

Nos. 11-1466, 12-1009

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

**SALEM HOSPITAL CORPORATION d/b/a
THE MEMORIAL HOSPITAL OF SALEM COUNTY**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

HEALTH PROFESSIONALS AND ALLIED EMPLOYEES

Intervenor

**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**

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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: Salem Hospital Corporation, d/b/a the Memorial Hospital of Salem County, 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. Health Professionals and Allied Employees was the charging party before the Board.

(B) Rulings Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Decision and Order issued on November 29, 2011, and reported at 357 NLRB No. 119.

(C) Related Cases: Board counsel are aware of one related case involving these parties. On September 18, 2012, the Board filed for enforcement in the Third Circuit (Case No. 12-3632) of its July 31, 2012 order against Salem Hospital Corporation. In that decision, the Board found that Salem unlawfully refused to provide information to the Health Professionals and Allied Employees, the duly-elected collective-bargaining representative whose certification the Hospital is challenging in the instant case. The Board's Decision and Order is reported at 358 NLRB No. 95.

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**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**

This case is before the Court on the petition of Salem Hospital Corporation to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Hospital. The Board found that the Hospital violated Section 8(a)(5) and (1) of the National Labor Relations Act¹ by refusing to bargain with Health Professionals and Allied Employees, the union selected in a secret-ballot election by the Hospital's registered nurses ("RNs").

The Board's Decision and Order issued on November 29, 2011, and is reported at 357 NLRB No. 119.² The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of Act, which authorizes the Board to prevent unfair labor practices affecting commerce.³ The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act.⁴ 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

¹ 29 U.S.C. § 158 (a)(5) and (1).

² JA 309-11. "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.

³ 29 U.S.C. § 160(a).

⁴ 29 U.S.C. § 160(e) and (f).

Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

Because the Board's Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act.⁵ Section 9(d), however, does not give the Court general authority over the representation proceeding, but instead 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."⁶ 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.⁷

The Hospital filed its petition for review on December 1, 2011. The Board filed its cross-application for enforcement on January 6, 2012. The petition and the cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

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

⁶ 29 U.S.C. § 159(d).

⁷ 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, the Board's Rules and Regulations, and the Board's Representation Casehandling Manual are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

Did the Board abuse its discretion in overruling the Hospital's challenges to a representation election won by the Union? If not, then the Board properly found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of a unit of the Hospital's RNs.

STATEMENT OF THE CASE

This case involves the Hospital's failure and refusal to bargain with the Union after the Hospital's RNs voted in favor of union representation in a Board-conducted election. The Board found that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act and ordered the Hospital to recognize and bargain with the Union. (JA 309-10.) The Hospital does not dispute that it has refused to bargain. Instead, it claims that, in the underlying representation proceeding, "the Board deprived the Hospital of any fair opportunity to show" that RNs serving as charge nurses are supervisors, and that the certification is "invalid"

because it was “generated” pursuant to the Board’s Health Care Rule.⁸ (Br. 16, 18.) The Board’s findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

STATEMENT OF FACTS

I. THE BOARD’S FINDINGS OF FACT

A. Background: The Hospital’s Operations and the Duties of Its Charge Nurses

The Hospital is an acute-care facility in Salem, New Jersey. It operates around the clock and has about 80 beds in six units.⁹ (JA 42, 44; 316-17.) Each unit has a director, who is responsible for hiring, evaluating and disciplining employees, overseeing their work, and approving their work schedules. (JA 44; 335, 342, 347, 352, 362, 365, 367, 369-70, 445.) During the evening hours and on weekends, house supervisors are responsible for running the Hospital and are “generally the highest-ranking officials” on duty. (JA 44; 325-26, 341, 352, 366, 406, 424, 474-75, 512-13.)

⁸ 29 C.F.R. § 103.30.

⁹ The Regional Director found two charge nurses in the Surgical Services unit to be statutory supervisors. (JA 43.) Because there is no challenge to that finding, the facts described below are limited to the duties of charge nurses in the other units.

The Hospital employs between 130 and 150 RNs in the six units who work in two 12-hour shifts. (JA 43; 338, 339-40.) Each unit has a designated charge nurse for each shift, and the charge nurse is always an RN. Some RNs serve as a charge nurse every shift they work, some do so occasionally, and some never do. (JA 44; 319-20, 321, 541-49.) No training is required to become a charge nurse. (JA 372, 382, 385, 407, 425, 435.) Like all RNs, charge nurses wear scrubs, are hourly employees, and do not have offices or attend supervisory or management meetings. (JA 44; 380, 394, 416-17, 429, 438, 529-30.)

On most units, all RNs generally meet together at the beginning of the shift and decide among themselves which patients they will care for. They consider continuity of care, equalization of workloads, room location, and nurse preferences. (JA 58; 381, 395, 407-08, 420, 458, 493-94, 506-07.) On two units, day-shift charge nurses assign patients to the night-shift RNs, and night-shift charge nurses make the assignments for the day-shift, typically by assigning patients to the RN they had the day before. (JA 58; 425, 476-77.)

Unit aides perform tasks such as taking vital signs and blood pressure readings, or retrieving equipment. (JA 60.) Any RN can ask a unit aide to perform those tasks. (JA 60; 332-33, 360, 363-64, 430.) RNs serving as charge nurses are not held accountable or disciplined if the aides' work is not done properly. (JA 60;

324, 331, 336, 337, 344, 368, 378, 385-86, 413, 427, 435, 479-80, 497-98, 508-10, 518, 525-26.)

RNs serving as charge nurses do not discipline or effectively recommend discipline of other employees. (JA 61; 342, 346, 350-51, 361, 383, 387, 410, 414, 426, 436, 494-95, 519-20, 527-28.) Hospital managers have not told charge nurses that they have the authority to discipline other employees. (JA 61; 383, 387, 410, 426-27, 433-34, 436, 459, 478, 497-98, 514-15.) Unit directors are responsible for employee evaluations. (JA 62; 359, 437, 497-99, 510-11, 527-28.) Charge nurses are not involved in the grievance process. (JA 62; 323, 428, 499-500, 519-20.)

