UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:	)	
	)	
SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE,	)	
	)	
Employer,	)	
	)	Case No. 15-RC-8773
and	)	
	)	
UNITED STEELWORKERS, DISTRICT 9,	)	
	)	
Petitioner.	)	
	)	

BRIEF OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

By notice published December 22, 2010 in the above-referenced case, the National Labor Relations Board indicated its intention to evaluate whether the "pragmatic or empirical community of interests" test adopted in Park Manor Care Center, 305 NLRB 872 (1991) for determining the appropriate bargaining unit in nonacute health care facilities is serving its statutory purpose. The Board invited the parties and interested amici to file briefs addressing the proper standard for determining appropriate units in nonacute care facilities, and particularly asked for their experience under the Park Manor test and their input on typically appropriate units in nonacute care facilities.

The International Union of Operating Engineers, AFL-CIO (IUOE) is a labor organization of approximately 400,000 members. Its affiliated local unions represent some 20,000 employees working in skilled maintenance units in the health care industry[1] as well as over 3,700 nurses. They work in acute care hospitals as well as nonacute care facilities such as psychiatric hospitals, rehabilitation facilities, and nursing homes.

The IUOE has long taken a special interest in the issue of appropriate bargaining units in the health care industry. During the Board's historic rulemaking proceeding, the IUOE was an active participant, presenting direct testimony, affidavits, and documentary evidence in support of the skilled maintenance unit. The Board relied heavily on the evidence presented by the IUOE in finding a separate skilled maintenance unit as one of the eight appropriate units in its Final Rule for acute care hospitals. See 53 Fed. Reg. at 33920-33924. The IUOE filed a joint brief to the Supreme Court in support of the Final Rule. AHA v. NLRB, 499 U.S. 606 (1991). Since the Supreme Court's unanimous affirmance of the Rule, the IUOE and its locals have continued to be active in litigating the Rule's application in acute care hospitals and in seeking representation of employees in hospitals.[2] And as will be shown below, they also have relevant experience in organizing and representing employees in nonacute care facilities.

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[1] The Board has described the skilled maintenance unit as "all employees involved in the maintenance, repair, and operation of [a facility's] physical plant systems, as well as their trainees, helpers, and assistants." 53 Fed. Reg. at 33923-33924. Skilled maintenance employees are distinguishable from the maintenance employees typically in "service and maintenance" units, who tend to be engaged in housekeeping, janitorial, or other unskilled maintenance functions. As the Board recognized in the Second Notice of Proposed Rulemaking, 53 Fed. Reg. at 33921, "the 'maintenance' employees in 'service and maintenance' units are frequently unskilled rather than skilled maintenance employees."

[2] See, for example, St. Margaret Memorial Hospital v. NLRB, 991 F.2d 1146 (3d Cir. 1993); Indiana Hospital v. NLRB, 10 F.3d 151 (3d Cir. 1993); Presbyterian University Hospital v. NLRB, 88 F.3d 1300 (3d Cir. 1996); McLean Hospital, 309 NLRB 564 (1992); Empire Health Centers Group, 314 NLRB 677 (1994); Silver Cross Hospital, 350 NLRB 114 (2007); Beth Israel Deaconess Medical Center, 1-RC-21608 (2003).

In light of this background and experience, the IUOE is in a position to provide useful information and perspective to the Board for its consideration in establishing the proper standard for determining appropriate units in nonacute health care facilities.

