JONES DAY

OCTOBER 2011


# NLRB ISSUES CONTROVERSIAL DECISION ON STANDARD FOR UNIT APPROPRIATENESS DETERMINATIONS

## *OVERTURNS PRECEDENT AND ESTABLISHES A POTENTIAL NEW COMMUNITY OF INTEREST TEST*

On August 26, 2011, in the third major decision released on Chairman Wilma Liebman's last day at the National Labor Relations Board ("NLRB" or "the Board"), the Board announced its 3–1 decision to reverse *Park Manor Care Center*,[1] which had defined the standard for determining units in nonacute health care facilities for 20 years. *See Specialty Healthcare & Rehabilitation Center of Mobile*.[2] In addition, despite the Congressional policy against proliferation of units in the health care industry that informed the *Park Manor* standard, the Board also potentially made it easier for unions to petition for smaller units consisting of employees in the same job classification in nonacute facilities—and simultaneously harder for employers to argue that a larger unit is appropriate—by putting the burden on employers to show that employees in the larger unit "share an overwhelming community of interest with those in the petitioned-for unit."

### THE OVERWHELMING COMMUNITY OF INTEREST TEST

The Board majority of former Chairman Wilma Liebman, Member Craig Becker, and now Chairman Mark Pearce, answered the (unasked) "question of what showing is required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless not an appropriate unit because the smallest appropriate unit contains additional employees."[3] After reciting Board maxims that there could be more than one appropriate unit, that size alone is not a factor in unit determinations, and that "the statute requires only *an* appropriate unit,"[4] the Board articulated the standard to be applied when an employer argues for the inclusion of other employees.

Initially, the Board recognized that it has stated—as recently as last year—that in order for a petitioned-for unit to be appropriate, it must be "sufficiently distinct" from employees excluded from the unit.[5] In *Specialty Healthcare*, however, the Board took "the opportunity to make clear that" in order for an employer to successfully oppose a petitioned-for unit on the basis that other employees must be included in the unit, the proper standard requires a showing "that the included and excluded employees share an overwhelming community of interest."[6] In summation, the Board explained its appropriateness analysis after *Specialty Healthcare* as follows:

> [W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite the contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an **overwhelming community of interest** with those in the petitioned-for unit.[7]

Applying the test to the petitioned-for Certified Nursing Assistants-only unit sought by the union in *Specialty Healthcare*, the Board found that the unit was appropriate, that there was no "overwhelming community of interest" compelling the inclusion of other employees, and that there was no undue unit proliferation by approving the CNA-only unit.

## BARGAINING UNIT PROLIFERATION ISSUES

The Board's decision summarized the history of unit determinations in the acute and nonacute health care field, beginning with the 1974 health care amendments to the National Labor Relations Act ("NLRA" or "the Act"), which subjected health care employers to the Act.[8] During the legislative process of the 1974 amendments, Congress stated that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."

In response to Congress's admonition regarding the nonproliferation of units, the Board engaged in extensive rulemaking in the late 1980s, resulting in the adoption of a rule defining eight appropriate units in acute care hospitals and prohibiting all other units absent extraordinary circumstances.[9] While the rule did not apply to nursing homes or other nonacute care facilities such as the one at issue in *Specialty Healthcare*, the Board formulated a rule for nonacute health care units in its 1991 *Park Manor* decision.

In *Park Manor*, the Board rejected application of the acute care rule but also rejected application of the Board's traditional community of interest test. Instead, the Board formulated a "pragmatic or empirical community of interest" approach, which it described as "a broad approach utilizing not only 'community of interest' factors but also background information gathered during [the acute health care] rulemaking and prior precedent. Thus … our consideration will include those factors considered relevant by the Board in its 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."[10]

In *Specialty Healthcare*, the Board offered three points to justify overturning *Park Manor*. First, the Board observed that while it has given deference to the Congressional policy against proliferation of units, Congressional reports do not have the force of law and, absent statutory language, "[t]he Act … provides no basis for defining appropriate units in the health care industry using different criteria than applied in other industries."[11] Second, the Board believed that, since the nursing home industry is a "highly dynamic industry," relying on rulemaking observations in the acute care industry from the 1980s is unreasonable.[12] Third and finally, the Board believed that *Park Manor*'s reference to "those factors considered relevant by the Board in its rulemaking proceeding" was unclear, leaving the Board "simply unable to understand how a '"pragmatic or empirical community of interests" approach' differs meaningfully from our traditional community-of-interest approach."[13] Accordingly, the Board overturned *Park Manor*, instead applying the overwhelming community of interest standard.

