

I. Introduction & Facts

The Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (“USW”) represents employees in around 130 non-acute care nursing homes throughout the U.S.

In the instant case, the USW seeks to represent all of the CNAs of a 170-bed nursing home, Specialty Healthcare & Rehabilitation Center of Mobile (“Specialty Healthcare” or “Employer”), which is organized in a fashion quite typical of other nursing homes with which the USW bargains.

It is becoming more typical throughout the non-acute care nursing home industry that CNAs are the backbone of the nursing home, and, more specifically, its care of the residents. Indeed, as is the case here, when one factors out the charge nurses who the Board is more frequently considering to be supervisory employees, the CNAs are the Nursing Department, and therefore share a readily identifiable and distinct community of interest.

Thus, as the Regional Director found in this case, the 53 CNA employees constitute the vast majority of the total non-supervisory employees at the nursing home, and are responsible for nearly all of the direct care of the residents (Regional Director’s Decision (“RD”) at ps. 2, 5-6,11).¹ As the Regional Director concluded, out of the larger group of employees in the bargaining unit proposed by the employer:

The CNAS are the only employees assigned to work the floors and tend to designated residents. The CNAs are the only employees who

¹As is becoming quite typical throughout the industry, the nursing home contracts out significant work to a subcontractor. Specifically, the laundry and housekeeping employees are not employed directly by Specialty Healthcare, but instead, are employed by a subcontractor (RD at p. 2, fn. 3). This results in the CNAs becoming a larger portion of the nursing home’s directly-employed workforce.

consistently handle the physical care of the residents and complete the ADLs [Activities for Daily Living sheets].

* * *

The CNAs, by virtue of their classification, are the only employees in the proposed bargaining unit who assist with feeding. The CNAs are the only employees who record the residents' daily functions, and who are assigned the care of individual residents, as opposed to participating in generalized activities or functions.²

(RD at p. 11-12) (emphasis added).

Consequently, “[t]he CNAs receive training in the care of residents to assist them in the performance of their duties.” (RD at p. 12). Indeed, “[t]he CNAs are the only employees in the Employer’s proposed unit who must attend classes, obtain state certification and maintain that certification.” (*Id.*).

Finally, the CNAs are distinct from all of the other employees in other respects. For example, “[t]he contact between the CNAs and the other employees in the proposed unit is limited and unspecific.” (RD at p. 12). Indeed, the CNAs, along with their direct supervisors, the RNs and LPNs, are the only employees in the Nursing Department which itself is overseen by the Director of Nursing (*Id.* at p. 3). In addition, “the CNAs work schedules, wage rates, and duties are distinctive and differ from the other employees.” (*Id.* at 11). More specifically, “[t]he CNAs are the only proposed bargaining unit employees who work a three shift schedule.” (*Id.*). Further, the Regional Director concluded that there is nominal functional interchange in light of the fact that “[t]here is

² The only other employees involved in direct resident care are the RNs and LPNs who, as the parties stipulate, are supervisors (directly supervising only the CNAs), and three (3) Activity Assistants who, while “assisting resident to participate in organized activities which may include pet therapy, music therapy, church services, bingo, and arts and crafts,” do not engage in any of the direct, physical care of the residents. (RD at ps. 7, 12)

no evidence that any employees have transferred into a CNA position,” and while the CNAs may assist other employees with their functions, “the record does not indicate that any of the other department employees help the CNAs in performance of their functions.” (*Id.* at 13).

II. Argument

A. Summary of Argument

This case illustrates why the Board should apply the same community-of-interest test in non-acute health care facilities as it does in every industry other than acute care hospitals, and specifically, that it should approve a petitioned-for unit if that unit is *prima facie* appropriate and unless the employer can demonstrate that the excluded employees share such an “overwhelming community of interest” with employees in the petitioned-for unit that there is no legitimate basis to exclude them. *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008); *see also, Overnite Transportation Company*, 322 NLRB 723, 723-724 (1996) (“The Board . . . does not compel a petitioner to seek any particular appropriate unit. The Board’s declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or the most appropriate unit for collective bargaining.”) Further, the Board, in applying this test, should keep in mind the presumption in favor of “the smallest appropriate unit encompassing the petitioned-for employee classifications.” *See, Boeing Co.*, 337 NLRB 152, 153 (2001); *United Operations, Inc.*, 338 NLRB No. 18, slip op. at 1 (2002).

