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	)	

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

G. Roger King (Counsel of Record)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215-2673
(614) 281-3939

Andrew M. Kramer
R. Scott Medsker
JONES DAY
51 Louisiana Ave., N.W.
Washington D.C. 20001-2113
(202) 879-3939

Counsel for *Amici Curiae* Coalition for a Democratic Workplace and HR Policy Association

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INTRODUCTION

Coalition for a Democratic Workplace ("CDW") and HR Policy Association ("HR Policy") (together, "*Amici*") respectfully submit this supplemental brief *amici curiae* as authorized by the National Labor Relation Board ("NLRB" or "the Board") in its March 15, 2011 Order to address representation case ("R case") data posted on the Board's website. *See* Order Modifying Briefing Schedule and Granting Extension of Time to File Supplemental Briefs, attached hereto as Ex. A. Specifically, *Amici* believe that it is incumbent upon the Board—and not *Amici*—to analyze all relevant data in the Board's possession and explain the Board's belief that the current unit determination standard results in "unnecessary litigation and delay." *Specialty Healthcare & Rehab. Ctr.*, 356 N.L.R.B. No. 56, at *4 (Dec. 22, 2010) (Notice and Invitation to File Briefs (hereinafter "Notice")). *Amici* further believe that the information provided to interested stakeholders is unusable both in format and content, denying stakeholders the opportunity to submit meaningful comment on the issues raised in the Board's Notice. However, as *Amici* stated in their prior brief in this matter, other Board data confirms *Amici*'s position that the Board's concerns of widespread litigation and delay in election cases are unfounded.

STATEMENT OF INTEREST

Amici incorporate by reference the statement of interest as contained in their March 8, 2011 brief filed in this matter.

ARGUMENT

I. The Board, And Not *Amici*, Should Analyze Its Own Representation Case Data In The First Instance.

The Board's Notice in this matter indicates that the Board's review of unit determination standards in the long-term health care industry and "more generally" is based, in part, on a perception that parties engage in litigation over the scope of a unit to "unnecessar[ily]" delay an election. Notice at *4. The Board wrote:

> [I]n the long-term [health] 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. Yet the Board has often recognized the "Act's policy of expeditiously resolving questions concerning representation." *Northwestern University*, 261 N.L.R.B. 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.

Id. (footnoted omitted). However, beyond this assertion, the Board failed to provide any evidentiary data or further statement explaining its concern that any delay was caused by litigation involving the current unit appropriateness standard as articulated in *Park Manor Care Center*, 305 N.L.R.B. 872 (1991), in the long-term care industry, or the more generally applicable community of interest test.

In an attempt to research and comment on the Board's assertion that litigation and delayed elections might warrant changing the standard for unit determination, *amicus* CDW filed a Freedom of Information Act ("FOIA") request seeking, among other information, any "statistical analyses, surveys, reports, or other data" that the Board relied upon in issuing its

Notice. According to the Board, however, there were no such documents. *See* Mar. 4, 2011 Ltr. from NLRB Exec. Sec'y Lester A. Heltzer to R. Scott Medsker, attached hereto as Ex. B.

Amici remain concerned by the Board's approach to the important issues raised in this case. As stated in their March 8, 2011 brief, *Amici* believe that before deciding an issue as important as the proper standard for unit determinations in the long-term health care industry—let alone industry in general—the Board should engage in a careful, thorough review as it did when it promulgated its final rule on appropriate units in the acute care industry. Thus, the Board's admission that it did not review any statistical analyses, surveys, reports, or other data before issuing its Notice is troubling. Further, *Amici* respectfully submit that even if the Board did not rely on statistical analyses, surveys, reports, or other data, it is incumbent upon the Board to review the relevant data in its own possession, rather than simply asserting, without supporting data, that there is a problem of delayed elections caused by the unit determination standard and asking interested stakeholders to comment in the first instance without the benefit of any Board guidance.

