UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPECIALTY HEALTHCARE & REHABILITATION CENTER OF MOBILE	)	
and	)	CASE 15-RC-8773
UNITED STEELWORKERS, DISTRICT 9, PETITIONER	)	

BRIEF OF *AMICI CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE AND HR POLICY ASSOCIATION IN SUPPORT OF RESPONDENT EMPLOYER

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Coalition for a Democratic Workplace ("CDW")[1] and HR Policy Association (together, "*Amici*") respectfully submit this brief *amici curiae* to address, among other things, the proper standard for the National Labor Relations Board ("NLRB" or "the Board") to apply when determining whether a petitioned-for unit is appropriate in industries other than the acute or non-acute health care industry. Specifically, *Amici* urge the Board to refrain from answering questions seven and eight posed in its Notice and Invitation to File Briefs (hereinafter "Notice") because the instant case is not an appropriate case to examine such important issues.[2] Instead, the Board should answer only the question presented to interested parties—the proper application of *Park Manor Care Center*, 305 N.L.R.B. 872 (1991)—and refrain from addressing the remaining questions posted in its Notice. If the Board concludes that it will address in *Specialty Healthcare* the issues raised in questions seven and eight despite our objection, *Amici* urge the Board to refrain from abandoning the "community of interest" test that has guided employers and labor organizations for decades.[3]

STATEMENT OF INTEREST

Coalition for a Democratic Workplace is a coalition that represents employers and associations and their workforce in traditional labor law issues. Consisting of hundreds of members, who represent millions of employers, CDW was formed to give its members a voice on labor reform, specifically, the Employee Free Choice Act. More recently, CDW has advocated for its members on a number of labor issues including non-employee access, an

[1] Signatory members of CDW are listed in Appendix A.

[2] Question seven asked for the parties' views on the following issue: "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." Question eight asked "Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 N.L.R.B. 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.'"

[3] *Amici* also adopt the arguments made in the amicus brief for the American Hospital Association and American Society for Healthcare Human Resources Administration.

employee's right to have access to organizing information from multiple sources, and, in this case, on unit determination issues.

CDW's members—the vast majority of whom are covered by the National Labor Relations Act ("NLRA" or "the Act") or represent organizations covered by the NLRA—have a strong interest in the way the Act, and specifically Sections 9(b) and 9(c), is interpreted and applied by the Board. Regarding the Board's interpretation of the Act, CDW's members have a substantial and compelling interest in the Board's interpretation of what is an "appropriate" unit. For instance, if the Board were to adopt a rule resulting in a vast proliferation of narrow units, CDW's employer members would be burdened with administering a number of different contracts covering only a few of its employees, not to mention the constant state of bargaining and related workplace disruptions that would accompany a proliferation of units.

Further, as to the Board's administration of the Act, CDW's members are interested in ensuring that the Board administers the Act in a just, efficient manner authorized by statute. Specifically, CDW's members have an interest in guaranteeing that the Board stays within the confines of its authority when it applies the Act to employers and employees such as CDW's members.

HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The Association consists of more than 300 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce, and 20 million employees worldwide. Since its founding, one of

HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

With the exception of those subject to the Railway Labor Act, all of the member companies of HR Policy are employers subject to the NLRA. These members have a considerable stake in how the Act is interpreted.[4]

ARGUMENT

I. The Board Should Not Reach Questions Seven Or Eight Of The Notice And Invitation For Briefing

A. *The Issue Of Whether To Apply A Presumption In All Industries Is Not Before The Board*

In the case before the Board, the Regional Director (hereinafter "RD") was asked to decide the appropriateness of a unit comprised exclusively of certified nursing assistants (CNAs) at one of Specialty Healthcare's non-acute health care facilities. In making the appropriateness determination, the RD was required to apply *Park Manor Care Center*, 305 N.L.R.B. 872, which has provided the unit determination standard unique to non-acute care facilities for nearly 20 years. But, in his decision, the RD failed to properly apply *Park Manor Care Center* and held—for the first time—that an all-CNA unit was appropriate. When Specialty Healthcare appealed the RD's decision to the Board, which gave rise to the Notice in this matter, it raised two arguments. First, the Employer argued that the RD's decision "is improper, because [it] ignored the weight of the evidence and failed to find a community of interest among the employees in the Employer's proposed unit." Employer's Br. In Support of its Request for Review of the Regional Director's Decision and Direction of Election at 7. Second, the Employer objected that the RD's decision "is erroneous as a matter of law, because the RD completely failed to perform

[4] In lieu of a Statement of the Case, *Amici* adopt by reference the Employer's Brief In Support Of Its Request For Review Of The Regional Director's Decision and Direction of Election. Relevant facts of the case will be discussed throughout *Amici's* brief.

the second step of the *Park Manor* analysis, and never considered the Board's factfinding, the possibility of a proliferation of units, or the potential creation of residual units in this case." *Id.* at 7-8.