Applying the foregoing test and presumption, as well as the Board’s holding in the seminal health care industry representation case of *Park Manor Care Center*, 305 NLRB 872 (1991), the Board should uphold the decision of the Regional Director who

approved the petitioned-for CNA unit at Specialty Healthcare. *See, e.g., Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1027 & fn. 4 (2006) (case involving union certified since 2000 as the exclusive bargaining representative of a CNA-only unit (excluding maintenance, laundry, housekeeping, dietary and office and clerical employees) at a medical center which includes a 44-bed nursing home, 10-bed hospital, an emergency room, and a rural health clinic).

B. There Is No Health Care Rule Which Prohibits The Petitioned-For Unit

As an initial matter, it is well-settled that the Board’s health care rules, which apply to acute care facilities, do not apply to non-acute care facilities such as nursing homes, and that, instead, the Board makes unit determinations at non-acute care facilities by adjudication on a case-by-case basis. *See*, Federal Register, Volume 53, No. 17 at 284 NLRB 1567-1568 (1998). As the Board explained, “we have decided to exclude nursing homes from the [health care] rule. The evidence shows that there are not only substantial differences between nursing homes and hospitals but also significant differences between the various types of nursing homes which affect staffing patterns and duties. . . . We, therefore, conclude that it is best to continue a case-by-case approach with respect to nursing homes.” 284 NLRB at 1568.

Moreover, while Specialty Healthcare claims that the Regional Director’s decision below violates some “mandate” to “avoid[] ‘undue proliferation’ of bargaining units in the health care setting,” there indeed is no such mandate. Specialty Healthcare Request for Review at p. 6. Indeed, prior to the 1974 NLRA amendments, Congress rejected a bill that would have limited the number of bargaining units in nonprofit health care institutions to five. *See Am. Hosp. Ass’n*, 499 U.S. at 616 (discussing S. 2292, 93d

Cong., 1st Sess. (1973)). During the following session, Congress passed a *different* bill extending NLRA coverage to all private health care institutions, a bill that “made no change to the Board’s authority to determine the appropriate bargaining unit in each case.” *Id.* And, while the legislative history of this later bill stated that “[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry,” *id.*, the Supreme Court has expressly held that one “obviously could not . . . contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating.” *Id.*; accord, *Int’l Bhd. of Elec. Workers v. NLRB (St. Francis Hosp.)*, 814 F.2d 697, 710 (D.C. Cir. 1987) (“[T]here is absolutely nothing in the Act to indicate that Congress intended the 1974 Amendments to restrict the Board’s broad discretion under section 9.”).

In any case, as we demonstrate below, the certification of the CNA-only unit would not lead to any “proliferation of units” in the nursing home at issue here.

C. *Park Manor* & The Community of Interest Test

The chief case decided after the Board issued its health care industry bargaining unit rule is *Park Manor Care Center* (“*Park Manor*”), 305 NLRB 872 (1991). In that case, the Board first made it clear that it had already “explicitly” decided that it would not apply its health care industry bargaining unit rule to nursing homes, but rather, that it would decide representation cases involving nursing homes on a “case-by-case approach,” guided primarily by the traditional “community of interests” test. *Id.* at 872, 874-876.

Of particular importance, the Board in *Park Manor* opted for the “community of interests test” over the “disparity of interests test” which, as the Board explained, “has been characterized by several courts of appeals as being most consistent with the ‘Congressional directive to “prevent undue proliferation of bargaining units in the health care field.”” 305 NLRB at 873. As the Board explained, the “application of the disparity test was not required” in light of the Supreme Court’s decision to uphold “the Board’s Rule, finding appropriate 8 units in acute care hospitals.” *Id.* fn. 12 (citing, *American Hospital Ass’n v. NLRB*, 111 S.Ct. 1539, 1544-1546 (1991)).

