

Nos. 15-1273 & 15-1303

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

RUSH UNIVERSITY MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 743

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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RUSH UNIVERSITY MEDICAL CENTER	*	
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Petitioner/Cross-Respondent	*	Nos. 15-1273
	*	15-1303
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	13-CA-152806
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,*	*	
LOCAL 743	*	
Intervenor	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties, Intervenors, Amici. Rush University Medical Center (“the Hospital”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. International Brotherhood of Teamsters, Local 743 (“the Union”) was the charging party before the Board and is the intervenor before the Court. The Hospital, the Board’s General Counsel, and the Union appeared before the Board in Case 13-CA-152806.

B. Ruling Under Review. The case involves the Hospital's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on August 7, 2015, reported at 362 NLRB No.163.

C. Related Cases. The ruling under review has not previously been before the Court or any other court. *Rush University Medical Center*, issued on February 27, 2015, and reported at 362 NLRB No. 23 (oral argument held on April 5, 2016), currently pending before the Court pursuant to a petition for review (Docket No. 15-1050), and the Board's cross-application for enforcement (Docket No. 15-1097), involves a similar issue regarding an *Armour-Globe* self-determination election among a subset of unrepresented employees to join a pre-existing, nonconforming unit in an acute-care facility.

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Dated at Washington, DC
this 11th day of May, 2016

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THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Rush University Medical Center (“the Hospital”) to review, and the cross-application of the National Labor Relations Board (“the Board”), to enforce, a Board Order issued against the

Hospital. The International Brotherhood of Teamsters, Local 743 (“the Union”), has intervened in support of the Board. The Board’s Decision and Order issued on August 7, 2015, is reported at 362 NLRB No. 163, and is final with respect to all parties. (JA 156-59.)¹ The Board has subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)).

The Court has jurisdiction over this proceeding pursuant to Sections 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provide that petitions for review of Board orders may be filed in this Court, and allows the Board, in that circumstance, to cross-apply for enforcement. The Hospital filed its petition for review on August 11, 2015. The Board filed its cross-application for enforcement on September 1. Both filings were timely because Sections 10(e) and (f) place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

¹ In this final brief, “JA” refers to the parties’ Joint Deferred Appendix, filed April 27, 2016. References preceding a semicolon are to the Board’s or Regional Director’s findings; those following are to the supporting evidence.

Because the Board's Order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 13-RC-143495), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) of the Act, 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.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue in this test-of-certification case is whether the Board properly found that the Hospital violated the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the OR Materials Tech and Supply Chain Tech employees employed in the Hospital's Materials Management Department at its main campus and the Supply Chain Tech employees employed in the Hospital's Warehouse Operations Department at its warehouse (collectively, “supply chain employees”).

Resolution of the issue turns on the subsidiary question: whether the Board reasonably found that the addition of the supply chain employees to the existing unit following self-determination elections was consistent with the Health Care Rule.

RELEVANT STATUTORY PROVISIONS

The attached Addendum includes pertinent statutory provisions not already provided by the Hospital's Addendum.

STATEMENT OF THE CASE

In this case, the Union petitioned for an *Armour-Globe* election seeking to include certain, discrete job classifications in a bargaining unit of nonprofessional employees that the Union has represented for nearly 50 years. An *Armour-Globe* election permits employees who share a community of interest with an already represented unit of employees to vote on whether to join the existing unit. *See NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990); *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937). The Hospital objected to the petitioned-for election, asserting that the Board's rules on appropriate bargaining units at acute-care facilities required the group of employees who would vote in the election to include all nonprofessional employees who were not currently included in the unit.

Following a hearing, the Board's Regional Director determined that the Union's petitioned-for voting group was not appropriate, but found, in the alternative, that two voting groups consisting of supply chain employees were appropriate and directed two elections. Specifically, the Regional Director ordered an *Armour-Globe* election among (1) the OR Materials Techs and Supply Chain Techs who work in the Hospital's Materials Management Department and (2) the Supply Chain Techs who work in the Hospital's Warehouse Operations Department. Following the elections, the Board's tally of ballots determined that a majority of both of the two voting groups voted to join the existing bargaining unit. Thereafter, the Hospital refused to bargain with the Union over their terms and conditions of employment in order to challenge the certifications of the Union as their bargaining representative. In the ensuing unfair-labor-practice proceeding, the Board found that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 157.)

Before the Court, the Hospital does not dispute that it refused to bargain with the Union. Instead, it contends (Br. 32-38) that the Board acted arbitrarily and capriciously in the underlying representation case by finding appropriate two voting groups that consisted uniquely of supply chain employees and by not including in the voting group all the unrepresented, nonprofessional employees.

The Board's findings in the representation and unfair-labor-practice proceedings, as well as the Decision and Order under review, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Hospital's Operations; the Union Represents a Pre-Existing Unit that Does Not Conform to the Health Care Rule

The Hospital is an acute-care teaching hospital in Chicago, Illinois. (JA 156; 212.) The Union has been the exclusive collective-bargaining representative of certain employees in various nonprofessional job classifications since 1967. (JA 18; 213.) The current collective-bargaining agreement, which is effective from September 5, 2013, to June 30, 2016, covers the following unit that contains 1,000 employees:

All environmental aides, environmental specialists, environmental technicians, dietary workers, laundry workers, transport specialists, elevator operators, maintenance employees, central service technical assistants, nursing attendants, psychiatric aides, community health aides, lab helpers, operating room attendants, mail room clerks, unit clerks, geriatric technicians, patient service associates (PSAs), physical therapy aides, rehabilitation aides, pediatric assistants, pediatric nursing assistants, certified nursing assistants (CNAs), truck drivers (laundry & SPD), food service assistant I lead, food service assistant II lead, environmental specialist lead, transport specialist lead, unit clerk lead, and journeymen lead. The unit specifically excludes supervisors, temporary and casual employees, regular part-time employees normally working less than seventeen (17) hours per week, and all other employees of the Hospital.

(JA 18; 213.) The unit also contains the Patient Care Technicians who voted to join the Union in 2014. (JA 18; 214.) The unit pre-dates Board changes to representation in acute-care facilities, so the unit is nonconforming.

B. Supply Chain Employees

Aside from the 1000 represented employees, the Hospital has another 680 nonprofessional employees in a residual unit who are currently unrepresented, including the supply chain employees at issue in this case. Supply chain employees work in the Warehouse Operations Department and Materials Management Department, both of which fall under the Hospital's Supply Chain Division. Supply chain employees are generally responsible for the daily receipt and distribution of supplies to the medical center units and affiliates, and their work is principally controlled by their location. All of the classifications require a high school diploma or GED certificate. (JA 18, 25-25; 216-18, 222-23.)

