UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE, INC.	)	
and	)	**Case 15-CA-068248**
UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC.	)	

RESPONDENT'S RESPONSE TO ORDER TRANSFERRING PROCEEDING TO THE BOARD AND NOTICE TO SHOW CAUSE, AND RESPONDENT'S MOTION FOR RECONSIDERATION

COMES NOW Specialty Healthcare and Rehabilitation Center of Mobile, Inc., Respondent herein, and submits this Response to the Order Transferring Proceeding To The Board and Notice To Show Cause, issued on December 8, 2011.

On December 7, 2011, the General Counsel filed a motion with the Board for Summary Judgment on the ground that the Respondent had admitted all of the material factual allegations in the Complaint. The Board then ordered that Respondent show cause why the General Counsel's motion should not be granted.

In response to this Order, Respondent submits several arguments demonstrating that cause exists for the denial of the General Counsel's motion:

1. A new hearing is warranted by the high rate of turnover at the Specialty Healthcare facility during the period between the election on February 20, 2009, and the ultimate certification of representative September 26, 2011;

2. A new hearing is warranted because the employees who voted in the election were unaware of the scope of the unit until two and a half years after the election was held; and

3. A new hearing is required in the interest of due process, as the Respondent was not given the opportunity to present evidence to comply with the Board's new standard, which was established in this case, and which allows an employer to show that a unit is inappropriate if there is an overwhelming community of interest between the included and excluded employees. Had Respondent been aware that the Board would introduce a new standard and find a CNA-only unit appropriate – for the first time in history – Respondent would have supplemented the evidence presented at the R-Hearing, and would have met this new standard.

The Respondent submits that, based on any of these points, just cause exists for a new hearing on the matters presented in this case; the matter should be reconsidered; and that the General Counsel's motion should not be granted.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

A. Background Information

Kindred Healthcare is the largest post-acute health care company in the United States. The Company has three main lines of business – it operates nursing homes, long-term/acute-care facilities (LTAC), and provides rehabilitation services to hospitals and nursing centers. (Hr. Tr. 17:7-13).[1] Kindred's corporate headquarters are located in Louisville, Kentucky.

The facility at issue in the present case – Specialty Healthcare and Rehabilitation Center of Mobile – operates as a nursing home and rehab center.[2] There are 170 licensed beds, and at the time of the Hearing, 143 of those beds were occupied. (Hr. Tr. 89:1-6). An Executive Director/Administrator is in charge of the facility, and is responsible for business operations, supervising all departments and employees, and all functions within the facility centered or focused on patient care. (Hr. Tr. 88).

[1] All citations to the transcript refer to the Hearing held on December 30, 2008.

B. Procedural History

On December 18, 2008, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("Union") filed a petition seeking to represent the Respondent's employees in the following bargaining unit:

> Included: All CNAs employed at the Mobile, AL facility;
>
> Excluded: All Office/Clerical employees, all Dietary employees, professional employees, guards and supervisors as defined by the Act.

A Hearing was conducted on December 30, 2008, before Hearing Officer Charles Rogers in Mobile, Alabama, at which time the Respondent argued that the CNA-only unit proposed by the Union was inappropriate as a matter of law, and that the only appropriate unit would include all non-professional service and maintenance employees. The unit, as proposed by the Respondent, would include all certified nursing assistants ("CNAs"), activity assistants, dietary aides, cooks, the social services assistant, the staffing coordinator, the maintenance assistant, the central supply clerk, the medical records clerk, the data entry clerk, the business office clerical, and the receptionist. The Respondent's proposed unit contained 86 employees; the Union's petitioned-for unit totaled 53.

In opposing the unit requested by the Union, the Respondent noted that this narrow unit was contrary to both the Board's well-established rule of *Park Manor Care Center*, 305 NLRB 872 (1991), as well as Congress' admonition against a proliferation of units in a health care setting. In filing its post-hearing Brief, the Respondent's argument was based heavily on the clear precedent of *Park Manor,* as well as the fact that a CNA-only group had never before been certified by the Board. Based on the existing standard, and with no indication that the Board

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[2] This facility recently underwent a name change, and is now operating as "Kindred Transitional Care and Rehabilitation – Mobile."

intended to overrule *Park Manor,* Respondent presented only two witnesses as the Hearing, and called no employees to speak about elements of integration, functional interchange, and other similarities in employment.

Still, despite the precedent, the Regional Director issued a Decision and Direction of Election, finding that "[d]istinct training, certification, supervision, uniforms, pay rates, work assignments, shifts, and work areas all demonstrate that the CNAs share a community of interest and form an appropriate bargaining unit." (D&D, 11).[3] The Respondent filed a timely Request for Review.