## THE DISSENT

In a strongly worded dissent, Member Brian E. Hayes accused the Board majority of continuing what he describes as a recent trend of "initiating a purported empirical inquiry into the effects of extant precedent, only to end by overruling that precedent in the absence of any factual justification, for the purely ideological purpose of reversing the decades-old decline in union density in the private American work force."[14]

Specifically, Member Hayes objected to the majority's decision to overturn *Park Manor*, which he described as precedent that had been applied for "two decades without apparent misunderstanding by the parties."[15] The dissent also stressed that, as *Specialty Healthcare* came to the Board, no party asked for *Park Manor* to be overturned, and instead had only asked the Board to review whether the standard was correctly applied. Member Hayes objected to the Board's decision to overturn *Park Manor* without being asked to do so "in order to get to the issue they really want to address, that is, a reformulation of the community-of-interest test."[16]

Regarding the Board's treatment of the community of interest test, Member Hayes raised two objections. First, he stressed that the "overwhelming community of interest" adopted by the Board is properly used in accretion cases where employees will be added to a recognized unit without affording those employees the opportunity to exercise their Section 7 rights to vote. In those cases, the Board requires a higher standard—the "overwhelming community of interest" standard—"to assure that those employees are not unfairly deprived of their right to vote on the question of representation."[17] Such concerns are not present in the run-of-the-mill unit determinations where any employee included in the unit will have a right to vote.[18]

Second, Member Hayes voiced concern that the Board was recreating the same error the Fourth Circuit reversed in *NLRB v. Lundy Packing Co.*,[19] where the Board presumed that petitioned-for units were appropriate unless there is "an overwhelming community of interest" with other excluded employees.[20] The *Specialty Healthcare* majority rejected this argument, however, stressing that there would be no presumption of appropriateness and that the "overwhelming community of interest" test would be applied only *after* the Board had engaged in the required appropriateness analysis.[21]

## THE PRACTICAL IMPACT OF *SPECIALTY HEALTHCARE*

The Board's decision undoubtedly affects employers facing unionizing efforts in the nonacute health care industry, as that industry's *Park Manor* test is no longer applicable. The Board's willingness to minimize the Congressional admonition against proliferation of units, and skepticism of treating health care providers differently under the Act, raises concerns for both acute and nonacute health care employers. But for all employers other than acute health care employers, who are still covered under the Board's rule defining appropriate units in the acute care industry, *Specialty Healthcare* is an encouragement for unions to petition for smaller, job-specific units that the Board may approve as appropriate, as long as the employees are "readily identifiable as a group" and share a community of interest.

The decision will make it harder for most employers to contend that a larger unit is appropriate unless they can meet the higher—potentially unattainable—standard of showing that the added employees share "an overwhelming community of interest" with the employees in the petitioned-for unit. *Specialty Healthcare* thus creates the prospect that many employers will face more organizing drives focused on smaller, easier-to-organize employee groups. And if those efforts are successful, those employers will have to engage in bargaining with more units, consisting of a smaller number of employees, and face having to administer multiple collective bargaining agreements with potentially varying wage scales, benefit packages, and work rules within a single workforce. Not only will those employers be hampered by the proliferation of units, but the increase in differing seniority systems, promotion systems, and systems for bidding on open positions between units likely adds barriers to employee promotion and transfers between units within the company.

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## ENDNOTES

1 305 NLRB 872 (1991).

2 357 NLRB No. 83 (Aug. 26, 2011).

3 *Id.* at *10.

4 *See id.* at *10-11.

5 *See id.* at *11-12 (citing *Wheeling Island Gaming*, 355 NLRB No. 127 at *1 fn.2 (2010) and *Seaboard Marine*, 327 NLRB 556, 556 (1999)).

6 *Id.* at *11.

7 *Id.* at *12-13 (footnotes omitted) (emphasis added).

8 *See id.* at *4.

9 *See id.* (citing 54 Fed. Reg. 6336-01 (1989)).

10 305 NLRB at 875 & fn. 16.

11 357 NLRB No. 83 at *4-5.

12 *Id.* at *5.

13 *Id.* at *6.

14 *Id.* at *16.

15 *Id.* at *17.

16 *Id.* at *17-18.

17 *Id.* at *18.

18 *Id.*

19 63 F.3d 1577 (4th Cir. 1995)

20 *See* 357 NLRB No. 83 at *18 (citing 63 F.3d at 1581).

21 *Id.* at *11 fn. 25.