Indeed, the importance of providing such information has been stressed by President Obama in his Executive Order 13563, "Improving Regulation and Regulatory Overview." Section 2 of the Executive Order encourages "the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole." *See* Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011) attached hereto as Ex. C. Further, the President's Office of Management & Budget advised all independent regulatory agencies of the importance of Section 2's requirement of "afford[ing] the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days," and has

encouraged independent regulatory agencies such as the Board to comply with the Executive Order. *See* Memorandum For The Heads Of Executive Departments And Agencies, And Of Independent Regulatory Agencies, M-11-10 (Feb. 2, 2011), attached hereto as Ex. D.

Consistent with Executive Order 13563's objectives of creating open dialogue and providing the public an opportunity for meaningful comment, *Amici* respectfully submit that it is incumbent on the Board to produce relevant data and articulate why the data suggests that litigation and delay are caused by the Board's current standard on unit appropriateness. As Member Hayes noted in his dissent to the Board's Notice, "copious information is already available in-house in records maintained by [the Board's] Office of Representation Appeals." Notice at *8. While, as it did here, the Board can produce raw data in response to FOIA requests from interested stakeholders or requests from Congress, public comment will be more meaningful and complete if the Board analyzes its own data in the first instance, articulates its interpretation of the data, and then invites public comment. By doing so, the Board will allow all interested stakeholders an opportunity to review the data, undertake their own analysis, and offer their own interpretations of the data or respond to the Board's interpretation of the data.

The Board's apparent failure to review any "statistical analyses, surveys, reports, or other data" before suggesting that the current unit determination standards cause delay in elections calls into question whether a review of *Park Manor* or the community of interest standard is actually warranted. But, more importantly, the Board's failure to produce data in a usable format, as discussed *infra*, and the Board's failure to articulate its interpretation of its own R case data, and then invite public comment, seriously limits the ability of the public and interested stakeholders such as *Amici* to offer meaningful comment on the issues raised by the Board. As a result, *Amici*'s concerns about the appropriateness of the Notice and Invitation process as

articulated in its initial brief are heightened. *Amici* believe that the Board's failure to analyze its own data and invite public comment further hinders an already insufficient process for allowing public comment on this important issue.

II. The Information Produced By The Board Is Neither In A Usable Format Nor Does It Address The Issues Raised In The Notice.

In its March 15 Order, the Board asked *Amici* and the parties to analyze R case data published on the Board's website and comment on the data and the Board's perception of election delay caused by the Board's current unit determination standards. However, the information published by the Board is unusable and does not contain enough information to respond to the Board's concerns regarding election delay.

First, the data as published is unusable because interested parties are incapable of determining what the data means. The Board offers no explanation of the various data fields contained in the published files beyond a generic description of the data as containing "[a]ll RC petitions" for all industries, the health care industry, and nursing and residential care facilities. While the data in some columns is readily identifiable ("Unit_Loc_State," "Election_Results," etc.), other columns such as "Tally_Type," (including "initial" and "revised initial"), "Unit_ID" (coded as either or "A" or "B"), etc. remain undefined and unexplained. Without knowing what the data purports to show, interested stakeholders such as *Amici* and the public at large are unable to analyze and comment on the data.

Second, the data is inaccessible and, even if accessed, is organized in a manner that prevents interested parties from analyzing the data. Initially, the data's published format makes it difficult, if not impossible, to access it in a meaningful way. The data on the Board's website is published in an ".xml" format, showing the data in a web-based format that cannot be sorted, organized, reformatted, or significantly analyzed. *Amici* estimate that the general industry files

alone contain approximately 28,057 rows of data. Producing this data in a format that prevents the public from sorting or organizing the data makes analysis virtually impossible, particularly in light of the Board's limited extension of fourteen days to analyze the data.

Third, beyond the data's format, the content of the data appears to be duplicative and internally inconsistent to the point that it is impossible to extract reliable information. For instance, the CATS-FRF-R-HEALTHCARE-2009 file contains sixteen entries for Case Number 11-RC-06495, involving a petition filed on August 26, 2002 and an election held on July 17, 2008—2,152 days apart.[1] While the file shows a "Date_Closed" date of November 17, 2008, eight of the entries show that the case was dismissed by a Regional Director while the other eight entries show that the election results were certified by a Board decision. Further, four of the sixteen entries indicate that the Board issued a pre-election decision on October 31, 2006. As a result, the multiple data entries skewed all of the information *Amici* sought from the published data, including median times to election, number of cases closed at a particular stage of the R case process (i.e., after notice of hearing but before hearing closed), and the relationship between the median number of days to election and the stage of the R case proceeding at which the case closed.

