

Nos. 11-1198, 11-1209, 11-1319, 11-1349

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SAN MIGUEL HOSPITAL CORPORATION d/b/a ALTA VISTA
REGIONAL HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS
FOR ENFORCEMENT OF TWO ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

(A) Parties and Amici: San Miguel Hospital Corporation, d/b/a Alta Vista Regional Hospital, petitioner/cross-respondent here, was a respondent in the case before the National Labor Relations Board. The Board is the respondent/cross-petitioner here, and the Board's General Counsel was a party in the case before the Board. The National Union of Hospital and Healthcare Employees District 1199NM, was the charging party before the Board.

(B) Rulings Under Review: This case involves consolidated petitions for review and cross-applications for enforcement of two Board Decision and Orders: *San Miguel Hosp. Corp.*, 356 NLRB No. 167 (May 31, 2011) and *San Miguel Hosp. Corp.*, 357 NLRB No. 36 (Aug. 2, 2011).

(C) Related Cases: Both cases were previously before this Court. After the Board's June 30, 2008 two-member decision (352 NLRB 809) finding that the Hospital had unlawfully refused to bargain, the Hospital petitioned this Court for review, and the Board subsequently filed a cross-application for enforcement (case nos. 08-1245, 08-1300). The D.C. Circuit put these cases in abeyance before the Board filed the record.

The Hospital subsequently refused to provide information, made a unilateral change to a policy, and discharged an employee as a result of the change. The Board found those actions to be unlawful (355 NLRB No. 43), and the Hospital petitioned for review (case no. 10-1197).

Following the Supreme Court's decision in *New Process Steel L.P. v. NLRB*, 560 U.S. ___, 130 S. Ct. 2635 (2010), the Board moved this Court to remand the two-member Board's 2008 decision in the refusal to bargain case. Then, because the findings in the unilateral change case were based on two prior decisions of the two-member Board, the Board issued an order setting aside its June 2010 decision in the unilateral change case and moved the Court to dismiss the Hospital's petition for review. This Court then remanded the refusal to bargain case "for further proceedings before the Board" and dismissed the unilateral change case.

The Board resumed processing both cases and issued the decisions under review here.

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REGIONAL HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

These consolidated cases are before the Court on the petitions of San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital to review, and on the cross-applications of the National Labor Relations Board to enforce, two Board Orders issued against the Hospital. In the first Order, reported at 356 NLRB No. 167 (2011) (“*San Miguel I*”), the Board found that the Hospital unlawfully refused

to bargain with its employees' duly elected collective-bargaining representative, the National Union of Hospital and Health Care Employees, District 1199NM. In the second Order, reported at 357 NLRB No. 36 (2011) ("*San Miguel II*"), the Board found that the Hospital unlawfully refused to provide necessary and relevant information to the Union, unilaterally changed its practice regarding fit tests for employees' masks, and discharged an employee as a result of that unlawful change.¹

The Board had subject matter jurisdiction over the proceedings below under Section 10(a) of Act, which authorizes the Board to prevent unfair labor practices affecting commerce.² The Board's Orders are final with respect to all parties under Section 10(e) and (f) of the Act.³ The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. The Hospital's petitions for review and the Board's cross-applications for enforcement are timely;

¹ "JA" references are to the Joint Appendix, and "Br." references are to the Hospital's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² 29 U.S.C. §§ 151, 160(a).

³ 29 U.S.C. § 160(e) and (f).

the Act places no limit on the time for filing actions to review or enforce Board orders. On September 28, 2011, the Court consolidated the cases.

The Board's *San Miguel I* order, which found that the Hospital unlawfully refused to recognize and bargain with the Union, is based, in part, on findings made in an underlying representation proceeding (Board Case No. 28-RC-6518). Therefore, under Section 9(d) of the Act, the record before the Court includes the record in that proceeding.⁴ Section 9(d), however, does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board."⁵ The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the rulings of the Court.⁶

⁴ 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

⁵ 29 U.S.C. § 159(d).

⁶ 29 U.S.C. § 159(c). *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. The Refusal to Bargain in *San Miguel I*: After the Union won a representation election, the Hospital filed objections to the election arguing that the certified bargaining unit was inappropriate and refused to bargain. Therefore, the issue before the Court is: Did the Board appropriately exercise its discretion in overruling the Hospital's objections to the election and certifying a combined bargaining unit of all professional and all nonprofessional employees? If so, then the Board properly found that the Hospital violated the Act by refusing to bargain with the Union.

2. The Procedural Challenges to *San Miguel I*: The Board rejected three procedural challenges to *San Miguel I* in which the Hospital argued that the Board erred by (i) processing the case post-remand too quickly, (ii) issuing the certification while the Hospital's RM petitions were pending, and (iii) allowing the General Counsel to amend the complaint to reflect the Hospital's ongoing refusal to bargain. The issues before the Court are whether the Court lacked jurisdiction to hear the first two claims because they were not made at the appropriate time under the Board's procedures, and whether the Board properly rejected the third claim

because the General Counsel has authority to amend the complaint and the Hospital was not prejudiced by the amendment.

3. The Refusal to Provide Information, Unilateral Change, and Discharge in *San Miguel II*: The Hospital also refused to provide information requested by the Union, made a unilateral change to its policy regarding fit tests for masks, and discharged an employee as a result of that changed policy. The Hospital has not challenged those findings before this Court. Therefore, if the Court agrees that the Board properly decided *San Miguel I*, then the Board is entitled to summary enforcement of its findings that the Hospital violated the Act by refusing to provide information, by making a unilateral change, and by discharging an employee because of that unilateral change.

STATEMENT OF THE CASES

This case involves two cases, consolidated by this Court. The first case, *San Miguel I*, involves the Hospital's refusal to bargain with the Union following a Board-conducted representation election. The second case, *San Miguel II*, involves the Hospital's subsequent refusal to provide presumptively relevant information to the Union, unilateral change to its fit test policy, and the discharge of an employee under the new, changed policy. The Board's findings in both cases are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation and Refusal to Bargain Proceedings

- 1. The Union petitions for an election in a combined unit of all professionals and all nonprofessionals; the Regional Director finds this unit to be appropriate for collective bargaining; the Board denies the Hospital's request for review**

The Hospital is an acute-care hospital in Las Vegas, New Mexico. (JA 45; JA 28.) On April 10, 2007, the Union filed a petition with the Board, seeking to represent a unit of professional and nonprofessional employees at the Hospital. (JA 43; JA 7, 13-15, 21-24, 29-30.) The professional employees would either constitute a separate bargaining unit or be included in the unit of nonprofessional employees, depending on the results of the election.⁷ (JA 43; JA 13-14.)

At a hearing before a Board hearing officer on the scope of the appropriate bargaining unit, the Hospital claimed that the petitioned-for combined unit was inappropriate. (JA 43; JA 26-27.) To support this claim, the Hospital argued that 29 C.F.R. § 103.30, Appropriate Bargaining Units in the Health Care Industry (“the Rule”)—which established the units appropriate for collective bargaining in

⁷ This type of election, called a *Sonotone* election, is in accordance with Section 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1), which states that the Board may include professional employees in a unit with nonprofessional employees only if “a majority of such professional employees vote for inclusion in such unit.” *See generally Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

the health care industry—is invalid because it violates Section 9(c)(5) of the Act.⁸ (JA 44; JA 23, 36-39.) In addition, the Hospital claimed that the petitioned-for units were coextensive with the Union’s organizational efforts, and that the Union should have been required to demonstrate extraordinary circumstances in order to combine units under the Rule. (JA 43; JA 23-25.)