THE PARK MANOR TEST PROVIDES A USEFUL FRAMEWORK FOR DETERMINING APPROPRIATE UNITS IN THE NONACUTE HEALTH CARE INDUSTRY AND SHOULD BE RETAINED

For the reasons advanced by the AFL-CIO in its brief, the IUOE supports the flexible approach that the Board announced in Park Manor for determining appropriate bargaining units in nonacute health care facilities, including nursing homes. In Park Manor, the Board stated that it would "take a broader approach" in determining units in nonacute care facilities, "utilizing not only 'community of interests' factors but also background information gathered during rulemaking and prior precedent." 305 NLRB at 875. It found that "comparing and contrasting" the work forces in nonacute facilities with those in acute care hospitals "would aid in determining appropriate units." Ibid. And it expressed the expectation that "after various units have been litigated in a number of individual facilities, and 'after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.'" Ibid., citing St. Francis Hospital, 271 NLRB 948, 953 n. 39 (1984). [3]

[3] In its brief in support of the request for review (pp. 9-10), the Employer would have the "background information gathered during the rulemaking proceeding" referred to in Park Manor limited to an avoidance of "undue proliferation" and residual units in the nonacute care industry. There is no basis to read the language so narrowly, and we read it as embracing all the information gathered in the rulemaking proceeding.

As we show below, under the Park Manor approach, the units found to be appropriate in acute care hospitals in the rulemaking proceeding will typically be, at the very least, an appropriate unit in nonacute care facilities. At the same time, where a unit not conforming to one of the eight hospital units is petitioned for, we submit that Park Manor allows the Board to apply a community of interest test to determine whether the unit is appropriate, in order to provide employees the fullest freedom in self-organization.

1. In the ten years since Park Manor was issued, cases decided thereunder have demonstrated "recurring factual patterns" which illustrate that various of the eight acute care hospital units are also "typically appropriate" in nonacute health care facilities. The skilled maintenance unit, which will be the focus of this brief, provides a particularly good example of how the information gained in the rulemaking proceeding is equally applicable to nonacute care facilities, thereby making units found in the hospital rule typically appropriate in nonacute care facilities under the Park Manor analysis.

In the hospital rulemaking proceeding, Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33900, 33923, the Board relied on the following factors in finding that skilled maintenance employees form a separate appropriate unit:

> The evidence from the hearings shows that, in virtually all health care facilities which were the subject of testimony at the hearings, skilled maintenance employees constitute a discrete and distinct group of employees. They perform functions apart from those of unskilled service, maintenance, and clerical employees. Skilled maintenance employees were shown to be highly skilled as evidenced by higher educational, licensing, and training requirements. While they share some common terms and conditions of employment with other hospital personnel, these employees uniformly have higher wages than service and clerical employees

> and have a number of bargaining interests separate and distinct from those of non-maintenance employees, such as access to craft related education and training programs, tool supply allowances, safety equipment and practices, portable pensions, and the like. Moreover, while skilled maintenance employees do work throughout the entire hospital, their contact with non-maintenance employees is brief and limited. Finally, the hearing evidence shows that transfers are rare in the industry and that skilled maintenance employees have a separate internal and external labor market. (emphasis added)

In light of these factors, the Board specifically noted that "the alleged trend toward specialized hospitals . . . would appear to have no impact on skilled maintenance units because the physical plant systems will essentially remain the same and will require skilled maintenance employees to operate them." 53 Fed. Reg. at 33923. As the Board summarized, skilled maintenance work "is, essentially, a non-health care occupation involving skills, interests, and job markets largely separate from the hospital itself." Ibid.

The cases decided under the Park Manor "pragmatic or empirical" test show the kind of "recurring factual patterns," 305 NLRB at 875, that confirm that the skilled maintenance unit is typically appropriate when requested in nonacute health care facilities.[4] Thus, in McLean Hospital Corporation, 309 NLRB 564 (1992), the Board affirmed the Regional Director's finding that the petitioned-for skilled maintenance unit was appropriate in a nonacute care psychiatric hospital, determining that the Regional Director had properly applied the Park Manor standard. In finding the skilled maintenance unit to be appropriate, the Regional Director "note[d] the striking similarity between the skilled maintenance workforce in acute care hospitals, as described in the rulemaking process, and the skilled maintenance workforce at [the psychiatric

[4] Indeed, even in pre-rulemaking decisions, skilled maintenance units were found appropriate in nonacute health care facilities, such as Hebrew Rehabilitation Center, 236 NLRB 255 (1977)(nursing home); McLean Hospital, 234 NLRB 424 (1979)(psychiatric hospital).

