UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION AND AMERICAN SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION IN SUPPORT OF THE RESPONDENT EMPLOYER

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In response to the Board's Notice and Invitation to File Briefs dated December 22, 2010, the American Hospital Association ("AHA") and the American Society for Healthcare Human Resources Administration ("ASHHRA") respectfully submit this brief as *amici curiae* in support of the Employer.

STATEMENT OF INTEREST

The AHA is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

The ASHHRA, which is a personal membership association affiliated with the AHA, is the Nation's only membership organization exclusively dedicated to meeting the professional needs of human resources leaders in health care. Founded in 1964, ASHHRA represents more than 3,400 human resources professionals across the nation. ASHHRA is governed by a 13-member board of directors, four standing committees, and more than 45 affiliated chapters who are all committed to enhancing the profession and moving forward toward one common goal – excellence in health care human resources.

Most of the hospitals that belong to the AHA are employers subject to the National Labor Relations Act (the "Act").[1] Many member hospitals interact frequently with organized labor, in

[1] Approximately 22 percent of the AHA's member hospitals are government-owned and are therefore covered by separate labor relations laws.

circumstances that range from long-standing collective bargaining relationships to initial organizing campaigns. As associations representing the interests of health care providers with both acute and nonacute facilities subject to the Act, the AHA and ASHHRA have a particular interest in ensuring that the Board consider their concerns about potential changes to the procedures and standards for determining appropriate bargaining units in the health care industry.

The AHA, ASHHRA and their members are committed to providing the best and most efficient delivery of patient care. Because patients frequently move back and forth between acute and nonacute care facilities, an integrated health care delivery model is essential to that objective. It is imperative that the delivery of patient care be uninterrupted and seamless as patients transition between acute and nonacute care facilities. Accordingly, the AHA and ASHHRA oppose any modifications to the procedures and standards for determining appropriate bargaining units that could erect obstacles to the integrated delivery of acute and nonacute care.

SUMMARY OF ARGUMENT

First, the Board should limit its decision to issues actually presented by and disputed in this particular case. The only disputed issue presented by the facts of this case and raised in the Employer's request for review is whether the petitioned-for unit of certified nursing assistants is appropriate under *Park Manor*. This is not a proper vehicle for the Board to reconsider the standards for determining appropriate bargaining units at nonacute care facilities generally. In any event, the Board has no authority in this case to amend, even in part, the rule governing appropriate units at acute care hospitals without notice and comment rulemaking.

Second, the Act expresses a policy against the proliferation of bargaining units in the health care industry which should constitute an important factor in bargaining unit determinations. The Board cases cited with approval by Congress in its expression of the Act's

nonproliferation policy establish that Congress intended for that policy to apply with equal force to both acute and nonacute health care facilities and that Congress implicitly rejected the approaches under consideration in this case as inconsistent with that policy. The approaches under consideration here also are contrary to Board unit determination law in the health care industry, which require the Board to look outside of the proposed unit in order (1) to give effect to Congress's admonition to avoid a proliferation of bargaining units, and (2) to determine further whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

Third, to the extent the Board finds itself properly equipped to establish uniform rules with respect to appropriate bargaining units at nonacute care facilities, the number of bargaining units at nonacute care facilities should be no greater than the number of bargaining units at acute care hospitals because nonacute care facilities are at least as functionally integrated as acute care hospitals. As a practical matter, under *Park Manor's* "pragmatic or empirical community of interests approach," the Board generally has found appropriate at nonacute care facilities only those units that would be appropriate at acute care hospitals. *Park Manor* properly balances both community of interests and the policy against the proliferation of bargaining units and imposes the fewest barriers to the integrated delivery of health care. Accordingly, the Board should continue to apply *Park Manor* for determining appropriate bargaining units at nonacute care facilities.

