure in requiring that the Hospital file post-election exceptions directly with the Board. In addition, the hearing officer properly rejected the Hospital's offer of proof on the unit appropriateness issue during the post-election proceedings because the Hospital had already fully litigated that issue before the Board in the pre-election proceedings.

ARGUMENT

THE BOARD DID NOT ABUSE ITS DISCRETION BY OVERRULING THE HOSPITAL'S ELECTION OBJECTIONS AND PROPERLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 7 of the Act, 29 U.S.C. § 157, gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf. Employers have the corresponding duty to bargain with their employees' chosen representative, and a refusal to bargain violates this duty under Section

8(a)(5) and (1) of the Act.⁸ The Hospital admits (Br. 18) its refusal to bargain with the Union, but argues that it had no legal obligation to do so because the Board erred in overruling its election objections. The Hospital's primary challenge to the Board's Order in this case (Br. 24-45) is an attack on the Board's 20-year-old rule, promulgated after extensive notice-and-comment rulemaking, and approved by the Supreme Court. *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610-19 (1991) ("AHA"). As the Regional Director found, and the Board reasonably affirmed, the Rule was properly applied in this case. (A 96-97, 153.) Accordingly, if the Board did not abuse its discretion in overruling the Hospital's election objections, the Hospital's actions violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its Order.⁹ *See Pearson Educ., Inc. v. NLRB*, 373 F.3d

⁸ Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. §§ 158(a)(1). Conduct that violates Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

⁹ In its brief, the Hospital includes an "Amended Statement of the Issues Presented for Review" (Br. 2-4), but presents argument on only those election objections related to unit appropriateness, whether the Regional Director followed proper procedure, and whether the hearing officer properly excluded evidence. Issues on which no discernible argument is raised in the opening brief are deemed waived by this Court. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (holding that contentions merely mentioned in a party's opening brief are deemed waived).

127, 130 (D.C. Cir. 2004); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

A. This Court Gives Considerable Deference to the Board’s Findings on Unit Appropriateness

Section 9(b) of the Act, 29 U.S.C. § 159(b), 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 th[e] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof” Construing that section, the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, ‘if not final, is rarely to be disturbed’” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Accord *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). Consequently, the party challenging the Board’s unit determination has the burden to show that the Board abused the “especially ‘wide degree of discretion’” accorded it by this Court on representation questions. *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445, 447-48 (D.C. Cir. 2001) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)).

This Court’s “review of the Board’s factual conclusions is ‘highly deferential.’” *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998)

(quoting *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997)). The Board's findings of fact are "conclusive" if supported by substantial evidence considered on the record as a whole. 29 U.S.C. § 160(e) (2000); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). Thus, as the Supreme Court has cautioned, a reviewing court may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; accord *Perdue Farms*, 144 F.3d at 834.

B. The Board Properly Certified a Unit of All Professional and Nonprofessional Employees

1. The Board, through notice-and-comment rulemaking, issued the Rule governing acute-care hospitals; the Supreme Court upheld the validity of the Rule

In 1974, Congress extended coverage of the Act to all acute-care hospitals. See Pub. Law 93-360, 88 Stat. 395 (1974). In doing so, it admonished the Board to give "due consideration . . . to preventing proliferation of bargaining units in the health care industry." *AHA*, 499 U.S. at 615-16 (quoting S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974)). This admonition created confusion in the development of bargaining units in the health care industry, as the Board and various Courts of Appeal arrived at different analytical structures for determining appropriate units. See generally *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1148 (3d Cir. 1993).

Consequently, to resolve these “seemingly interminable disputes” over hospital unit determinations, “the Board engaged in notice and comment rulemaking in an attempt to formulate a general definition of the bargaining units appropriate in the health care industry.” *Id.* In 1989, that process culminated in the issuance of the Rule, which provided that, with three exceptions, eight specifically defined units would be “the only appropriate units” in acute-care hospitals. *See* 29 C.F.R. § 103.30 (2008), 54 Fed. Reg. 16,336 (Apr. 21, 1989); *AHA*, 499 U.S. at 608.

Under the Rule, there are eight possible bargaining units: two units of professionals (registered nurses and doctors), three units of nonprofessionals (technical employees, skilled maintenance employees, and business office clericals), two residual units (all other professionals and all other nonprofessionals), and, as the Act requires (29 U.S.C. § 159(b)(3)), a separate unit of guards. *See* 29 C.F.R. § 103.30(a). Additionally, the Rule provided for three exceptions: extraordinary circumstances, previously existing nonconforming units, and “various combinations of units,” if sought by a labor organization. 29 C.F.R. § 103.30(a)-(c); *see also AHA*, 499 U.S. at 608. Although the Board’s promulgation of the Rule was immediately challenged, in 1991, the Supreme Court upheld its validity. *See AHA*, 499 U.S. at 619-20.