hospital]." 309 NLRB at 575. He pointed out that the skilled maintenance employees in both acute care hospitals and the psychiatric hospital shared the same high skill level, higher pay than other non-professional employees, separate supervision, and unique bargaining interests. In addition, in responding to the employer's argument that the psychiatric hospital differed from acute care hospitals, the Regional Director found that nothing about the psychiatric hospital "make[s] the duties or role of the skilled maintenance workers at McLean significantly different from that of the skilled maintenance workers at acute care hospitals." 309 NLRB at 576. [5]

Similarly, in Hebrew Home & Hospital, 311 NLRB 1400 (1993), the Board affirmed the Regional Director's determination that the petitioned-for skilled maintenance unit was appropriate in a nursing home. The Regional Director found that the skilled maintenance workers in the nursing home, like those in acute care hospitals, "perform functions apart from those of the [other] employees . . . in that they . . . are generally engaged in the operation, maintenance, and repair of the employer's physical plant systems" as opposed to "direct patient care." 311 NLRB at 1403. As is the case in acute care hospitals, the Regional Director noted that the performance of some routine, "unskilled" work by the skilled maintenance employees does not preclude the appropriateness of the skilled maintenance unit. The Regional Director also found that the skilled maintenance employees in the nursing home as well as in acute care hospitals possess specialized skills, are separately supervised, have limited and incidental contact with other employees, and that there is a lack of transfer between the skilled maintenance

[5] See also Empire Health Centers Group dba Deaconess Medical Center, 314 NLRB 677 (1994), in which the Board found that the transition of a hospital from an acute care facility to a rehabilitation unit did not extinguish the appropriateness of the existing skilled maintenance unit, since the employees at issue continued to perform the same work on the physical plant system under the same supervision even after the transition and that the operational differences did not impact unit work from the workers' perspective.

department and other departments, which demonstrates the different labor market and career paths of skilled maintenance employees. [6]

IUOE local unions have a long history of organizing and representing separate skilled maintenance units in nonacute care hospitals, nursing homes, and other nonacute health care facilities, and their experience supports the conclusion that the skilled maintenance unit is typically appropriate in such facilities. By way of example, IUOE local unions represent skilled maintenance employees working at psychiatric hospitals such as Western Psychiatric Hospital in Pittsburgh (IUOE Local 99) and Episcopal Hospital in Philadelphia (IUOE Local 835), and there are skilled maintenance units and engineering units in California state psychiatric hospitals and facilities for the developmentally disabled, such as Patton State Hospital in San Bernardino; Lanterman in Pomona; Atascadero; and Napa in Imola (IUOE Local Unions 39 and 501). Skilled maintenance employees are represented in separate units at several rehabilitation facilities in the Chicago area, such as the Rehabilitation Institute of Chicago and Shriners Children's Hospital (IUOE Local 399) and in New Jersey, such as Bacharach Institute of Rehabilitation and Newport Nursing and Rehabilitation Center (IUOE Local 68). IUOE local unions also represent skilled maintenance units at nursing homes, such as Philadelphia Long Term Care and Willow Crest Nursing Home in Philadelphia (IUOE Local 835), Washington Home and Community Hospice and J.B. Johnson Nursing Home in Washington, D.C. (IUOE

[6] See also Bon Secours Charity Health Systems, 2009 WL 2915082 (2009)(Case No. 2-RC-23303), in which the Administrative Law Judge, in determining challenges to ballots, concluded that the maintenance mechanics who performed work at a nursing home and assisted living facility were properly part of a skilled maintenance unit rather than a broad non-professional unit, relying on the similarity between the rulemaking proceeding's description of the skilled maintenance unit in acute care hospitals and the characteristics of the maintenance mechanics in the nonacute care facilities at issue. Cf. Marian Manor for Aged and Infirm, 333 NLRB 1084 (2001), in which the Regional Director determined that five maintenance mechanics, two painters, a carpenter and a groundskeeper employed at a nursing home had to be included in the petitioned-for service and maintenance unit -- notwithstanding their distinct function, separate supervision, and higher educational and experience requirements -- because he did not find them to have skilled maintenance status. 333 NLRB at 1094.