B. The Representation Proceeding

1. The Union files an election petition, and the Regional Director holds a hearing concerning the Hospital's claim that the charge nurses are statutory supervisors

On May 19, 2010, the Union filed an election petition, seeking to represent the Hospital's registered nurses, including charge nurses and case managers. (JA 64.) The Hospital contended that 48 charge nurses should be excluded from the unit as statutory supervisors because they have authority to assign, responsibly direct, discipline, and adjust grievances, using independent judgment. (JA 42-43 nn.3-4, 57.) From June 2-9, 2010, the Regional Office held a pre-election hearing to address the Hospital's contention.

a. The Hospital files an unfair labor practice charge against the Union, alleging that the charge nurses' actions tainted the election petition

On June 7, 2010, during the course of the hearing, the Hospital filed an unfair labor practice charge against the Union (4-CB-10499), alleging that two named RNs—considered by the Hospital to be supervisory charge nurses—were “involv[ed]” in filing the election petition, leading to “supervisory taint” of the election petition. (JA 16-19.) The Hospital moved to adjourn the hearing pending investigation of its charge pursuant to the Board’s “blocking charge” policy.¹⁰ (JA 397, 402.) The hearing officer denied the motion. (JA 405.) The Hospital filed a request for special permission to appeal with the Regional Director. Determining that two exceptions to the Board’s blocking charge policy applied, the Regional Director denied the appeal and ordered the hearing to proceed. (JA 22-23.) First, she determined that the hearing should continue because the supervisory status of RNs serving as charge nurses was critical to deciding both the election petition and the Hospital’s charge.¹¹ (JA 23; 405.) In addition, she noted that the representation hearing was underway, and proceeding with the hearing was the “most efficient way to resolve the issues raised by the petition and the charge.”¹²

¹⁰ See Board’s Representation Casehandling Manual, Sec. 11730.

¹¹ See *id.*, Sec. 11731.3.

¹² See *id.*, Sec. 11731.4.

(JA 23.) The Hospital did not appeal the Regional Director's decision to the Board. (JA43 n.5.)

b. The Hospital moves to transfer the proceeding to another region, but its request is denied

Also during the course of the hearing, the Hospital filed a motion to transfer the proceedings to another region, claiming that the hearing officer had ex parte contacts with one of the charge nurses and had prejudged the case. (JA 464, 502-05.) The hearing officer denied the motion. (JA 503-04.) The Hospital appealed his ruling to the Regional Director, who denied the appeal on June 9. (JA 24.) On June 23, the Hospital then requested that the Acting General Counsel transfer the case to another region, claiming that the hearing officer and his supervisor engaged in ex parte communications, and that the Region had "accept[ed]" the Union's allegations of misconduct by the Hospital's counsel. (JA 29, 31.) After conducting an investigation, the Acting General Counsel denied the Hospital's transfer request, finding that its claims had no merit. (JA 40-41, 43 n.5.)

c. After the parties develop a full record, the hearing officer closes the hearing

The hearing lasted six days, and the parties presented testimony by 19 witnesses. On the last day of the hearing, after the Union had presented its last witness, the hearing officer asked if the Hospital's counsel had anything to add. The Hospital's counsel stated that he wanted to put on "rebuttal" witnesses. (JA 532-33.) The hearing officer asked for an offer of proof regarding the additional witnesses because representation hearings are investigatory rather than adversarial proceedings in which rebuttal witnesses might be appropriate. The Hospital's counsel stated that "we would have additional witnesses who will be probative of the principal issue . . . the supervisory status of charge nurses. That would be the offer of proof." (JA 532-33.) He further stated that he needed an opportunity to rebut union witnesses' testimony about the house supervisors. (JA 533-34.)

The hearing officer ruled that he would not allow additional testimony because the parties had developed a full record, with each side's witnesses discussing the supervisory status of RNs serving as charge nurses, and the duties of the house supervisors. (JA 533-35.) After informing the Hospital's counsel that he could appeal the ruling, the hearing officer closed the hearing. (JA 534-35.)

2. The Regional Director dismisses the Hospital’s supervisory taint charge and issues a Decision and Direction of Election; the Hospital files a request for review, which the Board denies; the Union wins a secret-ballot election

After the hearing concluded, the Regional Director dismissed the Hospital’s “supervisory taint” unfair labor practice charge because the evidence produced by the Hospital failed to show a violation of the Act. (JA 37-39.) The Hospital appealed the dismissal to the Acting General Counsel, who denied the appeal. (JA 68-69.)

The Regional Director then issued a Decision and Direction of Election. (JA 42-67.) She found that, with the exception of two charge nurses in the Surgical Services Unit, the Hospital did not sustain its burden of proving that the RNs serving as charge nurses assign, responsibly direct, discipline, or adjust grievances using independent judgment, as is required to show that they are supervisors under the Act. (JA 43.) Accordingly, she directed that an election be conducted among the RNs.¹³ (JA 43, 62.)

Thereafter, the Hospital requested review of the Regional Director’s decision, arguing that it was prejudiced by her denial of the motions to adjourn and transfer the case. (JA 81, 90.) In its request for review, the Hospital also argued

¹³ Neither party presented evidence about the case managers, and in the absence of any evidence that the case managers should not be in a unit with RNs, the Regional Director included them in the unit. (JA 42 n.2.)

that the hearing officer exhibited bias by denying its motion to transfer the case, and by closing the record without hearing from the Hospital's "rebuttal" witnesses. (JA 99, 104-05.) In addition, the Hospital argued that the Regional Director erred in concluding that the RNs who serve as charge nurses lack supervisory status, and that the Board's Health Care Rule is inconsistent with Section 9(c)(5) of the Act (29 U.S.C. § 159(c)(5)). (JA 106-25.)

The Regional Office conducted the election on September 1 and 2, 2010, but impounded the ballots pending resolution of the Hospital's request for review. On December 9, the Board issued an order denying the request, finding that it "raise[d] no substantial issues warranting review," and rejecting the Hospital's claim that the hearing officer and Regional Director were biased. (JA 128 & n.1.) The Regional Director then opened and tallied the ballots, which showed 73 votes for the Union, 48 against, and 21 non-determinative challenged ballots. (JA 129.)

3. The Hospital files 20 objections to the election, the first 16 of which concern issues already decided by the Board; the Board orders objections 18-20 set for hearing; following a hearing, the Board adopts the administrative law judge's recommendation to overrule those objections

Following the tally of ballots, the Hospital filed 20 objections to the election, 19 of which the Regional Director initially set for a hearing.¹⁴ (JA 130-41.) Objections 1-16 involved the Hospital's charge of supervisory taint, its claim that

¹⁴ The Hospital withdrew objection 17. See JA 238 n.5.

RNs serving as charge nurses are not supervisors, and its challenge to the Health Care Rule and various procedural rulings by the hearing officer and Regional Director (including denying the motions to adjourn and transfer and closing the hearing). (JA 131-37.) Objections 18-20 contended that the Board agent did not conduct the election in accordance with the Board's representation case manual. (JA 138.)

The Union filed with the Board a request for special permission to appeal the Regional Director's decision to set objections 1-16 for a hearing. (JA 201-03; 146-54.) By order dated February 22, 2011, the Board granted the Union's request, noting that objections 1-16 involved matters that had been litigated during the pre-election hearing, and on which the Board had already ruled. (JA 203.) Accordingly, the Board reversed the Regional Director's decision to set objections 1-16 for a hearing, and remanded the case to the Regional Director for further processing. (JA 203.)