Unfortunately, the repetitive or seemingly inconsistent data is not unique to the 2009 file. For instance, the CATS-FRF-R-HEALTHCARE-2004 file shows eight entries for Case Number 03-RC-11359, four of which show an election on August 14, 2003 and four which show a rerun election on January 30, 2004. However, two of the rerun rows indicate that SEIU Local 1199 Upstate won the election while the other two rows indicate that the SEIU Local 1199 lost the election.

[1] With the assistance of professional technical support, *Amici* were able to convert the Board's .xml format into a sortable Excel format and calculate the number of days between petition filing and election. However, after sorting the data and identifying anomalies in the spreadsheet's calculations, *Amici* discovered the duplicative data and confirmed that the issue occurs in multiple files regardless of whether it is viewed in .xml or Excel format.

Fourth, the sheer volume of the data makes it unusable, particularly when viewed against the fourteen day extension the Board granted for parties to obtain the data, analyze it, and draft briefs for submission. For instance, it appears that the Board's data on all R case petitions for the health care industry from 2000-2011 contains 4,763 rows of data. The files containing R case petitions across all industries contain approximately 28,057 rows of data on elections. *Amici* submit that it is unreasonable for the Board to expect the public to analyze, review, and comment on this data in a fourteen-day window, particularly considering the unusable format and content of the data produced.

Finally, even if parties could analyze the published data, it appears that the information contained in the files may not address the election delay issue raised by the Board. While the information contains a "Date_Filed" column and a "Date_Election" column, there is no data indicating the number of days it took to reach an election. To the extent that a party can calculate the difference in the number of days between the filing date and election date, it is unreasonable to expect parties to do so for the thousands of cases contained in the data. And, as discussed above, the ".xml" format the Board chose for producing such data does not allow the addition of columns or creation of formulas to ascertain the difference between the two dates. Performing those calculations in other formats, such as Excel, produces unreliable results because of the multiple entries for single cases.

Even if the data revealed delays in elections, nothing in the Board's data indicates whether the delay was caused by a dispute over the appropriateness of the petitioned-for unit. While the data includes a column describing the unit deemed appropriate, and other columns indicate whether a hearing occurred or the Regional Director or Board issued a decision, there is no indication of whether the parties litigated any issue, let alone whether litigation could have

been avoided by applying the Notice's "single job" presumption of unit appropriateness. For instance, while the 2009 data file suggests that the petition in Case Number 11-RC-06495 was initially dismissed and results were later certified, the data does not reveal what caused the delay in the election being held. Further, while the 2004 data indicates that Case Number 03-RC-11359 took 50 days to reach an initial election and 219 days for a rerun election to occur, that data does not suggest that unit appropriateness was the cause of the delay. To the contrary, it appears that an appropriate unit was identified and an election proceeded within 50 days while some other reason, such as a violation of laboratory conditions, was the cause of the more significant delay. Thus, without being able to identify the reason for any delay, it is impossible for *Amici* to offer "full and appropriate input" on whether "the standard applicable in long-term care facilities can be clarified to prevent unnecessary litigation and delay," or whether "such revision should apply more generally." Notice at *4.