On February 19, 2009, the Board granted the Respondent's Request, and on August 27, 2010, affirmed the grant of review. On December 22, 2010, the Board issued a Notice and Invitation to File Briefs in the matter. In its Notice and Invitation, a majority of the Board announced its intention to revisit *Park Manor*, asserting that reconsideration of the standard was necessary due to "dramatic" changes in the long-term care industry within the last two decades, as well as the high number of representation petitions (3,000, according to the Board's records) that had been filed within such facilities.

In response, Respondent – as well as multiple *amici* – submitted briefs arguing against the overruling of *Park Manor*, and asserting the effectiveness of the existing standard; nevertheless, on August 30, 2011, the Board issued a 3-1 decision in *Specialty Healthcare,* 357 NLRB No. 83 (2011), overruling *Park Manor*, and adopting a new standard for determining appropriate bargaining units. Under the new standard, the Board will find any clearly identifiable group of employees to be an appropriate unit for purposes of collective bargaining; however, an employer can still overcome this presumption by showing that additional, non-included employees share an "overwhelming" community of interest with the employees within the

petitioned-for unit. In arriving at this conclusion, the Board modified fifty years worth of precedent – as noted by Member Brian Hayes in his dissent, the majority's holding "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." Indeed, the results of the *Specialty Healthcare* case will continue to have significant consequences on the manner in which the traditional community of interest test is applied, and will wholly alter the manner in which industries – and particularly the nursing home industry – are organized.

As much as the Board's decision will impact the future of labor law, however, the impact the decision has had on the Respondent in this case – as well as the employees at issue here – is significantly more concrete; yet, this practical consideration has been wholly ignored. As the record reflects, an election in this case was conducted in February, 2009; the ballots were then impounded until the end of 2011. The certification of the Union as representative occurred on September 26 of this year. Meanwhile, while the Board was making history with the decision, business was continuing as usual at the Mobile, Alabama facility – there was turnover; employees have come and gone. And now, the Board cannot turn a blind eye to the fact that representation may not be the desire of the Specialty CNAs. Nor can it ignore the reality that, by changing the law without warning or notice – and after the original R-Hearing was held – it has given Respondent no opportunity whatsoever to present evidence in order to comply with its newly drafted standard. The Respondent provided ample evidence at the R-case Hearing to meet the then-existing burden; it has now been blindsided, after the fact, by an entirely new set of rules. As a result, Respondent has not been permitted to demonstrate the manner in which the excluded employees share an overwhelming community of interest with the petitioned-for employees. And, while the *Specialty Healthcare* decision may have served as the Board's

[3] Decision and Direction of Election, Jan. 20, 2009.

vehicle for change, this does not mean that the basic interests of fairness and due process must be lost in the process.

II. ARGUMENT

A. A New Hearing Is Required By The High Rate Of Turnover At The Specialty Facility.

As described above, an election in this case was held on February 20, 2009. The votes were impounded, and ultimately, the representative certified on September 26, 2011. During the two years that passed, however, the facility has continued normal operations, and there has been significant turnover in the realm of CNAs. Indeed, while 60 CNAs were employed at the time of the certification, 34 were hired *after* the election in 2009. Consequently, a majority of the CNAs at the Mobile facility have never been given the opportunity to vote on representation.

In *Brooks v. NLRB,* 348 U.S. 96, 104 (1954), the Supreme Court held that there were several exceptions to the presumption of a union's majority status during the year following the union's certification; one of these "unusual circumstances" included a significant change in the size of the bargaining unit. To this end, the Board has also recognized that "[t]hree types of 'unusual circumstances' have been recognized; defunctness of the certified union, schism within the certified union, and radical fluctuation in the size of the bargaining unit." *Chelsea Industries, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO* , 331 NLRB 1648 (fn. 2).

While the Board has traditionally refused to find that employee turnover will rebut the union's majority status, this interpretation of the Supreme Court's language is not required. In considering the exception, the D.C. Circuit has noted that, while "[t]he Board has never applied that doctrine, which sometimes justifies an employer's petition for relief from a continuing obligation to bargain with an incumbent union ... to allow a challenge to a certification where a

number of employees have left after an election[,] ... That is not to say that the Board could not do so[.]" *King Elec., Inc. v. NLRB,* 440 F.3d 471 (D.C. Cir. 2006).

In the instant case, the fact that **over half** of the bargaining unit never had the opportunity to vote on representation certainly warrants the Board's reconsideration. This constitutes a fundamental change to the composition of the unit itself, and – without holding a hearing to adduce evidence, or allowing a new election – there is no way of knowing whether the current employees' interests are actually being served. As such, the Respondent requests that the Board reconsider its previous interpretation of the Supreme Court's rule in *Brooks,* and act within its power to ensure that the voice of the employees is, in fact, heard.

