**Specialty Healthcare and Rehabilitation Center of Mobile *and* United Steelworkers, District 9, Petitioner.** Case 15–RC–8773

December 22, 2010

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

NOTICE AND INVITATION TO FILE BRIEFS

On February 19, 2009, the Board granted the Employer's Request for Review in the above-captioned case.[1] The Board invites the filing of briefs in order to afford the parties and interested amici the opportunity to address the issues raised in this case.

The Petitioner seeks to represent a unit of certified nursing assistants (CNAs) at the Employer's nursing home. The Employer contends that the only appropriate unit consists of all nonprofessional service and maintenance employees. In addition to CNAs, the Employer would include activity assistants, dietary aides and cooks, the social services assistant, the staffing coordinator, the maintenance assistant, the central supply clerk, the medical records clerk, the data entry clerk, the business office clerical, and the receptionist. The Regional Director found appropriate the petitioned-for unit of CNAs.

In 1989, the Board promulgated a final rule regarding appropriate bargaining units in the health care industry. Although the original rule encompassed both acute care hospitals and nursing homes, the final rule was limited to acute care facilities, and the Board determined that eight units, or combinations of those units, were appropriate at those facilities except in extraordinary circumstances.[2] The Board decided that it would continue to determine if proposed units were appropriate in nursing homes and other nonacute care facilities "by adjudication." Rule 103.30(g).

In *Park Manor Care Center*, 305 NLRB 872 (1991), the Board faced the question of the proper standard for determining whether units are appropriate in nursing homes (and, by extension, other nonacute care facilities) after the promulgation of the acute care hospital unit rules. In answering that question, the Board observed "that its decision to determine units by rulemaking reflected a desire to replace earlier doctrinal applications with formulation of units based on the realities of the workplace, as learned from evidence presented during the rulemaking proceedings." Id. at 875. The Board indicated that in nonacute health care facilities as well it preferred "to take a broader approach utilizing not only 'community of interests' factors but also background information gathered during rulemaking and prior precedent." Id. Under that approach, referred to as the "pragmatic" or "empirical" community-of-interests test, the Board considers, in addition to traditional community of interest factors, information elicited in its rulemaking proceedings, as well as Board precedent pertaining to the type of facility involved or the type of unit sought. Id. and fn. 16.[3] The Board specifically noted its desire "that after various units have been litigated in a number of individual facilities, and after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.'' Id. (quotation marks and citations deleted).

Consistent with the Board's statement in *Park Manor*, supra, the Board continues to believe that it is its obligation under the Act to continually evaluate whether its decisions and rules are serving their statutory purposes. This is particularly true of decisions such as *Park Manor*, where the Board adopted a new approach to determining whether units are appropriate in health care facilities not covered by its newly-promulgated rule, but extends as well to the procedures and standards for determining whether proposed units are appropriate in all industries—a critical and necessary prerequisite for resolving questions concerning representation.

For these reasons, the parties and interested amici are invited to file briefs addressing the issues raised in this case. Specifically, the parties and amici in their briefs should address some or all of the following questions: (1) What has been their experience applying the "pragmatic or empirical community of interests approach" of *Park Manor* and subsequent cases. (2) What factual patterns have emerged in the various types of nonacute health care facilities that illustrate what units are typically appropriate. (3) In what way has the application of *Park Manor* hindered or encouraged employee free choice and collective bargaining in nonacute health care facilities. (4) How should the rules for appropriate units

[1] The Board affirmed the grant of review on August 27, 2010.

[2] See Collective-Bargaining Units in the Health Care Industry, Notice of Proposed Rulemaking and Notice of Hearing, reprinted at 284 NLRB 1516 (1987); Second Notice of Proposed Rulemaking, reprinted at 284 NLRB 1528 (1988); and Final Rule, 103.30, reprinted at 284 NLRB 1580 (1989). The rule was upheld by the Supreme Court. See *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991).

[3] The Board applied the same test to other nonacute care facilities. See, e.g., *CGE Caresystems*, 328 NLRB 748 (1999); *Charter Hospital of Orlando South*, 313 NLRB 951 (1994).

in acute health care facilities set forth in Section 103.30 be used in determining the appropriateness of proposed units in nonacute health care facilities. (5) Would the proposed unit of CNAs be appropriate under *Park Manor*. (6) If such a unit is not appropriate under *Park Manor*, should the Board reconsider the test set forth in *Park Manor*. (7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter. (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest."

In answering these questions, the parties are invited to submit empirical and practical descriptions of their experience under *Park Manor*.