As clearly indicated by the issues raised in the Employer's Brief seeking review, and as noted in Member Hayes's dissent in the Notice, the issue of whether to clarify or overrule *Park Manor* is not properly before the Board.[5] But even if the continued validity of *Park Manor* were before the Board, there is nothing in this case that would justify the Board to "hold that a unit of all employees performing the same job at a single facility is presumptively appropriate…as a general matter" or that units are *ipso facto* appropriate if they are a "'readily identifiable…group whose similarity of function and skills create a community of interest.'" Notice at 2 (quoting *American Cyanamid Co.*, 131 N.L.R.B. 909, 910 (1961)).

The Board has recognized that both acute and non-acute health care facilities present unique issues with respect to unit appropriateness that require the application of a unit appropriateness standard differing from every other industry. *See* 53 Fed. Reg. 33,900 (Sept. 1, 1988) (codified at 29 C.F.R. Part 103); *Park Manor*, 305 N.L.R.B. at 875-76 (discussing factors unique to health care industry that require a test different from the "disparity of interests" or "community of interest" test). Thus, even if the Board were to reach the issue of whether to overrule *Park Manor*, the Board should stop there. There is no issue in the case currently before the Board warranting it to reconsider the validity of unit appropriateness standards "as a general matter."

The dissent to the Board's Notice suggests that the Board is engaging in "broad scale rulemaking" by reaching the *Park Manor* issue and, by advancing questions seven and eight, potentially abusing its discretion to choose between adjudication and rulemaking under *NLRB v.*

[5] The amicus brief of AHA and ASHRRA advances a similar argument, which *Amici* support and incorporate by reference.

Bell Aerospace Co., 416 U.S. 267 (1974). While *Amici* recognize the Board's discretion to determine whether to engage in adjudication or rulemaking, and that—with the sole exception of its rulemaking in the acute care industry—unit determination issues have been decided by either Congress or the Board's adjudication procedures, we agree with the dissent on this point.[6] Even though the Board has discretion to choose between adjudication and rulemaking, there is "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973). When the Board, as it has done here, reconsiders such important and well-established "policy-type rules or standards" such as the community of interest test, it must do so cautiously.

For instance, rather than injecting the issues raised in questions seven and eight into this case through a request for *amicus* briefs, the Board should consider a more thoughtful approach. When the Board last considered wholesale revisions to unit determinations standards, it engaged in a deliberate and thoughtful rulemaking process that included multiple hearings across the country and the taking of thousands of pages of testimony from dozens of witnesses. *See* 53 Fed. Reg. 33,900, 33,900 (Sept. 1, 1988). *Amici* respectfully suggest that the consideration of one of the most important areas of Board law—the standard analysis to apply in determining what is an appropriate voting unit—should only be considered in a comprehensive, thoughtful process such as rulemaking, rather than attempting to solicit the ad hoc views of interested parties through *amicus* briefs in adjudication. *See Pfaff v. U.S. Dept. of Housing*, 88 F.3d 739, 748-49 n.4 (9th

[6] *Amici* echo the concerns of the dissent, the AHA, and ASHHRA that, depending on the changes the Board attempts to implement, the Board may be—through adjudication—improperly promulgating a rule that is generalized in nature, prospective, based on undisputed facts, and results from a legislative-type judgment that would be an abuse of discretion under *Bell Aerospace Co.* and the Administrative Procedure Act (APA). Regardless of the legal requirements, however, as a matter of policy and precedent, the Board should engage in rulemaking if it decides to reconsider the validity of the extremely important issue of unit appropriateness standards across all industry.