* * *

ARGUMENT

I. THE BOARD SHOULD LIMIT ITS DECISION TO ISSUES ACTUALLY PRESENTED BY AND DISPUTED IN THIS PARTICULAR CASE

The Supreme Court has articulated "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). While the Court has made "plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion[,]" *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294 (1974), the Court recognized that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion." *Id.* Such a situation could present itself here if the Board were to "in fact improperly promulgate[] a 'rule'" in the context of this adjudication. *Id.* at 291. That could occur if the Board were to formulate "a basically legislative-type judgment" that is "generalized in nature" and of "prospective application" but not actually presented by the "particular set of disputed facts" in the record. *Fla. E. Coast Ry.*, 410 U.S. at 246. Accordingly, the Board should limit its decision to issues actually presented by and disputed in this particular case.

A. This Case Is Not An Appropriate Vehicle For The Board To Modify Its Standards For Determining Bargaining Units At Nonacute Care Facilities

The only disputed issue presented by the facts of this case and raised in the Employer's request for review is whether the petitioned-for unit of certified nursing assistants is appropriate under *Park Manor*. 356 N.L.R.B. No. 56, Slip Op. at 4 (Dec. 22, 2010) (Member Hayes, dissenting) ("The parties involved did not request any such broad inquiry. On the contrary, the party seeking review sought to apply *Park Manor*, not to 'clarify' or overrule it."). As neither

the Petitioner nor the Employer has argued for a different standard, either to the Regional Director or to the Board, this case requires nothing more of the Board than application of *Park Manor*. This is not a suitable occasion for the Board to reconsider the standards for determining appropriate bargaining units at nonacute care facilities generally.[2]

Unlike this case, *Park Manor* did require the Board to decide the standard by which the Board would determine appropriate bargaining units at nonacute care facilities. There, the Board had recently promulgated its rule for determining appropriate bargaining units at acute care hospitals and the law was unsettled as to the standard that would be applied at nonacute care facilities, which were exempted from the final rule. Thus, in its request for review, the employer in *Park Manor* expressly argued that the Regional Director erred in applying the community of interests standard and that the proper standard for determining appropriate bargaining units at nonacute care facilities should be the disparity of interests standard. 305 N.L.R.B. 872, 873 (1991). In sum, *Park Manor* actually required the Board to resolve a live dispute between the parties about the applicable standard at nonacute care facilities.

Park Manor has been settled law now for two decades, and the Board should not lightly cast that standard aside, particularly when there is no dispute between the parties about its application and the Board has not been asked by either of the parties to modify that standard. The Board may, of course, reconsider that standard through rulemaking or in an appropriate case in which the standard is disputed and the Board is required to resolve that dispute, but this is not

[2] Indeed, it is questionable whether that issue is even appropriately before the Board in the first place. The Employer requested review on the ground that the Regional Director departed from officially reported Board precedent. The Employer did not request review on the ground that there are compelling reasons for reconsideration of an important Board rule or policy. *Compare* 29 C.F.R. § 102.67(c)(1) *with* 29 C.F.R. § 102.67(c)(4). Under the Board's rules and regulations, briefs "shall be limited to the issues raised in the request for review" and "the Board shall proceed . . . to decide the issues referred to it . . . ." 29 C.F.R. § 102.67(g) & (j).

such a case. The Board should not, however, use this amicus invitation as a means to gather evidence absent from the record in order to reconsider *Park Manor*. Rather, this case can and should be decided appropriately under *Park Manor*.