Briefs shall be filed with the Board in Washington, D.C., on or before February 22, 2011. The parties may file responsive briefs on or before March 8, 2011, which shall not exceed 10 pages in length. No other responsive briefs will be accepted. The parties and amici should file briefs electronically at http://mynlrb.nlrb.gov/efile. If assistance is needed in filing through http://mynlrb.nlrb.gov/efile, please contact Lester A. Heltzer, Executive Secretary, National Labor Relations Board.

We believe that it is desirable to ascertain the positions of interested parties and to solicit information from such parties before addressing an important question of statutory construction and public policy. Our rationale follows:

The long-term care industry in the United States, indeed around the world, has undergone a radical transformation in the past 20 years in the face of an aging population, changing consumer preferences relating to the form and location of long-term care, and a more general restructuring of the provision of health care, most importantly, a drastic reduction in the average length of stays in acute care hospitals.[4] As the Henry J. Kaiser Family Foundation reported in 2007, "Over the past 20 years, nursing home care has changed a great deal."[5] Moreover, "[t]here has been a proliferation of facility-like residential alternatives to nursing homes."[6] Indeed, as our dissenting colleague himself notes, the Board did not resolve the question of appropriate units in long-term care facilities when it engaged in rulemaking ultimately limited to acute health care facilities in 1989 because of "evidence of rapid transition in the industry." In addition, employment in long-term care has experienced dramatic growth in the last 20 years and that trend is projected to continue.[7] Finally, long-term care employees have demonstrated a persistent interest in invoking the statutory process for obtaining representation, filing almost 3000 petitions under Section 9 of the Act during the last decade. Despite these facts and our statutory duty to continually reconsider how the terms of the Act should be applied to ever changing industries, the dissent would have us close our eyes to these changes and blindly continue to apply a 20-year-old standard without even considering the possibility that it should be revised.[8] Such an approach is contrary to our statutory charge.

We strongly believe that asking all interested parties to provide us with information and argument concerning the question of statutory construction raised in this case is the fairest and soundest method of deciding whether our rules should remain the same or be changed and, if the latter, what the new rules should be. Our dissenting colleague expresses a deep and, we believe, unmerited skepticism about the adversary process and the value of hearing from interested parties—"[p]redictably, what we will receive will be mostly subjective or partisan justifi-

[4] Dept. of Health and Human Serv., Ctrs. for Medicare & Medicaid Serv., Nursing Home Data Compendium, at ii (2009) ("[T]he US population of persons aged 65 and over increased by 12.5% from 1999 to 2008 . . . ."); McCormick & Chulis, *Growth in Residential Alternatives to Nursing Homes: 2001*, 24 Health Care Financing Rev. 143 (2003) (noting the "proliferation of facility-like residential alternatives to nursing homes"); Cromwell, Donoghue, & Gilman, *Expansion of Medicare's Definition of Post-Acute Care Transfers*, 24 Health Care Financing Rev. 95 (2002) (documenting earlier discharges from acute care facilities).

[5] Wiener, et al., *Nursing Home Care Quality: Twenty Years After the Omnibus Budget Reconciliation Act of 1987*, at 9 (2007). Indeed, the entire "health care industry has undergone dramatic changes in the past 20 years." Pindus & Greiner, *The Effects of Health Care Industry Changes on Health Care Workers and Quality of Patient Care* (1997), available at http://www.urban.org/publications/407308.html.

[6] McCormick & Chulis at 143.

[7] BLS, Employment, Hours, and Earnings from the Current Employment Statistics Survey (National), at http://data.bls.gov/PDQ/serlet/SurveyOutputServlet (viewed Nov. 26, 2010).

[8] Unlike the dissent, we decline to address the merits of the case before receiving the briefs from all interested parties we solicit today except to note two facts. First, the current standard applicable to long-term care facilities articulated in *Park Manor* was described by the Board in that case as the "'pragmatic or empirical community of interests' approach." Id. at 875 fn. 16. So formulated, that approach cannot possibly be described as a model of clarity, particularly given that the words "pragmatic" and "empirical" are not synonymous. Second, despite our dissenting colleague's determined effort to paint our simple solicitation of views and supporting information from interested parties in partisan terms, nothing in the questions we have asked interested parties to address suggests that the Board is considering in any manner increasing the weight given to "the extent to which employees have organized," much less making it "controlling" as proscribed by Sec. 9(c)(5) of the Act.

cation for changing the law rather than any useful information responding to real concerns." We believe employers actually engaged in operating long-term care facilities and unions that represent or are seeking to represent employees laboring in such facilities as well as other potentially interested parties, such as scholars, can and will provide us with much more valuable information about the structures of employment in this critical industry than our colleague supposes and, most certainly, with more information than we have now.