In the end, the Board in *Park Manor* made it clear that an employer’s concerns about the proliferation of too many small units (whether in the acute or non-acute health care field) is given no greater priority than the converse concern that units too large may be difficult for unions to organize. *Id.* at 876. This is consistent with the general rule that, in making unit determinations, the Board will certify “a unit that is the *smallest appropriate unit* encompassing the petitioned-for classifications.” *See, The Boeing Co.*, 337 NLRB 152, 153 (2001); *United Operations, Inc.*, 338 NLRB No. 18, slip op. at 1 (2002).

And so, *Park Manor* stands for the following basic proposition: the Board will apply its community-of-interest test to determine on a “case-by-case basis” whether a petitioned-for unit in a nursing home or other non-acute health care facility is appropriate, rather than limiting the possible appropriate units to the acute care hospital units or some other “uniform” set of appropriate units.³ To the extent that any post-*Park Manor*

³Where unions have petitioned for acute care bargaining units in a non-acute health care facility after *Park Manor* – principally service and maintenance units or skilled maintenance units – the Board has generally found such units appropriate. *See*,

decisions have read *Park Manor* otherwise, the Board should clarify that it will apply the same community-of-interest test in non-acute health care facilities as it does in every industry other than acute care hospitals.

D. A CNA-Only Unit Is Appropriate Under the Community of Interest Test

As a practical matter, allowing CNA bargaining units will not lead to an undue proliferation of units in nursing homes. The number of likely bargaining units in most nursing homes is limited because physicians and other professionals are typically contractors rather than employees. In addition, as in this case, it is also becoming increasingly typical for laundry and housekeeping employees to be employed by subcontractors.

Furthermore, nursing home RNs are almost always supervisors, and, as in this case, nursing home LPNs (typically the only technical employees) are frequently supervisors as well. Indeed, one of the major, intervening changes in the law since *Park Manor* has been the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), which (much to the chagrin of unions) has led to the widespread exclusion of nursing home RNs and LPNs (especially those working as charge nurses as in this case) entirely from union representation. In fact, the specific representation issue confronting the Board in *Park Manor* – whether LPNs should be in the same unit as the lesser-skilled CNAs or whether they should be part of their own

e.g., *Hebrew Home & Hosp., Inc.*, 311 NLRB 1400 (1993) (skilled maintenance unit in nursing home); *McLean Hosp. Corp.*, 309 NLRB 564 (1992) (skilled maintenance unit in psychiatric hospital); *Hillhaven Convalescent Ctr.*, 318 NLRB 1017 (1995) (service and maintenance unit in nursing home).

unit– would arise with lesser frequency today, and certainly does not arise here where the parties have stipulated that they are statutory supervisors.

In the end, then, as the result of the quite typical contracting out of the laundry and housekeeping employees, and in light of the equally typical exclusion of the RNs and LPNs from representation, allowing a CNA unit would therefore typically result in **at most three units**: the CNA unit itself, which, we note, would typically constitute the entire Nursing Department unit; a skilled maintenance unit; and a residual service and maintenance unit.⁴ In light of the Supreme Court’s unanimous approval of the Board’s **eight-unit rule** even in the context of acute care hospitals, permitting three units in a nursing home would not constitute “undue proliferation.”

Finally, the Employer in this case contends that allowing the petitioned-for CNA unit will lead to “multiple small, residual, non-conforming units” that are not permitted by *Park Manor*. Er’s Req. for Rev., 29. The claim that “non-conforming units” are not allowed by *Park Manor* misreads that case. On the contrary, the Board in *Park Manor* explicitly refused to conform its nursing home unit determinations to the acute care hospital bargaining unit rule or any other “uniform [bargaining unit] rule” in favor of case-by-case adjudication, an implicit acknowledgment that nursing home units that do not conform to the acute care hospital units can be appropriate. More generally, a strict rule against the creation of small residual units would “impl[y] that *all* employees who share a community of interest *must* be included in the same unit, . . . conflict[ing] with

⁴ Although in theory there could be an additional business office clerical unit, in practice there are so few such employees in the typical nursing home that they infrequently seek union representation as an independent group. *See, e.g.*, Er’s Req. for Rev., 5 n. 5 (stating that there are only two business office clerical employees at Specialty Healthcare).

the principle that more than one bargaining unit may be appropriate in any particular setting.” *Blue Man Vegas*, 529 F.3d at 427 (emphasis added). Indeed, as the Supreme Court held even in the acute care context, “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991). Citing this passage, the Board has held that “[a] union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer,” just so long as the unit is indeed appropriate. *Overnite Transportation Co.*, 322 NLRB 723, 723 (1996) (emphasis added). Indeed, where the Board concludes that a petitioned-for unit is not appropriate under the Act, it should “attempt[] to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications,” *The Boeing Co.*, 337 NLRB 152, 153 (2001), rather than simply substituting the employer’s preferred unit.