On February 24, the Regional Director issued a supplemental decision on the Hospital's objections to the election, dismissing objections 1-16 as lacking merit and setting objections 18-20 for a hearing. (JA 214-15.) The Hospital filed a request for review of the Regional Director's supplemental decision and also moved for reconsideration of the Board's February 22 order that objections 1-16 did not warrant a hearing. (JA 218-26, 227-36.)

At the hearing on objections 18-20, the Hospital called a single witness. (JA 240 & n.8.) On March 23, the administrative law judge issued his decision, finding that the record was “essentially devoid of any conduct that one could advance as objectionable.” (JA 246.) He therefore recommended that the Hospital’s election objections be overruled. (JA 246-47.)

The Hospital filed exceptions to the judge’s decision. In its Decision and Certification of Representative, issued on August 3, the Board adopted the judge’s findings and recommendations. The Board denied the Hospital’s motion for reconsideration of the Board’s ruling in its February 22 order that objections 1-16 did not warrant a hearing. (JA 265-66 & n.1.) Accordingly, the Board certified the Union as the collective-bargaining representative of a unit of the Hospital’s RNs. (JA 265.)

C. The Unfair Labor Practice Proceeding: the Hospital Refuses To Bargain with the Union

On August 8, 2011, the Union requested that the Hospital recognize and bargain with it. (JA 268.) On August 17, the Hospital notified the Union that it was refusing to bargain. (JA 268.) Based on a charge filed by the Union, the Board’s Acting General Counsel issued a complaint, alleging that the Hospital’s refusal to bargain violated Section 8(a)(5) and (1) of the Act. (JA 267-72.) In its answer, the Hospital admitted its refusal to bargain but denied that the refusal was

unlawful, contending that the certified bargaining unit was inappropriate. (JA 275.)

The General Counsel then filed a motion for summary judgment with the Board. The Board issued an order transferring the case to itself and directed the Hospital to show cause why the motion should not be granted. (JA 291.) The Hospital filed a response and a cross-motion to dismiss the complaint. In its response, the Hospital argued that the Board had not yet ruled on its request for review of the Regional Director's supplemental decision on objections and that it had not been given adequate opportunity to argue that supervisory taint affected the election petition. (JA 297-304.) On November 21, 2011, the Board issued an erratum noting that it had inadvertently failed to rule on the Hospital's request for review of the Regional Director's supplemental decision and amending its Decision and Certification of Representative to deny the request for review. (JA 308.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 29, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued its Decision and Order in the unfair labor practice case, granting the General Counsel's motion for summary judgment. The Board found that "[a]ll representation issues raised by [the Hospital] were or could have been litigated in the prior representation proceeding." (JA 309.) 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 309.) Accordingly, the Board found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (JA 310.)

The Board’s Order requires the Hospital to cease and desist from the unfair labor practices 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.¹⁵ (JA 310.) Affirmatively, the Board’s Order requires the Hospital, upon request, to bargain with the Union and to post a remedial notice. (JA 309-10.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Hospital failed to meet its heavy burden of proving that RNs who serve as charge nurses are supervisors under the Act. On review, the Hospital does not directly challenge this key finding. Rather, the Hospital complains that the Board did not allow it to prove that the actions of certain RNs serving as charge nurses “tainted” the Union’s election petition. Given the Hospital’s failure to establish that the charge nurses are supervisors, the

¹⁵ 29 U.S.C. § 157.

Board reasonably rejected the Hospital's claim of "taint." Further, the Acting General Counsel dismissed the Hospital's unfair labor practice charge alleging taint, and his ruling is not subject to judicial review.

There is no more merit to the Hospital's claims that the Board deprived it of a fair opportunity to show that charge nurses are supervisors by refusing its motion to transfer, by closing the representation hearing after six days, and by permitting the Union to make an appeal that effectively prevented the Hospital from relitigating issues already determined by the Board. The Hospital fails to show that the Board abused its discretion in ruling on those procedural claims, and that the Hospital was prejudiced by the rulings.

The Hospital further argues that the Board's certification of a unit of RNs is invalid because the unit "is a byproduct" of the Board's 20-year-old Health Care Rule, which approved such units. According to the Hospital, the Health Care Rule violates Section 9(c)(5) of the Act by giving controlling consideration to extent of organization. But Section 9(c)(5) does not prohibit the Board from considering extent of organization; it only states that the Board cannot give that factor controlling consideration. The extensive notice-and-comment rulemaking that served as the foundation for the Health Care Rule clearly shows that extent of organization was not the controlling consideration in permitting units of RNs.

Rather, the rulemaking shows that the Board considered other factors, such as education, supervision, duties, wages and benefits, and history of bargaining.

The Court lacks jurisdiction to consider the Hospital's further claim that the Health Care Rule, which governs acute-care hospitals, has been called into question by the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*.¹⁶ The Hospital failed to raise this claim before the Board. In any event, nothing in *Specialty Healthcare* applies to acute-care facilities like the Hospital. Accordingly, the Hospital's request for a remand for reconsideration in light of an inapplicable case is simply another tactic to forestall bargaining with the Union that its RNs elected over two years ago.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE HOSPITAL VIOLATED THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE CERTIFIED BARGAINING REPRESENTATIVE OF A UNIT OF REGISTERED NURSES

A. Overview of Uncontested and Contested Issues

Section 7 of the Act gives employees the right to choose a collective-bargaining representative and to have that representative bargain with the employer on their behalf.¹⁷ Employers have the corresponding duty to bargain with their

¹⁶ 357 NLRB No. 83 (2011).

¹⁷ See 29 U.S.C. § 157.

employees' chosen representative, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act.¹⁸ The Hospital admits (JA 273-79, Br. 14) 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 RNs' representative is invalid. 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.¹⁹

On review, the Hospital does not challenge the Board's key finding—namely, that RNs serving as charge nurses are employees, not supervisors, and therefore that they are properly included in the unit. Nor does the Hospital challenge the Board's dismissal of its objections related to the conduct of the election, which the administrative law judge found to be “not supported by any facts.” (JA 246.) Therefore, we discuss only those issues on which the Hospital

¹⁸ 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).

¹⁹ 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).

presented arguments; issues on which no discernible argument is raised in the opening brief are deemed waived by this Court.²⁰

The Hospital primarily complains (Br. 16) that the Board—despite entertaining two hearings, multiple briefs, special appeals, requests for review, objections and evidence in support of objections, and a motion for reconsideration—did not afford it a “fair opportunity” to be heard. The Hospital fails to show, as it must, that the Board abused its discretion in rejecting the Hospital’s procedural claims and that it was prejudiced by the Board’s rulings.