With the sole exception of the rule governing appropriate units in acute health care facilities, the Board has for 75 years developed the meaning of the statutory term "an appropriate unit" through adjudication.[9] At various times, adjudication has led, in this area as in others, to changes in the rules.[10] The Supreme Court has approved the Board's use of adjudication in addressing the broad range of issues arising under the Act, observing that "the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between adjudication and rulemaking in this context lies in the first instance within the Board's discretion."[11] The Court stressed that the Board's judgment in choosing adjudication is "entitled to great weight."[12] Our dissenting colleague nevertheless contends that the Board not only should not but cannot even consider a revision of the rules governing appropriate units in the course of adjudication. Contrary to the dissent, we think it is evident that adjudication, which is subject to judicial review, provides for no less "scrutiny and broad-based review" than does rulemaking, especially where interested parties are given clear notice of the issues and invited to file briefs. And if, at any time, we are convinced that rulemaking would be a fairer or otherwise more appropriate means to address the questions raised in this case, we shall initiate that process.

In most respects, the Board's standard for determining whether a proposed unit is an appropriate unit is uniform across industries. Industry-specific rules are the exception, not the norm. Yet our dissenting colleague suggests it is not proper for the Board to even consider whether any revision of the standard that might be appropriate in this case or in the long-term care industry should also be applied more generally. But the most basic principle of adjudication, treating like cases alike, compels us to consider the scope of any holding we reach in this case and, thus, it is entirely appropriate that we have asked interested parties to express their views on that question.

Moreover, in the long-term care industry and more generally, the Board's standards for determining if a proposed unit is an appropriate unit have long been criticized as a source of unnecessary litigation. In 1994, the bipartisan Commission on the Future of Worker-Management Relations reported that parties engage in litigation over the scope of the unit for tactical purposes such as to delay an election.[13] Yet the Board has often recognized the "Act's policy of expeditiously resolving questions concerning representation." *Northeastern University*, 261 NLRB 1001, 1002 (1982). If, after receiving full and appropriate input from all interested parties, the Board determines that the standard applicable in long-term care facilities can be clarified to prevent unnecessary litigation and delay, we believe it will have a duty to at least consider whether any such revision should apply more generally.

In sum, if, as our dissenting colleague suggests, the Board's current, careful, prudent inquiry into the facts and solicitation of the views of all interested parties on an important question of statutory construction will become a "lightning rod for Congressional inquiry and protests from the labor-management community," the capacity of the Federal Government to carry out its statutory

[9] See, e.g., *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'"); *Western Electric Co.*, 98 NLRB 1018 (1952) (employerwide unit presumptively appropriate); *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962) (severance of a group of employees from established unit not appropriate unless those employees constitute a functionally distinct group).

[10] See, e.g., *Oakwood Care Center*, 343 NLRB 659 (2004) (bargaining units that combine employees solely employed by a user employer and employees jointly employed by the user employer and a supplier employer constitute multiemployer units, which may be appropriate only with the consent of all employers), revg. *M.B. Sturgis, Inc*., 331 NLRB 1298 (2000), revg. *Lee Hospital*, 300 NLRB 947 (1990); *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966) (criticizing prior standard for obtaining a craft severance election set forth in *American Potash & Chemical Corp*., 107 NLRB 1418 (1954), which itself substantially modified *National Tube Co*., 76 NLRB 1199 (1948)); *Sav-On Drugs, Inc*., 138 NLRB 1032 (1962) (reversing a long line of cases holding that, absent unusual circumstances, an appropriate multistore unit should include all employees within the employer's administrative division or geographic area).

[11] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[12] Id.

[13] Commission on the Future of Worker-Management Relations, U.S., "The Dunlop Commission on the Future of Worker-Management Relations—Final Report" 18–19 (1994).

responsibility to formulate sound labor-relations policy has reached a sorry state indeed.

Dated, Washington, D.C. December 22, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

This was a simple case. The Regional Director failed to apply extant law, as set forth in *Park Manor Care Center*, 305 NLRB 872 (1991), when determining that the petitioned-for unit of certified nursing assistants (CNAs) was appropriate for bargaining. Having granted review, the obvious decisional options for the Board would be to: (1) remand for the Regional Director to apply *Park Manor*; (2) without remanding, apply *Park Manor* and find that the CNA unit is not appropriate; or (3) without remanding, apply *Park Manor* and agree with the Regional Director's finding that the CNA unit is appropriate. The majority, however, has made a different choice. It seizes upon this case as an occasion for reviewing not only *Park Manor* and the standard for unit determinations in nonacute health care facilities, but also for reviewing "the procedures and standards for determining whether proposed units are appropriate in all industries." This is no longer a simple case.