Following the hearing, the Board’s Regional Director issued a Decision and Direction of Election, finding the two units to be appropriate and ordering a secret-ballot election to be conducted in two voting groups. (JA 43-74.) Voting Group A comprised all full-time, part-time, and per diem (averaging four or more hours of work per week) nonprofessional employees; Voting Group B comprised all full-time, part-time, and per diem professional employees. (JA 70-73.) The two voting groups excluded job classifications prohibited from the units by statute, such as guards and supervisors. (JA 48-51, 70-73.) In addition, the Hospital and the Union agreed that the Hospital’s physicians, whom it employs only at off-site clinics, did not properly belong in the units. (JA 48; JA 35, 38.) Under the Regional Director’s decision, the nonprofessionals in Voting Group A would be asked only to vote for or against union representation. The professionals in Voting Group B would be asked whether they wanted to be included in a unit with

⁸ 29 U.S.C. §159(c)(5) (“[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling”).

nonprofessionals for collective-bargaining purposes, and, if so, whether they wanted the Union to represent them. (JA 70-73.)⁹

The Hospital filed with the Board a timely request to review the Regional Director's Decision and Direction of Election. In addition, the Hospital filed three Representation-Management ("RM") petitions.¹⁰ The Regional Director consolidated the Hospital's RM petitions with the Union's petition and transferred the consolidated case to the Board. (JA 75 n.1.) The Board (Chairman Battista and Members Kirsanow and Walsh) denied the Hospital's request for review of the Regional Director's Decision and Direction of Election, which "necessarily resolve[d] the RM cases and result[ed] in dismissal of the RM petitions." (JA 75 n.1.)

⁹ See generally *Sonotone Corp.*, 90 NLRB at 1240-42.

¹⁰ RM petitions can be filed by employers when a union demands recognition or when the employer has a good faith doubt as to an incumbent union's continuing majority status. 29 U.S.C. § 159(c)(1)(B); Secs. 11002.1(a)(2), 11002.2, 11003.1(b), and 11022.3, Board's Casehandling Manual Part 2, Representation Proceedings. See also *Adams & Westlake, Ltd. v. NLRB*, 814 F.2d 1161, 1164 & n.2 (7th Cir. 1987). Here, the Hospital filed RM petitions in an attempt to suggest different bargaining units. 28-RM-605 and 28-RM-606 petitioned for bargaining units of business office clericals; 28-RM-607 petitioned for a unit of all professionals, excluding nurses and physicians.

2. The Union prevails in the election, and the Board's two sitting members certify it as the bargaining representative, over the Hospital's objections

In June 2007, the Board's Regional Office conducted an election pursuant to the Regional Director's Decision and Direction of Election. (JA 112.) The professional employees, voting separately in accord with the Regional Director's decision, chose to be included in the unit with the nonprofessionals by a vote of 48 to 19. (JA 76.) The professionals and nonprofessionals, collectively, voted for union representation by a vote of 121 to 73. (JA 77.)

The Hospital filed 24 objections to the election, which, among other things, reiterated its attacks on the validity of the Rule and the appropriateness of the bargaining unit. (JA 78-94.) A Board hearing officer took evidence and heard arguments on the objections during a one-day hearing and recommended that all the objections be overruled. (JA 122.) The Hospital filed exceptions to the hearing officer's report. (JA 128-43.) On March 4, 2008, the Board's only two sitting members overruled the Hospital's exceptions and adopted the hearing officer's findings and recommendations. (JA 144-45.) Because the Hospital did not file exceptions regarding Objections 1, 2, 8-10, and 16-24, the Board's two sitting members adopted pro forma the hearing officer's recommendations that those objections be overruled. (JA 145 n.3.) In the same order, the two-member Board certified the Union as the exclusive collective-bargaining representative of

all full-time, regular part-time, and per diem professional and nonprofessional employees, employed by the Hospital at its hospital in Las Vegas, New Mexico.

(JA 145-46.)

3. The Union requests bargaining, and the Hospital refuses; the two-member Board finds this refusal to be unlawful

Following its certification, the Union requested that the Hospital recognize and bargain with it. (JA 147.) The next day, the Hospital notified the Union that it would not bargain. (JA 148.) Based on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint, alleging that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (JA 154; JA 149-53.) The Hospital filed an answer admitting its refusal to bargain, but alleging that the Union was improperly certified in light of the Hospital's election objections. (JA 154.)

The Board's General Counsel then filed a motion for summary judgment. The two-member Board issued an order transferring the proceeding to itself and a notice to show cause why the motion should not be granted. The Hospital filed a response reasserting its election objections. (JA 154.)

On June 30, 2008, the two sitting members of the Board issued a decision and order finding that the Hospital's refusal to bargain violated the Act. (JA 155.)

Thereafter, the Hospital filed a petition for review in this Court, and the Board cross-applied for enforcement.¹¹

B. The Hospital Continues to Refuse to Bargain, Refuses to Provide Necessary and Relevant Information to the Union, Changes its Fit Test Policy Without First Notifying and Bargaining with the Union, and Discharges an Employee as a Result of that Change in Policy

In October 2008, the Hospital changed its policy regarding fit testing. (JA 182.) Fit testing, governed by the U.S. Department of Labor's Occupational Safety and Health Administration regulations, involves checking the fit of an employee's mask to ensure the mask seals out airborne disease. (JA 182 & n.3; JA 170-72.)

Before October 2008, employees did not have to pass the fit test to continue their employment. After October 2008, employees did have to pass the test to remain employed at the Hospital. The Hospital made the change without providing notice and an opportunity to bargain to the Union. (JA 182; JA 169-70, 173.) In November 2008, the Hospital discharged employee Bernice Abeyta as a result of the new fit test policy. (JA 182, 184; JA 169-70, 173.)

In January 2009, the Union requested a list of unit employees and employees separated from employment since the Union was certified. The Hospital refused to provide the information. (JA 181.)

¹¹ *San Miguel Hosp. Corp. v. NLRB*, D.C. Cir. Nos. 08-1245, 08-1300.

Thereafter, the Union filed an unfair labor practice charge. (JA 174.) On June 11, 2010, the Board (Chairman Liebman and Members Schaumber and Pearce) issued an order finding that the Hospital violated Section 8(a)(5) and (1) by failing to provide information requested by the Union in January 2009, unilaterally changing its practice regarding fit tests in October 2008, and discharging an employee in November 2008 based on its change to the fit tests. (JA 175-89.) Thereafter, the Hospital petitioned for review of that decision in this Court.¹²

C. Following the Supreme Court's Decision in *New Process Steel*, the Board Resumes Processing the Cases

On June 17, 2010, the Supreme Court issued a decision in *New Process Steel, L.P. v. NLRB*, holding that under Section 3(b) of the Act¹³, a delegee group of at least three Board members had to be maintained in order to exercise the delegated authority of the Board.¹⁴ Following the Supreme Court's decision, the Board moved this Court to remand the two-member Board's 2008 decision in the refusal to bargain case. Then, because the findings in the unilateral change case were based on two prior decisions of the two-member Board (the March 2008 certification of the Union, and the June 2008 refusal to bargain), the Board issued an order setting aside its June 2010 decision in the unilateral change case and

¹² *San Miguel Hosp. Corp. v. NLRB*, D.C. Cir. No. 10-1197.

¹³ 29 U.S.C. § 153(b).

¹⁴ 560 U.S. ___, 130 S. Ct. 2635 (2010).

moved the Court to dismiss the Hospital's petition for review. (JA 144-46, 154-57, 200-01.) This Court then remanded the refusal to bargain case "for further proceedings before the Board" and dismissed the unilateral change case.¹⁵ The Board resumed processing both cases.

On September 27, the Hospital again filed RM petitions, seeking elections in separate employee units. (JA 338-39.) The Regional Director dismissed those petitions on November 3.

On September 30, 2010, a three-member panel of the Board issued a Decision, Certification of Representative, and Notice to Show Cause in the refusal to bargain case. (JA 230-31.) The Board noted that under its rule against relitigation,¹⁶ parties challenging a certification by refusing to bargain are not allowed to relitigate in the unfair labor practice case any issues that were or could have been litigated in the prior representation proceeding. (JA 230.) Accordingly, the Board gave preclusive effect to an August 2007 order, issued by a three-member Board panel, denying the Hospital's request for review of the Regional Director's Decision and Direction of Election. (JA 230 n.3.) But the Board did

¹⁵ *San Miguel Hosp. Corp. v. NLRB*, Nos. 08-1245, 08-1300 (D.C. Cir. Sept. 20, 2010) (order remanding case to the Board); *San Miguel Hosp. Corp. v. NLRB*, No. 10-1197 (D.C. Cir. Nov. 2, 2010) (order granting motion to dismiss).

¹⁶ 29 C.F.R. §102.67(f). *See Pace Univ. v. NLRB*, 514 F.3d 19, 23-25 (D.C. Cir. 2008).

not give preclusive effect to the March 2008 Decision and Certification of Representative because it was issued by the two-member Board. (JA 230.)