Local 99), and at Fairview Baptist Home and Village, a continuum care facility in Downers Grove, Illinois (IUOE Local 399).

The skilled maintenance units represented by IUOE local unions in nonacute facilities share the same recurring factual patterns that were found in the rulemaking proceeding and in subsequent cases decided under the Park Manor standard. Thus, in all these nonacute care facilities, the skilled maintenance employees are engaged in the distinct function of operating, maintaining, and repairing the physical plant system. They have high skill levels and specialized training, as reflected in licensing requirements and participation in apprenticeship programs. They tend to earn higher wages than the service employees and are separately supervised. The skilled maintenance employees have separate internal and external labor markets: they have work experience in different industries; hires are made from the skilled maintenance labor market rather than from transfers from other hospital classifications; and there is upward mobility within the unit, with lesser skilled classifications increasing their skill levels.

A few examples are illustrative. At the Shriners Children's Hospital in Chicago, the skilled maintenance unit is composed of approximately nine employees. All the engineers in the unit hold a stationary engineer license and at least four of the employees went through the apprenticeship program. The employees there have worked in many different industries, including in hotels, office buildings, and schools.[7] Hires are made from the skilled maintenance labor market and we understand there have been no transfers from non-maintenance employees

[7] For example, one employee worked in the skilled maintenance unit at the Dirksen federal office building, at Lenox Suites, and at Lisle-Naperville Hilton Hotel prior to working at the hospital. Another worked previously in the skilled maintenance unit at DePaul University and at the Hyatt Hotel, and the Chief Engineer was in the skilled maintenance unit at Finkel Elementary School and the BlueCross/Blue Shield Building in Chicago prior to his employment at the hospital.

within the hospital. There has been upward mobility within the skilled maintenance unit, with a maintenance mechanic upgrading to an engineer position.

Similarly, at the skilled maintenance unit at Episcopal Hospital, a psychiatric facility in Philadelphia, the engineers in the 17-person unit hold Class A stationary engineer licenses, and several unit members have gone through the apprenticeship program. Employees in the unit are hired from the skilled maintenance labor market and there has been no transfer of employees into the unit from other hospital employee groups.

In short, the IUOE's experience confirms the Board's view in the rulemaking proceeding itself and in its subsequent cases applying the Park Manor test that the factors found in the rule to support a separate skilled maintenance unit in acute care hospitals are also found in nonacute care facilities. A comparison of the workforces in acute care hospitals and nonacute care facilities makes it clear that there is no difference whether the skilled maintenance employees are operating and maintaining the physical plant systems in an acute care hospital or in a nonacute care facility like a psychiatric hospital or a nursing home: the skilled maintenance employees' distinct function, high skill level and specialized craft training, separate supervision, high wages, lack of interaction with other employees, and separate labor market and career paths remain the same.[8]

[8] These same factors have led the Board to find skilled maintenance units to be appropriate in a wide range of other industries. See, for example, Omni International Hotel of Detroit, 283 NLRB 475 (1987)(hotel); Yuengling Brewery Co., 333 NLRB 892 (2001)(brewery); Ore-Ida Foods, 313 NLRB 1016 (1994)(food processing facility); American Cyanamid Co., 131 NLRB 909 (1961)(manufacturing plant).

Given this experience, requiring extensive case-by-case litigation over the appropriateness of the unit when it is petitioned for in nonacute care facilities is wasteful of resources. Rather, it is reasonable under Park Manor to accord substantial weight to the rulemaking record as it is applicable to the nonacute care industry, and to find the unit is typically appropriate.