B. In Any Event, The Board Has No Authority To Amend, Even In Part, The Rule Governing Appropriate Units At Acute Care Hospitals Without Notice And Comment Rulemaking

Whatever the scope of the Board's decision in this case, as a matter of law it cannot be so broad so as to modify, even in part, the rule governing appropriate units at acute care hospitals. Under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, administrative agencies may not repeal, amend, or make other fundamental changes to a substantive regulation without engaging in notice and comment rulemaking. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (APA rulemaking required when agency "adopt[s] a new position inconsistent with . . . existing regulations"); *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) ("an administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication"); *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 56 (D.C. Cir. 2002) ("'Rulemaking,' as defined in the APA, includes not only the agency's formulation, but also its modification, of a rule.") (citing 5 U.S.C. § 551(5)); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or '*amendments*.'") (citing 5 U.S.C. § 551(5)) (emphasis in original). "To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements." *Paralyzed Veterans*, 117 F.3d at 586. Therefore, while the Board apparently is contemplating reconsideration of "the procedures and standards for determining whether proposed units are appropriate in all

industries[,]" 356 N.L.R.B. No. 56, Slip Op. at 1, the Board may not, consistent with the APA, amend the standard applicable to acute care hospitals through this adjudication.

II. THE ACT EXPRESSES A POLICY AGAINST THE PROLIFERATION OF BARGAINING UNITS IN THE HEALTH CARE INDUSTRY WHICH SHOULD CONSTITUTE AN IMPORTANT FACTOR IN BARGAINING UNIT DETERMINATIONS

Congress, the courts, and the Board have long recognized that health care institutions present special considerations because of their patient care function. In 1947, Congress went so far as to except not-for-profit hospitals from the coverage of the Act, *see* 29 U.S.C. § 152(2) (1970 ed.), and in 1960 the Board itself excepted proprietary hospitals from the Act's coverage, *see Flatbush Gen. Hosp.*, 126 N.L.R.B. 144 (1960). While these decisions were later repealed and reversed, respectively, the law has always been concerned with, and has developed around, "the need to avoid disruption of patient care and disturbance of patients in the hospital setting." *NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773, 778 (1979).

To accomplish that overarching objective, the Act expresses a policy against the proliferation of bargaining units in the health care industry. As the Supreme Court has recognized, Congress admonished that:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 N.L.R.B. No. 50, 85 LRRM 1093 (Jan. 15, 1974), and *Woodland Park Hospital*, 205 N.L.R.B. No. 144, 84 LRRM 1075 (Aug. 27, 1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 N.L.R.B. No. 170, 83 LRRM 1242 (Jun. 6, 1973).

Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 615-16 (1991) (quoting House and Senate Committee Reports on the National Labor Relations Act Amendments of 1974); *see also Long Island Coll. Hosp. v. NLRB*, 566 F.2d 833, 838 (2d Cir. 1977) ("the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health

care industry") (quoting Senate Committee Report). That policy should caution the Board against "pressing the logic of its traditional standard in the health care field without regard to the number of units that might result, either absolutely or relatively to the institution's size." *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1471 (7th Cir. 1983).

A. Congress Has Implicitly Rejected The Approaches Under Consideration Here As Inconsistent With The Act's Nonproliferation Policy

The Board cases cited with approval by Congress in its expression of the Act's nonproliferation policy establish three important points relevant to this case.

First, Congress's citation to *Four Seasons Nursing Center of Joliet*, 208 N.L.R.B. 403 (1974), is instructive because in that case the Board reversed an Acting Regional Director's determination finding a petitioned-for maintenance unit at a nursing home appropriate. In choosing to cite with approval a case involving a unit determination at a nursing home as an example of a case in which the Board gave due consideration to preventing the proliferation of bargaining units, Congress unequivocally indicated its intent that the Board apply the Act's nonproliferation policy to nonacute care facilities, such as nursing homes. There can be no dispute, therefore, that Congress intended for the Act's nonproliferation policy to apply with equal force to both acute and nonacute health care facilities. *See Park Manor*, 305 N.L.R.B. at 876 ("These general principles are equally applicable to unit determinations in nonacute care facilities.").