B. A New Hearing Is Required Because Of The Uncertainty Surrounding The Appropriate Bargaining Unit.

As described above, prior to the Board's landmark decision in this case, no CNA-only unit had ever been found appropriate. Consequently, in voting in the election, the Specialty employees in this case had no notice of the unit which would ultimately be certified. To the contrary, the employees had every reason to believe that the job-specific unit would be rejected by the Region and the Board, and that a new election, which included other non-professional employees, would be held. The idea that the Board would overrule *Park Manor* and turn the Mobile election into a seminal case was not something that could be reasonably anticipated.

In *General Shoe Corp.,* 77 NLRB 124, 126 (1948), the Board held that "in election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." Based on this principle, the Board has long held that, in order to have a valid vote, you must have an informed electorate; this is the justification for the development of many of the election rules, including the need for the distribution of employee lists pursuant to

Excelsior Underwear: the specific reason for the requirement is to "ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote[.]" 156 NLRB 1236 (1996). Along these same lines, notice to employees prior to an election must be sufficient, and must accurately reflect the scope and membership of the proposed unit. *See Mercy General Health Partners Amicare Homecare*, 331 NLRB 783, 786 (2000)(ordering new election where "the unit as certified would differ substantially in character and scope from the unit in which the election was conducted, and the question on that ballot would have been different from the one that should have been presented to the employees").

Applying these principles here, it follows that, at the time of the election, Specialty employees did not receive proper notice regarding the ultimate scope of the bargaining unit. They had no opportunity to make an informed decision as to whether they desired representation; they had no way of knowing that their election would be the one that completely changed the law. As such, their choice was not a reflection of their "uninhibited desires," and the unit that was eventually certified was not the one that could have been reasonably foreseen. Thus, for this reason as well, just cause exists to deny the General Counsel's request.

C. A New Hearing Is Required In Order To Satisfy The Guarantee Of Due Process

Finally, turning to the most critical point, the Respondent submits that a new hearing is required in order to satisfy the basic principles of due process, as Respondent has never been afforded the opportunity to present evidence that its employees share an overwhelming community of interest with the petitioned-for CNAs.

The Board has acknowledged that an employer has a right to due process in representation hearings, and in presenting evidence germane to a representation petition. *North Manchester Foundry, Inc.,* 328 NLRB No. 50 (1999)(finding that a hearing officer improperly

refused to allow an employer to present evidence of eligibility); *AmeriHealth, Inc.,* 326 NLRB No. 55 (1998)(granting request for review and remanding for a hearing following the Regional Director's dismissal under a Show Cause Order, where the case involved a matter of first impression, and therefore "a hearing would be preferable," and noting that "the best way for us to assess the total factual context here ... to provide for the full development of the record through a hearing").

In issuing its decision in *Specialty Healthcare*, the Board made an enormous change to traditional labor law, and instituted a wholly new standard. And, while *Specialty* became the "test case" for the Board to overrule the precedent of *Park Manor,* Specialty itself has not been given the opportunity to "test" the new rule. Every argument Specialty has made, and all evidence it presented at the Hearing, was based on the *Park Manor* standard. Respondent had every expectation that an application of the enhanced community of interest test would result in a finding that an all-CNA unit was inappropriate; not only was this outcome dictated by *Park Manor* itself, but it was also a very practical reality, as no CNA-only unit had ever been previously found appropriate. When the Board chose to abandon that rule, however, it did so without giving Respondent an opportunity to respond, and to try to comply with this new legal framework.

Accordingly, Respondent is not attempting to relitigate the matters decided in the underlying Representation case; it is attempting to litigate them for the first time. It is asking for the Board to consider evidence that it would submit in order to show that the non-included employees share an overwhelming community of interest with the CNAs in the petitioned-for unit, and for the opportunity to make an argument that these individuals warrant inclusion in any bargaining unit found appropriate within the Mobile facility. This is a new issue, and a new

standard; to deny Respondent the opportunity to litigate its case it to deny Respondent its right to due process.[4]

III. CONCLUSION

For the foregoing reasons, the Respondent requests that the Board find that Just Cause has been shown in this case, and that a new hearing on these matters is warranted by remaining questions of fact, and the compelling meaning of the law.

Respectfully submitted, this 22nd day of December, 2011.

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ATTORNEYS FOR SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE

[4] It is also notable that the Board denied the Respondent's motion for a ten-day extension of time to respond the Board's Order to Show Cause. Although the Respondent submitted that the press of business and the holiday season justified an extension, the Board flatly denied the request on the same day, on the grounds that additional time was simply "unwarranted."

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CERTIFICATE OF SERVICE

I certify that on this date I have served Respondent's Response to the Order Transferring Proceeding To The Board and Notice To Show Cause with the Office of the Executive Secretary via the NLRB's e-filing system, as well as e-mail delivery on the parties identified below:

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Dated this 22nd day of December, 2011.

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