III. Other Available Data Reveals That The Board's Concerns Regarding Election Delay Are Unfounded.

While the Board failed to offer its own interpretation of its R case data and further failed to produce the information in a usable format, other available data suggests that the Board's concerns with widespread delay in elections are unfounded.[2] As *Amici* stated in their initial brief in this matter, the available, usable data reveals that elections were only delayed in a slim minority of cases—less than 8% in FY 2008 and 2009—by parties litigating issues to the point of a Regional Director or the Board directing an election to take place. *See* Brief of *Amici Curiae* Coalition For A Democratic Workplace And HR Policy Association In Support Of Respondent Employer at 7, attached hereto as Ex. E. As *Amici* also stated, the vast majority of cases in both the health care industry and general industry occurred as a result of consent or stipulated

[2] Unless otherwise noted, all reports and data cited in this section are publicly available at http://www.nlrb.gov. Tables 9 and 10 of the Board's Annual Reports contain relevant data on R cases.

elections. *Id.* Annual Reports show that only a handful of these consent or stipulated elections reached the hearing stage.

Finally, the data also reveals that litigation in R cases is not an increasingly frequent occurrence. To the contrary, the data suggests that elections today are more likely to be the result of consent or stipulation, rather than a directed election, than 30 or 40 years ago. The 1970 and 1980 Annual Reports indicate that approximately 14% of elections in those years were Regional Director- or Board-directed elections compared to the approximately 8% average contained in the 2008 and 2009 Reports.

Thus, what data is available seems to suggest that litigation delaying elections is not as prevalent an issue as suggested by the Board's Notice. Nor has the Board produced any data supporting its suggestion that litigation leads to delay in elections, let alone that the litigation causing the delay involves the Board's current unit determination standards. Given that the relevant data is in the Board's possession, and the Board has not produced any data, *Amici* are led to the following conclusions: (1) there is no data supporting the Board's position on this issue, and (2) there is no compelling reason to modify the unit determination standards as articulated in *Park Manor Care Center* or the well-established traditional community of interest test.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Board has not provided any statistical analyses, survey, report, or other data supporting its concern that litigation over unit appropriateness leads to an unnecessary delay in elections. Accordingly, for this reason and for the reasons stated in their initial brief, *Amici* urge the Board to refrain from modifying the unit determination standards applicable to the long-term health care industry or any other industry.

Respectfully submitted,

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

Dated: March 29, 2011

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March 2011, a true and correct copy of the Supplemental 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:

Clifford H. Nelson, Jr.
Constangy, Brooks & Smith LLC
230 Peachtree Street, NW
Suite 2400
Atlanta, GA 30303
cnelson@constangy.com

Leigh E. Tyson
Constangy, Brooks & Smith LLC
230 Peachtree Street, NW
Suite 2400
Atlanta, GA 30303
ltyson@constangy.com

Edward J. Goddard
Kindred Healthcare, Inc.
680 South Fourth Street
Louisville, KY 40202
edward.goddard@kindredhealthcare.com

Charles P. Roberts, Esq.
Constangy, Brooks & Smith LLP
100 North Cherry Street, Suite 300
Winston-Salem, NC 27101
croberts@constangy.com

Randy Rigsby
Staff Organizer
USW District 9
919 Sharit Avenue
Suite 213
Gardendale, AL 25071
rrigsby@usw.org

Daniel M. Kovalik
Assistant General Counsel
United Steelworkers
Five Gateway Center
Pittsburgh, PA 15222
dkovalik@usw.org

Richard P. Rouco, Esq.
Whatley Drake LLC
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
rrouco@whatleydrake.com

Kathleen McKinney
National Labor Relations Board
Region 15 – New Orleans
600 South Maestri Place
7th Floor
New Orleans, LA 70130-3413
kathleen.mckinney@nlrb.gov

/s/_G. Roger King
G. Roger King

EXHIBIT A

NOT INCLUDED IN
BOUND VOLUMES

Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPECIALTY HEALTHCARE AND REHABILITATION
CENTER OF MOBILE

Employer

and Case15-RC-8773

UNITED STEELWORKERS, DISTRICT 9

ORDER MODIFYING BRIEFING SCHEDULE AND
GRANTING EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEFS

On December 22, 2010, the Board issued a Notice and Invitation to File Briefs in this case on certain questions set forth in the Notice and Invitation. The deadline for filing briefs was February 22, 2011.