First, the Hospital—ignoring its failure to show that charge nurses are supervisors—challenges various rulings rejecting its claim of “supervisory taint.” Next, the Hospital complains that the representation hearing should not have been closed before it presented rebuttal evidence about the house supervisors, even though its witnesses had already testified on that subject. Then, the Hospital objects that the representation proceeding should have been transferred to another region based on its unsubstantiated claims of *ex parte* communications. Finally, the Hospital faults the Board for granting a motion by the Union that effectively precluded the Hospital from relitigating issues on which the Board had already

²⁰ 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).

ruled. As we show below, the Hospital failed to prove that the Board abused its discretion in rejecting the Hospital's claims or that these rulings prejudiced it.

The Hospital also challenges (Br. 42-53) the certification by attacking the Board's 20-year-old Health Care Rule, which was promulgated after extensive notice-and-comment rulemaking, and approved by the Supreme Court.²¹ The Hospital, however, fails to show that the Health Care Rule is invalid. Finally, the Hospital argues that the Court should remand this case to the Board in light of *Specialty Healthcare & Rehabilitation Center of Mobile*.²² This Court lacks jurisdiction to hear that argument because the Hospital never raised it to the Board. In any event, *Specialty Healthcare* affects only non-acute care facilities like nursing homes, not hospitals.

B. Given the Hospital's Failure To Show the Supervisory Status of RNs Who Serve as Charge Nurses, Its Allegations of "Supervisory Taint" Were Properly Rejected

During the representation hearing, the Hospital not only alleged that RNs who serve as charge nurses are supervisors under Section 2(11) of the Act,²³ but it also contended on several fronts that these putative supervisors were involved in the organizing drive, thus tainting the Union's election petition. Specifically, the

²¹ 29 C.F.R. § 103.30. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610-19 (1991) ("AHA").

²² 357 NLRB No. 83 (2011).

²³ 29 U.S.C. § 152(11).

Hospital filed an unfair labor practice charge alleging “supervisory taint,” and it moved to adjourn the pre-election hearing pending investigation of its charge. (JA 16-19.) The Hospital also filed election objections making the same allegation (JA 131, 136-37), and repeated its claims in a variety of pleadings (JA 26-33, 77, 292-307, 273-79).

For the Hospital’s claims to have merit, the charge nurses would, necessarily, have to possess supervisory status. But the Regional Director, affirmed by the Board, reasonably found that the Hospital failed to meet its burden of demonstrating that they are supervisors.²⁴ (JA 127-28; 43.) Accordingly, the Board, affirming the Regional Director, properly rejected the Hospital’s claims of supervisory taint. (JA 309-10 n.5.) Moreover, when the Hospital raised its claims of taint again in the refusal to bargain case, the Board properly ruled that they could not be relitigated.²⁵ (JA 309.) In short, given the Board’s finding that the RNs, when serving as charge nurses, are not supervisors under the Act, the Board properly concluded that they could not engage in “supervisory taint.”

²⁴ See *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001); accord *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

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

In addition, the Acting General Counsel dismissed the Hospital's unfair labor practice charge because the limited evidence it produced failed to show a violation of the Act. (JA 37, 68-69.) It is settled that the General Counsel's decision to refuse to issue a complaint on a charge is unreviewable.

1. Because the RNs serving as charge nurses are employees, not supervisors, the Board properly rejected the Hospital's claim that the charge nurses engaged in "supervisory taint"

As the Supreme Court has explained, the burden of demonstrating supervisory status under Section 2(11) of the Act rests with the party asserting it.²⁶ The Board's determination on this issue must be upheld as long as it is supported by substantial evidence.²⁷ Indeed, given the Board's expertise in deciding who is and who is not a supervisor under the Act, its findings are "entitled to great weight."²⁸

To meet its burden, the Hospital was required to show that the charge nurses had authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

²⁶ *Kentucky River*, 532 U.S. at 711-12; accord *Beverly Enters.-Mass.*, 165 F.3d at 962.

²⁷ *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999).

²⁸ *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 241 (D.C. Cir. 1971) (quoting *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968)). See also *Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996) ("A Board determination regarding supervisory status is entitled to special weight and is to be accepted if it has warrant in the record and reasonable basis in the law.").

reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action,” where that authority “is not of a merely routine or clerical nature, but requires the use of independent judgment.”²⁹ As the Board appropriately found, however, the Hospital failed to establish by a preponderance of the evidence that the charge nurses are supervisors under Section 2(11) of the Act.³⁰ (JA 127-28; 43.) Because the Hospital does not challenge this finding, it has waived any arguments related to the supervisory status of the charge nurses.³¹

For example, the Hospital failed to show that RNs serving as charge nurses assign work using independent judgment. Although the charge nurses’ evaluation forms said they assigned nurses to patients, the actual assignment process was routine and did not require independent judgment. Instead, on most units, all the nurses on a shift meet and decide together who will take which patients based on continuity of care, room location, nurse preferences, and workload. (JA 58.)

Nor did the Hospital show that RNs serving as charge nurses provide the nursing aides with “responsible” direction within the meaning of Section 2(11).

²⁹ 29 U.S.C. § 152(11). *Kentucky River*, 532 U.S. at 712 (citation omitted). *Accord VIP Health Servs.*, 164 F.3d at 648; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

³⁰ *See, e.g., Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

³¹ *See Sitka Sound Seafoods*, 206 F.3d at 1181.

For direction to be “responsible,” the person giving direction “must be accountable for the performance of the task by the other, such that some adverse consequence may befall [the person giving direction] if the tasks performed by the employee are not performed properly.”³² As the Board found (JA 127-28; 60), there is no evidence that the charge nurses are held accountable for the work done by the aides who are purportedly under their direction.

In short, the Board reasonably found that the Hospital failed to meet its burden in the representation proceeding of showing that the RNs serving as charge nurses are statutory supervisors. On review, the Hospital does not directly challenge that finding. It follows that the charge nurses’ actions could not have tainted the election petition. Accordingly, the Board appropriately rejected the Hospital’s repeated attempts to litigate its claim of supervisory taint.

2. The Hospital cannot obtain judicial review of the Acting General Counsel’s refusal to issue complaint on the Hospital’s charge of supervisory taint

The Hospital errs in attempting to challenge the Acting General Counsel’s decision to dismiss its unfair labor practice charge alleging that the charge nurses engaged in “supervisory taint.” (JA 37, 68-69.) After all, employees like the charge nurses could not taint a petition. Further, under Section 3(d) of the Act, the

³² *Oakwood Healthcare*, 348 NLRB at 691-92.

General Counsel has “final authority” over “issuance of complaints,”³³ and his determination is “unreviewable.”³⁴ This Court has also recognized that the General Counsel has complete discretion to decide whether or not to issue a complaint.³⁵ A necessary corollary of this principle is that a party cannot litigate a charge that the General Counsel declined to allege in the complaint.³⁶

³³ 29 U.S.C. § 153(d).