2. Under the Rule, “all professionals” and “all nonprofessionals” are appropriate units for collective bargaining

As explained above, under the Rule, there are eight appropriate collective-bargaining units in acute-care hospitals. 29 C.F.R. §103.30(a). In addition to those eight units, the Board may find “various combinations of units” to be appropriate. *Id.* During the rulemaking process, the Board explained that some combinations of units “would obviously be appropriate, such as all professionals, or all non-professionals” *Second Notice of Proposed Rulemaking for Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. 33,900, 33,932 (Sept. 1, 1988) (“*Second Notice*”). *See also* Office of the General Counsel, Memorandum 91-3 (1991). (A 250-59.) As the Supreme Court has explained, a union “may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *AHA*, 499 U.S. at 610 (emphasis in original); *see also Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The “initiative in selecting an appropriate unit resides with the employees” – not with the employer.¹⁰ *AHA*, 499 U.S. at 610. Indeed, “the NLRB may simply look at the

¹⁰ In its *Second Notice*, the Board rejected comments from employers complaining that only unions had the option to petition for combined units. *Second Notice*, 53 Fed. Reg. 33900, 33932. As the Board explained, because the petitioner – the union – is only required to seek an appropriate unit, it “does not benefit an employer to have the option of showing that another unit, perhaps a combined unit, is also appropriate, or even more appropriate, since the appropriateness of an alternative unit is not the issue.” *Id.* Moreover, an RM

union's proposed unit and, if it is an appropriate unit, accept that unit determination without any further inquiry." *Country Ford Trucks*, 229 F.3d at 1191.

Here, the Union petitioned to represent a unit of all professional and all nonprofessional employees. The professional employees would either constitute a separate bargaining unit or be included in the unit of nonprofessional employees, depending on the results of the election.¹¹ (A 77.) The Board affirmed the Regional Director's finding that this unit was appropriate for collective bargaining. (A 153.) As the Regional Director explained (A 96-97), the Board, during its notice-and-comment rulemaking, determined that units of all professionals or all nonprofessionals would "obviously be appropriate."

To challenge the Board's determination, the Hospital would have to show that the combined unit was "truly inappropriate." *Blue Man*, 529 F.3d at 421. The Hospital has made no such showing. Instead, the Hospital argues that the Rule itself is "arbitrary and in derogation of Section 9(c)(5) of the Act" (Br. 57); that, in any event, the Rule as applied in this case violates Section 9(c)(5) (Br. 45); and

petition (filed by an employer) must seek the unit requested by the union, and a decertification petition must be filed in the certified or recognized unit. *Id.* at 33932 n.26 (citing *Wm. Wood Bakery*, 97 NLRB 122 (1951); *Rest. & Tavern Owners Ass'n of Salem*, 126 NLRB 671 (1960); *Campbell Soup Co.*, 111 NLRB 234 (1955)).

¹¹ See *Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

that, under the Rule, the Union should have been required to demonstrate extraordinary circumstances in order to combine units (Br. 46-47). As shown below, each of these attacks on the Board's decision fails.

a. The Rule established the units appropriate for bargaining regardless of the extent of organization

The Hospital's primary contention (Br. 36, 38-39) is that because a union is "required" to organize employees only in the specified eight appropriate units under the Rule, the Rule is arbitrary and violates Section 9(c)(5) of the Act, 29 U.S.C. § 159(c)(5).¹² As an initial matter, the Supreme Court held that the Rule was not "arbitrary or capricious" but was instead "based on a 'reasoned analysis' of an extensive record." *AHA*, 499 U.S. at 619. Moreover, contrary to the Hospital's claim (Br. 30-35), in developing the Rule, the Board did not violate Section 9(c)(5) by giving controlling consideration to extent of organization. Rather, it invited comments and relied upon "empirical evidence" to determine which units would be appropriate in the health care industry. *Second Notice*, 53 Fed. Reg. 33900, 33,901. As the Supreme Court found, the Board "gave extensive consideration" to the "special problems that 'proliferation' might create in acute-care hospitals" and conducted "careful analysis of the comments that it received,"

¹² Section 9(c)(5) states that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5).

providing a “well-reasoned justification for the new rule.” *AHA*, 499 U.S. at 616-18.