On February 7, 2011, the Board extended the time to file briefs until March 8, 2011, granting, in part, the unopposed requests of the Employer and prospective amicus curiae Coalition for a Democratic Workplace. The Board applied that extension of time to briefs filed by all other parties and any interested amici, and correspondingly extended the time for parties to file responsive briefs to March 22, 2011.

By letter dated March 2, 2011, as amended and filed on March 8, 2011, United States Senators Michael B. Enzi, Orrin G. Hatch and Johnny Isakson requested that the Board make public certain NLRB representation case data that had been requested by

private persons under the Freedom of Information Act (FOIA) and requested that the Board extend the time for filing briefs by 60 days.[1]

By letter dated March 7, 2011, Congressmen John Kline and Darrell Issa requested that the Board post, on its website, representation case (RC) data responding to specific enumerated questions in that letter. The Congressmen also requested that the Board grant an extension of time for the filing of briefs to 60 days after the website posting.

In their briefs filed in response to the Notice and Invitation to File Briefs, various amici argued that the Board's representation case data would have been helpful to inform their submissions.

The Board now has posted on its website the representation case data made available in response to FOIA requests, which data may be accessed on the Board's website at: http://www.nlrb.gov/node/392. Other representation case data is available through the Board's website at: http://www.nlrb.gov/opengov/nlrb-data-datagov. The Board has decided to grant, in part, the unopposed requests for an extension of time made by Senators Enzi, Hatch, and Isakson and by Congressmen Kline and Issa.[2]

Accordingly, those parties and amici who *previously* filed briefs by March 8, 2011, as well as Congressmen Kline and Issa, if they so choose, **may file supplemental briefs *solely* addressing the representation case data recently posted on the Board's website in response to FOIA requests and other data available through the Board's website, as mentioned above.** Such briefs shall not exceed 10 pages in length and shall be filed with the Board in Washington, D.C. on or before March 29, 2011. By March 22, the

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[1] Senators Enzi, Hatch, and Isakson timely filed an amicus brief on March 8, 2011.

[2] Member Hayes took no part in the consideration of these requests.

parties shall file responsive briefs to the briefs previously filed by March 8, 2011. The parties shall file responsive briefs to supplemental briefs by April 8, 2011. The parties' responsive briefs shall not exceed 10 pages in length. No other responsive briefs will be accepted. No further extensions of time for the filing of briefs or responsive briefs in this proceeding will be granted.

The parties and amici shall file briefs electronically at http://mynlrb.nlrb.gov/efile. Service of briefs on the parties shall be made in accordance with Section 102.114(a) and (i) of the Board's Rules and Regulations.

If assistance is needed in filing through http://mynlrb.nlrb.gov/efile, please contact the undersigned.

Dated, Washington, D.C., March 15, 2011

By direction of the Board:

Lester A. Heltzer
Executive Secretary

EXHIBIT B

United States Government

NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1099 14th STREET NW, Suite 11600
WASHINGTON DC 20570

March 4, 2011

RE: FOIA ID: ES-2011-0033

(Specialty Healthcare and Rehabilitation Center of Mobile
Case 15-RC-8773; 356 NLRB No. 56 (Dec. 22, 2010))

R. Scott Medsker, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

Dear Mr. Medsker:

This is in response to your February 2, 2011 faxed request, pursuant to the Freedom of Information Act (FOIA) and on behalf of the Coalition for a Democratic Workplace, for certain information regarding RC cases filed with the Agency for the fiscal years 1991 through 2009.

By letter dated February 9, 2011, I advised you that part of your request had been referred to the FOIA Officer for the Acting General Counsel, and that I would be responding to that portion of your request seeking "all statistical analyses, surveys, reports, or other data—if any—that the Board relied on in deciding to issue its Notice and Invitation to File Briefs" in the above-captioned case.

A search of Board-side records, including those maintained in the offices of the Board Members, discloses no document that is responsive to this part of your request.

The undersigned is responsible for the above determination. You may obtain a review of this determination under the provisions of Section 102.117(c)(2)(v) of the Board's Rules and Regulations by filing an appeal with Chairman Wilma B. Liebman, National Labor Relations Board, Washington, D.C. 20570, within 28 calendar days of the service of this letter, that is, on or before April 1, 2011. Any appeal should contain a complete statement of the reasons on which it is based.