1. Supply Chain Tech – Warehouse Operations Department

There are 19 Supply Chain Tech-Warehouse employees who work in a remote warehouse one mile from the Hospital and fill supply orders from the various hospital departments. The warehouse receives both printed and telephone supply orders; each order is assigned to a particular tech. The techs collect the supplies from the warehouse and take the gathered supplies to the warehouse dock. Non-hospital employees then load and transport the supplies to the Hospital. The techs also restock unused supplies that are returned from the Hospital and restock supplies that the Hospital's vendors deliver. These employees report to the same

supervisor and are in the same job classification. (JA 26-27; 182-84, 188-89, 203-05, 216-18.)

2. Supply Chain Tech and OR Materials Tech – Materials Management Department

There are 30 Supply Chain Techs who work in the Materials Management Department. These techs work in various hospital buildings and generally restock medical supplies that come from the warehouse and fill urgent requests for supplies. Supplies coming from the warehouse are dropped off in carts in a central receiving area, and the techs route the supplies to their appropriate areas using automated ground vehicles and restock them. The techs also help other hospital employees locate supplies, as needed, and operate as “runners” to fill urgent orders. (JA 27-28; 162, 181-82, 184, 185, 209-10, 216-18.)

The Hospital employs nine OR Materials Techs who work in the Materials Management Department and are primarily responsible for the daily availability of supplies and equipment for the surgical areas. Their duties are similar to those of the Supply Chain Tech – Materials Management Department; the principal difference is that the OR Materials Techs must maintain a sterile environment while restocking supplies. Like the Supply Chain Tech, the OR Materials Techs operate automated ground vehicles for transporting supplies and also fill urgent orders. Employees in the two job classifications clock into work in the same area,

share a break room, and work in the same staging area to sort supplies. (JA 28-29; 186, 187-89, 222-23.)

C. The Representation Proceeding

On December 23, 2014, the Union filed a petition seeking an *Armour-Globe* self-determination election to add the supply chain employees to the existing, nonconforming bargaining unit of nonprofessional employees.² (JA 60-61.) The Hospital objected to the petitioned-for voting group, claiming that it ran afoul of the Board's rule regarding appropriate units in the health care industry, 29 C.F.R. § 103.30 ("the Health Care Rule" or "the Rule"). The Hospital argued that the Rule required a voting group to include *all* remaining nonprofessional employees not currently in the existing bargaining unit. (JA 21.)

On February 23, 2015, following a hearing, the Board's Regional Director issued a Consolidated Decision and Direction of Election wherein he determined, among other things, that the Union's petitioned-for voting group, which included all three classifications of supply chain employees, was not appropriate because it did not form an identifiable, distinct voting group. (JA 29-30.) Specifically, the

² The Hospital references (Br. 19-21) the two other representation petitions filed simultaneously with the petition at issue here. Those petitions are not before the Court for review, as the Hospital recognizes (Br. iii n.2). Likewise, the two other earlier filed petitions that the Hospital discusses (Br. 11-16) are also not before the Court. Rather, the only petition before the Court, and the only petition relevant to determining the issue presented, is the petition involving the supply chain employees in Board Case No. 13-RC-143495.

Director based his denial of the petition for one voting group comprised of all supply chain employees on factors such as the employees in the petitioned-for unit work in separate physical locations, report to different supervisors, perform different job functions, and have limited interchange. (JA 29.)

The Director then invoked his authority under Section 3(b) of the Act, which empowers him to determine, alternatively, “the unit appropriate for the purpose of collective bargaining.” 29 U.S.C. § 153(b). Under this authority, the Director ordered two self-determination elections to decide whether two voting groups wanted to join the existing unit – (1) the Supply Chain Tech employees and OR Materials Tech employees, both of whom work in the Materials Management Department, and (2) the Supply Chain Tech employees, who work in the Warehouse Operations Department. (JA 30.) In doing so, the Director rejected the Hospital’s argument for an expanded voting group to include all unrepresented, nonprofessional employees. The Director relied on *St. Vincent Charity Medical Center*, 357 NLRB No. 79, 2011 WL 4830116 (2011), wherein the Board clarified that the Health Care Rule did not preclude a petition for a self-determination election among a subgroup of unrepresented residual employees to determine whether they want to join an existing, nonconforming unit. (JA 22.) Thereafter, the Director applied the *Armour-Globe* analysis and found that because the two groups of supply chain employees constituted identifiable, distinct segments of the

Hospital's unrepresented, nonprofessional employees and shared a community of interest with the existing unit of nonprofessional employees, the two voting groups were appropriate. (JA 30.)

On March 9, 2015, the Hospital filed a request for review of the Regional Director's Consolidated Decision and Direction of Election, which the Board denied on March 24. (JA 156; 88-115.) On March 25 and 26, two elections were held, and majorities among the voting group comprised of the Supply Chain Tech and OR Materials Tech in the Materials Management Department and the voting group comprised of the Supply Chain Tech in the Warehouse Operations Department voted to join the existing bargaining unit. (JA 156; 116-17.) On April 16, the Board certified the Union as the collective-bargaining representative of the supply chain employees. (JA 156; 44-49.)

D. The Unfair-Labor-Practice Proceeding

On April 20, the Union requested that the Hospital bargain over the supply chain employees' terms and conditions of employment. (JA 157; 139-40.) The Hospital refused, prompting the Union to file an unfair-labor-practice charge. (JA 156; 128.) On June 4, the General Counsel issued a complaint alleging that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (JA 156; 132.) In its answer, the Hospital admitted its refusal to bargain, but denied the

appropriateness of the bargaining unit for the purposes of collective bargaining under Section 9(b) of the Act. (JA 156; 139-40.)

On June 18, the General Counsel filed a motion for summary judgment with the Board. (JA 156.) On June 26, 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 156; 146-48.) The Hospital opposed the motion, and in doing so, reasserted its position that the Health Care Rule required that the voting group be expanded to include all residual, unrepresented nonprofessional employees. (JA 156; 149-55.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 7, 2015, the Board (Chairman Pearce and Members Johnson and McFerran) 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 156.) The Board also found that the Hospital did "not offer to introduce 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 156.) Accordingly, the Board found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (JA 157.)