³⁴ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) (citing 29 U.S.C. § 153(d); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)). *See also NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 125-26 (1987) (holding “that it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial,” and therefore unreviewable by a court of appeals).

³⁵ *Beverly Health & Rehab. Servs. v. Feinstein*, 103 F.3d 151, 153 (D.C. Cir. 1996) (discussing complaint process and that the Act “does not authorize judicial review of the General Counsel’s decision to file or withdraw a complaint”). *Accord Williams v. NLRB*, 105 F.3d 787, 790-91 n.3 (2d Cir. 1996) (“A court has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before it”) (attribution omitted).

³⁶ *See Williams*, 105 F.3d at 790-91 n.3; *New England Health Care Emp. Union v. NLRB*, 448 F.3d 189, 193 (2d Cir. 2006) (refusing to address an argument the General Counsel did not assert); *Int’l Union of Operating Eng’rs, Local 150 v. NLRB*, 325 F.3d 818, 830 (7th Cir. 2003) (stating union’s argument, not pursued by General Counsel, was “not an issue in this case”); *Baker v. Int’l Alliance of Theatre & Stage Emps.*, 691 F.2d 1291 (9th Cir. 1982) (discussing the unreviewability of decisions by the Board’s General Counsel not to pursue unfair labor practice allegations in a complaint).

In arguing (Br. 41) that it was deprived of “a full and fair opportunity to litigate [its] allegations of supervisory taint,” the Hospital attempts to litigate the General Counsel’s decision not to issue complaint “through the back door,” a maneuver that this Court will not entertain.³⁷ And contrary to the Hospital’s claim (Br. 27 n.7), the Supreme Court has “reject[ed the] argument that the Administrative Procedure Act, 5 U.S.C. § 704, provides an alternative route for judicial review of the General Counsel’s prosecutorial decisions.”³⁸

³⁷ See *Retail Clerks Union 1059, Retail Clerks Int’l Ass’n, AFL-CIO v. NLRB*, 348 F.2d 369, 370 n.1 (D.C. Cir. 1965) (noting that just as the Court “would not entertain a frontal attempt to review” the General Counsel’s refusal to issue complaint, it would not review a challenge to the General Counsel’s decision “through the back door”).

³⁸ *Beverly Health*, 103 F.3d at 154 (citing *United Food & Commercial Workers*, 484 U.S. at 131).

C. The Board Did Not Abuse Its Discretion in Denying the Hospital's Transfer Request, Closing the Representation Hearing After the Parties Were Heard, and Granting the Union's Appeal Regarding the Hospital's Election Objections

The Board has considerable discretion in making procedural and evidentiary rulings.³⁹ Such rulings are reviewed for abuse of discretion,⁴⁰ and the party challenging them must prove prejudice.⁴¹ In claiming that the Board improperly declined its request to transfer the representation proceeding to another region, prematurely closed the pre-election hearing, and improperly granted the Union's special appeal regarding the Hospital's election objections, the Hospital has shown neither.

³⁹ See *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 14 (D.C. Cir. 1986) (“a decision to reopen the record is within the Board’s discretion”); accord *May Dep’t Stores Co. v. NLRB*, 897 F.2d 221, 230 (7th Cir. 1990) (Board’s ruling on motion to reopen record “will only be disturbed by [the Court] if the [moving party] establishes an abuse of discretion”).

⁴⁰ See *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge’s refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same).

⁴¹ *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from ALJ’s exclusion of evidence); *Desert Hosp.*, 91 F.3d at 190 (employer “failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing”).

1. The Board appropriately exercised its discretion in denying the Hospital's transfer request

The Board did not abuse its discretion in denying the Hospital's request for review of the Regional Director's decision not to transfer the representation case to another region. (JA 127-28; 24.) In seeking a transfer, the Hospital alleged that the hearing officer and his supervisor had "ex parte meetings" with at least one charge nurse who testified at the hearing. (Br. 28, JA 502-05.) The Hospital claims (Br. 30) that the Board's decision not to transfer the case "subjected the Hospital to measureable prejudice." But despite its rhetorical claims, the Hospital has failed to show that the Board abused its discretion, or that the Hospital was prejudiced by the Board's action.⁴²

The Hospital's claims were reviewed at every level of the Agency—by the Regional Director, Acting General Counsel, and the Board—and at no point did the Hospital provide actual evidence of ex parte communications. (JA 127-28; 24, 26-33, 40-41, 90-95.) Rather, the Hospital simply alleged that "it appeared as though" the hearing officer and his supervisor met with certain charge nurses during the hearing, and that this "demonstrated that their status as supervisors ha[d] been prejudged." (JA 27, 29.) The Acting General Counsel's investigation found "no evidence" of any ex parte communications by the hearing officer or his

⁴² *Desert Hosp.*, 91 F.3d at 190.

supervisor. (JA 41.) Indeed, the Acting General Counsel found that the hearing officer's contact with the charge nurses "except for an occasional pleasantry, was limited to those times when they were testifying on the record." Further, the hearing officer's supervisor "had no contact with a charge nurse." (JA 41.) The Acting General Counsel thus concluded that there was no indication that the Region had prejudged the supervisory status of the charge nurses. (JA 41.) Given the absence of any support for the Hospital's claims of bias, the Board properly found that them to be "without merit." Accordingly, the Board did not abuse its discretion by denying the Hospital's request for review of the Regional Director's decision not to transfer the representation case. (JA 128 & n.1.)

2. The Board did not abuse its discretion by affirming the hearing officer's decision to close the representation hearing

The Hospital claims (Br. 24-25) that, near the end of the pre-election hearing, the hearing officer prevented it from putting on additional witnesses to discuss house supervisors, and that his ruling "robbed" the Hospital "of the opportunity to present compelling and important evidence to prove the supervisory status of the charge nurses." The Hospital filed a request for review of the hearing officer's ruling, which the Board denied. (JA 127-28.) The Hospital fails to show that the Board abused its discretion by denying review on this issue.

During the six-day hearing, the directors of each of the six hospital units testified for the Hospital, as did the director of human resources and the director of

information technology. (JA 315, 334, 347, 365, 369, 375, 379, 531.) Each of the six unit directors testified about the responsibilities of house supervisors. (JA 327-30, 341, 343-44, 348-49, 352-58, 366, 371, 373-74, 376-77.) In addition, 11 witnesses from 5 units testified for the Union, and most of them also testified about the house supervisors. (JA 381, 384, 387-88, 389-90, 394, 409, 410, 411-12, 415, 421, 424, 432, 434, 436, 439-44, 446, 457, 460-63, 494-96, 512-17.)