Cir. 1996) ("[a]djudication is best suited to incremental developments to the law, rather than great leaps forward."). Where, as here, the issues raised in questions seven and eight do not exist in the case before the Board, it is particularly inappropriate to make such a "great leap" in the Board's law regarding unit appropriateness via adjudication. Given that the Board took the precautions of rulemaking when it modified the appropriate unit standard as applied to the acute care industry, surely the Board should undertake those same protections and careful consideration before revising the standard as applied to *all* industries.[7]

Finally, in any event, this issue should not be decided until the Board is operating with a full complement of confirmed members. While the Board has reconsidered or even reversed precedent in the past with less than a full complement, *amici* suggest that proceeding to consider the extremely important community of interest test without a full complement of confirmed Board members is not good public policy and also establishes inappropriate precedent for future Boards. There simply is no reason to rush to a decision with a Board with only three confirmed Members on issues as important as those presented in the *Specialty Healthcare* Notice.

B. *The Board Has Failed To Demonstrate That A Change In The Community Of Interest Standard Is Necessary*

Additionally, the Board's rationale for reconsidering standards—either in the non-acute care industry or generally—is unsupported by the Board's own data. The Notice issued states that "the Board's standards for determining if a proposed unit is an appropriate unit have long been criticized as a source of unnecessary litigation" and that "[i]f…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

[7] As the Ninth Circuit noted in *Pfaff*, the Administrative Procedures Act contains numerous mechanisms, such as the notice and comment rulemaking procedure, that allow for comment on a concrete set of proposals. *See* 88 F.3d at 748-49 n.4. Further, rulemaking would require the Board to consider the impact that any rule would have on businesses, particularly small businesses, and otherwise comply with the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act of 1996.

should apply more generally." Notice at 3. However, data from the Board suggests that very few election cases reach the RD's office, let alone the Board.[8] Tables 9 and 10 of the Board's Annual Report for Fiscal Year 2008 reveal that nearly 90% of the RC cases closed during that year were closed before an RD or the Board issued a decision. Of the 2,388 RC cases disposed of during FY 2008, only 183 of them (7.6%) resulted in an RD- or Board-directed election. The numbers for FY 2009 are nearly identical, with 90% of RC cases disposed of before the RD or Board issued a decision, and 146 of 2,002 cases (7.3%) resulting in a directed election. And, as *amicus* Chamber of Commerce of the United States of America notes in its brief, the Board's publicly available data reveals that unit determination issues are not overly delayed by litigation. According to the Chamber of Commerce's brief, of 107 elections in the Health Care and Social Assistance industry in FY 2009, 87 of them occurred by stipulation or consent with a median time of 40 days between petition and election.

Data specific to the health care industry likewise reveals that the vast majority of election and representation cases are resolved long before reaching the RD or Board. During October 2010 through January 2011, 109 elections were held in the Health Care and Social Assistance industries, which includes Ambulatory Health Care Services, Hospitals, Nursing and Residential Care Facilities, and Social Assistance. Of those elections, 87% were either consent (24) or stipulated (71) elections. One of the 109 elections was an expedited election. The remainder—13 elections (12%)—were directed by an RD. The Board was not required to direct a single election during that period.[9] Thus, while it is difficult to discern what portion of these cases

[8] Unless otherwise noted, all reports and data cited in this section are publicly available at http://www.nlrb.gov.

[9] In order to further assess the issues raised in the Notice, *Amicus* CDW filed an information request with the Board on February 2, 2011 requesting data on the number of representation cases in general industry and in the Health Care and Social Assistance industry. While parts of the information requested were provided in massive databases three (3) business days before the deadline for briefing, other parts remain pending. *Amici* maintain that if the Board insists on injecting issues into cases through requests for *amicus* briefs, it is incumbent upon the Board to produce information in a readily available and useful format to allow all interested parties and stakeholders to

were in non-acute care facilities, the data reveals that the Board's concern of employers litigating unit determination issues to delay an election is unfounded.

Thus, contrary to the Board's concerns, actual data shows that the vast majority of representation cases result in an election by agreement of the parties. And at any rate, there is no guarantee that changing the law will alleviate the perceived problems. If the Board were to adopt an approach making "same job" units presumptively appropriate, it is likely that employers will become *more* litigious as they seek to expand the units and avoid the significant burdens of unit proliferation. Accordingly, *Amici* request that the Board refrain from addressing questions seven or eight in the *Specialty Healthcare* Notice.

II. Employees Who Perform The Same Job At A Single Facility Should Not Constitute A Presumptively Appropriate Unit

Question seven of the Board's Notice asks whether the Board should "hold that a unit of all employees performing the same job at a single facility is presumptively appropriate" in either the non-acute health care industry or "as a general matter." Notice at 2. *Amici* respectfully submit that the Board should reject such an approach, as it did in *Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127 (Aug. 27, 2010).