In addition, the Board considered the Hospital's postelection objections and other issues it raised, as well as the exceptions and brief filed by the Hospital in response to the hearing officer's report on the election objections. (JA 230.)

Based on those deliberations, the Board adopted the hearing officer's findings and recommendations for the reasons stated in the March 2008 Decision and Certification of Representative, which the Board incorporated by reference. (JA 230.)

Finally, the Board's decision included a notice to show cause. (JA 230.) The Board noted that "it is possible that the [Hospital] has or intends to commence bargaining at this time" and that "other events" may have occurred which the parties "wish to bring to our attention." (JA 230.)

In its response to the Board's notice to show cause, the Hospital raised several procedural claims. For example, it argued that the Board violated its due process rights by issuing the September 30, 2010 Decision, Certification of Representative, and Notice to Show Cause four days after the Court's remand, and while the RM petitions were pending. The Hospital also complained that because the General Counsel did not amend the complaint, it failed to prosecute the case. (JA 232-42.)

The Acting General Counsel filed an opposition to the Hospital's response, noting that the "three-member Board had the same fully-developed record before it that was considered by the prior two-member Board," and that the Hospital's RM petitions have no role in determining whether the Board certifies the Union following an election. The General Counsel further noted that it did not amend the complaint because "nothing had changed regarding the Hospital's alleged unlawful conduct." (JA 246.)

The Hospital followed with a motion to strike or, alternatively, to respond to the General Counsel's opposition. In that motion, the Hospital argued that the General Counsel's opposition was an improper attempt to amend the complaint to allege that the Hospital had continued its refusal to bargain and included an untimely request that the Board grant the motion for summary judgment. (JA 251.)

The Union, on December 10, 2010, renewed its request that the Hospital bargain. The Hospital did not respond. (JA 337; JA 257.) As a result of the Union's renewed request to bargain, the General Counsel filed a motion for special permission to amend the complaint to include the September 2010 Decision, Certification of Representative, and Notice to Show Cause; the Union's December 2010 request to bargain; and the Hospital's failure to respond to that request. (JA 258-63.) The Hospital filed an opposition. (JA 274-84.)

In February 2011, the Board granted the General Counsel's motion. (JA 288.) The General Counsel then amended the complaint by adding new paragraphs regarding the Union's September 2010 certification, the Union's renewed bargaining request, and the Hospital's continued refusal to bargain. (JA 289-99.) The Hospital filed an answer to the amended complaint in which it admitted its continued refusal to bargain. (JA 338; JA 302.)

The General Counsel then filed a motion to supplement the 2008 motion for summary judgment, seeking to add two documents to the record: the amended complaint and the Hospital's answer to the amended complaint. (JA 306-10.) The Hospital opposed that motion and filed a cross-motion for summary judgment. (JA 337-38.)

II. THE BOARD'S CONCLUSIONS AND ORDERS

A. *San Miguel I*

On May 31, 2011, the Board (Chairman Liebman and Members Pearce and Hayes) issued its Decision and Order, granting the General Counsel's motion for summary judgment. The Board rejected the Hospital's arguments that the Board violated its due process rights by failing to adequately review the record, that the Board's September 30, 2010 Decision, Certification of Representative, and Notice to Show Cause was premature because the Hospital's RM petitions were not dismissed until November 3, 2010, and that the General Counsel improperly

delayed filing an amended complaint. (JA 338-39.) The Board further found that “[a]ll other issues raised by [the Hospital] were or could have been litigated in the prior representation proceeding.” (JA 339.) The Board also found that the Hospital did “not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.” (JA 339.) Accordingly, the Board found that the Union continued to be the exclusive collective-bargaining representative of a unit of the Hospital’s employees and that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (JA 339.)

The Board’s Order requires the Hospital to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.¹⁷ Affirmatively, the Board’s Order requires the Hospital, upon request, to recognize and bargain with the Union, and to post a remedial notice. (JA 340-41.)

¹⁷ 29 U.S.C. § 157.

B. *San Miguel II*

On August 2, 2011, the Board (Chairman Liebman and Members Becker and Pearce) issued its Decision and Order in *San Miguel II*. The Board affirmed the administrative law judge's findings that the Hospital violated Section 8(a)(5) and (1) by unilaterally changing its practice concerning fit tests, discharging employee Bernice Abeyta pursuant to the unlawful change, and refusing to provide requested information to the Union. (JA 342.)

The Board incorporated by reference its June 2010 decision, reported at 355 NLRB No. 43, but did not adopt that prior decision wholesale. (JA 342.) Rather, the Board modified the rationale, stating that it no longer relied on the March 2008 Decision and Certification of Representative, and instead relied on the September 2010 Decision, Certification of Representative, and Notice to Show Cause, as well as the Board's May 31, 2011 decision in *San Miguel I*. (JA 342.) In addition, the Board noted that the Hospital's obligation to bargain over terms and conditions of employment began on the date of the election, not the date of the certification, and that the Hospital assumed the risk by not providing the Union with relevant information after the election. (JA 342-43.) Finally, the Board modified the judge's recommended remedy. (JA 342-43 & n.3.)

The Board's Order requires the Hospital to cease and desist from failing and refusing to bargain collectively and in good faith with the Union; unilaterally

changing wages, hours, or other terms and conditions of employment, without first giving the Union notice and an opportunity to bargain; discharging employees under the unlawful unilateral change to fit tests; and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (JA 177-78.)

Affirmatively, the Order directs the Hospital to take the following actions: furnish the Union with the information it requested; notify and bargain with the Union before implementing any changes in unit employees' wages, hours, or other terms and conditions of employment; rescind the unlawful unilateral change concerning fit tests and restore the status quo ante; offer Abeyta and any other employees discharged as a result of the unlawful unilateral change to fit tests full reinstatement to their former jobs; make those employees whole for any loss of earnings and benefits suffered; remove from the Hospital's files any reference to their discharges; and post a remedial notice. (JA 177-78.)

SUMMARY OF ARGUMENT

1. The Hospital's employees chose the Union as their exclusive collective-bargaining representative. But the Hospital has admittedly refused to bargain with that representative, claiming that it has no obligation to do so because the unit should not have been certified by the Board. The Hospital's primary argument is that the unit is inappropriate because the Board gave controlling weight to the extent of organization, both in developing the Rule governing appropriate units in the health care industry and in this particular case.

To the contrary, the Board, following its 20-year-old rule, reasonably determined that the unit was appropriate for collective bargaining. That unit—all professional and nonprofessional employees—was determined by the Board, in accordance with the Rule, to be an “obviously [] appropriate” combination of the Rule's eight appropriate units. To successfully challenge the Board's determination, the Hospital would have to show that the combined unit was “truly inappropriate.” The Hospital makes no such showing.

Moreover, the Hospital's claim that the Rule governing acute-care hospitals has been called into question by the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*¹⁸ is specious. Nothing in *Specialty Healthcare* applies to acute-care facilities like the Hospital. Rather, the Hospital's request for

¹⁸ 357 NLRB No. 83 (2011).

a remand for reconsideration in light of *Specialty Healthcare* is simply another tactic to forestall bargaining with the Union its employees elected almost five years ago.

2. The Hospital's additional procedural arguments—that the Board violated its due process rights by resuming case processing too quickly after the Court's remand, by issuing the certification while its RM petitions were pending, and by allowing the General Counsel to amend the complaint to include the Hospital's continued refusal to bargain—also fail. Because the Hospital failed to raise its first two claims at the time appropriate under the Board's procedures, the Court lacks jurisdiction to consider them.

In any event, there is no merit to any of the Hospital's claims. This Court grants administrative agencies a presumption of regularity, and the Hospital failed to show that the Board's case processing violated established procedures or that the Board engaged in improper behavior. The Board also properly noted that an employer may not use an RM petition to challenge a union's continued majority between the election and certification. And the Hospital's claim that the Board improperly allowed the General Counsel to amend the complaint misses the point: the amended complaint merely reflects the Hospital's admitted continued refusal to bargain.

3. Finally, the Hospital failed to challenge the Board's findings in *San Miguel II* that, following the Union's election victory, the Hospital further violated the Act by unilaterally changing its fit test policy, firing an employee as a result of that change, and refusing to provide relevant information to the Union. Those findings are based on the Board's certification of the Union in the representation proceeding that underlies the Board's Decision and Order in *San Miguel I*. Therefore, if the Court agrees that the Board properly certified the Union, and that the Hospital's procedural challenges to *San Miguel I* should be rejected, then the Board is entitled to summary enforcement of its otherwise uncontested findings in *San Miguel II*.