At the end of the hearing, the Hospital asked to call rebuttal witnesses but did not indicate that it had new, non-cumulative evidence to present. Rather, the Hospital's counsel stated that he needed to address the issue of the house supervisors' authority after hours. (JA 452, 455.) But, as the hearing officer correctly noted (JA 455), the Hospital's witnesses had already testified about the house supervisors. In fact, the Hospital's witnesses testified that the house supervisors are "responsible for the entire hospital" once the unit directors have left for the day. (JA 344, 352.) In addition, the Hospital had entered an organizational chart into evidence showing that house supervisors are at the same level of authority under the nursing supervisor as unit directors. (JA 455, 540.) Moreover, the Hospital had stipulated that house supervisors are statutory supervisors. (JA 314.)

On the last day of the hearing, the Hospital's counsel made an offer of proof, stating that "we would have additional witnesses who will be probative of the

principal issue for raising this case and in regard to which this hearing was conducted, the supervisory status of charge nurses. That would be the offer of proof.” (JA 532-33.) The Union objected, arguing that the evidence would be cumulative and repetitive. (JA 533-34.) The hearing officer then correctly noted that the Hospital and the Union had already put on multiple witnesses regarding the supervisory status of charge nurses. (JA 534-35.)

The hearing officer thus properly rejected the Hospital’s request for additional witnesses, which showed only that it wanted to present additional testimony about an issue already discussed. The Board’s Representation Casehandling Manual states that the hearing officer should reject “[a]ttempts to present irrelevant or cumulative testimony.”⁴³ Because both the Hospital and the Union had already addressed the authority of house supervisors and put on witnesses to discuss the charge nurses’ supervisory status, the hearing officer properly concluded that a full record had been developed.⁴⁴ Accordingly, he denied the Hospital’s request to continue the hearing. (JA 534-35.)

⁴³ Board’s Representation Casehandling Manual, Sec. 11189(k).

⁴⁴ *See id.*, Sec. 11181 (the representation hearing “is investigatory, intended to make a full record and nonadversarial”). *See also Mariah, Inc.*, 322 NLRB 586, 586 n.1 (1996) (upholding hearing officer’s decision to exclude irrelevant evidence, and noting that her ruling was consistent with her duty to ensure a complete and concise record).

In these circumstances, the Board appropriately denied the Hospital's request for review of the hearing officer's decision. Given the cumulative nature of the additional testimony with which it sought to burden the record, the Hospital fails to show that the Board abused its discretion in denying the Hospital's request for review, or that it was prejudiced by the rulings of the hearing officer and the Board.⁴⁵

Contrary to the Hospital's suggestion (Br. 31), there is no requirement that the Board address a party's specific arguments in denying a request for review. As the Supreme Court has explained, "the Board has only discretionary review of the determination of the regional director," and is not required to "review the regional director's representation determination before issuing an unfair labor practice order based on it."⁴⁶ Rather, under the Board's Rules and Regulations, a request for review will be granted only where compelling reasons exist, based on grounds that are inapplicable here.⁴⁷ The Hospital failed to demonstrate compelling reasons for granting its request for review.

⁴⁵ See *Desert Hosp.*, 91 F.3d at 190.

⁴⁶ *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 140 (1971).

⁴⁷ See 29 C.F.R. §102.67(b).

3. The Board did not abuse its discretion by granting the Union's special appeal

Nor did the Board abuse its discretion in granting the Union's special appeal of the Regional Director's notice of hearing on election objections, in which she set 19 of the Hospital's objections for hearing. In its special appeal, the Union correctly noted that objections 1-16 had been considered—and rejected—by the Board when it denied the Hospital's request for review of the Regional Director's Decision and Direction of Election. (JA 203.) Objections 1-16 involved the Hospital's charge of supervisory taint, its challenge to the Board's Health Care Rule, the determination that RNs serving as charge nurses were not supervisors, and rulings by the hearing officer and Regional Director to deny the Hospital's motions to adjourn and transfer and to close the hearing. (JA 131-37.) The Board found that a hearing was not warranted on those objections because it had already ruled on them. As the Board noted, “[t]o allow relitigation of such issues without new or previously unavailable evidence wastes scarce resources on issues that have been settled.” (JA 203.)

The Hospital does not directly challenge the Board's reasons for granting the Union's appeal. Instead, the Hospital complains (Br. 33-34) that the appeal was not authorized by the Board's Rules and Regulations that it was untimely because it was filed more than 30 days after the Regional Director's notice of hearing, and that the Board granted the appeal before the Hospital filed its opposition. Contrary

to the Hospital's claims, the Rules and Regulations allow a party to request special permission to appeal a Regional Director's decision in "appropriate cases."⁴⁸ The Rules and Regulations do not set a time limit on filing a request for special permission to appeal; rather, they state only that such an appeal must be made "promptly," and that if the Board grants permission to appeal, it can "proceed forthwith to rule on the appeal."⁴⁹

Furthermore, as the Supreme Court and this Court have recognized, the administration of an agency's procedural rules is "always within [its] discretion," and decisions "to relax or modify" those rules are "not reviewable except upon a showing of substantial prejudice."⁵⁰ As noted above, the Hospital does not contend that the Board abused its discretion by issuing a ruling that merely prevented the Hospital from relitigating, in the guise of objections, claims previously addressed in the pre-election hearing. Accordingly, the Hospital cannot show that it was prejudiced when the Board entertained the Union's appeal.

Moreover, the Board fully considered the Hospital's arguments opposing the appeal. Although the Board granted the Union's motion before the Hospital filed

⁴⁸ 29 C.F.R. § 102.65(c).

⁴⁹ *Id.*

⁵⁰ *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953)). *Accord Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 636 (D.C. Cir. 1984).

an opposition, the Hospital subsequently moved for reconsideration of the Board's decision. (JA 218-26.) The Board considered the Hospital's motion for reconsideration but denied it because it "fail[ed] to raise any issues warranting reconsideration by the Board." (JA 265 n.1.) Thus, the Board reasonably exercised its discretion in granting the Union's appeal and denying the Hospital's motion for reconsideration.⁵¹

D. The Board Properly Rejected the Hospital's Arguments that the Health Care Rule Violates Section 9(c)(5) of the Act, and the Court Lacks Jurisdiction To Consider the Hospital's Meritless Claim that the Health Care Rule Cannot Be Squared with *Specialty Healthcare*

The Board's Health Care Rule, promulgated more than 20 years ago, sets out the 8 units appropriate for collective bargaining in acute-care hospitals. In the representation proceeding below, the Board, consistent with the Health Care Rule, certified a unit of the Hospital's RNs. The Hospital argues (Br. 42) that the certification is "unenforceable" because it is a "byproduct" of the Health Care Rule, which, according to the Hospital, conflicts with Section 9(c)(5) of the Act. The Board properly rejected the Hospital's argument.