Thus, in the nursing home setting, every petitioned-for bargaining unit must be evaluated on its own merits; that is the consequence of the Board’s decision to exempt nursing homes from the mandatory hospital bargaining unit rule and instead “determine appropriate units in [nursing homes] . . . by adjudication.” 29 C.F.R. § 103.30(g).

Notably, the health care industry bargaining unit rule allows for residual units in acute care hospitals that result from stipulations or from units that predate the rule. 29 C.F.R. § 103.30(d); *see also* 53 Fed. Reg. at 33932, 284 NLRB at 1573 (explaining that “[t]o the extent a stipulation may later result in the creation of a residual group of unrepresented employees, the Board will address their representation concerns . . . on a case-by-case basis applying the rules insofar as practicable”). And, the Board has further affirmed that where a nonconforming unit exists, even “a non-incumbent union . . . [may]

represent[] in a separate residual unit all unrepresented employees residual to those in the existing non-conforming unit,” even though the result is a perpetuation of both nonconforming units. *St. Mary’s Duluth Clinic Health Sys.*, 332 NLRB 1419, 1421 (2000) (overruling *Levine Hosp. of Hayward, Inc.*, 219 NLRB 327 (1975)). It would be anomalous for the Board to allow for the creation and continued existence of residual units in hospitals covered by the rulemaking but not in nursing homes where bargaining units are decided by case-by-case adjudication.

E. The *Blue Man Vegas* Test Is Applicable Here

In applying its community-of-interest test in the non-acute health care setting, as well as in every other industry other than acute care hospitals, the Board should apply its traditional community-of-interest test, a test that has been approved of and helpfully summarized by the D.C. Circuit in *Blue Man Vegas*, 529 F.3d at 421: when a petitioned-for unit is *prima facie* appropriate, the Board should approve it unless the employer demonstrates that the excluded employees share such an “overwhelming community of interest” with employees in the petitioned-for unit that there is no legitimate basis to exclude them. The petitioned-for group and the excluded employees share an “overwhelming community of interest” when “neither group can be said to have any *separate* community of interest justifying a separate bargaining unit.” *Id.* at 422 (quoting *Trident Seafoods*, 101 F.3d at 120) (emphasis added).

It is well-established that in undertaking its statutory responsibility to “decide in each case . . . the unit appropriate for the purposes of collective bargaining,” 29 U.S.C. § 159(b), the Board’s “focus is on whether the employees share a ‘community of interest.’” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). That is, the Board must determine

whether the petitioned-for unit consists of “employees who have substantial mutual interests in wages, hours, and other conditions of employment.” *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73 (1971) (quoting 15 NLRB Ann. Rep. 39 (1950)). Factors considered include “similarities in skills, interests, duties, and working conditions; the nature of the employer’s organization, including functional integration, organizational and supervisory structure, interchange of employees, and physical proximity; employee desires and bargaining history; and the extent of union organization among employees.” J. Abodeely, *The NLRB and the Appropriate Bargaining Unit* 13 (rev. ed. 1981).

In light of the statute’s clear statement that a “unit appropriate for the purposes of collective bargaining” may be “the employer unit, craft unit, plant unit, or subdivision thereof,” 29 U.S.C. § 159(b), it follows logically that several different groupings of employees in a workplace may each share a sufficient community of interest to qualify as an appropriate unit. *See Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991) (“[T]he language [of Section 9(a)] suggests that employee may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” (emphasis in original)); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) (“There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be ‘appropriate.’” (emphasis in original)).