The Board ordered the Hospital to cease and desist from its refusal to bargain and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order requires the Hospital, upon request, to bargain with the Union and to post a remedial notice. (JA 158.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Hospital's refusal to bargain violates Sections 8(a)(5) and (1) of the Act. Following two separate *Armour-Globe* self-determination elections conducted by the Board, the supply chain employees chose to join a pre-existing unit of nonprofessional employees and the Board certified the Union as their exclusive collective-bargaining representative and the Hospital refused to bargain. The Hospital defends its refusal to bargain by claiming that it has no obligation to do so because the Board should not have certified the Union. In the main, the Hospital contends that the Health Care Rule and Board precedent required that the voting group include all of the unrepresented, nonprofessional employees at the Hospital. To the contrary, the Board reasonably determined that supply chain employees met the requirements for *Armour-Globe* self-determination elections because, under settled law, they constitute distinct, identifiable groups that share a community of interest with the existing unit of nonprofessional employees.

The Board reasonably interpreted the Health Care Rule and its own precedent to defeat the Hospital's assertion. First, as the Board noted, the Rule expressly exempts the unit at issue because it is nonconforming and pre-existed the Rule's promulgation. Second, the Rule's requirement that where there are "existing nonconforming units in acute-care hospitals and a petition for additional units is filed . . . the Board shall find appropriate only units which comport, insofar as practicable, with the [eight defined units]," does not apply to an *Armour-Globe* self-determination election. By definition, an *Armour-Globe* election does not create an "additional unit," but instead adds employees to an existing unit. *See* 29 C.F.R. § 103.30(c). The Board's interpretation of Section 103.30(c) as applying only to additional units comports with established Board precedent.

The Hospital relies on inapposite cases in an unsuccessful attempt to show that the Board has departed from precedent. The cited cases have no application here because they involve *additional* units (as opposed to adding employees to an existing unit), petitions that predate the Health Care Rule, or, in one instance, a unit was not in an acute-care facility.

Moreover, contrary to the Hospital's claim, the Board's decision will not result in unit proliferation – undue or otherwise – for the simple reason that the self-determination elections by their very definition do not create new units; these elections merely seek to add employees to existing units. The Board likewise

properly rejected the Hospital's unfounded claim that self-determination elections disrupt patient care which finds no support in the record.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

A. Introduction

Section 7 of the Act (29 U.S.C. § 157) gives employees the right to choose a collective-bargaining representative and to have that representative bargain with the employer on their behalf. Employers have the corresponding duty to bargain with their employees' chosen representative, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).³ Here, the Hospital admits (Br. 28) that it refused to bargain with the Union to contest the Board having certified the Union as exclusive representative of the supply chain employees. As such, unless the Hospital prevails in its challenge to the validity of the certifications, its refusal violates Section 8(a)(5) and (1), and the Board's Order is entitled to enforcement. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1949); *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).

³ 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).

In contesting the certification, the Hospital claims that the Board's decision runs afoul of the Health Care Rule by allowing two *Armour-Globe* self-determination elections whose voting groups are comprised only of supply chain employees. This case therefore involves the issue of whether *Armour-Globe* self-determination elections among a portion of unrepresented employees are proper in an acute-care hospital setting. The Board has long recognized that an *Armour-Globe* election is the appropriate avenue to permit employees who share a community of interest with a unit of already represented employees to vote on whether to join the existing unit. *Warner-Lambert Co.*, 298 NLRB 995, 995 (1990). Unlike ordinary representation elections, where the vote determines which union, if any, will be certified to represent employees in an appropriate unit, an *Armour-Globe* election determines whether "a fringe group of employees desire to share in representation provided by an incumbent union." *Fed. Mogul Corp.*, 209 NLRB 343, 347 (1974). An *Armour-Globe* election is a well-accepted, "venerable" procedure that has been used "in countless cases" to provide self-determination elections for residual groups of employees. *Am. Med. Response, Inc.*, 344 NLRB 1406, 1415 (2005).

In this case, the Board reasonably determined that allowing two voting groups comprised uniquely of supply chain employees to vote an *Armour-Globe* elections, in the presence of a pre-existing, nonconforming unit, is entirely

consistent with the Health Care Rule, 29 C.F.R. 103.30(a), and extant Board law.

The Rule identifies eight specific bargaining units that are presumptively appropriate for acute health care facilities. The Rule, however, does not squarely address the situation presented here — a partially organized acute-care facility with a pre-existing unit that does not conform to one of the Rule’s eight specified units. In promulgating the Rule, the Board specifically deferred this type of situation involving nonconforming units to case-by-case adjudication. *Kaiser Found. Hosp.*, 312 NLRB 933, 933-34 (1993), citing COLLECTIVE-BARGAINING UNITS IN THE HEALTH CARE INDUSTRY, 53 Fed. Reg. 33,900, 33,929 (Sept. 1, 1988); *see also St. Mary’s Duluth Clinic Health Sys.*, 332 NLRB 1419, 1419 (2000) (the Board deferred to case adjudication the resolution of representation issues concerning nonconforming units).

B. Standard of Review

Section 9(b) of the Act 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” 29 U.S.C. § 159(b). The Supreme Court has construed Section 9(b) to leave the determination of an appropriate unit “largely within the discretion of the Board, whose decision, ‘if not final, is rarely to be disturbed.’” *South Prairie Constr. Co.*

v. Operating Eng'rs, Local 627, 425 U.S. 800, 805 (1976); accord *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). Consequently, the party challenging the Board's unit determination must show that the Board abused the "especially 'wide degree of discretion'" accorded it by the Court on representation questions. *Randell Warehouse of Az., 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)). The Court will uphold the Board's unit determination "unless it is arbitrary and not supported by substantial evidence on the record." *Country Ford Trucks*, 229 F.3d at 1189.

The Court's "review of the Board's factual conclusions is highly deferential." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (internal quotations omitted). The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e) (2000); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 499 (1951). "Substantial evidence" for purposes of the Court's review of findings of fact consists of "such relevant evidence as a reasonable mind might accept to support a conclusion." *Universal Camera*, 340 U.S. at 477. A reviewing court accordingly 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*." *Id.* at 488.

The Board is vested with broad discretion in interpreting and applying its own rules. *KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d, 291, 294-95 (2d Cir. 1996) (citing *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991)). The Court defers to the Board's interpretation of its rules if that interpretation is "neither plainly erroneous nor inconsistent with the regulations." *Parkwood Dev. Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation"); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (same).

Finally, the Board has "primary responsibility" for applying the Act, and when its "interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices." *Elec. Workers Local 702 v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000).