ARGUMENT

In its brief, the Hospital contests the validity of the Union's certification as the collective-bargaining representative of a unit of Hospital employees. Its attack on the Union's certification challenges the Board's 20-year-old Health Care Rule, the Board's processing of the case after the remand from this Court, the Board's dismissal of the Hospital's RM petitions, and the General Counsel's amendment of the complaint. The Hospital does not directly challenge the Board's findings in *San Miguel II* that it unlawfully refused to provide relevant and necessary information to the Union, made unilateral changes to a policy, and discharged an employee as a result of that changed policy. Rather, the Hospital merely notes (Br.

22 n.9) that the Board's decision in *San Miguel II* relies on the validity of the certification in *San Miguel I*. As we show below, the Hospital's arguments fail, the Board's certification was proper, and the Board is entitled to summary enforcement of its findings in *San Miguel II*.

I. THE BOARD PROPERLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 7 of the Act gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf. Employers have the corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act.¹⁹ The Hospital admits (JA 338 n.4; JA 302, Br. 11) its refusal to bargain with the Union, but argues that it had no legal obligation to do so because the Board's certification of the Union as the collective-bargaining representative is invalid. The Hospital's primary challenge to the Board's Order in this case (Br. 25-46) is an attack on the Board's 20-year-old Health Care Rule, promulgated after extensive notice-and-comment rulemaking, and approved by the

¹⁹ See 29 U.S.C. § 158(a)(5) and (1). A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

Supreme Court.²⁰ As the Board found, the Rule was properly applied. (JA 62-63, 75.) Accordingly, if the Board did not abuse its discretion in certifying the Union, the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its Order.²¹

In its brief, the Hospital primarily argues that the Board's Rule violates Section 9(c)(5) of the Act. In addition, the Hospital challenges the Board's resumption of processing the case following *New Process Steel*, the Board's dismissal of the Hospital's RM petitions, and the General Counsel's amendment of the complaint. But the Hospital's "Amended Statement of the Issues Presented for Review" (Br. 2-6) includes several issues not argued in its brief. Below, we discuss only those issues on which the Hospital presented arguments; issues on which no discernible argument is raised in the opening brief are deemed waived by this Court.²²

²⁰ See *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610-19 (1991) ("AHA").

²¹ See *Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

²² See *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (holding that contentions merely mentioned in a party's opening brief are deemed waived).

A. This Court Gives Considerable Deference to the Board’s Findings on Unit Appropriateness

Section 9(b) of the Act²³ provides that “[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof” Construing that section, the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, ‘if not final, is rarely to be disturbed’”²⁴ Consequently, the party challenging the Board’s unit determination has the burden to show that the Board abused the “especially ‘wide degree of discretion’” accorded it by this Court on representation questions.²⁵

This Court’s “review of the Board’s factual conclusions is ‘highly deferential.’”²⁶ The Board’s findings of fact are “conclusive” if supported by

²³ 29 U.S.C. § 159(b).

²⁴ *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). *Accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000).

²⁵ *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445, 447-48 (D.C. Cir. 2001) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)).

²⁶ *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (quoting *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997)).

substantial evidence considered on the record as a whole.²⁷ Thus, as the Supreme Court has cautioned, a reviewing court may not “displace the Board’s choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”²⁸

B. The Board Properly Certified a Unit of All Professional and Nonprofessional Employees

1. The Board, through notice-and-comment rulemaking, issued the Rule governing acute-care hospitals; the Supreme Court upheld the validity of the Rule

In 1974, Congress extended coverage of the Act to all acute-care hospitals.²⁹ In doing so, it admonished the Board to give “due consideration . . . to preventing proliferation of bargaining units in the health care industry.”³⁰ This admonition created confusion in the development of bargaining units in the health care industry, as the Board and various Courts of Appeal arrived at different analytical structures for determining appropriate units.³¹

²⁷ 29 U.S.C. § 160(e) (2000); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

²⁸ *Universal Camera*, 340 U.S. at 488; accord *Perdue Farms*, 144 F.3d at 834.

²⁹ See Pub. Law 93-360, 88 Stat. 395 (1974).

³⁰ *AHA*, 499 U.S. at 615-16 (quoting S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974)).

³¹ See generally *St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1148 (3d Cir. 1993).

Consequently, to resolve these “seemingly interminable disputes” over hospital unit determinations, “the Board engaged in notice and comment rulemaking in an attempt to formulate a general definition of the bargaining units appropriate in the health care industry.”³² In 1989, that process culminated in the issuance of the Rule, which provided that, with three exceptions, eight specifically defined units would be “the only appropriate units” in acute-care hospitals.³³

Under the Rule, there are eight possible bargaining units: two units of professionals (registered nurses and doctors), three units of nonprofessionals (technical employees, skilled maintenance employees, and business office clericals), two residual units (all other professionals and all other nonprofessionals), and, as the Act requires, a separate unit of guards.³⁴ Additionally, the Rule provided for three exceptions: extraordinary circumstances, previously existing nonconforming units, and “various combinations of units,” if sought by a labor organization.³⁵ Although the Board’s promulgation of the Rule was immediately challenged, in 1991 the Supreme Court upheld its validity.³⁶

³² *Id.*

³³ *See* 29 C.F.R. § 103.30 (2008), 54 Fed. Reg. 16,336 (Apr. 21, 1989); *AHA*, 499 U.S. at 608.

³⁴ *See* 29 U.S.C. § 159(b)(3); 29 C.F.R. § 103.30(a).

³⁵ 29 C.F.R. § 103.30(a)-(c); *see also AHA*, 499 U.S. at 608.

³⁶ *See AHA*, 499 U.S. at 619-20.

2. The Rule established the units appropriate for bargaining regardless of the extent of organization

The Hospital's primary contention (Br. 25)—that by delineating eight appropriate units in which unions will organize, the Rule necessarily violates Section 9(c)(5) of the Act³⁷—misapprehends the Board's considerations in developing the Rule, as well as the statutory language itself. Contrary to the Hospital's claim (Br. 30-35), in developing the Rule, the Board did not violate Section 9(c)(5) by giving controlling consideration to extent of organization. Rather, it invited comments and relied upon "empirical evidence" to determine which units would be appropriate in the health care industry.³⁸ As the Supreme Court found, the Board "gave extensive consideration" to the "special problems that 'proliferation' might create in acute-care hospitals" and conducted "careful analysis of the comments that it received," providing a "well-reasoned justification for the new rule."³⁹

The Board's "careful analysis" included consideration of factors similar to those it had previously considered in adjudications, including "uniqueness of

³⁷ Section 9(c)(5) states that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5).

³⁸ *Second Notice of Proposed Rulemaking for Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. 33,900, 33,901 (Sept. 1, 1988) ("Second Notice").

³⁹ *AHA*, 499 U.S. at 616-18.

function; training, education and licensing; wages, hours and working conditions; supervision; employee interaction; and factors relating to collective bargaining, such as bargaining history”⁴⁰ Thus, for each of the eight units it found to be appropriate, the Board delineated the multiple factors it relied upon. For example, the Board determined that a separate unit of nurses was warranted because they work around the clock, 7 days per week; have constant responsibility for patient care; are subject to common supervision by other nurses; share similar education, training, experience, and licensing requirements not shared by other employees; have the most contact with other nurses; and have a lengthy history of separate organization and bargaining.⁴¹ In addition, the Board determined that a unit of business office clericals, separate from service and maintenance employees, was warranted because the clericals “perform substantially different functions from those performed by other employees.”⁴² The Board also noted that the business office clericals are required to have a higher level of education than service and maintenance employees; have significant differences in their terms and conditions of employment compared with service and maintenance employees; have separate supervision and a separate, external labor market; and have a history of

⁴⁰ *Second Notice*, 53 Fed. Reg. at 33,905-906.

⁴¹ *Id.* at 33,911.

⁴² *Id.* at 33,924.

representation separate from service and maintenance employees and different bargaining interests.⁴³

In any event, Section 9(c)(5) does not preclude the Board from considering extent of organization: while the extent of union organization cannot be the “controlling” factor in the Board’s determination, it can be one of the factors considered by the Board in making a unit determination.⁴⁴ Thus, the Board’s consideration of extent of organization during rulemaking—as one of several factors—did not violate Section 9(c)(5).