The Board’s “careful analysis” included consideration of factors similar to those it had previously considered in adjudications, including “uniqueness of function; training, education and licensing; wages, hours and working conditions; supervision; employee interaction; and factors relating to collective bargaining, such as bargaining history” *Second Notice*, 53 Fed. Reg. 33,900, 33,905-906. Thus, for each of the eight units it found to be appropriate, the Board delineated the multiple factors it relied upon. For example, the Board determined that a separate unit of nurses was warranted because they work around the clock, 7 days per week; have constant responsibility for patient care; are subject to common supervision by other nurses; share similar education, training, experience, and licensing requirements not shared by other employees; have the most contact with other nurses; and have a lengthy history of separate organization and bargaining. *Id.* at 33,911. In addition, the Board determined that a unit of business office clericals, separate from service and maintenance employees, was warranted because the clericals “perform substantially different functions from those performed by other employees.” *Id.* at 33,924. The Board also noted that the business office clericals are required to have a higher level of education than service and maintenance employees; have significant differences in their terms and conditions of

employment compared with service and maintenance employees; have separate supervision and a separate, external labor market; and have a history of representation separate from service and maintenance employees and different bargaining interests. *Id.* at 33,924-926.¹³

In any event, Section 9(c)(5) does not preclude the Board from considering extent of organization: while the extent of union organization cannot be the “controlling” factor in the Board’s determination, it can be one of the factors considered by the Board in making a unit determination. *NLRB v. Metropolitan Life Insur. Co.*, 380 U.S. 438, 441-42 (1965); *see also Country Ford Trucks, Inc., v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). Thus, the Board’s consideration of extent of organization during rulemaking – as one of several factors – did not violate Section 9(c)(5).

The Hospital’s alternative argument – that the Rule as applied in this case violates Section 9(c)(5) – similarly fails. In this case, the Board did not consider the Union’s extent of organization as even one factor in making its determination. As the Regional Director explained (A 79), extent of organization is typically an

¹³ The Board’s discussions relating to nurses and business office clericals are summarized here as examples. The Board also provided detailed discussions of its reasoning related to the other units as follows: physicians, 53 Fed. Reg. 33,900, 33,917; other professionals, *id.* at 33,917-918; technical employees, *id.* at 33,918-920; skilled maintenance employees, *id.* at 33,920-924; other nonprofessionals, *id.* at 33,927; and guards, *id.* at 33,927 n.24.

issue when a union organizes only part of an organization's employees. *See generally Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

Here, the Union organized the entire facility – a wall-to-wall unit. The Hospital did not contend that a larger group of employees would be the only appropriate unit. Indeed, there was no larger group of employees that the Union could have organized.¹⁴ (A 79.)

b. The Rule allows unions to combine units; no demonstration of extraordinary circumstances is required

The Hospital misapprehends the “extraordinary circumstances” exception to the Rule and argues (Br. 46-47) that the Board should have required the Union to show extraordinary circumstances in order to combine any of the eight units defined in the Rule. The extraordinary circumstances exception is simply not applicable to this situation. The Rule provides the extraordinary circumstances exception, not to justify the already approved combination of units, but “to allow for the possibility of individual treatment of uniquely situated acute-care hospitals, so as to avoid accidental or unjust application of the rule.” 53 Fed. Reg. 33,900,

¹⁴ As discussed above, the only employees that the Union did not seek to represent were physicians and guards. Physicians are employed only at off-site clinics, and both the Union and the Hospital agreed that the clinics were not appropriately included in the units. (A 82; A 59, 62.) The Union was prohibited by Section 9(b) of the Act, 29 U.S.C. § 159(b), from representing both guards and non-guard employees. (A 83.)

33,932. The Rule makes separate allowance for various combinations of the eight units, if sought by a union.¹⁵ 29 C.F.R. § 103.30(a); *see also AHA*, 499 U.S. at 608.

There is nothing in the Board’s notices of proposed rulemaking or the Rule itself that indicates the extraordinary circumstances exception applies to combinations of units. Indeed, the Board’s explicit language in the Rule suggests the opposite. Nor does the Hospital cite any cases showing that the Board or courts have required unions to demonstrate extraordinary circumstances in order to combine units. To the contrary, the Board has approved, without requiring the demonstration of extraordinary circumstances, combined units in acute-care hospitals. *See Pontiac Osteopathic Hosp.*, 327 NLRB 1172, 1173 (1999); *Dominican Santa Cruz Hosp.*, 307 NLRB 506, 508 (1992).¹⁶

¹⁵ “Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate. . . .” 29 C.F.R. § 103.30(a).