In *Wheeling Island Gaming*, the Board was asked to review an Acting RD's decision that a petitioned-for unit of only poker dealers was inappropriate "because poker dealers did not have a community of interest separate and distinct from that of craps, roulette, and blackjack dealers." *Id.* Slip Op. at 1. A Board panel majority of Chairman Liebman and Member Schaumber agreed and affirmed the Acting RD's decision. *Id.*

(continued…)

submit meaningful comment. *Amici* request that the Board complete the response to the information request to the extent that it has not yet done so. *Amici* further reserve the right to supplement the record with its analysis of the data provided on March 3, 2010.

Dissenting, Member Becker would have reversed the Acting RD's decision and found that a unit of only poker dealers was appropriate because the unit "has a rational basis" based on the dealers' community of interest. *Id.* Slip Op. at 2. Member Becker found that any shared community of interest with other employees, such as blackjack, craps or roulette dealers, was irrelevant. *Id.* Under the dissent's view, "it should be emphasized that from the perspective of employees seeking to exercise their rights under the Act, one clearly rational and appropriate unit is all employees doing the same job and working in the same facility. Absent compelling evidence that such a unit is inappropriate, the Board should hold that it is an appropriate unit." *Id.*

Chairman Liebman and Member Schaumber rejected Member Becker's novel approach. Both Chairman Liebman and Member Schaumber agreed that the "same job" approach failed to consider whether the employees in that same job had a community of interest "sufficiently distinct" from other employees to warrant the establishment of a separate unit. *Id.* Slip Op. at n.2. Further, while the Board does not make appropriateness determinations based on size of the unit alone, a unit could be found inappropriate if it "'is *too narrow in scope* in that it excludes employees who share a substantial community of interest with employees in the unit sought.'" *Id.* (quoting *Colo. Nat'l Bank of Denver*, 204 N.L.R.B. 243 (1973) (emphasis added in *Specialty Healthcare*)). In addition, Member Schaumber also dissented from Member Becker's approach on the basis that it "gives effect to the statutory prohibition against defining a unit based on the extent of a union's organizing," contrary to Section 9(c)(5). *See id.* and Section II.B, *infra*.

The standard described in question seven of the Notice should be rejected for the same reasons the Board rejected the standard proposed by Member Becker in *Wheeling Island*

Gaming. As the Board noted in *Wheeling Island Gaming*, that standard is flawed and contrary to established Board law and the plain language of the NLRA.

A. *A "Same Job" Presumption Fails To Consider Whether The Unit Is "Sufficiently Distinct" And Is Contrary To Board Law And The National Labor Relations Act*

Adopting a standard that would create a presumption of appropriateness for employees in the same job at the same facility fails for both legal and public policy reasons. The proposed standard ignores one of the central and "necessar[y]" factors in the unit appropriateness analysis: "whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *Wheeling Island Gaming*, 355 N.L.R.B. No. 127, Slip Op. at *1 (quoting *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980)) (emphasis added by *Wheeling Island Gaming*); *see also, e.g.*, *Virtua Health, Inc.*, 344 N.L.R.B. 604 (2005) (refusing to create unit of only paramedics because they did not have a sufficiently distinct community of interest from other employees); *Pratt & Whitney*, 327 N.L.R.B. 1213 (1999) (refusing to create separate unit of engineers because there was no sufficiently distinct community of interest from other engineers); *Sheridan Peter Pan Studios, Inc.*, 144 N.L.R.B. 3 (1963) (denying certification to unit of only photographers where they were only a segment of the employer's administrative department).

Undoubtedly, employees who work in the same job in the same facility will have certain common interests. However, "[t]he Board's inquiry into the issue of appropriate units, even in a non-health care industrial setting, never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Newton-Wellesley Hospital*, 250 N.L.R.B. at 411. Requiring a "sufficiently distinct" factor in the appropriateness analysis serves important objectives of the Act by avoiding proliferation of units and by assuring "to employees the fullest freedom in exercising the rights guaranteed by" the NLRA. *See* 29

U.S.C. § 159(b) ("The Board shall decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.") (emphasis added).