The parties involved did not request any such broad inquiry. On the contrary, the party seeking review sought to apply *Park Manor*, not to "clarify" or overrule it. After the Board granted review, neither party filed a brief. Instead, the notice and invitation to file briefs is a stunning initiative by my colleagues to consider replacing decades of Board law applying the community-of-interest standard with a test that will likely find that any group of employees who perform the same job in the same facility is an appropriate bargaining unit, without regard for whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. This initiative clearly represents broad scale rulemaking, without the "inconvenience" of complying with the various statutory requirements for rulemaking under the Administrative Procedures Act, and without the scrutiny and broad-based review that such requirements are designed to insure. The compelling need for such review and scrutiny is patent here, inasmuch as the result contemplated could reduce to insignificance the mandate under our Act that extent of organization not be the controlling factor in unit determinations. Regardless of ultimate outcome, the mere process of inviting comment to the questions posed here will most certainly become a lightning rod for Congressional inquiry and protests from the labor-management community.

When enacting the 1974 amendments to the Act extending its coverage to include health care institutions, Congress made abundantly clear that it intended the Board to take a special approach towards unit determinations in recognition of the unique needs of that industry. Thus, both Senate and House Reports directed that the Board give due consideration to preventing proliferation of units in the health care industry, which approach was explained during debate as necessary to accommodate the need to balance employee rights against the public right to uninterrupted health care delivery.[1] For the period subsequent to the amendments, circuit courts generally found this explicit admonition controlling on the Board's health care unit determinations despite the fact that it was not embodied in specific statutory language.[2] In fact, it was the "checkered and largely unfavorable treatment" of the Board's unit determinations by reviewing courts as not sufficiently adhering to Congress' admonition that gave impetus to the Board's decision to engage in rulemaking to determine the most appropriate units for the health care industry that would fulfill Congressional objectives.[3] The Board's extensive rulemaking process, however, made evident that appropriate unit decisions in the health care industry were not rooted solely in the Congressional admonition against "undue proliferation" but also the Board's reasoned judgment that "large-scale splintering of the workforce" was not in accord with what is appropriate in the health care industry.[4]

The rule in its final form did not extend to nursing homes and other nonacute care facilities.[5] The Board excepted nursing homes from coverage by the final rule

[1] See substantial discussion of the legislative history of the health care amendments to the Act in *Masonic Hall v. NLRB*, 699 F. 2d 626, 630–632 (2d Cir. 1983), referenced by the Board in its First Notice of Proposed Rulemaking, 52 Fed.Reg. 25142, 25143 fn. 28 (1987), and accompanying text.

[2] See discussion and cases referenced in *Masonic Hall*, supra at 632–633. But see *Electrical Workers Local 474 (St. Francis Hospital) v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987).

[3] First Notice of Proposed Rulemaking at 25143.

[4] Second Notice of Proposed Rulemaking, 53 Fed.Reg. 33900, 33905 (1988).

[5] Id. at 33927–33929.

based on evidence of rapid transition in the industry and of significant differences among various types of nursing homes. The Board concluded these considerations would lead to difficulty in establishing uniform rules. But, at the same time, the Board recognized that, generally, there was less diversity in nursing homes among various groupings and more functional integration.[6] These considerations would logically lead to the conclusion that broader, less fragmented units might well be found appropriate in these facilities.

Subsequently, in *Park Manor*, the Board chose to apply the knowledge gained from the Board's extensive rulemaking process to nursing homes. In that case, the Board remanded a unit issue to the Regional Director and indicated that unit determinations for nursing homes should be governed not only by traditional community-of-interest factors, but also background information gathered during rulemaking and, finally, relevant prior decisions as to the type of unit sought or type of institution involved.[7] In doing so, it noted particularly the observations from rulemaking concerning functional integration among employees in such facilities that likely would result in finding smaller separate units less appropriate.[8]

Applying the above principles to the facts here, the final health care rules applicable to acute care facilities delineate nonprofessional employee units as a separate appropriate unit.[9] Further, under *Park Manor*, the Board has consistently found nonprofessional service and maintenance employees a separate appropriate unit in nursing homes.[10] Finally, as to the petitioned-for CNA unit here, CNAs have traditionally been considered within this group, although, significantly, their inclusion in an overall unit has rarely been disputed.[11]

In sum, the Board has applied *Park Manor* principles to unit determinations in the nursing home industry for approximately two decades and there is ample precedent at our disposal for doing so here. Instead, the majority takes this case as an opportunity to sweep away the well-established and carefully considered approach towards unit determinations specifically focused on the special needs of the heath care industry. My colleagues note that the Board adopted a new approach in *Park Manor* and that it is our obligation to continually evaluate whether our decisions and rules are serving the Board's statutory purposes. Despite the dictum in *Park Manor* relied on by my colleagues to launch this inquiry, there is little in the intervening two decades to suggest that our policies are in any way problematic, that the public wants us to reconsider our precedent, or that intervening changes in the nursing home industry warrant a new and different approach.