⁵¹ See *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 271 (D.C. Cir. 1998) (finding the Board "was well within its province in concluding" that employer's motion for reconsideration lacked merit because it raised "nothing not previously considered").

The Hospital also argues that the Court should remand this case to the Board because it is incompatible with *Specialty Healthcare*. The Court lacks jurisdiction to consider this claim, however, because the Hospital failed to raise it below. In any event, the Hospital's claim has no merit because *Specialty Healthcare* applies only to nonacute-care facilities like nursing homes.

1. The Board's Health Care Rule established the units appropriate for bargaining without giving controlling weight to extent of organization

In 1974, Congress extended coverage of the Act to all acute-care hospitals.⁵² In doing so, it admonished the Board to give “due consideration . . . to preventing proliferation of bargaining units in the health care industry.”⁵³ 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.⁵⁴

Consequently, to resolve these “seemingly interminable disputes” over hospital unit determinations, “the Board engaged in notice and comment

⁵² See Pub. Law 93-360, 88 Stat. 395 (1974).

⁵³ *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 615-16 (1991) (“AHA”) (quoting S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974)).

⁵⁴ See generally *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1148 (3d Cir. 1993).

rulemaking in an attempt to formulate a general definition of the bargaining units appropriate in the health care industry.”⁵⁵ In 1989, that process culminated in the issuance of the Health Care Rule, which provided that, with three exceptions, eight specifically defined units would be “the only appropriate units” in acute-care hospitals.⁵⁶

Under the Health Care 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.⁵⁷

Additionally, the Health Care Rule provided for three exceptions: extraordinary circumstances, previously existing nonconforming units, and “various combinations of units,” if sought by a labor organization.⁵⁸ Although the Board’s

⁵⁵ *Id.*

⁵⁶ *See* 29 C.F.R. § 103.30, 54 Fed. Reg. 16336 (Apr. 21, 1989); *AHA*, 499 U.S. at 608.

⁵⁷ *See* 29 U.S.C. § 159(b)(3); 29 C.F.R. § 103.30(a).

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

promulgation of the Health Care Rule was immediately challenged, in 1991 the Supreme Court upheld its validity.⁵⁹

The Hospital's primary contention (Br. 45-46)—that by delineating eight appropriate units in which unions will organize, the Health Care Rule necessarily violates Section 9(c)(5) of the Act⁶⁰—misapprehends the Board's considerations in developing the Health Care Rule, as well as the statutory language itself. Contrary to the Hospital's claim (Br. 42-48), in developing the Health Care 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.⁶¹ 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."⁶²

⁵⁹ See *AHA*, 499 U.S. at 619-20.

⁶⁰ 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).

⁶¹ *Second Notice of Proposed Rulemaking for Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. 33900, 33901 (Sept. 1, 1988) ("*Second Notice*").

⁶² *AHA*, 499 U.S. at 616-18.

The Board's "careful analysis" included consideration of factors similar to those it had previously considered in adjudications, including "uniqueness of function; training, education and licensing; wages, hours and working conditions; supervision; employee interaction; and factors relating to collective bargaining, such as bargaining history" ⁶³ 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. ⁶⁴ 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." ⁶⁵ 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

⁶³ *Second Notice*, 53 Fed. Reg. at 33905-906.

⁶⁴ *Id.* at 33911.

⁶⁵ *Id.* at 33924.

of employment compared with service and maintenance employees; have separate supervision and a separate, external labor market; and have a history of representation separate from service and maintenance employees and different bargaining interests.⁶⁶

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.⁶⁷ Thus, the Board’s consideration of extent of organization during rulemaking—as one of several factors—did not violate Section 9(c)(5).

2. The Court lacks jurisdiction to consider the Hospital’s arguments concerning *Specialty Healthcare*, a case that does not apply to acute-care facilities such as the Hospital

The Hospital argues (Br. 48-53) that the Health Care Rule is “irreconcilable” with *Specialty Healthcare*, and that the Court should remand the

⁶⁶ *Id.* at 33924-926. 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 33917; other professionals, *id.* at 33,917-918; technical employees, *id.* at 33918-920; skilled maintenance employees, *id.* at 33920-924; other nonprofessionals, *id.* at 33927; and guards, *id.* at 33927 n.24.

⁶⁷ *NLRB v. Metro. Life Ins. 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).

instant case to the Board for reconsideration in light of that case. But because the Hospital never raised its claim before the Board, the Court lacks jurisdiction to consider it. Specifically, Section 10(e) of the Act precludes the Court from hearing arguments never made to the Board.⁶⁸

Under the Board's Rules and Regulations, the Hospital had an opportunity to raise its *Specialty Healthcare* argument in the representation case. The Board issued its Decision and Certification of Representative in the representation proceeding on August 3, 2011, and *Specialty Healthcare* issued on August 26. The Hospital had until August 31 to file a motion for reconsideration, rehearing, or reopening of the record.⁶⁹ Because the Hospital failed to file such a motion, the

⁶⁸ 29 U.S.C. § 160(e). *See also* *Woelke & 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).

⁶⁹ 29 C.F.R. § 102.48(d)(1)-(2) (parties have 28 days after service of the Board's order to file motions for reconsideration, rehearing, or reopening of the record). *See New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011). *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.”).

Court lacks jurisdiction to consider the *Specialty Healthcare* arguments raised in the Hospital's brief.⁷⁰

Moreover, the Hospital again failed to raise the issue during the unfair labor practice proceeding, as it would have needed to do in order to preserve its claim.⁷¹ Thus, in the answer to the complaint and response to the notice to show cause that the Hospital filed after *Specialty Healthcare* issued, the Hospital failed to make any argument about that case. In sum, given the Hospital's failure to raise its argument at the appropriate times before the Board, the Court lacks jurisdiction to consider it.⁷²

In any event, *Specialty Healthcare* has no impact on unit determinations in acute-care hospitals. Therefore, the Hospital's request (Br. 53) that the case be remanded to the Board "for further review in light of *Specialty Healthcare*" should be denied.

⁷⁰ See *New York & Presbyterian*, 649 F.3d at 733.

⁷¹ See *Alois Box Co., Inc. v. NLRB*, 216 F.3d 69, 76-77 (D.C. Cir. 2000). See also *Salem Hosp. Corp.*, 358 NLRB No. 95 (2012), at *4-5 (in subsequent case involving the same parties, administrative law judge notes that the Hospital did not raise *Specialty Healthcare* in either the representation or the instant unfair labor practice proceeding).

⁷² See Section 10(e) of the Act; *Woelke & Romero*, 456 U.S. at 665-66; *Dean Transp.*, 551 F.3d at 1063.

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 approach. Accordingly, the Board overruled *Park Manor Care Center*,⁷³ a case decided after publication of the Health Care 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 Health Care 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.”⁷⁴ 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*.⁷⁵

⁷³ 305 NLRB 872, 875 (1991).

