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Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-001

Re: **Speciality Healthcare and Rehabilitation Center of Mobile,**

NLRB Case No. 15-RC-8773;

Letter Brief of International Foodservice Distributors Association

Dear Executive Secretary Heltzer:

This letter brief to the National Labor Relations Board ("Board") is submitted for filing on behalf of the International Foodservice Distributors Association in response to the Board's December 22, 2010 Notice and Invitation to File Briefs in the above-referenced case. As argued below, the Board should not answer Questions 7 and 8[1] or, if it does so, the Board

[1]In its Invitation to File Briefs, the Board invited answer to some or all of eight questions presented. Questions (7) and (8) asked:

> (7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter. (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."

should reject any formulaic presumption that petitioned-for same job units are appropriate. At all times, in broader industry, traditional community of interest factors should control.

Interest of the International Foodservice Distributors Association

The International Foodservice Distributors Association (IFDA), the trade association representing foodservice distributors throughout North America and internationally whose membership includes leading broadline, system and speciality distributors, works to help foodservice distributors succeed. IFDA's members operate more than 700 distribution facilities, providing hundreds of jobs in each of their communities. IFDA's members make the food away from home industry possible, ensuring food safety in the delivery of food and other related products to restaurants and, importantly, institutions that depend critically on unimpeded supplies in the service of their clientele (e.g., nursing homes, hospitals, military mess halls, school cafeterias).

IFDA's interests in this case are straightforward – members when unionized typically administer contracts that are broad in scope. It is common, for example, to have, in a distribution center, a single "warehouse" contract and a single "transportation" contract. If the Board were to rule in this industry in a manner that created multiple narrower units, IFDA members would be forced to administer specialized contracts covering only segments of their employees, with attendant inefficiencies resulting from adjusting and coordinating between contracts and, e.g., deciding pervasive jurisdictional issues. The effect of fractured units on productivity and the ability to compete would be substantial.

Proliferation of units resulting from such a ruling would be contrary to the National Labor Relations Act, and the time-honored "community of interests" standard applied by the Board. Thus, IFDA has strong and compelling interests to address the issues presented by the Board as raised by Questions Seven (7) and Eight (8).

ARGUMENT

I. The Board Should Not Broadly Reach Questions Seven and Eight Beyond the Context in Which They Have Been Posed.

The Board should not broadly reach Questions Seven (7) and Eight (8) beyond the context in which they have been posed. There is a saying somewhat appropriate under these circumstances, namely: *bad facts make bad law.* As applied here IFDA is not aware of any circumstances that would warrant a departure from current precedent. IFDA is concerned in particular that the Board in *Speciality Healthcare* has taken a simple case, *factually,* involving a simple issue in the *health care* context – whether a unit of certified nursing assistants at a nursing home is appropriate – and may go well beyond the facts, *legally*, to create rules not suited to non-*healthcare* employers, indeed, that could impact virtually every private sector employer covered by the National Labor Relations Act.

The Board has recognized that health care employers and employees face special issues when considering appropriate units which necessitate scope of unit standards that diverge from the traditional "community of interest standard" that applies in all other industries. *Park Manor Care Center*, 305 N.L.R.B. 872, 875 (1991). According to the Board in *Park Manor,* as a "conceptual formulation," the traditional "community of interest" standard was abandoned

in the health care setting as a "doctrinal situation," that did not fit the "realities" of the healthcare "workplace." *Id.* at 875-76 (discussing health care industry factors necessitating different approach than "community of interest" test).

Thus, the Board should not reach or answer, if at all, Questions Seven (7) and Eight (8) in any industry other than health care. The stakes for broader industry are too high to diverge from the tried-and-true "community of interest" factors. For all of these reasons, the Board should not, "as a general matter," reconsider standards applicable to determinations as to appropriate units.

II. The Board Should Not Find Employees Performing The Same Job At A Single Facility A Presumptively Appropriate Unit As "A General Matter," Or That A Proposed Unit Is Appropriate If All Employees In the Proposed Unit Are Readily Identifiable As A Group.

The Board should not find employees performing the same job at a single facility a presumptively appropriate unit as a "general matter," or that a proposed unit is appropriate if all employees in the proposed unit are readily identifiable as a group. *See Wheeling Island Gaming, Inc.* 355 N.L.R.B. No. 127 (Aug. 27, 2010). The Board in *Wheeling Island Gaming* considered the issue of whether a petitioned-for unit of only poker dealers was appropriate as, "poker dealers did not have a community of interest separate and distinct from that of craps, roulette and blackjack dealers."

The Board in *Wheeling Island Gaming* concluded that a unit limited only to poker dealers was not appropriate to collective bargaining. *Id.* In rejecting the same job approach,

and in responding to claims by the dissent that the only question in a representation proceeding is whether the petitioned for unit is *an appropriate unit*, the Board explained that employee groups are never considered in isolation. *Id.* ("Board's inquiry "never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another;" "[n]umerous groups of employees fairly can be said to possess employment conditions or interests 'in common.'").

The appropriate unit inquiry is more layered, according to the Board in *Wheeling Island Gaming*, as groups of employees performing different jobs must be compared, and so as to avoid unit determinations that are so, "*narrow in scope* that they exclude employees who share a substantial community of interest with employees in the unit sought." quoting *Colorado National Bank of Denver*, 204 N.L.R.B. 243 (1973) (emphasis added by the Board in *Wheeling Island Gaming*). As the same job standard is, as found in *Wheeling Island Gaming*, flawed and inconsistent with decades of Board decisions and the National Labor Relations Act, it should be rejected. Rather, at all times, a community of interest standard should control unit determinations in broader industry.

Respectfully submitted,

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