3. The Board properly applied the Rule to this case; no demonstration of extraordinary circumstances is required for a union to combine units under the Rule

Because its attack on the Board’s Rule must fail, the Hospital makes the alternative argument (Br. 41-46) that the Board improperly applied the Rule here by certifying a combined unit of all professionals and all nonprofessionals (also called a wall-to-wall unit). But to challenge the Board’s determination, the

⁴³ *Id.* at 33,924-926. The Board’s discussions relating to nurses and business office clericals are summarized here as examples. The Board also provided detailed discussions of its reasoning related to the other units as follows: physicians, 53 Fed. Reg. at 33,917; other professionals, *id.* at 33,917-918; technical employees, *id.* at 33,918-920; skilled maintenance employees, *id.* at 33,920-924; other nonprofessionals, *id.* at 33,927; and guards, *id.* at 33,927 n.24.

⁴⁴ *NLRB v. Metro. Life Insur. Co.*, 380 U.S. 438, 441-42 (1965); *see also Country Ford Trucks, Inc., v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000).

Hospital would have to show that the combined unit was “truly inappropriate.”⁴⁵

The Hospital has made no such showing.

As explained above, under the Rule, there are eight appropriate collective-bargaining units in acute-care hospitals.⁴⁶ In addition to those eight units, the Board may find “various combinations of units” to be appropriate.⁴⁷ During the rulemaking process, the Board explained that some combinations of units “would obviously be appropriate, such as all professionals, or all non-professionals”⁴⁸ As the Supreme Court has explained, a union “may seek to organize ‘a unit’ that is ‘appropriate’—not necessarily *the* single most appropriate unit.”⁴⁹ The “initiative in selecting an appropriate unit resides with the employees” —not with the employer.⁵⁰ Indeed, “the NLRB may simply look at the union’s proposed unit and,

⁴⁵ *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

⁴⁶ 29 C.F.R. § 103.30(a).

⁴⁷ *Id.*

⁴⁸ *Second Notice*, 53 Fed. Reg. at 33,932. *See also* Office of the General Counsel, Memorandum 91-3 (1991).

⁴⁹ *AHA*, 499 U.S. at 610 (emphasis in original); *see also Blue Man*, 529 F.3d at 421.

⁵⁰ *AHA*, 499 U.S. at 610.

if it is an appropriate unit, accept that unit determination without any further inquiry.”⁵¹

Here, the Union petitioned to represent a unit of all professional and all nonprofessional employees. The professional employees would either constitute a separate bargaining unit or be included in the unit of nonprofessional employees, depending on the results of the election.⁵² (JA 43.) The Board affirmed the Regional Director’s finding that this unit was appropriate for collective bargaining. (JA 75.) As the Regional Director explained (JA 62-63), the Board, during its notice-and-comment rulemaking, determined that units of all professionals or all nonprofessionals would “obviously be appropriate.”

Furthermore, the Hospital misapprehends the “extraordinary circumstances” exception to the Rule and argues (Br. 42-43) that the Board should have required the Union to show extraordinary circumstances in order to combine any of the eight units defined in the Rule. The extraordinary circumstances exception is simply not applicable to this situation. The Rule provides the extraordinary circumstances exception, not to justify the already approved combination of units, but “to allow for the possibility of individual treatment of uniquely situated acute-

⁵¹ *Country Ford Trucks*, 229 F.3d at 1191.

⁵² *See Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

care hospitals, so as to avoid accidental or unjust application of the rule.”⁵³ The Rule makes separate allowance for various combinations of the eight units, if sought by a union.⁵⁴

There is nothing in the Board’s notices of proposed rulemaking or the Rule itself that indicates the extraordinary circumstances exception applies to combinations of units. Indeed, the Board’s explicit language in the Rule suggests the opposite. Nor does the Hospital cite any cases showing that the Board or courts have required unions to demonstrate extraordinary circumstances in order to combine units. To the contrary, the Board has approved, without requiring the demonstration of extraordinary circumstances, combined units in acute-care hospitals.⁵⁵

Nor does *St. Margaret Memorial Hospital*, cited by the Hospital in its brief (Br. 42-43), stand for the proposition that a union must show extraordinary

⁵³ *Second Notice*, 53 Fed. Reg. at 33,932.

⁵⁴ “Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate. . . .” 29 C.F.R. § 103.30(a). *See also AHA*, 499 U.S. at 608.

⁵⁵ *See Pontiac Osteopathic Hosp.*, 327 NLRB 1172, 1173 (1999); *Dominican Santa Cruz Hosp.*, 307 NLRB 506, 508 (1992).

circumstances when it seeks to combine units under the Rule.⁵⁶ Rather, in that case, the employer argued that extraordinary circumstances existed, making a unit sought by the union inappropriate. The Board held, and the Third Circuit affirmed, that the employer, in urging extraordinary circumstances, must “demonstrate that its arguments are substantially different” from those considered during the rulemaking proceedings.⁵⁷ Nothing in *St. Margaret* suggests that a union, in order to petition for a combined unit of all professional and nonprofessional employees, must first demonstrate extraordinary circumstances. Rather, the burden is on the employer—here, the Hospital—to demonstrate through a showing of extraordinary circumstances that it would be “unjust” or an “abuse of discretion” for the Board to apply the Rule.⁵⁸

Contrary to the Hospital’s claims, the Rule clearly permits a union to seek to organize a combination of the eight units. As the Regional Director explained (JA 63), a reasonable interpretation of the Board’s use of “or” is that either a professional or a nonprofessional unit, independent of the other, is appropriate. And so long as the professionals are allowed to decide for themselves whether to

⁵⁶ See *St. Margaret Mem’l Hosp.*, 303 NLRB 923, 923 (1991), *enforced*, 991 F.2d 1146, 1153 (3d Cir. 1993).

⁵⁷ *Id.* at 923.

⁵⁸ *Id.* (quoting 53 Fed. Reg. at 33,933).

be included in the same unit as the nonprofessionals, a combined wall-to-wall unit is, without more, also appropriate.⁵⁹

Under the Hospital's view, however, there could never be a wall-to-wall unit in a hospital. Such a result would contravene Congress's expressed desire that the Board give "due consideration . . . to preventing proliferation of bargaining units in the health care industry."⁶⁰ Prohibiting unions from seeking wall-to-wall units in hospitals would undermine the Rule and Congress's nonproliferation policy.

Finally, the Hospital incorrectly argues (Br. 32-35) that by organizing a wall-to-wall unit, the Union disenfranchised some employees and that by allowing such disenfranchisement, the Rule violates Section 9(b) of the Act.⁶¹ In essence, the Hospital complains that the Union should not be certified in a unit in which any employee does not want union representation. The Hospital misses the point of workplace democracy. Under Section 9(a) of the Act, if a majority of employees vote for representation, the entire unit, including those who voted against it, is

⁵⁹ See 29 U.S.C. § 159(b)(1) (the Board may include professional employees in a unit with nonprofessional employees only if "a majority of such professional employees vote for inclusion in such unit."). See also *Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

⁶⁰ See S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974).

⁶¹ 29 U.S.C. § 159(b).

represented by the union.⁶² Here, the Union petitioned for a facility-wide unit and won a decisive victory. Of 194 valid votes cast, 121 were for union representation. (JA 96.) Moreover, Congress expressly contemplated wall-to-wall units in Section 9(b), and the Board generally presumes that wall-to-wall units are appropriate.⁶³

C. The Board’s Decision in *Specialty Healthcare* Does Not Apply to Acute-Care Facilities such as the Hospital

Contrary to the Hospital’s claims, the Board’s decision in *Specialty Healthcare & Rehabilitation Center of Mobile*⁶⁴ has no impact on unit determinations in acute-care hospitals. Therefore, the Hospital’s request (Br. 40) that the case be remanded to the Board “for further review in light of *Specialty Healthcare*” should be denied.

In *Specialty Healthcare*, the Board clarified the analysis to be used in determining appropriate bargaining units in nonacute-care facilities like nursing homes, explaining that it would be governed by a traditional community-of-interest

⁶² 29 U.S.C. § 159(a).

⁶³ See 29 U.S.C. § 159(b) (“ . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof”); *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 518 (D.C. Cir. 1999) (citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962)); *Airco, Inc.*, 273 NLRB 348, 349 (1984).