⁷⁴ 357 NLRB No. 83, at *5. *See also Second Notice*, 53 Fed. Reg. at 33928; *Final Rule*, 54 Fed. Reg. at 16343.

⁷⁵ *Specialty Healthcare*, 357 NLRB No. 83, at *6, 8.

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 Health Care Rule, which “by its express terms . . . does not apply to [Specialty Healthcare] or to nursing homes.”⁷⁶ And at no point in *Specialty Healthcare* did the Board question the validity of the Health Care Rule or the appropriateness of applying it to unit determinations in acute-care hospitals.⁷⁷ Indeed, the Board could only change the Health Care Rule through another rulemaking—not through adjudication.⁷⁸ To the extent that the Hospital is seeking amendment or repeal of the Health Care Rule, it could petition the Board to do so at any time—without further delaying bargaining with the Union.⁷⁹

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 Health Care Rule’s validity as it applies to acute-care hospitals. To the contrary, the Board noted that, during the rulemaking, it found “substantial

⁷⁶ *Id.* at *5.

⁷⁷ *See AHA*, 499 U.S. at 618-19 (noting that the “question whether the Board has changed its view about certain issues or certain industries does not undermine the validity of a rule that is based on substantial evidence and supported by a ‘reasoned analysis’”) (citation omitted).

⁷⁸ Admin. Procedure Act, 5 U.S.C. § 553; *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

⁷⁹ Admin. Procedure Act, 5 U.S.C. § 553(e); 29 C.F.R. § 102.124.

differences between nursing homes and hospitals . . . which affect staffing patterns and duties.”⁸⁰ 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 have more contact and a greater overlap of function.⁸¹ 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.⁸²

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 Health Care Rule. Thus, the Hospital errs in suggesting that *Specialty Healthcare* calls into question the validity

⁸⁰ *Specialty Healthcare*, 357 NLRB No. 83, at *5 (quoting 53 Fed. Reg. at 33928).

⁸¹ 53 Fed. Reg. at 33928.

⁸² *Specialty Healthcare*, 357 NLRB No. 83, at *7 n.14 (quoting *Park Manor*, 305 NLRB at 875).

of the Union's certification as the representative of a unit of acute-care hospital employees.

The Hospital also errs in claiming (Br. 52) that the Health Care 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 force of law.⁸³ The Board's comment was hardly novel; the Supreme Court made the same point in *AHA*, the decision in which it approved the Health Care Rule.⁸⁴

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 RNs over two years ago.

⁸³ 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).

⁸⁴ *See AHA*, 499 U.S. at 616.

CONCLUSION

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

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September 2012

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

SALEM HOSPITAL CORPORATION d/b/a)	
THE MEMORIAL HOSPITAL OF SALEM)	
COUNTY)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1466, 12-1009
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	4-CA-64455
)	
and)	
)	
HEALTH PROFESSIONALS AND ALLIED)	
EMPLOYEES)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,477 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 26th day of November, 2012

**UNITED STATES COURT OF APPEALS
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EMPLOYEES)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2012, I electronically filed the foregoing 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 certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM
NATIONAL LABOR RELATIONS ACT

Section 2(11) of the Act, 29 U.S.C. § 152(11), provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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:

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not . . . (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; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(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) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) subsection (a) of this section; 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) subsection (a) of this section; 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. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(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 CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS

§ 11730 Blocking Charge Policy—Generally

The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted. However, there are significant exceptions to the general policy of having a charge “block” a petition. Accordingly, the filing of a charge does not automatically cause a petition to be held in abeyance.

The exceptions to the blocking charge policy are set forth in detail in Sec. 11731. Where the Regional Director is giving consideration to these exceptions while implementing the blocking charge policy, it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

§ 11731.3 Blocking Charge Policy Exception 3: Petition and Charge Raise Significant Common Issues; UC and AC Petitions

There are situations where the Type I or Type II alleged unfair labor practices are so related, at least in part, to the unresolved question concerning representation sought to be raised by the petition that the processing of the petition will resolve significant common issues. *Panda Terminals*, 161 NLRB 1215, 1223–1224 (1966); *Krist Gradis*, 121 NLRB 601, 615–616 (1958). Thus, it may be appropriate to conduct a hearing and issue a decision to resolve an issue, such as supervisory status, that is relevant to both the petition and the unfair labor practice case. Sec. 11228. Where appropriate, the conditions of Exception 2 (Sec. 11731.2) should also be taken into account, especially with respect to proceeding to an election.

UC and AC Petitions: When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Sec. 11490.3. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential

for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case.

§ 11731.4 Blocking Charge Policy Exception 4: Scheduled Hearing

In situations where a R case hearing has already been scheduled when a Type I or Type II unfair labor practice charge is filed and time does not permit determination of possible merit of the charge, the Regional Director may proceed with the hearing in the R case. A separate determination should then be made by the Regional Director pursuant to Exceptions 2 and 3 above (Secs. 11731.2 and .3) with regard to issuing a decision and/or conducting an election.

§ 11181 Nature and Objective of Hearing

The R case hearing is a formal proceeding the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a full record and nonadversarial.

§ 11189 Checklist

(k) Each party should be permitted to introduce any relevant testimony. Attempts to present irrelevant or cumulative testimony should be rejected. Sec. 11188.1. As appropriate, an offer of proof may be used. Sec. 11226.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.48(d)(1)-(2) Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions

(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.

29 C.F.R. §102.65(c) Motions; Interventions

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in section 102.66(c). Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate appeal pursuant to section 102.67(b), (c), and (d) or whenever the case is transferred to it for decision: *Provided, however,* That if the Regional Director has issued an order transferring the case to the Board for decision such rulings may be appealed directly to the Board by special permission of the Board. Nor shall rulings by the hearing officer be appealed directly to the Regional Director unless expressly authorized by the

Rules and Regulations, except by special permission of the Regional Director, but shall be considered by the Regional Director when he reviews the entire record. Requests to the Regional Director, or to the Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state (1) the reasons special permission should be granted and (2) the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the Regional Director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the Regional Director. If the Board or the Regional Director, as the case may be, grants the request for special permission to appeal, the Board or the Regional Director may proceed forthwith to rule on the appeal.

29 C.F.R. § 102.67 Proceedings before the Regional Director; further hearing; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action

(b) Directions of elections; dismissals; requests for review. A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: Provided, however, That within 14 days after service of a decision dismissing a petition any party may file a request for review of such a dismissal with the Board in Washington, DC: Provided, further, That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69.

* * *

(f) Waiver; denial of request. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

§ 102.124 Petitions for issuance, amendment, or repeal of rules

Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original and seven copies of such petition shall be filed with the Board in Washington, DC, and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

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.