First, presuming that a "same job" unit is appropriate would result in the proliferation of units, which both Congress and the Board have attempted to avoid. When Congress amended the NLRA in 1974 to cover the health care industry, it indicated concern about the proliferation of bargaining units in that industry, where there were many separate professional and vocational specialties each of which could plausibly form a unit that could paralyze the facility. *See* S. Rep. No. 766, 93d Cong. 2d Sess. 5 (1974); H. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974); *see also NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1469-70 (7th Cir. 1983) (discussing proliferation in health care industry); *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984) (proliferation in general industry). And, as the Board has recognized "[i]t is well established that the Board does not approve fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Seaboard Marine, Ltd.*, 327 N.L.R.B. 556, 556 (1999); *see also Colo. Nat'l Bank of Denver*, 204 N.L.R.B. at 243 (rejecting petitioned-for unite as "too narrow in scope in that it excludes employees who share a substantial community of interest with employees in the unit sought.").

Adopting a "same job" presumption would essentially eliminate the "sufficiently distinct" factor from the appropriateness analysis and, by doing so, would create in all industries the concern that Congress saw in the health care industry—employers faced with multiple fragmented units, each of which could halt the employer's operations if their demands were not satisfied. *See Cont'l Web Press*, 742 F.2d at 1090 ("The different unions may have inconsistent

goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike.")[10] Thus, an employer balkanized into multiple units is burdened with not only the costly burden of negotiating separately with a number of different unions, but also the attendant drama and potential work disruption, coupled with a threat that its operations could be ceased by self-interested fractions of the workforce. *See id.* This type of fractious dealing and conflict between multiple interest groups, with multiple voices, is the type of conflict that Section 9(b) and the community of interest test are meant to avoid. *See Oakwood Care Ctr.*, 343 N.L.R.B. 659, 662-63 (2004).

Additionally, the proliferation of collective bargaining agreements in a single facility can lead to the establishment of barriers that will prevent an employer from efficiently running its operation. For instance, each bargaining unit will likely seek to protect work performed exclusively by the unit members, thereby attempting to put contractual walls around the unit's work. This will impair an employer's ability to assign work in the most efficient manner, even if employees inside and outside of the unit are equally capable of performing the work (*i.e.*, blackjack dealers versus poker dealers). This loss in productivity will detract from, rather than enhance, economic competitiveness. Thus, establishing narrow units will not advance the goal of having a competitive workplace and can undermine the viability of an operation, which will not produce future job opportunities – important goals in today's global environment.

Likewise, the proliferation of units also creates workplace barriers limiting the rights of employees. Allowing "same job" units also creates the risk of balkanizing the workforce by forming communities of interest based on such unit determination, rather than the underlying

[10] Additionally, *Amici* support the argument made by the AHA and ASHHRA as it relates to *Four Seasons Nursing Center of Joliet*, 208 N.L.R.B. 403 (1974) and *Woodland Park Hospital, Inc.*, 205 N.L.R.B. 888 (1973). As the AHA and ASHHRA note, Congress's citation to *Four Seasons* and *Woodland Park* indicate that its concerns with unit proliferation were not limited to the acute care industry. Thus, the Board should carefully consider the likelihood that a "same job" standard would result in an increased number of narrow units.

functional reality of the positions. But perhaps most troublesome is the freezing effect that fragmented units would have on employee advancement. When the varied collective bargaining agreements inevitably have differing provisions for transfers, promotions, seniority, position posting and preference, etc., it will be extremely difficult—if not impossible—for an employee whose unit is limited to his or her unique job description to develop his or her career.

The standard proposed in question seven is inappropriate for a second reason: it is contrary to Section 9(b)'s admonition that the appropriateness determination "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter." *See* 29 U.S.C. § 159(b). As multiple courts have recognized, "'the union will propose the unit it has organized.'" *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995) (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) and citing *Cont'l Web Press, Inc.*, 742 F.2d at 1093). By announcing a presumption of appropriateness for units based on job title, the Board invites unions to petition for the election it can win, rather than the election for a unit that is sufficiently distinct to justify a separate status. As a result, employees who want union representation but who perform a job with others who do not want representation either lose their opportunity to organize or become part of an extremely small unit with virtually no bargaining power or leverage. *See Cont'l Web Press, Inc.*, 742 F.2d at 1090 ("[B]reaking up a work force into many small units creates a danger that some of them will be so small and powerless that it will be worth no one's while to organize them, in which event the members of these units will be left out of the collective bargaining process."). Of course, overly-narrow units also disenfranchise those who wish to cast a vote *against* organization, as is their right under Section 7. Limiting a petition to only one job within a function (i.e., poker dealers rather than poker, blackjack, craps, and roulette dealers), disenfranchises the vote of the employee in the petitioned

for unit who would vote "no" to representation, particularly if the votes within the entire function may have included more "no" votes.[11] But regardless of how the line-drawing is done, a standard that allows for the establishment of artificially ***created*** narrow and isolated units to win the vote does not "assure…employees the fullest freedom" in organization.