¹⁶ In *Dominican Santa Cruz*, two unions petitioned for two different units. Local 3 petitioned for a wall-to-wall unit, and the California Nurses Association petitioned for a unit of registered nurses. *Dominican Santa Cruz*, 307 NLRB at 506. Local 3 argued that its wall-to-wall unit was “the ‘most’ and, therefore, the ‘only’ appropriate unit in view of the Congressional directive against proliferation of units in the health care industry.” *Id.* The Board rejected Local 3’s argument that its wall-to-wall unit was the only appropriate unit and found that both petitioned-for units were appropriate. *Id.* at 507. In addition, the Board found that

Nor does *St. Margaret Memorial Hospital*, cited by the Hospital in its brief (Br. 47), stand for the proposition that a union must show extraordinary circumstances when it seeks to combine units under the Rule. *See St. Margaret Mem'l Hosp.*, 303 NLRB 923, 923 (1991), *enforced*, 991 F.2d 1146, 1153 (3d Cir. 1993). Rather, in that case, the employer argued that extraordinary circumstances existed, making a unit sought by the union inappropriate. The Board held, and the Third Circuit affirmed, that the employer, in urging extraordinary circumstances, must “demonstrate that its arguments are substantially different” from those considered during the rulemaking proceedings. *Id.* at 923. Nothing in *St. Margaret* suggests that a union, in order to petition for a combined unit of all professional and nonprofessional employees, must first demonstrate extraordinary circumstances. Rather, the burden is on the employer – here, the Hospital – to demonstrate through a showing of extraordinary circumstances that it would be “unjust” or an “abuse of discretion” for the Board to apply the Rule. *Id.* (*quoting* 53 Fed. Reg. 33,900, 33,933).

To the extent that the Hospital is arguing, in addition to its extraordinary circumstances argument (Br. 48, 52), that the Union must first demonstrate a community of interest before being allowed to combine units, that argument is

Local 3 “failed to demonstrate that there are extraordinary circumstances” to justify its claim that a wall-to-wall unit was the only appropriate unit. *Id.*

waived. The Hospital failed to make that argument to the Board and is making it for the first time to this Court.¹⁷ Because that argument was never made to the Board, Section 10(e) of the Act, 29 U.S.C. § 160(e), precludes the Court from hearing it. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009).

Furthermore, contrary to the Hospital's claim (Br. 45-46), the Board's use of the *Sonotone* election in the health care context is appropriate. The Hospital's argument is based on the Board's statement in its *Second Notice* that some combinations of units "would obviously be appropriate, such as all professionals, or all non-professionals" 53 Fed. Reg. 33,900, 33,932. According to the Hospital (Br. 46), the Board's use of the disjunctive precludes a finding that a combined unit of all professional and all nonprofessional employees could ever be appropriate, even through the use of a *Sonotone* election.

Contrary to the Hospital's claims, the Rule clearly permits a union to seek to organize a combination of the eight units. As the Regional Director explained (A 97), a reasonable interpretation of the Board's use of "or" is that either a professional or a nonprofessional unit, independent of the other, is appropriate. And so long as the professionals are allowed to decide for themselves through a

¹⁷ Neither the Hospital's request for review of the Regional Director's Decision and Direction of Election nor its exceptions to the hearing officer's report on objections made this argument. (A 109-44, 225-40.)

Sonotone election whether to be included in the same unit as the nonprofessionals, a combined wall-to-wall unit is, without more, also appropriate.

Under the Hospital's view, however, there could never be a wall-to-wall unit in a hospital. Such a result would contravene Congress's expressed desire that the Board give "due consideration . . . to preventing proliferation of bargaining units in the health care industry." *See* S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974). Moreover, the Board regularly finds petitioned-for wall-to-wall units in other industries to be appropriate. *See Airco, Inc.*, 273 NLRB 348 (1984) (petitioned-for wall-to-wall units are presumptively appropriate).

Prohibiting unions from seeking wall-to-wall units in hospitals would undermine the Rule and Congress's nonproliferation policy.

Finally, the Hospital incorrectly argues (Br. 38-39) that by organizing a wall-to-wall unit, the Union disenfranchised some employees. In essence, it complains that the Union should not be certified in a unit in which any employee does not want union representation. The Hospital misses the point of workplace democracy. Under Section 9(a) of the Act, 29 U.S.C. § 159(a), if a majority of employees vote for representation, the entire unit, including those who voted against it, is represented by the union. Here, the Union petitioned for a facility-wide unit and won a decisive victory. Of 194 valid votes cast, 121 were for union representation. (A 174.)