Second, in explicitly approving the Board's holding in *Four Seasons Nursing Center* that the petitioned-for maintenance unit was inappropriate, Congress implicitly rejected the contrary approach taken by the Board in *American Cyanamid Co.*, 131 N.L.R.B. 909 (1961), under consideration in this case, as to unit determinations in the health care industry. In *American Cyanamid*, which predates *Four Seasons Nursing Center* by more than a decade and did not

involve a health care institution, the Board found that "on the basis of the evidence in this record" the petitioned-for unit of "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. That approach in *American Cyanamid* was rejected by the Board in *Four Seasons Nursing Center*, which held that because "the maintenance employees primarily perform duties not requiring a high degree of skill or specialized training, we find, contrary to the Acting Regional Director, that the maintenance unit sought herein is not composed of a distinct and homogeneous group of employees with interests separate from those of other employees, and therefore is not an appropriate unit." 208 N.L.R.B. at 403.[3] Given that Congress expressly approved of the Board's holding in *Four Seasons Nursing Center*, the Board should not apply the contrary approach of *American Cyanamid* here.[4]

Third, Congress's citation to *Woodland Park Hospital, Inc.*, 205 N.L.R.B. 888 (1973), is telling because in that case the Board rejected the notion floated by the majority in this case, *i.e.*, that a unit of all employees performing the same job at a single facility is presumptively appropriate. Congress approved the Board's holding in *Woodland Park Hospital* that there was "no basis for concluding that the X-ray technicians here involved, although separately supervised, constitute a separate appropriate unit." *Id.* at 889. Accordingly, Congress itself already answered the seventh question posed by the Board here in the negative. Congress

[3] While the proposed unit in *Four Seasons Nursing Center* comprised only two employees, that was not the basis for the Board's finding that the unit was inappropriate.

[4] In any event, it is worth noting that *American Cyanamid* does not support finding the petitioned-for unit in this case appropriate. There, the Board found a unit of all maintenance employees appropriate. *See* 131 N.L.R.B. at 911. Here, the petitioned-for unit represents only a fraction of the Employer's service and maintenance employees. The Board has consistently held that such fragmented units are inappropriate. *See, e.g., Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127 (Aug. 27, 2010); *Sheridan Peter Pan Studios, Inc.*, 144 N.L.R.B. 3 (1963).

approved of the Board's conclusion in *Woodland Park Hospital* that "[t]o establish a separate unit for X-ray technicians . . . would in our opinion lead to severe fragmentation of units in the health care industry." *Id.* Congress's approval of *Woodland Park Hospital* casts doubt on the legitimacy of finding a unit of all employees performing the same job at a single nonacute care facility presumptively appropriate. Particularly in the health care industry, "the Board cannot divide the work force into as many bargaining units as there are differentiable tasks." *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1091-92 (7th Cir. 1984).

B. The Board Has Implicitly Rejected The Approaches Under Consideration Here As Inconsistent With The Act's Nonproliferation Policy

In *Newton-Wellesley Hospital*, 250 N.L.R.B. 409 (1980), the Board acknowledged that "the legislative history of the 1974 health care amendments to the Act requires the Board to give due consideration to avoiding an unwarranted fragmentation of bargaining units in this industry" and that the establishment of general rules "could result in the Board's giving insufficient attention to this admonition of Congress, and could permit the splitting of professional or other employees into separate units regardless of whether the particular circumstances warranted such a division." *Id.* at 411. For these reasons, the Board held that "any community of interests evaluation *must* accommodate the admonition to avoid a proliferation of bargaining units in the health care field." *Id.* at 412 (emphasis added). The Board recounted that its "efforts to effect such an accommodation should be manifest . . . from the number of situations in which the Board has refused to approve units that, in any other context, would amount to appropriate units." *Id.* The Board recognized that while "Board Members have not, of course, agreed in all health care unit determination cases about where the fulcrum should be set to effect the correct balance between employees' community of interests and the legislative admonition against

proliferation[,] . . . all Board Members recognize that some balance *must* be struck." *Id.* at 413 (emphasis added).