In choosing among alternative appropriate units, the Act’s reference to a representative “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,” 29 U.S.C. § 159(a),

when “read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees.” *Am. Hosp. Ass’n*, 499 U.S. at 610. Thus, where a union petitions for a *prima facie* appropriate unit – *i.e.*, a unit in which “the employees . . . share a community of interest,” *Blue Man Vegas*, 529 F.3d at 421 – the Board should approve the unit unless the employer can show that “the excluded employees share an overwhelming community of interest with the included employees” such that “there is no legitimate basis upon which to exclude them.” *Ibid.*

A heightened employer showing is necessary because the fact “[t]hat the excluded employees share a community of interest with the included employees does not . . . mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit.” *Ibid.* Rather, “the employer’s burden is to show the *prima facie* appropriate unit is ‘truly inappropriate.’” *Ibid.* (quoting *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000)). *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (“[I]t is not enough for the employer to suggest a more suitable unit; it must show that the Board’s unit is clearly inappropriate.”). In order to make this showing, the employer must demonstrate that “neither [the petitioned-for] group [nor the excluded employees] can be said to have any *separate* community of interest justifying a separate bargaining unit.” *Blue Man Vegas*, 529 F.3d at 422 (quoting *Trident Seafoods*, 101 F.3d at 120) (emphasis added).

The facts of *Blue Man Vegas* illustrate how the “analytic framework” set forth in that decision functions in practice. In that case, the union petitioned to represent a unit composed of six out of seven departments of the stage crew for the popular Blue Man

Group theatrical show, including the audio, carpentry, electrics, properties, video, and wardrobe departments; every department except for a small group of “musical instrument technicians” or “MITs.” 529 F.3d at 419. The excluded MITs were separately supervised, signed-in separately from other members of the stage crew, primarily worked with the musicians rather than the other stage crew members, had different skills from the stage crew members in other departments, and, in some cases, were salaried rather than hourly employees. *Id.* at 419-20.

Applying the analytic framework described above, the D.C. Circuit concluded:

A unit comprising all the non-MIT stage crews is *prima facie* appropriate because, notwithstanding the differences among them, those employees share a community of interest. It may well be that a unit comprising all the stage crews, including the MITs, would also be *prima facie* appropriate because the MITs also share a community of interest with the other stage crew employees, but that does not necessarily render the unit comprising only the non-MIT stage crews ‘truly inappropriate.’ Indeed, both the differences that are unique to the MITs and the differences that can be found among all the stage crews stand in [the employer’s] way: The MITs lack an overwhelming community of interest with the other stage crews (just as each of the non-MIT crews may lack an overwhelming community of interest with each of the other non-MIT crews).” *Id.* at 424-25.

In other words, “[e]ven if . . . differences in supervision, pay structure, and sign-in sheet were too meager on their own to justify the exclusion of the MITs from bargaining unit[,] . . . [t]he sum of those differences was sufficient to justify the Board’s decision that the MITs do not share an *overwhelming* community of interest with the other stage crew employees.” *Id.* (emphasis added).

Applying the foregoing analytic framework to this case, the Regional Director correctly concluded that the petitioned-for CNA unit constitutes an appropriate unit for collective bargaining, rejecting the Employer’s contention that only a wall-to-wall unit of

all nonprofessional employees would be appropriate. The petitioned-for CNA unit is *prima facie* appropriate at Specialty Healthcare because the CNAs share a community of interest. Because the Employer failed to make its heightened showing that the workers excluded from the unit share an overwhelming community of interest with the CNAs, the Regional Director correctly found the petitioned-for unit appropriate.

The Regional Director correctly concluded that the CNAs at Specialty Healthcare share a community of interest. The CNAs must be state certified and are required to undertake certain specialized training to obtain and retain this certification. RD at ps. 3-4. The CNAs are part of the Nursing Department and are supervised by the LPN Charge Nurses and RN Unit Managers. *Id.* at 5. Finally, the CNAs are primarily responsible for the direct care of residents, including “feeding, bathing, dressing, turning, lifting, transporting residents to different areas or activities within the facility, and trimming nails and hair.” *Id.*

The Employer, for its part, failed to show that the workers it contended should be included in the unit (activity assistants, dietary employees, cooks, the central supply clerk, the medical records clerk, the receptionist, the data entry clerk, the maintenance assistant, the social services assistant, the business office clerical and the coordinator/staffing clerk, RD at ps. 1-2) share an overwhelming community of interest with the CNAs such that there is no legitimate basis to exclude them from the CNA unit. In contrast to the CNAs, none of the excluded employees are required to obtain state certification or undertake any specialized training relating to the care of residents. *Id.* at 4. Likewise, none of the excluded employees are supervised by the LPN Charge Nurses

or RN Unit Managers or are employed in Specialty Healthcare's Department of Nursing. *Id.* at 3.