C. The Regional Director Properly Followed the Board's Procedural Rules

The Regional Director followed established procedure, and the Hospital's claim otherwise (Br. 54) is plainly incorrect. In his order directing a hearing on the Hospital's objections to the election, the Regional Director instructed the hearing officer to report his findings to the Board and instructed the parties to file any exceptions to that report with the Board. (A 181-82.) As the Board pointed out in its Decision and Certification of Representative (A 241 n.1), the Board's procedures explicitly give the Regional Director the discretion to order that the hearing officer's report and any exceptions be filed directly with the Board. NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11396.2 (2007). The Casehandling Manual further provides that if the Regional Director "directs that the hearing officer's recommendations be made to the Board, the hearing officer's report should provide for exceptions to be filed . . . with the Board." *Id.* The hearing officer's report, as required by the Casehandling Manual, did, indeed, direct that exceptions be filed with the Board. (A 219 n.14.)

Thus, contrary to the Hospital's claims, the Regional Director followed established Board procedure. *See U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004). Further, not only did the Hospital receive a hearing before a Board hearing officer, it was allowed to, and in fact did, file exceptions to the hearing officer's

report with the Board. The Board considered those exceptions and overruled them. (A 242 & n.3.)

The Hospital also argues (Br. 54) that the hearing officer in the post-election proceeding improperly excluded evidence related to the Hospital's argument that the Board's Rule violates Section 9(c)(5). As the hearing officer noted, the Hospital had already argued that issue, and lost, in prior proceedings. (A 212.) Indeed, the Hospital made that argument to a Board hearing officer during the pre-election proceeding; the Regional Director reviewed and rejected the Hospital's argument and, at the Hospital's request, the Board reviewed (and rejected) the argument.

Because the Hospital had made the argument that the Rule violates Section 9(c)(5) during the pre-election proceeding, the hearing officer properly rejected the Hospital's attempt to relitigate the issue during the post-election proceeding. (A 212-13.) *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 334 & n.7 (1946) (noting that Board policy and procedure differentiate between pre- and post-election proceedings and finding that unit appropriateness issues are properly raised in the pre-election proceeding). The hearing officer did allow the Hospital to make an offer of proof on the issue; however, the Hospital presented no evidence to show that its objections related to unit appropriateness actually affected the results of the election. (A 212; A 201-06.) Nor did the Hospital contend that the unit had

become inappropriate since the original unit determination or that the original determination was based on an inadequate record. (A 241 n.1.) Although the Regional Director “arguably erred” by ordering a hearing on all the objections, the Board agreed with the hearing officer that the Hospital could not relitigate an issue previously decided by the Board. (A 241-42 n.1.) Therefore, because the Hospital failed to present evidence on the unit issue that had not already been considered by the Board, the hearing officer properly recommended that those objections be overruled. (A 211, 241 n.1; A 206.) *See St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1153 (3d Cir. 1993).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Hospital's petition for review and enforce the Board's Order in full.

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National Labor Relations Board
February 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAN MIGUEL HOSPITAL CORPORATION	*
d/b/a ALTA VISTA REGIONAL HOSPITAL	*
	*
Petitioner/Cross-Respondent	* Nos. 08-1245,
	* 08-1300
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 28-CA-21896
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the Board certifies that its final brief contains 6,753 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
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Dated at Washington, DC
this 17th day of February, 2009

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	*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by hand delivery the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that final brief by first-class mail upon the following counsel at the address listed below:

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Dated at Washington D.C.
this 17th day of February, 2009

ADDENDUM

STATUTES AND REGULATIONS

Section 3(b) of the Act, 29 U.S.C. § 153(b), provides in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 9 of the Act, 29 U.S.C. 159, provides in relevant part:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

* * *

(b) . . . the Board shall not (1) decide that any unit is appropriate for [collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises

* * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board — (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . ; or (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

* * *

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be

made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

29 C.F.R. § 103.30, Appropriate Bargaining Units in the Health Care Industry, provides in relevant part:

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

- (1) All registered nurses.
- (2) All physicians.
- (3) All professionals except for registered nurses and physicians.
- (4) All technical employees.
- (5) All skilled maintenance employees.
- (6) All business office clerical employees.
- (7) All guards.
- (8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term: . . .

(5) A non-conforming unit is defined as a unit other than those described in paragraphs (a)(1) through (8) of this section or a combination among those eight units.

NLRB, Casehandling Manual, (Part Two), Representation Proceedings,
§ 11396.2

11396.2 Directions to Hearing Officer . . .

Directed Election: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director or to the Board, whichever the Regional Director decides is appropriate.

If the Regional Director directs the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her. The hearing officer's report should provide for exceptions to be filed as follows: Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Regional Director. Exceptions must be received by the Regional Director at the Regional Office by [date].

The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.

If the Regional Director directs that the hearing officer's recommendations be made to the Board, the hearing officer's report should provide for exceptions to be filed as follows: Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date].