In sum, a petitioned-for unit cannot be "appropriate" unless it has a community of interest "sufficiently distinct" from those excluded from the desired unit. Applying a presumption based along job description lines alone abandons this important part of the appropriateness determination and, in doing so, will result in a proliferation of units that hinders, rather than encourages, both the collective bargaining process and the rights of individual employees. Accordingly, *Amici* respectfully submit that the Board should not adopt the standard proposed in question seven.

B. *A Presumption Of Appropriateness Violates Section 9(c)(5)*

Section 9(c)(5) of the NLRA, added in 1947 through the Labor Management Relations Act, states that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). The legislative history of Section 9(c)(5) reveals that the Senate adopted the House-proposed amendment "to discourage the Board from finding a bargaining unit to be appropriate *even though such unit was only a fragment of what would ordinarily be deemed appropriate*, simply on the extent of organization theory." 93 Cong. Rec. 6601 (1947) (emphasis added). As the Board recognizes, Section 9(c)(5) "was intended to prevent fragmentation of appropriate units into smaller inappropriate units." *Overnite Transp. Co.*, 322 N.L.R.B. 723, 725 (1996) (*Overnite Transp. I*) (citing Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free*

[11] Of course, if the union thought it would win a larger unit, it would petition for it. ""[T]he union will propose the unit it has organized.'" *NLRB v. Lundy Packing Co.*, 68 F.3d at 1581.

Choice, 18 Case W. Res. L. Rev. 479, 503-04 (1967)). While the Board may consider extent of organizing as *a* factor in the appropriate analysis, the extent of organizing may not be "the *controlling* factor" in the appropriateness determination. *See NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965) (emphasis added); *accord Lundy Packing Co.*, 68 F.3d at 1580; *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978); *Overnite Transp. I*, 322 N.L.R.B. at 724.

In *Wheeling Island Gaming*, Member Schaumber noted that the dissent's standard for unit determinations likely violated Section 9(c)(5). Member Hayes's dissent from the Notice in this case raises similar concerns. Because, like the dissent's position in *Wheeling Island Gaming*, the standard proposed in question seven makes extent of organizing the controlling factor in determining whether the presumption of appropriateness applies, the standard violates Section 9(c)(5).

The standard proposed in question seven fails under any meaningful reading of Section 9(c)(5). Under the proposed standard, a union would appear to be entitled to a presumption of appropriateness as long as it only organizes employees in the same job at a single facility—that is, as long as the extent of the union's organization does not reach beyond a single job, the unit is presumed appropriate. In that case, the extent of the union's organization is the only factor that triggers the presumption, violating Section 9(c)(5)'s prohibition.

The standard proposed in question seven discusses a presumption, but does not indicate whether the presumption is rebuttable or irrebuttable. Of course, if the presumption is irrebuttable and the Board intends to select a petitioned-for unit as *the* appropriate unit based solely on the extent of the union's organization, Section 9(c)(5) is clearly violated. But even if the presumption is rebuttable, similar to the standard advanced by Member Becker in *Wheeling*

Island Gaming, the standard still creates a Section 9(c)(5) violation under the Fourth Circuit's reasoning in *Lundy Packing Co.*

Much like the proposed standard in question seven and the *Wheeling Island Gaming* dissent, the Board in *Lundy Packing Co.* "adopted a novel legal standard" under which "any union-proposed unit is presumed appropriate unless an 'overwhelming community of interest' exists between the excluded employees and the union-proposed unit." 68 F.3d at 1581. The Court found that this standard violated Section 9(c)(5), notwithstanding the chance to rebut the presumption, because "[b]y presuming the union-proposed unit proper . . . the Board effectively accorded controlling weight to the extent of union organization." *Id.* Likewise, the proposed standard in question seven "effectively accord[s] controlling weight to the extent of union organization" as long as the union limits its organization to employees in the same job in a single facility.