C. The Two Voting Groups Are Appropriate Because They Constitute Distinct, Identifiable Segments of Employees and Share a Community of Interest with the Existing Unit

As outlined above, an *Armour-Globe* self-determination election is a longstanding procedure that permits employees who share a community of interest with an already represented unit of employees to vote on whether to join the

existing unit.⁴ *NLRB v. Raytheon*, 918 F.2d 249, 251 (1st Cir. 1990); *see also* *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1301 (9th Cir. 1985) (approving the *Armour-Globe* procedure as “consistent with the purpose of the [Act]”). Unlike representation elections in which employees decide whether to select a particular bargaining representative, the “logical and unambiguous intent” of an *Armour-Globe* self-determination election is to allow a distinct group of employees to become part of an existing represented unit. *Belroit Corp.*, 301 NLRB 637, 637 (1993). Here, the Board determined (JA 30) that two separate voting groups of the supply chain employees and the existing unit employees together form an appropriate unit, and, as such, properly directed an *Armour-Globe* election in order for the supply chain employees to vote on their inclusion in the unit.

In assessing whether to direct a self-determination election and add unrepresented employees to an existing unit, the Board undertakes a two-step analysis. First, the Board determines “whether the fringe group and the larger existing unit together form an appropriate unit.” *Berlin Grading Co. v. NLRB*, 946 F.2d 527, 530-31 (7th Cir. 1991). While the voting group need not constitute a separate appropriate unit by itself to be added to an existing unit, the employees must share a community of interest with the existing unit. *Raytheon Co.*, 918 F.2d

⁴ The procedure is so named because it originated in *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), and was refined in *Armour & Co.*, 40 NLRB 1333 (1942).

at 252. Second, the Board considers whether a particular voting group constitutes a distinct, identifiable segment of employees. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *see also St. Vincent*, 2011 WL 4830116, at *2. After the Board determines that a unit inclusive of both groups is appropriate, the Board directs a self-determination election “to give the fringe employees their choice, whether they preferred to be represented by the existing unit . . . or whether they preferred to remain unrepresented.” *NLRB v. S. Ind. Gas & Elec. Co.*, 853 F.2d 580, 582 (7th Cir. 1988); *see also Raytheon Co.*, 918 F.2d at 250.

Here, based on the evidence presented at hearing, the Board determined that the two voting groups of supply chain employees constitute identifiable, distinct segments of the Hospital’s unrepresented employees. The Board has defined a distinct, identifiable group as one in which the employees perform similar work, are in the same classification, work in the same area, and have the same supervision. *St. Vincent*, 2011 WL 4830116, at *2-3; *Warner-Lambert Co.*, 298 NLRB at 995; *cf. Capital Cities Broad.*, 194 NLRB 1063, 1064 (1972). As the Board explained, the Supply Chain Techs in the Warehouse Department constitute a voting group that “conforms to the departmental lines established by the [Hospital] because it includes all the non-professional employees in the Warehouse Operations Department.” (JA 30.) The Board found further (JA 30) that these Supply Chain Techs all report to the same supervisor, are in the same job

classification, and perform the same job functions. Further, the Board noted (JA 30) that the Supply Chain Techs all work in the remote warehouse. *See* p. 7.

With respect to the Supply Chain Techs and OR Material Techs in the Materials Management Department, the Board likewise found that this voting group “conforms to the departmental lines established by the [Hospital] because it includes all the non-professional employees in the Materials Management Department.” (JA 30.) Further, the employees in both job classifications clock into work at the same location and share a break room. (JA 30.) The employees perform the same basic job duties and work in the same staging area to sort supplies. (JA 30.) While they handle different supplies, they both restock and ensure hospital staff has the supplies needed. (JA 30.) Moreover, the employees in these two job classifications “work together to ensure [urgent] orders are answered and filled twenty four hours a day, seven days a week.” (JA 30.) *See* pp. 8-9.

Before the Board, the Hospital did not contest the Board’s underlying factual findings as to the distinct, identifiable nature of the two voting groups. The Court therefore lacks jurisdiction to review these findings, which the Hospital also fails to challenge in its opening brief. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary

circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *see also N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not raised in employer’s opening brief are waived); Fed. R. App. P. 28(a)(8)(A).

With regard to the second prong of the *Armour-Globe* analysis, the parties stipulated that all the petitioned-for employees at issue in the case are nonprofessional employees and thus “share a presumed community of interest with the nonprofessional employees in the existing bargaining unit.” (JA 23.) Accordingly, substantial evidence supports the Board’s determination that it was appropriate to hold two self-determination elections to determine whether the supply chain employees wanted to be included in the pre-existing unit of nonprofessional employees.

D. The Board Reasonably Found that Self-Determination Elections Among the Supply Chain Employees Are Not Contrary to the Health Care Rule

The Hospital argues (Br. 32-38, 48-55) that the Board’s decision permitting a voting group of only supply chain employees violates the Health Care Rule. Specifically, the Hospital contends that the Rule requires the Board to include in any voting group all of the Hospital’s unrepresented, nonprofessional employees — a category of employees recognized as appropriate by the Health Care Rule.

The Board properly rejected this argument as inconsistent with the Rule's language and relevant precedent.

1. The Health Care Rule excepts pre-existing, nonconforming units from its coverage

In 1974, Congress amended the Act to address concerns particular to the health care industry and include acute health care facilities under the coverage of the Act. *See* Pub. Law 93-360, 88 Stat. 395 (1974). This alteration, however, “made no change in the Board’s authority to determine the appropriate bargaining unit in each case.” *Am. Hosp. Ass’n*, 499 U.S. at 615. Later, the Board, prompted by the “seemingly interminable disputes” over hospital unit determinations, engaged in notice-and-comment rulemaking in an attempt to formulate a general definition of the bargaining units appropriate in the health care industry. *St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1148 (3d Cir. 1993). In 1989, that process culminated in the issuance of the Health Care Rule, which provided that, with three exceptions, eight specifically defined units would constitute the only appropriate units in acute-care hospitals. 29 C.F.R. § 103.30, *see also Am. Hosp. Ass’n*, 499 U.S. at 608.

The Rule enumerates 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. *See* 29 U.S.C. § 159(b)(3); 29 C.F.R. § 103.30(a). The Supreme Court has upheld the Rule. *Am. Hosp. Ass'n*, 499 U.S. at 619-20.