Thus, in the rulemaking process, the Board reiterated that:

> [u]nder rulemaking as under adjudication, we intend at all times to be mindful of avoiding undue proliferation, not only because this desire was expressed in the legislative history, but also because it accords with our own view of what is appropriate in the health care industry. It would be undesirable to create or permit a large-scale splintering of the workforce into the numerous trades, technical disciplines, and professions typically found in health care institutions. To give each such grouping a separate voice for organizing and negotiating would create a never-ending round of bargaining sessions and individualized demands not conducive to stability, industrial peace, or the smooth delivery of services to the public.

Collective Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33900, 33905 (proposed Sept. 1, 1988). Accordingly, while the Board "must effectuate section 7 rights by permitting bargaining in cohesive units, units with interests both shared within the group and disparate from those possessed by others," the Board recognized that in the health care industry it also must "weigh[] against this . . . Congress' expressed desire to avoid proliferation in order to avoid disruption in patient care, unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages, and increased costs due to whipsaw strikes and wage leapfrogging." Collective Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25142, 25143 (proposed July 2, 1987).

The approaches being considered in this case fail to give effect to Congress's admonition that the Board avoid a proliferation of bargaining units in the health care industry. Remarkably, the approaches under consideration here do not even mention the Act's nonproliferation policy as a relevant factor in unit determinations at nonacute health care facilities. The sole focus is on the community of interests of the proposed unit. However, even outside of the health care industry, that inquiry is incomplete:

> The 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. Numerous groups of employees fairly can be said to possess employment conditions or interests "in common." Our inquiry . . . necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. . . . This approach has been followed by the Board not only with regard to whether the unit sought is initially appropriate, but also with regard to the placement of specific employees within or without the unit. The inquiry is always whether the interests of these employees are sufficiently distinct to justify the exclusion.

Newton-Wellesley Hospital, 250 N.L.R.B. at 411 & n.6; *see also Colo. Nat'l Bank of Denver*, 204 N.L.R.B. 243, 243 (1973) (finding "that the unit sought is too narrow in scope in that it excludes employees who share a community of interest with employees in the unit sought"); *accord Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) ("If . . . the excluded employees share an overwhelming community of interest with the included employees, then there is no legitimate basis to exclude them from the bargaining unit"). The Board recently reaffirmed these principles in *Wheeling Island Gaming*, 355 N.L.R.B. No. 127, Slip Op. at n.2.

As these authorities make plain, the Board should not make unit determinations in a vacuum, as is under consideration here. Rather, the Board necessarily must look outside of the proposed unit in order (1) to give effect to Congress's admonition to avoid a proliferation of bargaining units in the health care industry, and (2) to determine further whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. Because the approaches under consideration here fail to do either, they should be abandoned.

III. THE NUMBER OF BARGAINING UNITS AT NONACUTE CARE FACILITIES SHOULD BE NO GREATER THAN THE NUMBER OF BARGAINING UNITS AT ACUTE CARE HOSPITALS

A. Nonacute Care Facilities Are At Least As Functionally Integrated As Acute Care Hospitals

As originally proposed, the Board's rule for bargaining units at acute care hospitals also included nursing homes. *See* Collective Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25142, 25146 (proposed July 2, 1987). The Board tentatively determined that for small hospitals (100 beds or fewer) and nursing homes, there should be only four units: (1) all professionals; (2) all technicals; (3) all service, maintenance, and clericals; and (4) all guards. *Id.* at 25148. As the Board itself explained the proposed rule in *Park Manor*:

> The earliest proposed rule contained the same units for small hospitals and nursing homes as for large hospitals, except that instead of providing for separate units of MDs and RNs, it provided for an all-professional unit. The Board decided tentatively to eliminate the narrower units in favor of broader ones (in small hospitals and nursing homes) because it believed that in smaller facilities there would be less division of labor and specialization and thus more functional integration of employees' services than normally is the case in large hospitals. The Board also noted that it expected that there were far fewer professionals other than physicians and nurses in the smaller facilities (especially in nursing homes), and therefore that separate units of "other professionals" were less likely to be appropriate.