My colleagues nevertheless today solicit "empirical and practical" information. Of course, copious information is already available in-house in records maintained by our Office of Representation Appeals. Predictably, what we will receive will be mostly subjective or partisan justification for changing the law rather than any useful information responding to real concerns. Regardless of what we receive, I see the invitation to file briefs as a prelude to what will likely result in the substantial increase of units in the nonacute health care industry, in complete contradiction of the Congressional admonition and of the logical expectation from the rulemaking experience and prior precedent that units would be fewer in number and broader in scope than in the acute care setting.

The majority's unjustified reconsideration of *Park Manor* and of unit determinations in the nursing home industry would be reason enough to dissent, and to contend that rulemaking should be the appropriate process for reconsideration of a unit determination test based, at least in part, on the results of the Board's prior rulemaking process. However, a far greater concern is raised by the invitation for parties and amici to address the standard for unit determinations in other industries.[12] I see no reason to embark on this ill-considered path at all, much less only a scant few months after the Board's most recent rejection of the view that a unit consisting of all employees who do the same job at the same location

[6] Id.

[7] *Park Manor*, supra at 875.

[8] Id. at 874.

[9] See 29 CFR § 103.30. Notably, the Congressional admonition against undue proliferation of bargaining units cited with approval a nursing home case, *Four Seasons Nursing Center of Joliet*, 208 NLRB 403 (1974), where the Board dismissed a petition for a separate two-person maintenance unit because it "was not composed of a distinct and homogenous group of employees *with interests separate from those of other employees*." Id. (emphasis added).

[10] E.g., *CGE Caresystems*, 328 NLRB 748 (1999); *Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603 (1998); *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995); *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995).

[11] *Jersey Shore*, supra; *Lincoln Park*, supra; *Hillhaven*, supra. I note that, in cases predating the 1974 amendments, CNAs were similarly included in broad nonprofessional units in nursing homes without dispute. E.g., *Leisure Hills Health Centers*, 203 NLRB 326 (1973); *Madeira Nursing Center*, 203 NLRB 323 (1973).

[12] My colleagues pose the following questions: (7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. *Should such a unit be presumptively appropriate as a general matter*. (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest." (emphasis added)

is appropriate, without considering whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.[13] Further, while the Board has broad discretion to make law through case-by-case adjudication rather than through rulemaking, I believe my colleagues' actions test, and likely will exceed, the limits of that discretion here. They are contemplating a broad revision of a test for determination of appropriate units in all industries under our jurisdiction—a test that has stood for at least 50 years.[14] In this respect, I find relevant the observations of the Ninth Circuit in *Pfaff v. U.S. Dept. of Housing & Urban Development*, 88 F.3d 739, 748 (1996), that abuse of discretion may be present "where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, . . . and where the new standard is very broad and general in scope and prospective in application."

Finally, beyond the substantial concerns expressed above, there is real reason to fear that my colleagues' ultimate purpose is to use this case as a vehicle for abnegating the statutory requirement in Section 9(c)(5) that "[i]n determining whether a unit is appropriate . . . the extent to which employees have organized shall not be controlling." In some circumstances, it might be prudent for a Board Member to let the process play out before dissenting. Not here. There is too much at stake, both for the sake of industrial stability and for the Board's reputation as impartial overseer of the representation election process. I find that there are no reasons at all to reconsider our unit determination policies, by adjudication or rulemaking, either in the nonacute health care industry or more generally in all industries. There are sound reasons not to do so, perhaps most significantly the risk that we may contravene our own Act, express Congressional intent, the experience informing our health care unit rules, and the Administrative Procedures Act. I therefore dissent from the issuance of a notice and invitation to file briefs.

Dated, Washington, D.C. December 22, 2010

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[13] *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010) (opinion of Chairman Liebman and Member Schaumber; Member Becker dissenting).

[14] See, e.g., *Monsanto Co.*, 183 NLRB 415 (1970).