⁶⁴ 357 NLRB No. 83 (2011).

approach. Accordingly, the Board overruled *Park Manor Care Center*,⁶⁵ a case decided after publication of the Rule to govern unit determinations in nonacute-care facilities such as nursing homes. In *Park Manor*, the Board determined that, in the nonacute-care context, it would apply not only community-of-interest factors, but also background information gathered during the rulemaking process that preceded the Rule. However, as the Board explained in *Specialty Healthcare*, the background information developed in the rulemaking about nursing homes was “limited and did not provide an adequate basis for the Board to reach any conclusions concerning bargaining units in nursing homes.”⁶⁶ For this reason, the Board decided to abandon the *Park Manor* formulation and to base unit determinations in nonacute-care facilities on traditional community-of-interest factors, as it had done before *Park Manor*.⁶⁷

Nothing in *Specialty Healthcare* applies to acute-care facilities like the Hospital. Rather, as noted above, unit determinations in acute-care hospitals are governed by the Board’s Rule, which “by its express terms . . . does not apply to [Specialty Healthcare] or to nursing homes.”⁶⁸ And at no point in *Specialty*

⁶⁵ 305 NLRB 872, 875 (1991).

⁶⁶ 357 NLRB No. 83, at *5. *See also Second Notice*, 53 Fed. Reg. at 33,928; *Final Rule*, 54 Fed. Reg. at 16,343.

⁶⁷ *Specialty Healthcare*, 357 NLRB No. 83, at *6, 8.

⁶⁸ *Id.* at *5.

Healthcare did the Board question the validity of the Rule or the appropriateness of applying it to unit determinations in acute-care hospitals. Instead, as shown above, *Specialty Healthcare* clarified only the Board’s approach when determining appropriate units in nonacute-care facilities like nursing homes. Indeed, the Board could only change the Rule through another rulemaking—not through adjudication.⁶⁹

The Hospital errs in relying on *Specialty Healthcare* as a guise for seeking to have this Court remand the case to so that the Board could consider the Hospital’s assertion (Br. 37) that acute-care facilities are “dynamic” and have undergone substantial change since the Board’s adoption of the Rule. As an initial matter, if the Hospital had wanted to make this factual assertion, it was obligated to do so in the proceedings before the Board. For example, the Hospital could have raised this issue during the hearing on the appropriateness of the unit or in its objections to the election. The Hospital cannot now properly obtain a remand to explore its belated factual claim.⁷⁰

⁶⁹ *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”). *See also Alaska Prof’l Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).

⁷⁰ *See* Section 10(e) of the Act (29 U.S.C. § 160(e)), which precludes the Court from hearing arguments never made to the Board. *See also Woelke &*

In any event, *Specialty Healthcare* does not provide any support for a remand. As the Supreme Court noted in *AHA*, during the rulemaking process, the Board developed an “extensive record” on acute-care facilities.⁷¹ As the Supreme Court further explained, the Board based its conclusion—that the appropriateness of units in acute-care hospitals does not differ significantly from hospital to hospital—on “a reasoned analysis” of that extensive record.⁷²

The Board’s discussion in *Specialty Healthcare* of evidence concerning nursing homes that was gathered during the rulemaking process does not call into question the Rule’s validity as it applies to acute-care hospitals. To the contrary, the Board noted that, during the rulemaking, it found “substantial differences between nursing homes and hospitals . . . which affect staffing patterns and duties.”⁷³ For example, the Board found that nursing homes have less diversity among professional, technical and service employees; the staff is more functionally integrated; nurses provide a lower level of care to patients and receive lower salaries than that paid in acute-care hospitals; and nursing home non-professionals

Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982); *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009).

⁷¹ 499 U.S. at 618-19.

⁷² *Id.* (citation omitted).

⁷³ *Specialty Healthcare*, 357 NLRB No. 83, at *5 (quoting 53 Fed. Reg. at 33,928).

have more contact and a greater overlap of function.⁷⁴ The Board also reiterated in *Specialty Hospital* that, unlike acute-care hospitals, it did not have “a sufficient body of empirical data as to nursing homes to make a uniform rule as to them,” and perhaps never would due to their lack of uniformity.⁷⁵

Given this lack of evidence concerning nursing homes, the Board in *Specialty Healthcare* decided that unit determinations in nonacute-care facilities would continue to be adjudicated on a case-by-case basis. However, this discussion about nursing home data has no impact on unit determinations in acute-care hospitals, which continue to be governed by the Rule. Thus, the Hospital errs in suggesting that *Specialty Healthcare* calls into question the validity of the Union’s certification as the representative of a unit of acute-care hospital employees.

The Hospital also errs in claiming (Br. 38) that the Rule “lost” its justification when the Board in *Specialty Healthcare* noted that Congress’s admonition against proliferation in health care bargaining units did not have the

⁷⁴ 53 Fed. Reg. at 33,928.

⁷⁵ *Specialty Healthcare*, 357 NLRB No. 83, at *7 n.14 (quoting *Park Manor*, 305 NLRB at 875).

force of law.⁷⁶ The Board's comment was hardly novel; the Supreme Court made the same point in *AHA*, the decision in which it approved the Rule.⁷⁷

In sum, a remand of this case to the Board would be unwarranted because *Specialty Healthcare* is inapplicable here. The Board has not altered how it makes unit determinations in acute-care facilities, and the Hospital's suggestion otherwise is simply an attempt to further evade its obligation to bargain with the Union elected by its employees four years ago.

II. THE COURT LACKS JURISDICTION TO CONSIDER TWO OF THE HOSPITAL'S THREE PROCEDURAL CHALLENGES TO *SAN MIGUEL I*; IN ANY EVENT, THERE IS NO MERIT TO ANY OF THE HOSPITAL'S CLAIMS

In addition to its arguments about the Board's Health Care Rule, the Hospital makes a series of procedural attacks (Br. 46-60) on the Board's *San Miguel I* decision. Specifically, the Hospital complains that the Board violated its due process rights by resuming case processing too quickly after the Court's remand, by issuing the 2010 certification while the Hospital's RM petitions were pending, and by allowing the General Counsel to amend the complaint to reflect

⁷⁶ Congress, in extending the Act's coverage to all acute-care hospitals in 1974, admonished the Board to give "due consideration . . . to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974); *see also* Pub. Law 93-360, 88 Stat. 395 (1974).

⁷⁷ *See AHA*, 499 U.S. at 616.

the Hospital's admittedly ongoing refusal to bargain. Because the Hospital failed to raise its first two arguments at the time appropriate under the Board's procedures, the Court lacks jurisdiction to consider them. In any event, to prevail on its claims, the Hospital would have to show that the Board violated established procedures or engaged in improper behavior. As we now demonstrate, the Hospital has shown neither.

A. The Court Lacks Jurisdiction To Consider the Hospital's Assertion that the Board Did Not Fully Consider its Election Objections; In Any Event, its Claims Have No Merit

The Hospital argues (Br. 49) that this Court should grant its petition for review because the Board assertedly "reopened [the refusal to bargain case] prior to the Court's release of mandate" making the 2010 certification "legally void." Because the Hospital failed to raise this claim at the time appropriate under the Board's procedures, the Court lacks jurisdiction to hear it. Moreover, notwithstanding the Hospital's baseless allegations, it has demonstrated no grounds to impugn the Board's decision-making process.

1. The Court lacks jurisdiction to hear the Hospital's claim

The Hospital argues (Br. 47, 49) that by issuing the September 30, 2010 Decision, Certification of Representative, and Notice to Show Cause four business days after the Court's remand, the Board processed the case too quickly, making the certification void. After a three-member panel of the Board issued that

decision, however, the Hospital had 28 days to file a motion for reconsideration, rehearing, or reopening of the record pursuant to Section 102.48(d)(1)-(2) of the Board's Rules and Regulations.⁷⁸ As the Board noted in *San Miguel I*, despite this opportunity to present its argument in such a motion, the Hospital did not do so.⁷⁹ (JA 338 & n.6.) Indeed, in its Response to the Notice to Show Cause, the Hospital specifically recognized that a motion for reconsideration was the "appropriate time" to raise arguments related to the Board's "reissuance" of the Decision, Certification of Representative, and Notice to Show Cause. (JA 237.)