Very truly yours,

Lester A. Heltzer (By HENRY BREITENEICHER
Associate Executive Secretary)
Lester A. Heltzer
Executive Secretary

cc: Jacqueline A. Young, FOIA Officer for the Acting General Counsel

EXHIBIT C

Federal Register
Vol. 76, No. 14
Friday, January 21, 2011

Presidential Documents

Title 3—

The President

Executive Order 13563 of January 18, 2011

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *General Principles of Regulation.* (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. *Public Participation.* (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally

be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. *Integration and Innovation.* Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. *Flexible Approaches.* Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. *General Provisions.* (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

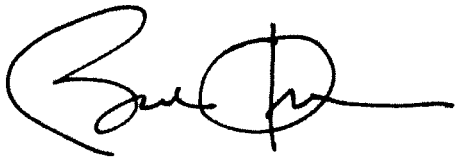
(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 18, 2011.

[FR Doc. 2011–1385
Filed 1–20–11; 8:45 am]
Billing code 3195–W1–P

EXHIBIT D

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 2, 2011

M-11-10

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND OF INDEPENDENT REGULATORY AGENCIES

FROM: Cass R. Sunstein
Administrator

SUBJECT: Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Order 13563 states that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It sets out certain principles and requirements designed to promote public participation, improve integration and innovation, increase flexibility, ensure scientific integrity, and increase retrospective analysis of existing rules. The purpose of this Memorandum is to offer guidance on these principles and requirements.

Relationship between Executive Order 13563 and Executive Order 12866

Executive Order 13563 is designed to affirm and to supplement Executive Order 12866; it adds to and amplifies the provisions of Executive Order 12866, rather than displacing or qualifying them. After the issuance of Executive Order 13563, agencies should continue to follow the principles and requirements contained in Executive Order 12866.

Section 1 of Executive Order 13563 specifically reiterates five principles from Executive Order 12866. These principles generally involve consideration of benefits, costs, and burdens. Section 1 also asks agencies "to use the best available techniques to quantify anticipated present and future costs as accurately as possible," such as identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. The goal of this provision is to promote careful and accurate quantification. At the same time, Section 1 recognizes that agencies may consider and discuss certain values that "are difficult or impossible to quantify"; such values include "equity, human dignity, fairness, and distributive impacts."

Public Participation

Section 2 of Executive Order 13563 emphasizes the importance of public participation. It requires agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than

60 days." This section complements a corresponding provision in Executive Order 12866,[1] while also emphasizing the importance of public comment through the Internet. Section 2 aims to promote agencies' continuing efforts to use online technologies to facilitate greater participation in the rulemaking process, thus making that process simpler and more accessible—and less burdensome and costly—for all stakeholders.

Section 2 also requires an "open exchange" of information among government officials, experts, stakeholders, and the public. In this context, "open exchange" refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made. Section 2 thus seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself. In this way, Section 2 is designed to foster better and more informed agency decisions.

This provision is not satisfied simply through the acceptance of electronic submission of rulemaking comments by interested parties who lack information about the arguments and information provided by other parties. A central goal of public participation is to improve the content of rules, and open exchanges of information by interested parties can be helpful in that endeavor.

Section 2 also directs agencies (to the extent feasible and permitted by law) to give the public timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings. For proposed rules, agencies are required to include an opportunity for public comment on the rulemaking docket, including comment on relevant scientific and technical findings.[2]

Finally, Section 2 directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking. This provision emphasizes the importance of prior consultation with "those who are likely to benefit from and those who are potentially subject to such rulemaking." One goal is to solicit ideas about alternatives, relevant costs and benefits (both quantitative and qualitative), and potential flexibilities.

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[1] "Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Executive Order 12866, Section 6(a)(1).