The Rule provides for three exceptions: extraordinary circumstances, previously existing, nonconforming units, and “various combinations of units,” if sought by a labor organization. 29 C.F.R. § 103.30(a)-(c); *see also Am. Hosp. Ass'n*, 499 U.S. at 608. Relevant to the issue in this case is the Rule’s exception from coverage of nonconforming units. *See* 29 C.F.R. § 103.30(a) (providing that only the eight units described in the Rule will be found appropriate “[e]xcept . . . in circumstances in which there are existing nonconforming units”); *see also Crittenton Hosp.*, 328 NLRB 879, 880 (1999).

The Rule defines a “nonconforming unit” as a unit other than one of the eight units enumerated therein, or some combination of those eight units. 29 C.F.R. § 103.30(f)(5). By definition, a nonconforming unit is one that existed prior to the Rule’s enactment. *See St. Vincent*, 2011 WL 4830116, at *1 (2011); *Crittenton Hosp.*, 328 NLRB at 880; *St. John’s Hosp.*, 307 NLRB 767, 767 (1992); *St. Mary’s*, 332 NLRB at 1419-20.

Since 1967, the Union here has represented a bargaining unit consisting of some, but not all, of the job classifications usually categorized in the nonprofessional unit under the Rule. (JA 18.) Therefore, the unit at issue is a

nonconforming unit, and, as such, is excepted from the Rule's requirement that it comply with one of the Rule's eight appropriate units.

2. The requirement to conform “insofar as practicable” with the Rule applies to petitions for additional units

The Hospital raises several arguments challenging the Board's finding that the two voting groups are exempt from the Health Care Rule. First, it argues (Br. 32-38) that Section 103.30(c) of the Rule requires an election among all of the Hospital's residual nonprofessional employees. *See* 29 C.F.R. § 103.30(c). Specifically, the Hospital maintains (Br. 32) that the Board acted arbitrarily and capriciously by not expressly finding that it was impracticable to include all of the unrepresented nonprofessional employees in the unit. The Hospital, relying primarily on (Br. 36-38) *St. John's* and *St. Mary's*, asserts further that the Board's decision here runs counter to precedent. These arguments lack merit because the Board's decision comports with the Rule's language and established precedent.

a. The Rule's language and related precedent do not require the Board to include all unrepresented nonprofessional employees in a voting group

Contrary to the Hospital's (Br. 42) contention, a “correct application” of the Board's Health Care Rule does not require an election among all of the Hospital's unrepresented, nonprofessional employees. The Rule provides that where “there are existing nonconforming units in acute-care hospitals, and a petition for additional units is filed . . . the Board shall find appropriate only units which

comport, insofar as practicable, with the [eight defined units].” 29 C.F.R. § 103.30(c). The Board has consistently interpreted this language as applying “only to petitions for ‘additional units,’ that is, petitions to represent a new unit of previously unrepresented employees, which would be an addition to the existing units at a facility.” *Kaiser Found. Hosp.*, 312 NLRB at 934 (quoting 29 C.F.R. § 103.30(c)); *see also St. Vincent*, 2011 WL 4830116, at *8, n.8 (Section 103.30(c)’s “plain language” provides that compliance “insofar as practicable” with the Rule applies only when an *additional* unit is sought); *Crittenton Hosp.*, 328 NLRB 879, 880 (1999) (stating that “where there are existing nonconforming units,” the Rule “by its own terms” applies only to a “petition for a *new* unit of previously unrepresented employees”). As we show below, the Board’s current decision accords with the above-cited cases because an *Armour-Globe* election by definition does not involve the creation of an additional unit.

Here, the Board properly relied on (JA 22) *St. Vincent*, wherein the Board addressed the issue of *Armour-Globe* elections in the acute-care context. In *St. Vincent*, the Board held that a union may petition for a self-determination election among a group of residual employees to determine whether they wanted to join an existing nonconforming unit of nonprofessional employees already represented by a union. 2011 WL 4830116, at *2-4. The Board rejected precisely the argument the Hospital presses here: that the Health Care Rule requires the inclusion of all

remaining unrepresented nonprofessional employees in the voting group. Instead, the Board determined that the “plain language” of Section 103.30(c) applied only when a petitioner seeks “an *additional* unit,” a situation that “is not present” in an *Armour-Globe* election, because, by definition, employees are seeking to join an existing unit. *St. Vincent*, 2011 WL 4830116, at *8 n.8. The Board further explained that “there is nothing in the Rule that requires a more comprehensive grouping.” *Id.* at *4.

Likewise, the Hospital errantly contends that *St. Vincent* is a “repudiation of” (Br. 47) and “end-around” (Br. 42) the Rule. Rather, the Board’s decision in *St. Vincent* adhered to the path established in *Kaiser Foundation Hospital* and *Crittenton Hospital*, where the Board determined that Section 103.30(c) does not require that “existing nonconforming units automatically be restructured to fit within the Rule’s eight listed units.” *Crittenton Hosp.*, 328 NLRB at 880; *see also Kaiser Found. Hosp.*, 312 NLRB at 935 (the Board’s “long-standing policy of according great deference to collective-bargaining history” supported the decision “not to apply the Rule automatically to preexisting nonconforming units”).

In *Kaiser Foundation Hospital*, the Board denied a nonincumbent union’s petition to represent a unit of skilled maintenance employees, one of the Rule’s eight appropriate units, because that request would have required severance of those employees from their pre-existing nonconforming unit. 312 NLRB at 934-

35. The Board rejected the argument that compliance with Section 103.30(c) required severance because it would result in a separate unit that conformed “insofar as practicable” to the Rule. *Id.* at 934. The Board explained that the petition sought “to create a unit by dividing an existing unit,” so the petition “fell outside the plain language of [Section 103.30(c)],” which applies only to “additional units.” *Id.* The Board reasonably determined that the language used in Section 103.30(c) reflects that “the Board contemplated that the Rule would apply only with respect to petitions for new units,” and that “the Board understood the phrase ‘new units’ to mean those sought in addition to any existing nonconforming units.” *Id.* at 934 & n.9.