Because the Hospital failed to file such a motion to assert its claims regarding the Board's decision-making process, the Court lacks jurisdiction to consider those arguments raised in the Hospital's brief.⁸⁰ Furthermore, the Hospital waived any challenge to the Board's specific finding—that the Hospital should have presented its due process claims to the Board in a motion for

⁷⁸ 29 C.F.R. § 102.48(d)(1)-(2). *See New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011).

⁷⁹ *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

⁸⁰ *See New York & Presbyterian*, 649 F.3d at 733.

reconsideration (JA 338 n.6)—by failing to challenge that finding in its opening brief.⁸¹

2. In any event, courts afford administrative agencies a presumption of regularity and will not delve into agencies' internal deliberative processes based on pure speculation

In any event, the Hospital's arguments are meritless: the Hospital's speculative claims regarding the Board's decision-making process are contrary to the presumption of regularity the courts afford agency decision-making and provide no basis for the Court to disturb the Board's Decision and Order in *San Miguel I*.

The fact that the Board issued its Decision, Certification of Representative, and Notice to Show Cause four business days after the Court issued the mandate in the two-member case does not counter the presumption that the Board properly discharged its duties.⁸² As the Board explained (JA 230):

We have considered the postelection representation issues raised by [the Hospital]. The Board has reviewed the record in light of the exceptions and

⁸¹ See *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996).

⁸² See, e.g., *National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejects claims that it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) ("bare allegation" that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process).

brief, and has adopted the hearing officer's findings and recommendations to the extent and for the reasons stated in the March 4, 2008 Decision and Certification of Representative, which is incorporated herein by reference.

The Hospital has offered nothing in rebuttal.

Indeed, administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."⁸³ Absent compelling evidence to the contrary, the Supreme Court takes at face value the Board's assurances that it adequately considered the record before issuing a decision.⁸⁴ This Court affords administrative agencies a presumption of regularity to support "the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues."⁸⁵ This presumption "can be overcome, and further explication can be required of the decisionmaker, only upon a strong showing of bad faith or improper behavior."⁸⁶

⁸³ *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-44 (1978); *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C. Cir. 1990).

⁸⁴ *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947).

⁸⁵ *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 460 (D.C. Cir. 1967).

⁸⁶ *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

The Hospital failed to show that the Board engaged in improper behavior, instead making only bald assertions that the Board did not “meaningful[ly] review” its objections to the election and that “the Board reopened the case prior to the Court’s release of jurisdiction.” (Br. 47, 49.) This Court will not allow an agency’s decisions to be overturned based on such “speculative allegations.”⁸⁷

Furthermore, contrary to the Hospital’s claims (Br. 48), nothing in the Board’s decision suggests that it resumed processing the case before the mandate issued. As the Board made clear, it “was aware that it would need to revisit this case long before” the mandate issued, and “was prepared to act promptly thereafter.” (JA 338.) The Board did not suggest that it began deliberations before receiving the mandate, merely that it was prepared to act “promptly.” (JA 338.)

There is no more merit to the Hospital’s assertion (Br. 47) that the Board processed its 24 election objections too quickly. It is undisputed that a Board hearing officer recommended overruling those objections following a hearing. Furthermore, as he noted, objections 3-15 (challenging the health care rule and the Regional Director’s decisions on supervisory status) concerned bargaining unit decisions made by the Regional Director and upheld on review by a three-member panel of the Board. (JA 75; JA 114 & n.4.) Subsequently, the Hospital failed to file exceptions to the hearing officer’s recommendations that objections 1, 2, 8-10,

⁸⁷ *Braniff Airways*, 379 F.2d at 462.

and 16-24 be overruled. (JA 145, 230.) Given the Hospital's choice to forego exceptions, it is in no position to complain about the Board's decision to adopt the hearing officer's recommendations in the absence of exceptions. (JA 145, 230.)

Thus, the Board handled the Hospital's election objections in accordance with established procedure. The Hospital has demonstrated no improper behavior by the Board to justify overturning the Union's certification and further delaying the employees' representation by the union they elected in 2007.

B. The Court Lacks Jurisdiction to Consider the Hospital's Claim that it Could Force a New Election through RM Petitions; In Any Event, the Hospital, Having Refused To Bargain with the Union Since It Won an Election, Cannot Claim a Question Concerning Representation

1. The Court lacks jurisdiction to consider the Hospital's claim that its pending RM petitions precluded the Board from issuing the Decision, Certification of Representative, and Notice to Show Cause

The Hospital next attacks the Board's procedures by arguing (Br. 50-54) that the Board "had no legal basis" for issuing the September 30, 2010 Decision, Certification of Representative, and Notice to Show Cause because the Hospital had filed RM petitions that had not yet been dismissed.⁸⁸ The Hospital, however, failed to raise its argument in the representation proceeding. It was not until its Response to the Notice to Show Cause that the Hospital presented its baseless

⁸⁸ The Hospital is not challenging the Board's dismissal of the three RM petitions it filed in 2007.

contention. (JA 239-41.) Accordingly, as the Board explained in *San Miguel I*, the Hospital was procedurally barred from raising the issue for the first time in the refusal to bargain case. (JA 338-39.) As the Board noted, the Hospital could have but did not raise the issue in the underlying representation proceeding, either directly or through a motion for reconsideration or to reopen the record. (JA 339.) Indeed, the Hospital acknowledged its failure to exercise these options in its Response to the Notice to Show Cause. (JA 338-39; JA 237.)

Given the Hospital's failure to raise its argument at the time appropriate under the Board's procedures, namely, in the underlying representation proceeding, the Court lacks jurisdiction to consider the argument.⁸⁹ Furthermore, nowhere in its opening brief does the Hospital challenge the Board's finding that it should have raised its argument about the prematurity of the certification in the underlying representation proceeding. (JA 339.) Given the Hospital's failure to contest the Board's finding in its opening brief, the Hospital has waived any challenge to that finding.⁹⁰

⁸⁹ See generally *L. A. Tucker*, 344 U.S. at 37.

⁹⁰ See *Parsippany Hotel*, 99 F.3d at 418.

2. The Union won an election in a combined unit; the Hospital cannot file RM petitions to force a new election in the units it prefers

In any event, the Board properly rejected the Hospital's attempts to force a new election in its preferred units by filing RM petitions on September 27, 2010, seeking six separate units. The Hospital ignores that in 2007, the Board conducted an election in the combined professional/nonprofessional unit for which the Union had petitioned—an election the Union won. Although an employer may (as the Hospital does) challenge a union's election victory by refusing to bargain, as the Board explained (JA 338-39), an employer cannot use an RM petition to challenge the union's continued majority status when the employer has never bargained with the union.⁹¹

An employer may file an RM petition only in two limited circumstances—namely, when a union demands recognition,⁹² and when the employer has evidence of “objective considerations relating to an incumbent labor organization's continued majority status.”⁹³ But neither circumstance comes into play in a case

⁹¹ *Brooks v. NLRB*, 348 U.S. 96, 104 (1954); *Kane Co.*, 145 NLRB 1068, 1070 (1964), *enforced* 352 F.2d 511 (6th Cir. 1965); *Sunbeam Corp.*, 89 NLRB 469, 473 (1950); *Teesdale Mfg. Co.*, 71 NLRB 932, 935 (1946).

⁹² Secs. 11002.2 and 11002.1(a)(2), Board's Casehandling Manual Part 2, Representation Proceedings.

⁹³ *Id.* at Sec. 11022.3; 11003.1(b), 11042. See also *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 723 (2001).

like this one, where the Union petitioned to represent employees in a certain unit and prevailed in the election. As the Board explained, in this situation, it is settled that an employer cannot use an RM petition to challenge “an alleged postelection loss of majority support.” (JA 339.) This is so because a post-election loss of support “is not relevant to the question of whether a union should be certified as the result of a properly conducted Board election.”⁹⁴ (JA 339.)

In any event, the Hospital forgets that, even in the limited circumstances where an RM petition can be filed, the employer must seek the unit requested by the union, and that if it is filed as a decertification petition, it must be filed in the certified or recognized unit.⁹⁵ As the Board explained in its *Second Notice of Proposed Rulemaking*, because the union is only required to seek an appropriate unit, it “does not benefit an employer to have the option of showing that another unit . . . is also appropriate, or even more appropriate, since the appropriateness of an alternative unit is not the issue.”⁹⁶ Thus, the Hospital could not use its RM petitions to attempt to force new elections in units it preferred to the unit requested by the Union.