305 N.L.R.B. at 874.

After conducting extensive hearings on the proposed rule and carefully considering the evidence presented at those hearings, the Board issued a second notice of proposed rulemaking that eliminated the distinction between large and small acute care hospitals and excluded nursing homes from the rule's coverage. *See* Collective Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33900, 33927-29 (proposed Sept. 1, 1988). As to the former, the Board concluded that the record did not support its belief "that smaller hospitals were more functionally integrated than larger hospitals, and could function with fewer, broader units." *Id.* at 33927. As to the

latter, the record did support the Board's belief that "there is less diversity in nursing homes among professional, technical and service employees, and the staff is more functionally integrated," that "almost no aspect of nursing home care is in the exclusive domain of any one group of employees," and that "there appears to be a greater overlap of functions as well as greater work contact between the various nursing home non-professionals." *Id.* at 33928. However, the record showed "significant differences between the various types of nursing homes which affect staffing patterns and duties" and the Board concluded that "[i]n the absence of a measure of uniformity of operation, it would be difficult to establish uniform rules with respect to appropriate bargaining units." *Id.* at 33928-29.

There are no facts in the record that would enable the Board to reach a contrary conclusion in this case. As the Board majority in this case recited, "there has been a proliferation of facility-like residential alternatives to nursing homes." 356 N.L.R.B. No. 56 at 2. That fact reinforces the differences between the various types of nonacute care facilities that caused the Board to drop nursing homes from the final rule. That "employment in long-term care has experienced dramatic growth in the last 20 years" and that "long-term care employees have demonstrated a persistent interest in invoking the statutory process for obtaining representation," *id.*, does not mean that the nonacute care industry is now characterized by "a measure of uniformity of operation" that will enable the Board "to establish uniform rules with respect to appropriate bargaining units." 53 Fed. Reg. at 33928-29; *see also Park Manor*, 305 N.L.R.B. at 875 ("we do not have a sufficient body of empirical data as to nursing homes to make a uniform rule as to them at this time, and perhaps never will because we are not sure that all are sufficiently uniform to warrant finding the same units appropriate for all"). Indeed, the very fact that the Board is soliciting empirical evidence from *amici curiae* in this case suggests that the

record has not equipped the Board to craft uniform rules applicable to the diverse range of nonacute care facilities currently providing care in a wide variety of settings.

To the extent the Board finds otherwise, the number of bargaining units at nonacute care facilities should be no greater than the number of bargaining units at acute care hospitals. In the rulemaking process, the Board proposed fewer units at nursing homes than at acute care hospitals because it believed that in nonacute care facilities "there would be less division of labor and specialization and thus more functional integration of employees' services." *Park Manor*, 305 N.L.R.B. at 874. That belief was confirmed by the evidence presented at the hearings on the proposed rule. *See* 53 Fed. Reg. at 33928 (finding that "there is less diversity in nursing homes among professional, technical and service employees, and the staff is more functionally integrated," that "almost no aspect of nursing home care is in the exclusive domain of any one group of employees," and that "there appears to be a greater overlap of functions as well as greater work contact between the various nursing home non-professionals"). There is nothing in the record in this case that is to the contrary. Accordingly, the number of bargaining units at nonacute care facilities should be fewer, or at least no greater, than the number of bargaining units at acute care hospitals.

B. *Park Manor* Properly Balances Community Of Interests And The Policy Against The Proliferation Of Bargaining Units And Allows For The Integrated Delivery Of Health Care

Two years after the Board promulgated its final rule regarding appropriate units at acute care hospitals in 1989, the Board articulated the standard for determining whether units are appropriate at nonacute health care institutions in *Park Manor*. In that case, the union sought to represent service and maintenance employees of an intermediate care nursing home, excluding office clerical and technical employees. The employer argued that its technical employees – four licensed practical nurses – should be included in the unit. The Board did not resolve the issue,

but remanded to the Regional Director to consider, in addition to traditional community of interest factors, "those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute." 305 N.L.R.B. at 875. The Board labeled this approach the "pragmatic or empirical community of interests" approach. *Id.* at n.16.