[2] This requirement is consistent with Office of Information and Regulatory Affairs, Memorandum for the President's Management Council, *Increasing Openness in the Rulemaking Process – Improving Electronic Dockets* (May 28, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf, which states, "To the extent feasible, and consistent with applicable laws, regulations, and policies, agencies should make their electronic regulatory dockets on Regulations.gov consistent with their paper-based dockets. Both dockets should provide the public with access to all relevant materials. To the extent that they are part of a rulemaking, supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket."

Integration and Innovation

Section 3 of Executive Order 13563 calls for "[g]reater coordination across agencies" to produce simplification and harmonization of rules. This provision complements related provisions of Executive Order 12866, such as the provision asking each agency to "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."[3]

Section 3 of Executive Order 13563 instructs agencies (1) to consider the combined effects of their regulations (together with those of other agencies) on particular sectors and industries and (2) to promote coordination across agencies and harmonization of regulatory requirements. Section 3 thus emphasizes the crucial importance of simplifying and harmonizing regulations and acknowledges that, at times, regulated entities might be subject to requirements that, even if individually justified, may have cumulative effects imposing undue, unduly complex, or inconsistent burdens. Section 3 is designed to reduce burdens, redundancy, and conflict, and at the same time to promote predictability, certainty, and innovation.

Efforts at harmonization might occur within agencies, as efforts are made to coordinate various rules. Such efforts may also occur across agencies, as agencies work together to produce greater simplicity and predictability. Such interagency efforts may be promoted or assisted by OIRA.

Flexible Regulatory Tools

Section 4 of Executive Order 13563 states that ". . . each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." Such approaches include "warnings, appropriate default rules, and disclosure requirements, including provision of information to the public about risks in a form that is clear and intelligible." This provision complements, and does not displace, related provisions in Executive Order 12866 (such as the provision in Section 1(b)(3), asking each agency to "identify and assess available alternatives to direct regulation, including...providing information upon which choices can be made by the public").

Section 4 acknowledges the importance of considering flexible approaches and alternatives to mandates, prohibitions, and command-and-control regulation. It emphasizes the potential value of approaches that maintain freedom of choice and improve the operation of free markets (for example, by promoting informed decisions). It directs agencies to consider the use of tools that can promote regulatory goals through actions that are often less expensive and more effective than mandates and outright prohibitions. When properly used, these tools may also encourage innovation and growth as well as competition among regulated entities.

[3] Executive Order 12866, Section 1(b)(11).

Science

Section 5 of Executive Order 13563 refers to the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and implementing guidance. It emphasizes that each agency shall "ensure the objectivity of any scientific and technological information used to support the agency's regulatory actions."

In implementing guidance, the President's Science Adviser stated, "Science, and public trust in science, thrives in an environment that shields scientific data and analyses from inappropriate political influence; political officials should not suppress or alter scientific or technological findings."[4] Section 5 of Executive Order 13563 extends the President's Memorandum and implementing guidance to the context of regulatory actions.

Retrospective Analysis of Existing Rules

Section 6 of Executive Order 13563 emphasizes the importance of retrospective analysis of rules and contains a "look back" requirement: "Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles set forth in Sections 1 through 5 remain fully applicable, and should help to orient agency thinking.

Agency plans should not, of course, call into question the value of longstanding agency rules simply because they are longstanding. Many important rules have been in place for some time. The aim is instead to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Agencies should explore how best to evaluate regulations in order to expand on those that work (and thus to fill possible gaps) and to modify, improve, or repeal those that do not. Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken. Agency review processes should facilitate the identification of rules that warrant repeal or modification.

While systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking. Retrospective review may reveal that an existing rule is needed but has not operated

[4] John Holdren, Memorandum for the Heads of Agencies and Departments, *Scientific Integrity* (December 17, 2010), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

as well as expected, and that a stronger, expanded, or somewhat different approach is justified. In formulating its preliminary plan for retrospective review, each agency should exercise its discretion to develop a plan tailored to its specific mission, resources, organizational structure, and rulemaking history and volume.