⁹⁴ See cases cited *supra* at note 91.

⁹⁵ *Second Notice*, 53 Fed. Reg. at 33,932 n.26 (citing *Wm. Wood Bakery*, 97 NLRB 122 (1951); *Rest. & Tavern Owners Ass’n of Salem*, 126 NLRB 671 (1960); *Campbell Soup Co.*, 111 NLRB 234 (1955)).

⁹⁶ *Id.* at 33,932.

In sum, given the Hospital's failure to raise, in the underlying representation proceeding, its claim that its pending RM petitions precluded the Board from issuing its Decision, Certification of Representative, and Notice to Show Cause, the Court lacks jurisdiction to consider the claim. In any event, the Board properly rejected the Hospital's claim because an employer cannot use an RM petition to challenge a union's election victory, or to force new elections in units that differ from the one requested by the duly elected union.

C. The Board Properly Granted the General Counsel's Motion for Special Permission To Amend the Complaint

The Hospital next complains (Br. 54-60) that the Board abused its discretion by granting the General Counsel's motion to amend the complaint to reflect the Hospital's ongoing, and admitted, refusal to bargain with the Union. With hyperbolic flourish, the Hospital even goes so far as to assert (Br. 54) that "the Board permitted the General Counsel to ignore procedural due process and collude with the Union in an effort to salvage its case." For the reasons discussed below, the Hospital's baseless rhetoric must be rejected.

To begin, nowhere in its brief does the Hospital deny the essential facts that underlie the complaint amendment. After the Union won the election in 2007, the Hospital refused to bargain. As detailed above, the Hospital challenged the Union's certification and several years of litigation ensued. In its September 2010 Decision, Certification of Representative, and Notice to Show Cause, the Board

notified the General Counsel that he could amend the complaint to reflect the current state of the evidence. (JA 231.) He did not amend the complaint because, at that time, nothing had changed. (JA 246-47.)

On December 10, 2010, however, the Union again asked the Hospital to bargain, and the Hospital failed to respond. Thereafter, the General Counsel requested permission from the Board to amend the complaint to reflect the Union's renewed request and the Hospital's ongoing—and admitted—refusal to bargain. The Board granted the General Counsel's motion. (JA 288.) As the Board explained in *San Miguel I*, Section 3(d) of the Act gives the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 . . . , and in respect of the prosecution of such complaints before the Board."⁹⁷ (JA 338.)

In any event, as the Board further explained in *San Miguel I*, given the Hospital's inability to show that it was prejudiced by the complaint amendment, its challenge must fail. (JA 338.) It is settled that "[p]roof of a denial of due process requires a showing of substantial prejudice."⁹⁸ Agency orders should not be overturned "because of a procedural error without making the normal appellate

⁹⁷ 29 U.S.C. § 153(d).

⁹⁸ 16D CORPUS JURIS SECUNDUM § 1810 (2005).

assessment as to whether the error was harmless or prejudicial.”⁹⁹ Thus, in order to challenge the Board’s ruling permitting the General Counsel to amend the complaint to reflect the Hospital’s ongoing, admitted refusal to bargain with the Union, it was incumbent on the Hospital to demonstrate that it was prejudiced by the amendment. The Hospital has made no such claim, much less demonstrated it. Nor could the Hospital do so, given its admission in its answer to the amended complaint that it was continuing to refuse to bargain with the Union. (JA 302.) Simply put, the Hospital cannot show that it was prejudiced by a Board ruling permitting the General Counsel to amend the complaint to reflect an uncontested and admitted fact—namely, the Hospital’s ongoing refusal to bargain with the Union.

III. IF THE COURT AGREES THAT THE BOARD PROPERLY CERTIFIED THE UNION AND REJECTS THE HOSPITAL’S PROCEDURAL CLAIMS, THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS IN *SAN MIGUEL II*

In *San Miguel II*, the Board found that the Hospital refused to provide necessary and relevant information to the Union, made a unilateral change to its policy regarding fit tests, and discharged an employee as a result of that changed policy. (JA 343.) The Board’s findings in *San Miguel II* are premised on its

⁹⁹ Charles H. Koch, Jr. 1 ADMIN. L. & PRAC. 9.29 (3d ed.). See 5 U.S.C. § 706 (In reviewing agency actions, “due account shall be taken of the rule of prejudicial error.”).

findings in *San Miguel I* that the Union's certification as collective-bargaining representative is valid and that the Hospital's procedural arguments lack merit.

In its brief, the Hospital fails to challenge any part of the Board's *San Miguel II* decision. Therefore, if the Court agrees with the Board that the Union's certification is valid, and that the Hospital's procedural claims lack merit, then the Board is entitled to summary enforcement of its findings that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to provide information, making a unilateral change, and discharging an employee as a result of the unilateral change.¹⁰⁰

¹⁰⁰ See *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997); *Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Hospital's petitions for review and enforce the Board's Orders in full.

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM
NATIONAL LABOR RELATIONS ACT

Section 3(b) of the Act, 29 U.S.C. § 153(b), provides in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

Section 3(d) of the Act, 29 U.S.C. § 153(d), provides in relevant part:

The General Counsel of the Board . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 9 of the Act, 29 U.S.C. 159, provides in relevant part:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

* * *

(b) . . . the Board shall not (1) decide that any unit is appropriate for [collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises

* * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board — (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . ; or (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

* * *

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

THE BOARD'S HEALTH CARE RULE

29 C.F.R. § 103.30, Appropriate Bargaining Units in the Health Care Industry, provides in relevant part:

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

- (1) All registered nurses.
- (2) All physicians.
- (3) All professionals except for registered nurses and physicians.
- (4) All technical employees.
- (5) All skilled maintenance employees.
- (6) All business office clerical employees.
- (7) All guards.
- (8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term: . . .

(5) A non-conforming unit is defined as a unit other than those described in paragraphs (a)(1) through (8) of this section or a combination among those eight units.

THE BOARD'S RULES AND REGULATIONS

Section 102.48(d)(1)-(2) of the Board's Rules and Regulations

(d) (1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

Casehandling Manual, (Part Two), Representation Proceedings

§ 11002.1(a) Representation A representation case, initiated by the filing of a petition under Section 9(c) of the Act, takes the form of:

. . . (2) a RM case, alleging that one or more claims for recognition as the exclusive bargaining agent have been received by the employer or that the continued majority status of the incumbent union is in question

§ 11002.2 Who May File

. . . (b) RM petition: A RM petition may be filed only by an employer.

§ 11003.1(b) RM Petition In a RM case, the petition should be accompanied by proof of demand for recognition made by a labor organization upon the employer or the employer's evidence of objective considerations (*Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001); Sec. 11042). If the proof of demand and/or the evidence of objective considerations is not received with the petition, the

employer has 48 hours within which to submit such proof/evidence. However, processing of the petition should nonetheless be initiated upon receipt of the petition. Thereafter, the petition should not be processed further unless the proof of demand and/or the evidence of objective considerations has been timely received.

§ 11022.3 Parties in RM Petition The employer's showing of interest in a RM case consists of proof of a demand for recognition made by one or more labor organizations or evidence of objective considerations relating to an incumbent labor organization's continued majority status. Secs. 11003.1(b) and 11042. A union or other collective-bargaining representative will be regarded as a claimant in a RM case if it is the representative or one of the representatives on the basis of whose majority claim the employer filed the instant petition.

§ 11042 Generally In petitioning the Board for an election to question the continued majority of an incumbent union, employers must demonstrate a "good-faith reasonable *uncertainty* (rather than *disbelief*) as to unions' continuing majority status." *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001). The Regional Director should process a RM petition based on a prima facie showing of objective considerations that a union has lost its majority status, provided that there have been no unfair labor practices committed that undermine the employees' support for the union. The question of objective considerations, like the showing of interest in a RC or RD case, is a matter for the administrative determination of the Regional Director and may not be litigated. . . .

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SAN MIGUEL HOSPITAL CORPORATION)	
d/b/a ALTA VISTA REGIONAL HOSPITAL)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1198, 11-1209,
)	11-1319, 11-1349
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case Nos.
Respondent/Cross-Petitioner)	28-CA-21896
)	28-CA-22280

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,087 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 13th day of June, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, I electronically filed the Board's proof brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the brief on the following counsel through the CM/ECF system:

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