As a practical matter, under *Park Manor's* "pragmatic or empirical community of interests approach," the Board generally has found appropriate at nonacute care facilities only those units that would be appropriate at acute care hospitals. Thus, the Board has found separate units of registered nurses appropriate at nonacute care hospitals and other long-term care providers. *See South Hills Health Sys. Home Health Agency*, 330 N.L.R.B. 653 (2000); *Visiting Nurses Ass'n of Cent. Ill.*, 324 N.L.R.B. 55 (1997); *Charter Hosp. of Orlando South*, 313 N.L.R.B. 951 (1994); *McLean Hosp. Corp.*, 311 N.L.R.B. 1100 (1993); *Holliswood Hosp.*, 312 N.L.R.B. 1185 (1993). Similarly, the Board has found it appropriate to exclude technical employees from a unit of nonprofessionals at nursing homes. *See Lincoln Park Nursing Home*, 318 N.L.R.B. 1160 (1995); *Hillhaven Convalescent Ctr.*, 318 N.L.R.B. 1017 (1995). The Board likewise treats business office clerical employees the same at acute and nonacute health care institutions. *See CGE Caresystems, Inc.*, 328 N.L.R.B. 748 (1999); *Lincoln Park Nursing Home*, 318 N.L.R.B. 1160; *Charter Hosp. of Orlando South*, 313 N.L.R.B. 951; *Lifeline Mobile Medics, Inc.*, 308 N.L.R.B. 1068 (1992). Finally, the Board has found a separate unit of skilled maintenance employees appropriate at nonacute health care providers. *See Hebrew Home & Hosp., Inc.*, 311 N.L.R.B. 1400 (1993); *McLean Hosp. Corp.*, 309 N.L.R.B. 564 (1992).

In *Virtua Health, Inc.*, 344 N.L.R.B. 604 (2005), the union sought to represent a systemwide unit of paramedics at a comprehensive regional medical system that included both acute care hospitals and nonacute care facilities. The employer argued that the unit must include all of its technical employees, not just paramedics. The Regional Director found that the rule governing bargaining units at acute care hospitals did not apply and that the proposed unit was appropriate under *Park Manor*. A majority of the Board disagreed, finding that "even under the broader standard set forth in *Park Manor*, a unit limited to the Employer's paramedics is inappropriate" because the interests of the paramedics were not sufficiently distinct from the interests of other technical employees to warrant the establishment of a separate unit. *Id.* at 606.[5]

In each of the above-referenced cases applying *Park Manor's* "pragmatic or empirical community of interests approach," including *Virtua Health*, the Board appropriately balanced community of interests and the policy against the proliferation of bargaining units, as Congress directed, and erected no obstacles to the integrated delivery of care. If the Board had permitted these work functions to splinter into their component job classifications such as X-ray technicians, paramedics, or certified nursing assistants, the result would have been a "severe fragmentation of units in the health care industry[,]" *Woodland Park Hospital, Inc.*, 205 N.L.R.B. 888, 889 (1973), the precise danger that Congress admonished the Board to avoid. Particularly in light of these congressional admonitions, the Board should not impose bargaining

[5] The Board has never decided whether the rule governing appropriate units at acute care hospitals applies to hospital systems that include both acute and nonacute care facilities. *See Virtua Health*, 344 N.L.R.B. at 605-06 (finding it "unnecessary to reach this issue"); *but see Child's Hosp., Inc*., 307 N.L.R.B. 90, 92 (1992) (finding the rule inapplicable to "a single facility composed of an acute care hospital and a nursing home"). The Employer in this case operates a nursing home, not an integrated hospital system providing both acute and nonacute care. Accordingly, because the facts of this case do not present that issue, the Board has no occasion to decide here the appropriate application of the rule to an integrated hospital system containing both acute and nonacute care facilities.