The conclusion that acute care hospital units are typically appropriate in the nonacute care industry will not result in a proliferation of units. As an initial matter, as the AFL-CIO brief notes, the so-called Congressional "admonition against proliferation" obviously does not have the force of law. AHA v. NLRB, 499 U.S. 606, 616-617 (1991). See also IBEW Local 474 v. NLRB, 814 F.2d 687, 710 (D.C. Cir. 1987). In any event, the Board considered the issue of proliferation in the rulemaking proceeding and concluded that the eight units found to be appropriate in acute care hospitals did not result in undue proliferation. 53 Fed. Reg. 33933-33934. For the same reasons articulated therein, there is no basis to conclude that finding the hospital units appropriate in nonacute care facilities would be any more proliferative or result in problems such as strikes, jurisdictional disputes, or wage whipsawing that led to concerns about undue proliferation. Moreover, with respect to the skilled maintenance unit in particular, the Board also noted in the rulemaking proceeding that the "skilled maintenance employee unit may be viewed as a consolidation of specialized employees inasmuch as it combines such employees as carpenters, painters, plumbers, and electricians" and therefore directly takes into account any Congressional concern about unit proliferation by "putting all such separate skilled crafts into one skilled maintenance unit." 53 Fed. Reg. at 33922, 33923 (emphasis in original).

2. Where the employees in a nonacute care facility seek to be represented in a unit that does not conform to one of the hospital units, such as the CNA unit sought in the instant case, Park Manor contemplates initially applying a community of interest standard to determine the appropriateness of the unit. In time, after such units are litigated in a number of individual facilities, it may be that "recurring factual patterns will emerge" indicating that such specialized units are typically appropriate -- the expectation expressed in Park Manor. 305 NLRB at 875.

The national policy articulated in Section 1 of the National Labor Relations Act -- to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" -- is implemented in part by Section 9(b) of the Act, in which the Board is charged with the critical authority to make unit determinations "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." Reading these sections together, the Supreme Court has recognized that "[Section 9(b)], read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees." AHA v. NLRB, 499 U.S. 606, 610 (1991). Therefore, the proper focus in Board unit determinations is on effectuating employees' organizing rights by an employee-centered analysis of the relevant unit.

As the Supreme Court recognized in AHA v. NLRB, 409 U.S. at 610 (1991)(collecting cases), the statute "suggests that employees may seek to organize 'a unit' that is 'appropriate' -- not necessarily *the* single most appropriate unit." (emphasis in original). From its earliest years, the NLRB has recognized that its job is not to ferret out "the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit" but rather simply to determine whether the petitioned-

for unit is an appropriate unit." Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950), enf'd, 190 F.2d 576 (7th Cir. 1951)(emphasis in original). As the Board emphasized there, the term "appropriate" "carries with it no overtones of the exclusive or the ultimate or the superlative." Id., 91 NLRB at 418, n. 13. See also Garden State Hosiery Co., 74 NLRB 318, 324 (1947)(the statute does not require the unit to be "perfect, or the best possible, or the ultimate; it requires only that the unit be appropriate"); P.J. Dick Contracting, 290 NLRB 150, 151 (1988)("Board inquiry pursues not the most appropriate or comprehensive unit but simply an appropriate unit").

In fulfilling this function, the Board focuses on the unit that has been requested in the petition. The Board analyzes the community of interest among the employees in the petitioned-for unit, and where such community of interest is demonstrated, "[its] inquiry ends" even though there may be other units that would be equally or even more appropriate. Dezcon, Inc., 295 NLRB 109, 111 (1989). See also Blue Man Vegas LLC v. NLRB, 529 F.3d 417, 421 (D.C. Cir. 2008)(the fact that the employees in a "prima facie" appropriate unit also have a community of interest with other employees does not render the petitioned-for unit inappropriate).

Under these principles, for the reasons set forth in the AFL-CIO's brief, the CNAs in this case share a common community of interest that warrants a separate unit under the traditional community of interest test referenced in Park Manor, regardless of whether they also have some interests in common with other employees. Moreover, looking at the information gathered in the rulemaking proceeding, we submit that none of that information undercuts the appropriateness of the separate CNA unit in the nursing home here.