Finally, this is not a case where extent of organization is only one of multiple factors. The presumption of appropriateness proposed by the Board will result in an appropriateness determination based *only* based on the extent of the organized and petitioned-for unit. The D.C. Circuit has distinguished *Lundy Packing Co.* where the Board "did not presume the Union's proposed unit was valid," but considered multiple other factors and made findings on the record. *See Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 423 (D.C. Cir. 2008). Similarly, in *Overnite Transp. Co. v. NLRB*, 294 F.3d 615 (4th Cir. 2002) (*Overnite Transp. II*), the Fourth Circuit affirmed an RD's decision that noted the union's desires concerning the composition of the unit, but also applied the community of interest factors and case law. 294 F.3d at 620. But the standard proposed in question seven is far different from those in *Blue Man Vegas* or *Overnite Transportation II* as it does not require record findings or consideration of case law. Rather,

based on the petition alone, the Board proposes to deem a unit presumptively appropriate. Such a presumption is clearly contrary to Section 9(c)(5) and should not be adopted by the Board.

III. *American Cyanamid* Does Not Support A Single Job Unit

In question eight, the Board asks whether it should "find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 N.L.R.B. 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.'" Notice at 2. However, the passage quoted from *American Cyanamid* is rather unremarkable, when considered in context: the Board simply decided in that case that "on the basis of the evidence in this record…maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation." 131 N.L.R.B. at 910. Thus, *American Cyanamid* simply applies the community of interest factors and finds that the petitioned-for unit of employees performing the maintenance functions at that place of employment constituted an appropriate unit. Cases applying *American Cyanamid* do so in the context of what is an appropriate unit for maintenance employees, and not for any holding regarding "employees [who] are readily identifiable as a group."

Member Becker's dissent in *Wheeling Island Gaming* applies a flawed interpretation of the holding in *American Cyanamid*: that having a *separate identity* is sufficient, without "requir[ing] a showing that the terms and conditions of employment of the maintenance employees substantially differed from all other employees of their employer." *See* 355 N.L.R.B. No. 127, Slip Op. at *2-3. Further, Member Becker objected that while making a showing of special and distinct interests might be appropriate in severance cases, "it is not appropriate in determining whether a proposed unit of organized employees is an appropriate unit." *Id.* at *3. Again, the *Wheeling Island Gaming* panel majority rejected this argument, noting that "[t]he

Board has a long history of applying [the "sufficiently distinct"] standard in initial unit determinations," citing *Monsanto Co.*, 183 N.L.R.B. 415 (1970), and *Harrah's Ill. Corp.*, 319 N.L.R.B. 749 (1995). *See also Virtua Health, Inc.*, 344 N.L.R.B. 604 (refusing to find a unit limited to paramedics appropriate because they are not sufficiently distinct from other employees).

Member Becker correctly notes that both the community of interest test and the requirement of a showing of distinctness are traced to *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962)—a unit severance case. However, the factors from that case are routinely applied in cases involving previously unrepresented employees. *See*, *e.g.*, The Developing Labor Law 643 n. 21 (Higgens, Ed.) (2006). And, when the Board recently summarized the appropriateness analysis, the focus was not on the employees' identity—as Member Becker suggests it should be—but on the underlying distinctness of the function performed by the employees in the petitioned-for unit:

> In determining whether a unit of employees…is appropriate, the Board considers whether the employees are organized into a separate department; have *distinct skills and training*; have *distinct job function* and perform *distinct work*, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have *distinct terms and conditions of employment*; and are separately supervised.

United Operations, Inc., 338 N.L.R.B. 123, 123 (2002) (emphasis added). Undoubtedly, employees who satisfy the community of interest test will often be "readily identifiable" as a group separate from other employees. But Member Becker's reading of *American Cyanamid* places the proverbial cart before the horse: an employee's distinctiveness of function, functional integration, frequency of contact, and interchange with other employees gives them a community of interest and, in all likelihood, a separate identity. But the identity, alone, does not

create a community of interest and justify a finding that the identifiable employees warrant a separate and appropriate unit.

The Board, therefore, should decline to find a unit appropriate based solely on a finding that all employees in the proposed unit share a common job description. Such an approach not only totally disregards years of well-established and sound Board jurisprudence, but also such an approach would violate Sections 9(b) and 9(c)(5) of the Act. Thus, the Board should continue to apply the traditional community of interest test as articulated in footnote 2 of the majority opinion in *Wheeling Island Gaming*.