The employees who share the closest community of interest with the CNAs are the activity assistants, who must have “a bachelor’s degree or equivalent advanced training or certification in a job related area,” *id.* at 4, and who participate to some degree in the care of residents by “assisting residents to participate in organized activities which may include pet therapy, music therapy, church services, bingo, and arts and crafts.” *Id.* at 7. On the other hand, unlike the activity assistants, “[t]he CNAs are the only employees who assist residents with dressing, bathing, and eating” and “who are assigned the care of individual residents, as opposed to participating in generalized activities or functions.” *Id.* at 12. Thus, although the activity assistants share *some* community of interest with the CNAs, that common community of interest is not so “overwhelming” that “neither [the CNAs nor the activity assistants] can be said to have any *separate* community of interest.” *Blue Man Vegas*, 529 F.3d at 422 (emphasis added). Therefore, the activity assistants may properly be excluded from the petitioned-for CNA unit.

Also helpful here is the case of *United Operations, Inc.*, 338 NLRB No. 18, slip op. at ps. 1-4 (2002), where the Board, keeping in mind the admonition to approve “the smallest appropriate unit,” found that the petitioned-for unit of 9 heating, ventilation and air conditioning service technicians (HVAC techs), excluding the other 42 field service employees, was an appropriate one for organizing at an employer which provides general building maintenance services through its field service employees (i.e., 26 building service employees and 16 policers). As the Board explained in that case, even though

the HVAC techs shared common personnel policies and work rules with other field service employees, the HVAC tech unit was an appropriate one in light of the fact that

The HVAC techs are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work with little overlap; the Employer's work is not significantly integrated; there is little contact between the HVACs and. . . [other field service employees]; there is no significant interchange; the HVAC techs receive higher wages; and the HVAC techs are separately supervised

Id. at p. 3. And, the Board found that while the HVACs and some of the other employees performed some of the same tasks and assisted each other at times, thus exhibiting a “spirit of cooperation,” the fact that the HVACs “spend a majority of their time performing distinctive duties” meant that they could properly be organized into a separate unit. *Id.*

In light of the foregoing, the Board in *United Operations, Inc.* rejected the Regional Director's determination that “smallest appropriate unit must include all field service employees” 338 NLRB No. 18, slip op. at p. 1. Rather, the Board concluded that the HVAC techs were the smallest appropriate unit for bargaining. *Id.*; *accord, Burns & Roe Services, Inc.*, 313 NLRB 1307 (1994) (finding unit of electrical department employees appropriate where they were separately supervised, separately assigned work, and received a distinct wage rate and training).

Similarly, in this case, the CNAs -- organized as they are into their own (Nursing) department; with distinct skills and job training; performing distinct functions and work (specifically, the direct care of residents); receiving distinct wages; and with their own, distinct supervision -- constitute the smallest appropriate unit for organizing and bargaining. Indeed, in certifying the CNA unit in this case, the Board would simply be certifying the unit of all non-supervisory employees in the Nursing Department. The

CNA-only unit is therefore patently reasonable, and is certainly not without precedent. See, e.g., *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1027 & fn. 4 (2006) (case involving union certified since 2000 as the exclusive bargaining representative of a CNA-only unit (excluding maintenance, laundry, housekeeping, dietary and office and clerical employees) at a medical center which included a 44-bed nursing home, 10-bed hospital, an emergency room, and a rural health clinic).

III. Conclusion

In light of the above, the USW urges the Board to determine appropriate bargaining units in non-acute health care facilities by applying the same community-of-interest test it applies generally. Applying this analytic framework to the facts of this case, the Board should affirm the Regional Director's decision finding the petitioned-for CNA unit an appropriate unit to be organized.

Dated: March 8, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Daniel M. Kovalik, do hereby certify that on March 8, 2011, a copy of the foregoing document was filed electronically with the National Labor Relations Board in Washington, DC and copies were served via U. S. Mail, postage prepaid, on the following:

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