In the rulemaking proceeding, the Board determined that it was unable to generalize at that time about units that were appropriate in nursing homes, since nursing homes "vary both in size and type of service rendered" so 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." 53 Fed. Reg. 33927-33929. Therefore, it determined to continue making unit determinations in nursing homes on a case-by-case basis. While it cited one comment which indicated there was "for the most part little difference in the duties of LPNs and nurses' aides" and also stated "there appears to be a greater overlap of functions [and] work contact between various nursing home non-professionals," 53 Fed. Reg. 33928, it did not purport to determine that such was always the case in every nursing home. Indeed, by noting that nursing homes varied widely among themselves and that the nursing home industry was in a period of rapid transition which was changing staffing needs, it signaled that it would apply a flexible approach and consider each facility on its own to determine whether a unit like the CNA unit here is appropriate.

Finding the CNA unit here should not raise "undue proliferation" concerns. The CNAs, if successful in an election, would apparently be the only current unit in the nursing home. As the Board stated in the rulemaking proceeding, 53 Fed. Reg. at 33933, other units would only be "potential units" and it is doubtful that a large number of units would ever exist in a particular facility. Moreover, it is difficult to conceive how a single CNA unit would result in "increased strikes, jurisdictional disputes, or other disruptions in the delivery of health care services," 53 Fed. Reg. at 33934, which non-proliferation was supposed to avoid. And ultimately, the fundamental issue before the Board is "whether it should deny [one group of employees] the

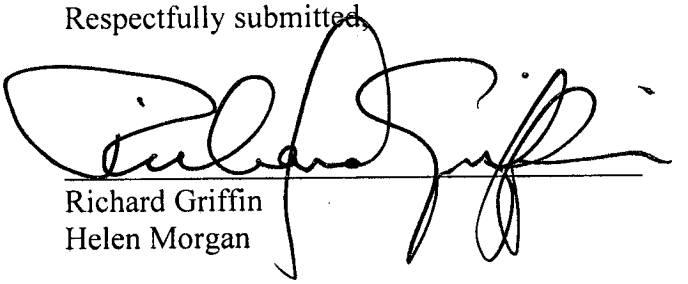
benefits of the Act until the other employees also become interested in collective bargaining, or whether it should make collective bargaining an immediate possibility for those who may presently desire it." Garden State Hosiery Co., 74 NLRB 318, 320 (1947). As the Board has expressed, "it is not the Board's function to compel all employees to be represented or unrepresented at the same time . . . , unless an appropriate unit does not otherwise exist." Mc-Mor-Han Trucking, 166 NLRB 700, 701 (1967). An employee-centered analysis supports that the CNAs, with their mutual community of interest, are entitled to express their representational wishes in an election in their own unit now.

Finally, the IUOE's experience shows that it is not unusual for units that do not conform to the hospital units to be present in nonacute care facilities as a result of agreement with the employer. For example, IUOE Local 324 represents an engineer unit at BCA Stonecrest, a psychiatric facility located in Detroit, as a separate unit as a result of a stipulated election agreement in Board Case No. 7-RC-23395. There are separate engineer units in two skilled nursing and rehabilitation facilities in Chicago, Kindred Chicago Central and Kindred Chicago North (IUOE Local 399). IUOE Local 95 represents the engineer unit at the five county nursing homes in Allegheny County, Pennsylvania. In all these instances, the parties have recognized that productive collective bargaining can proceed in nonacute care facilities in units other than the eight hospital units. There is no reason for the Board in its own unit determinations to foreclose such units where the employees therein are shown to share a community of interest that makes the unit an appropriate one.

CONCLUSION

For the reasons set forth herein, as well as those contained in the AFL-CIO's brief, the IUOE respectfully requests the Board to continue to apply the flexible approach it announced in Park Manor for determining appropriate bargaining units in nonacute health care facilities, and to affirm the Regional Director's finding that the CNA unit requested here is appropriate under that test.

Respectfully submitted,



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