The Board followed a similar course in *Crittenton Hospital*. In that case, for over 25 years, the union represented a nonconforming unit consisting of some, but not all, of the hospital’s registered nurses and other specialty nurses. *Crittenton Hosp.*, 328 NLRB at 880. A nonincumbent union petitioned to represent the nonconforming unit, and the incumbent union opposed, arguing that the Rule required expansion of the voting group into a conforming unit of all registered nurses. *Id.* The Board rejected the incumbent union’s argument and found that Section 103.30(c)’s requirement to conform to one of the eight specified units “insofar as practicable” applied uniquely to those circumstances where there is both an existing nonconforming unit and a petition for a new unit of previously

unrepresented employees. *Crittenton Hosp.*, 328 NRB at 880. The Board succinctly explained that “[b]y its own terms, the Rule applies only to initial organizing attempts or, where there are existing nonconforming units, to a petition for a new unit of previously unrepresented employees, which would be an addition to the existing units at the [e]mployer's facility.” *Id.* The Board acknowledged that these circumstances were noticeably absent in *Crittenton Hospital*, because the petitioning union sought to represent an already represented unit, not an additional unit. *Id.* Accordingly, the “insofar as practicable” requirement of Section 103.30(c) had no bearing on the appropriate unit determination in that case because there was no petition for a new unit, and to force the inclusion of the residual employees “would be a misapplication of the Rule and inequitable.” *Id.*; *see St. Mary's*, 332 NLRB at 1420-21 (affirming *Kaiser Foundation Hospital's* and *Crittenton Hospital's* interpretation of the “literal language” of Section 103.30(c) as applying only to “additional units”).

Thus, the Board's decision here comports with the reasoning in *St. Vincent*, *Kaiser Foundation Hospital*, and *Crittenton Hospital*, all of which reasonably cabined the application of Section 103.30(c) to new units. As in those cases, the Union here does not seek an additional unit, but, rather, seeks to add a group of employees to an already existing bargaining unit. These cases make clear that the Board consistently finds that the requirement to conform a nonconforming unit

“insofar as practicable” to the Rule simply does not apply in this context. For this reason, the Board, contrary to the Hospital’s assertion (Br. 32), had no obligation to consider whether it was impracticable to include all unrepresented nonprofessional employees residual to the nonconforming unit and appropriately made no such finding.

b. *St. John’s* does not require the voting group to include all unrepresented nonprofessional employees

The Hospital argues (Br. 42-48) that the Board’s decision here and in *St. Vincent* is contrary to *St. John’s*, and “abrogates” (Br. 42) the Rule. The Hospital’s argument is unsupported.

The employer in *St. John’s* had five separate nonconforming units of skilled maintenance employees, each represented by five different unions. 307 NLRB at 767. One of the five incumbent unions petitioned to represent a sixth unit comprised of a subset of the remaining unrepresented skilled maintenance employees. *Id.* The Regional Director permitted the sixth unit provided it was expanded to include all of the unrepresented skilled maintenance employees. *Id.* The employer sought review of the limited issue of whether it was “inappropriate to create a sixth unit of skilled maintenance employees.” *Id.* at 767-68. The employer did not dispute that an election seeking to add all unrepresented skilled maintenance employees to an existing unit would be proper. On review, the Board found that “in the face of [five] existing nonconforming units,” the conformance,

“insofar as practicable” to the units set forth in the Rule, meant adding all remaining unrepresented employees to an existing unit “rather than creating a sixth unit.” *Id.* at 768. The Board then remanded the case to the Regional Director to direct, “if the [union] desires,” a self-determination election where the remaining unrepresented employees voted on whether to join an existing unit. *Id.*

The Hospital maintains (Br. 45-46) that *St. John’s* requires that compliance with the Health Care Rule means that the Board must include all unrepresented, nonprofessional employees in the voting group. As noted above (pp. 28-29), the Board considered and rejected this argument in *St. Vincent*, where the Board limited the holding in *St. John’s* to its facts. As the Board explained in *St. Vincent*, *St. John’s* was distinguishable on two grounds. *St. Vincent*, 2011 WL 4830116, at *3.

First, in *St. John’s*, the Board found that “*to the extent* the [union] was seeking an election in a *separate* residual unit, it was required to include all unrepresented employees residual to the existing unit.” *St. Vincent*, 2011 WL 4830116, at *3 (emphasis added). But in *St. Vincent*, the union sought to add to an existing unit and did not seek an election in a separate additional residual unit. *Id.* at *4. Second, in *St. John’s*, the Board, citing unit proliferation concerns, refused to allow a sixth unit where the employer already had five pre-existing, nonconforming units of the same type of employee. *St. Vincent*, 2011 WL

4830116, at *4. In contrast, *St. Vincent* involved a single unit “that could have been organized under the Health Care Rule into [four] separate units.” *Id.* Unlike *St. John’s*, where a sixth unit would have caused undue unit proliferation, the self-determination election in *St. Vincent*, where just one group of employees voted whether to be added to a single unit, “[could] not be said to implicate concerns about undue proliferation of units.” *St. Vincent*, 2011 WL 4830116, at *4.

Further, the Board in *St. Vincent* observed that the decision to expand the voting group in *St. John’s* was never specifically reviewed because the Board remanded to the Regional Director to determine whether the union desired an election of all residual employees. *St. Vincent*, 2011 WL 4830116, at *3. That is to say, the employer’s failure in *St. John’s* to challenge the requirement that all residual employees must be included in the fifth unit prevented the Board from ever expressly considering the matter.

Under these circumstances, the Board properly determined that this case is akin to *St. Vincent*, because the Union seeks to add a distinct, identifiable segment of employees to a single, nonconforming group of nonprofessional employees. This case does not have any concerns or circumstances present in *St. John’s* that led to the inclusion of all the unrepresented, nonprofessional employees to the existing, nonconforming unit.

The Hospital further argues (Br. 46) that *St. Mary's* “reaffirmed” the holding in *St. John's* with the statement that under *St. John's* “any election to determine a representative for unrepresented . . . workers [has] to include all the remaining [unrepresented] workers residual to the existing unit.” *St. Mary's*, 332 NLRB at 1419. This statement, however, divorces *St. John's* from its context, which as discussed above (p. 33), is plainly distinguishable from both *St. Vincent* and the case at hand.

Further, contrary to the Hospital's contention (Br. 46-47), *St. Mary's* does not support its argument that the voting groups here must include all unrepresented employees. Indeed, the Board's discussion in *St. Mary's* fully endorses the Board's approach here inasmuch as *St. Mary's* draws a clear distinction between petitions for a separate unit and petitions to add a subset of employees to an already existing, nonconforming unit. *See* 332 NLRB at 1421. In *St. Mary's*, the Board determined that Section 103.30(c)'s “insofar as practicable” language did not preclude a *nonincumbent* union from representing a *separate* unit of all unrepresented technical employees residual to those in the existing nonconforming unit. 332 NLRB at 1421. Notably, the Board found that because the petition at issue was for an additional unit, the unit had to comply “insofar as practicable” to one of the enumerated units, which it did by creating a unit consisting solely of technical employees. *Id.* at 1420; 29 U.S.C. § 103.30(c).