While each agency should set its own priorities, all plans are expected to address the following topics:

- **Public participation**. Consistent with the general commitment to public participation, agencies should solicit the views of the public on how best to promote retrospective analysis of rules. Even before preliminary plans are written, for example, the public might be asked to provide comments on how such plans might be devised and to help identify those rules that might be modified, streamlined, expanded, or repealed. Consistent with existing guidance on the Paperwork Reduction Act (PRA), agencies may consider general efforts to obtain public feedback, including town hall meetings and online equivalents, to be exempt from PRA requirements.[5] Agencies are encouraged to consider providing a period of public comment after drafts of preliminary plans are written and/or after such plans have been submitted to OIRA. Agencies may want to reach out to stakeholders with an interest in the rules mentioned in the preliminary plans to ensure that diverse views are considered. Because knowledge of the effects of rules is widely dispersed in society, and because members of the public are likely to have useful information and perspectives, agencies should consider developing mechanisms to promote public consultation about existing rules on a continuing basis.

- **Prioritization**. The preliminary plan should specify factors that the agency will consider and the process that the agency will use in setting priorities and in selecting rules for review. To the extent feasible, the preliminary plan should also include an initial list of candidate rules for review over the next two years.

- **Analysis of costs and benefits**. Agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments, which can be used to enhance the agency's analytic capability.

- **Structure and staffing**. Responsibility for retrospective review should be vested with a high-level agency official who can secure cooperation across the agency. The preliminary plan should also consider how best to maintain sufficient independence from

[5] For further explanation of the applicability of the Paperwork Reduction Act, please see Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Information Collection under the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf and Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

the offices responsible for writing and implementing regulations. Finally, the plan should identify possible actions to strengthen internal review expertise (if necessary).

- **Coordination with other forms of retrospective analysis and review**. Under existing requirements and authorities, many agencies are already engaged in retrospective analysis and review. For example, the Regulatory Flexibility Act, 5 U.S.C. §610, requires agencies to "publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities." The same provision calls for review of all such agency rules every ten years. It is appropriate to use existing processes, and information now at hand, as significant inputs into preliminary plans.

Within 100 days, agencies should submit initial drafts of their preliminary plans to the appropriate desk officer at the Office of Information and Regulatory Affairs (OIRA). OIRA desk officers will review the plans and may provide suggestions to the agencies on possible improvements. OIRA desk officers are also prepared to work with agencies as they finalize their preliminary plans.

Independent Agencies

Executive Order 13563 does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority. In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules.

EXHIBIT E

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

G. Roger King (Counsel of Record)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215-2673
(614) 281-3939

Andrew M. Kramer
R. Scott Medsker
JONES DAY
51 Louisiana Ave., NW
Washington D.C., 20001
(202) 879-3939

Counsel for *Amici Curiae* Coalition for a Democratic Workplace and HR Policy Association

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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

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[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:

Clifford H. Nelson, Jr.
Constangy, Brooks & Smith LLC
230 Peachtree Street, NW
Suite 2400
Atlanta, GA 30303
cnelson@constangy.com

Leigh E. Tyson
Constangy, Brooks & Smith LLC
230 Peachtree Street, NW
Suite 2400
Atlanta, GA 30303
ltyson@constangy.com

Edward J. Goddard
Kindred Healthcare, Inc.
680 South Fourth Street
Louisville, HY 40202
edward.goddard@kindredhealthcare.com

Charles P. Roberts, Esq.
Constangy, Brooks & Smith LLP
100 North Cherry Street, Suite 300
Winston-Salem, NC 27101
croberts@constangy.com

Randy Rigsby
Staff Organizer
USW District 9
919 Sharit Avenue
Suite 213
Gardendale, AL 25071
rribsby@usw.org

Daniel M. Kovalik
Assistant General Counsel
United Steelworkers
Five Gateway Center
Pittsburgh, PA 15222
dkovalik@usw.org

Richard P. Rouco, Esq.
Whatley Drake LLC
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
rrouco@whatleydrake.com

Kathleen McKinney
National Labor Relations Board
Region 15 – New Orleans
600 South Maestri Place
7th Floor
New Orleans, LA 70130-3413
kathleen.mckinney@nlrb.gov

/s/ G. Roger King
G. Roger King