unit standards that jeopardize a health care provider's ability to deliver uninterrupted care to patients as they transition between acute and nonacute care facilities. *Park Manor* allows the Board to strike an appropriate balance between community of interests and nonproliferation in each case and provides enough flexibility for the Board to strike a different balance where appropriate, such as in small nonacute care facilities in which fewer units would be appropriate given the limited number of employees and the functional integration of their duties. In contrast, allowing a greater number of units at nonacute care facilities, as queried by the Board in its amicus invitation in this case, would create unnecessary friction in the workplace, impose additional costs on care providers, and impede the integration of health care delivery methods, ultimately to the detriment of patient care. *E.g.*, *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 615 (1991) ("the fact that so many specialists are employed in the industry create[s] the potential for a large number of bargaining units, in each of which separate union representation might multiply management's burden in negotiation and might also increase the risk of strikes").

CONCLUSION AND SUMMARY OF RESPONSES TO QUESTIONS

For the reasons discussed above, the AHA and ASHHRA oppose any modifications to the procedures and standards for determining appropriate bargaining units that could erect obstacles to the integrated delivery of acute and nonacute care. For answers to questions 1 and 2 posed by the Board in its Notice and Invitation to File Briefs, the AHA and ASHHRA refer the Board to the amicus brief filed by the American Health Care Association. The AHA and ASHHRA respond below to questions 3 through 8. For answers to questions 7 and 8 as they pertain to industries other than health care, the AHA and ASHHRA refer the Board to the amicus brief filed by the Coalition for a Democratic Workplace, in which the AHA joins and incorporates by reference.

3. *In what way has the application of* Park Manor *hindered or encouraged employee free choice and collective bargaining in nonacute health care facilities?*

The Board's application of *Park Manor* has appropriately balanced community of interests and the policy against the proliferation of bargaining units in the health care industry, as Congress directed.

4. *How should the rules for appropriate units in acute health care facilities set forth in Section 103.30 be used in determining the appropriateness of proposed units in nonacute health care facilities?*

The number of appropriate units at nonacute care facilities should be no greater than the number of appropriate units at acute care hospitals because nonacute care facilities are at least as functionally integrated as acute care hospitals, but the number of appropriate units at nonacute care facilities may be fewer than under the rule.

5. *Would the proposed unit of CNAs be appropriate under* Park Manor?

The AHA and ASHHRA submit that the answer is no.

6. *If such a unit is not appropriate under* Park Manor, *should the Board reconsider the test set forth in* Park Manor?

The AHA and ASHHRA submit that the answer is no. The Board's application of *Park Manor* has appropriately balanced community of interests and the policy against the proliferation of bargaining units in the health care industry, as Congress directed.

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?*

The AHA and ASHHRA submit that the answer is no. In approving the Board's decision in *Woodland Park Hospital, Inc.*, 205 N.L.R.B. 888 (1973), Congress answered this question in the negative. This approach also is contrary to the Board's decision in *Newton-Wellesley Hospital*, 250 N.L.R.B. 409 (1980).

8. *Should the Board find a proposed unit appropriate if, as found in* American Cyanamid Co., *131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest?"*

The AHA and ASHHRA submit that the answer is no. In approving the Board's decision in *Four Seasons Nursing Center of Joliet*, 208 N.L.R.B. 403 (1974), Congress implicitly rejected this approach. This approach also is contrary to the Board's decision in *Newton-Wellesley Hospital*, 250 N.L.R.B. 409 (1980).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2011, a copy of the Brief of *Amici Curiae* American Hospital Association and American Society for Healthcare Human Resources Administration was electronically filed with the National Labor Relations Board and that true and correct copies of the brief were served vie e-mail upon:

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