The instant case is readily distinguishable as it involves neither a nonincumbent union nor a petition for an entirely separate unit. Moreover, *St. Mary's* did not involve an *Armour-Globe* election. By its very terms, an *Armour-Globe* election requires the voting group to consist of a distinct, identifiable segment of a larger group and does not require inclusion of the larger residual group. See *S. Ind. Gas*, 853 F.2d 580, 581-82 (7th Cir. 1988) (*Armour-Globe* elections allow unions to petition to represent “some fringe employees” (emphasis added)).

The Hospital does not advance its case by citing (Br. 37-38) to decisions that pre-date passage of the Health Care Rule and that fall outside the ambit of the Rule. For instance, the Board had no occasion in either *Mary Thompson Hospital Inc.*, 242 NLRB 440 (1979), or *Oakwood Hospital Corp.*, 219 NLRB 620 (1975), to consider whether the petitioned-for units were appropriate under the Health Care Rule for the simple reason that the Board decided those cases a decade before the Rule was passed. Neither case involves an examination of a nonconforming unit under the Rule, and the Hospital has failed to identify the relevance of these cases to the issue before the Court. Moreover, the Board's stated aim in *Mary Thompson* was to “‘complete’ or ‘correct’ the existing unit so as to bring it into conformity with some unit which the Board would find appropriate for the health care industry.” 242 NLRB at 441. Without the benefit of the Health Care Rule, the

Board in *Mary Thompson* sought to establish conformed groupings of employees that were most appropriate in the acute-care setting. The Board recognized that the same goal was implicitly sought in *Oakwood Hospital*. See *Mary Thompson*, 242 NLRB at 441 n.9. Here, the Board need not go through the same exercise because the Health Care Rule has affirmatively established the proper groupings of hospital employees and has specifically exempted nonconforming units from the Rule's scope. Thus, unlike *Mary Thompson* and *Oakwood Hospital*, the Board does not need to contort the nonconforming unit in the instant case into any conformed grouping.⁵

Similarly inapposite is *Kaiser Foundation Health Plan of Colorado*, 333 NLRB 557 (2001), which does not involve an acute-care facility and thus falls outside the reach of the Health Care Rule. While the Board there directed an election to include all residual employees, it did so relying on *St. Mary's*. See *Kaiser Found. Health Plan*, 333 NLRB at 558. For the reasons discussed above (pp. 34-35), the instant case is distinguishable from *St. Mary's*, and therefore, to the extent *Kaiser Foundation Health Plan*, involving a nonacute-care facility outside the scope of the Health Care Rule, is at all relevant, it is distinguishable for the same reasons.

⁵ Both *Mary Thompson* and *Oakwood* rely, in part, on *Levine Hospital of Hayward, Inc.*, 219 NLRB 327 (1975), which the Board has expressly overruled. See *Crittenton Hosp.*, 328 NLRB at 881 n.9.

3. The Hospital's Remaining Contentions Lack Merit

The Hospital argues (Br. 38-42, 48-50) that the Board's decision will result in a proliferation of units, causing multiple elections and campaigns that will disrupt patient care.⁶ Specifically, the Hospital asserts that Congress, the Board, and the courts have been concerned with the proliferation of different units within the acute-care setting, and the Board's decision here runs afoul of these concerns. This argument lacks both legal and factual support.

a. The Board's interpretation will not result in proliferation of units

The legislative history of the 1974 health care amendments to the Act contains an admonition that the Board has an obligation to make unit determinations with "due consideration" given "to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 766, 93rd Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). The Board has acknowledged the "seriousness of Congress' concern" about undue proliferation of units in health care workplaces." *See Manor*

⁶ In addition to its disruption argument, the Hospital claims that the Board's decision creates the "perverse anomaly" (Br. 52) of treating organized hospitals differently than unorganized hospitals. The Hospital, however, never raised this argument to the Board. Without conceding the merit of the Hospital's newly minted assertion, its failure to raise it to the Board in the first instance fully responds to its current complaint that the Board "has never explained how or why certain hospitals are worthy of fewer protections." (Br. 53.) More importantly, its failure precludes judicial review. *See* 29 U.S.C. § 160(e); *Woelke*, 456 U.S. at 665.

Healthcare Corp., 285 NLRB 224, 226 (1987). But a concern about undue proliferation of units does not restrict the Board from using its discretion to determine an appropriate unit. In fact, the Supreme Court unequivocally found that the “admonition” from the committee reports is not binding on the Board and does not have “the force of law.” *Am. Hosp. Ass’n*, 499 U.S. at 616-17 (“legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute”). The Court went on to note that “[i]f Congress believes the Board has not given ‘due consideration’ to the issue, Congress may fashion an appropriate response.” *Id.* at 617.

Here, the Board’s decision gave due consideration to the concern regarding proliferation of units, which puts to rest the Hospital’s errant claim (Br. 32) that the Board did not explain the policy reasons behind its decision. As the Board explained, a self-determination election, by definition, “avoids any proliferation of units as it does not result in the creation of a separate, additional unit.” (JA 22.) As the Board further expounded in *St. Vincent*, a self-determination election “undeniably avoids any proliferation of units, much less undue proliferation, because it does not result in the creation of and election in a separate additional unit. Rather, an *Armour-Globe* election permits employees . . . to vote whether they wish to be added to the existing unit.” 2011 WL 4830116, at *2. The Board

further found in *St. Vincent* that allowing the inclusion of the distinct grouping of employees to the existing unit actually “bring[s] the existing unit closer to a grouping sanctioned by the Rule, while avoiding unit proliferation.” *Id.* at *4. The effect is the same here, where the inclusion of the supply chain employees to the existing unit will bring the unit closer to what the Rule requires.

Further, as the Board has previously explained, any concern about undue proliferation “must be weighed against the significant, long-established policy of according deference to existing collective-bargaining relationships.” *St. Mary’s*, 332 NLRB at 142. The Board’s decision here reflects this balancing, as it “further[s] the [voting groups’] interest in obtaining representation while avoiding undue proliferation of units.” *St. Vincent*, 2011 WL 4830116, at *4.

b. Allowing two supply chain employee self-determination elections does not disrupt patient care

The Hospital baldly asserts (Br. 39-40) that its past experience with organizing campaigns resulted in disruption of patient care and hospital business. The Hospital further argues (Br. 39-41) that the Board’s decision going forward will result in many elections, disrupt patient care, and adversely affect hospital operations. As we show below, these arguments ignore the basic organizational rights of employees and, in any event, are premised on unfounded speculation.