CONCLUSION AND SUMMARY OF RESPONSES TO QUESTIONS

For the foregoing reasons, *Amici* respectfully request the Board to refrain from addressing the issues raised in questions seven and eight or, in the alternative, to refrain from adopting the standards raised in those questions. In the event that the Board chooses to answer questions seven and eight, *Amici* submit the following responses.

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.*

Amici respectfully submit that the answer is "no." A "same job" presumption fails to consider whether the unit is "sufficiently distinct" as required by Board law and further violates Section 9(c)(5) of the Act by relying exclusively on the extent of organization.

8. *Should the Board find a proposed unit appropriate if, as found in American Cyanamid Co., 131 N.L.R.B. 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."*

Amici respectfully submit that the answer is "no." While sharing a community of interest may create a "readily identifiable…group," the shared identity is insufficient to warrant the creation of a separate bargaining unit. Rather, the Board should continue to focus on the traditional community of interest test and the distinct nature of skills, training, work, and job function between employees included and excluded from the unit sought.

Respectfully submitted,

/s/ G. Roger King
G. Roger King
Andrew M. Kramer
R. Scott Medsker

Dated: March 8, 2011

Counsel for *Amici Curiae*

APPENDIX A

National Organizations (49)

American Bakers Association
American Fire Sprinkler Association
American Foundry Society
American Hospital Association*
American Hotel and Lodging Association
American Meat Institute
American Pipeline Contractors Association
American Seniors Housing Association*
American Trucking Associations
Assisted Living Federation of America*
Associated Builders and Contractors
Associated General Contractors of America
Brick Industry Association
Center for the Defense of Free Enterprise
College and University Professional Association for Human Resources
Federation of American Hospitals
Food Marketing Institute
Forging Industry Association
Heating, Airconditioning & Refrigeration Distributors International (HARDI)
Independent Electrical Contractors
Industrial Fasteners Institute
International Association of Amusement Parks and Attractions
International Council of Shopping Centers
International Foodservice Distributors Association*
International Franchise Association
International Warehouse Logistics Association
Metals Service Center Institute
Modular Building Institute
National Association of Chemical Distributors
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Council of Farmer Cooperatives
National Council of Textile Organizations
National Federation of Independent Business
National Grocers Association

National Mining Association
National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
North American Die Casting Association
Printing Industries of America
Retail Industry Leaders Association*
Snack Food Association
Society for Human Resource Management
Truck Renting and Leasing Association

State and Local Organizations (28)

Arkansas State Chamber of Commerce/Associated Industries of AR
Associated Builders and Contractors Inc., Greater Houston Chapter
Associated Builders and Contractors, Inc. Central Ohio Chapter
Associated Builders and Contractors, Inc. Central Pennsylvania Chapter
Associated Builders and Contractors, Inc. Delaware Chapter
Associated Builders and Contractors, Inc. Eastern Pennsylvania Chapter
Associated Builders and Contractors, Inc. Heart of America Chapter
Associated Builders and Contractors, Inc. Inland Pacific Chapter
Associated Builders and Contractors, Inc. Keystone Chapter
Associated Builders and Contractors, Inc. Michigan Chapter
Associated Builders and Contractors, Inc. Mississippi Chapter
Associated Builders and Contractors, Inc. Nevada Chapter
Associated Builders and Contractors, Inc. Rhode Island Chapter
Associated Builders and Contractors, Inc. Rocky Mountain Chapter
Associated Builders and Contractors, Inc. Southeast Texas Chapter
Associated Industries of Massachusetts
Capital Associated Industries, Inc., Raleigh and Greensboro, NC
Charleston Metro Chamber of Commerce
Flagstaff Chamber of Commerce
Kansas Chamber
Little Rock Regional Chamber of Commerce
Management Association of Illinois
Montana Chamber of Commerce
Nevada Manufacturers Association
New Jersey Motor Truck Association
Texas Hospital Association
Virginia Trucking Association

West Virginia Chamber of Commerce

**** These organizations have filed separate amicus briefs in this case. They also have joined this brief as members of CDW and support the arguments herein.***

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2011, a true and correct copy of the Brief of *Amici Curiae* Coalition For A Democratic Workplace And HR Policy Association In Support of Respondent Employer was electronically filed with the National Labor Relations Board and was served by e-mail upon:

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