Here, the Board (JA 21-22) properly resolved any conflict between the employees’ Section 7 rights and the Hospital’s concern for patient care. Such

consideration necessarily involves the balancing of employee rights guaranteed by the Act against the “conflicting legitimate interests” of employers, including the interest of health care institutions in preventing disruption of patient care; the results of such balancing by the Board are “subject to limited judicial review.” *Beth Israel Hosp.*, 437 U.S. 437 U.S. 483, 501 (1978). The Hospital’s argument undermines the basic organizational rights of employees to join an existing unit through a self-determination election. However, while the Board is mindful of the need to protect the “tranquil environment” that is desirable for patient care, it will not act in derogation of employee rights under the Act. *Id.* at 495 (citing *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 NLRB 1150, 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977)). The Supreme Court prohibits such a wholesale proscription on employees’ Section 7 rights in the health care context. *See Beth Israel Hosp.*, 437 U.S. at 496 (explaining that “nothing in the legislative history of the 1974 amendments indicates a congressional policy inconsistent with the Board’s general approach to enforcement of [Section] 7 self-organizational rights in the hospital context”). Moreover, the Supreme Court was clear that, “[the 1974 health care] amendments subjected all acute-care hospitals to the coverage of the Act but made no change in the Board’s authority to determine the appropriate bargaining unit in each case.” *Am. Hosp. Ass’n*, 499 U.S. at 615. The Court must

therefore reject the Hospital's attempt to limit its employees' organizational rights.⁷

Notwithstanding the Board's proper balancing of the employees' Section 7 rights, the Hospital's claim of patient care disruption is utterly devoid of record support. The Hospital does not identify a single incident where patient care was impeded, much less compromised. It cites no discipline that the Hospital meted out to address patient care disruption. In this regard, it bears emphasizing that the record in this case incorporates *two* other representation case records between the Hospital and the Union, and the Hospital cannot pinpoint a single example across these three attempts to build a record of disruption. The Hospital's argument can only be understood as follows: Any non-work activity is inherently disruptive. *See, e.g.*, Tr. 139 (Hospital counsel explaining to the administrative law judge that "anything that takes [the Hospital] off course can be viewed as disruptive. . . . It's disruptive in the sense that it's a distraction from [the employees'] normal job."). The Court must reject the Hospital's dangerous assumption as inherently violative of the Act.

⁷ The Hospital (Br. 13, 53) takes umbrage at the Union's "publicized intention" to organize subsets of the residual unit. However, the Union's filing of such representation petitions is entirely lawful. The Union is free to organize the residual unit consistent with extant Board law and free to advise employees of that plan via a flyer.

The Hospital generally cites to (Br. 38-39) a prior campaign and ensuing election among a different classification of employees, Patient Care Technicians (PCTs), but still cannot identify a single instance of disruption to its operation during that election. The Hospital refers (Br. 11) to an offer of proof made at that particular representation hearing. But that offer provided only generalized comments about difficulties ensuring patient coverage and unspecified complaints by patient family members.⁸ While the Hospital recounts (Br. 38-39) the time associated with the representation proceeding, including the hearing in this case and in the prior case involving the PCTs, this fact alone establishes nothing more than recognition of basic rights under the Act. Once again, the Hospital cannot baldly equate the exercise of these rights with patient care disruption. Further, its claim of disruption ignores the fact that it *chose* to participate in an anti-union campaign. The Hospital was under no obligation to hire an anti-labor consultant, to hold meetings between its managers and the consultants, to encourage its supervisors to campaign against the Union, or to instruct its managers to discuss union matters with employees during work hours.

⁸ Indeed, the Hospital's offer of proof did not allude to any specific documents or testimony that, if admitted, would have shown the election's effect on patient care. Further, as noted above (pp. 42-43), the Hospital had a *third* chance to show patient disruption during the hearing in this case and offered nothing more than general statements that elections are distracting.

The Hospital's concern (Br. 40-41) of future disruptions and strikes is also unfounded. First, even assuming that such events would occur, as discussed above (pp. 40-41), the Board must balance the Hospital's concerns against the organizational rights of employees. Second, the no-strike clause in the collective-bargaining agreement protects against the Hospital's concern. (JA 355-56.) The Union's petitions in this case do not create an additional bargaining unit; rather, they add employees to an existing unit who are covered by a contract. Once these new voting groups are covered by the contract, they cannot engage in economic action under that agreement. The Hospital also premises its concerns on the notion that negotiations are a "rough and tumble affair" (Br. 41), but, just as any workplace distraction is not necessarily inherently disruptive of operations, contract negotiations are not inherently acrimonious. This is particularly true when, as here, the basic framework governing employment for the unit to which the voting groups have been added already exists. The parties here are not starting anew. Like its role in any distractions resulting from the anti-union campaign, the Hospital ignores its role in any such "rough and tumble affair." To be sure, the Hospital exercises a certain amount of control with respect to the tone of any negotiations.

It bears noting, too, that the Hospital cannot show that a wall-to-wall election is a fortiori less disruptive than holding a few elections among small

voting groups. Without foundation or explanation, it asserts that one large election must necessarily be less disruptive than several elections involving a smaller number of employees in a residual unit. To make the statement is not to prove it. Moreover, the Board permits an election in health-care units every year, absent a contract or other bar. Accordingly, there could be as many as eight elections (one election per unit set forth in the Rule) each year.

In sum, in promulgating the Rule, the Board expressly left questions regarding nonconforming units to be determined by adjudication on a case-by-case basis. Here, supported by both the Rule's language and precedent, the Board reasonably determined that the nonconforming unit at issue was not required to conform "insofar as practicable" with one of the Rule's eight enumerated units. The Board reasonably determined that the inclusion of two distinct segments of employees to a pre-existing unit raises no unit proliferation concerns, and properly allows the supply chain employees to exercise their organizational rights.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

May 2016

Statutory Addendum

Statutory Addendum

29 U.S.C. § 153(b)

(b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] 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. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three 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. The Board shall have an official seal which shall be judicially noticed.

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

RUSH UNIVERSITY MEDICAL CENTER	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1273
	*	15-1303
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	13-CA-152806
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 743	*	
	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,142 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 11th day of May 2016

**UNITED STATES COURT OF APPEALS
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	*	
and	*	
	*	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,*	*	
LOCAL 743	*	
Intervenor	*	

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I electronically filed the foregoing document 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 that 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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