

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”) certifies 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 was previously before the Court, but after the Court's decision in *Rush University Medical Center v. NLRB*, 833 F.3d 202 (D.C. Cir. 2016), the Court vacated the parties' briefs and directed new briefing.

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Dated at Washington, DC
this 3rd day of May, 2017

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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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 (“*Rush II*”), 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 a petition for review of a Board order 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.

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).

¹ “JA” refers to the parties’ Joint Deferred Appendix, filed April 17, 2017, whereas “SA” refers to the Board’s Supplemental Appendix filed May 2, 2017. References preceding a semicolon are to the Board’s or Regional Director’s findings; those following are to the supporting evidence.

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 Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of two groups of unrepresented employees who voted in separate self-determination elections to join the existing bargaining unit of nonprofessional employees and skilled maintenance workers represented by the Union.

Resolution of the issue turns on the subsidiary question: whether the Board acted within its discretion in directing the self-determination elections in this case, which, contrary to the Hospital's contention, was not inconsistent with the policies underlying the Health Care Rule.

RELEVANT STATUTORY PROVISIONS

The attached Addendum includes pertinent statutory and regulatory provisions.

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 and skilled maintenance workers that the Union has represented for nearly 50 years at the Hospital. An *Armour-Globe* election permits a group of 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 Health Care Rule, 29 C.F.R. § 103.30, on appropriate bargaining units at acute-care facilities required the group of voting employees to include all nonprofessional employees who were not currently included in the unit.

Specifically, the Union sought a voting group that would include the unrepresented employees in three job classifications: 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"). 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, rather than one, were appropriate and directed two elections. The Regional Director ordered an *Armour-Globe* election among the petitioned-for employees working in the Materials Management Department and another election among the petitioned-for employees working in the Warehouse Operations Department. Following the elections, the Board's tally of ballots determined that a majority of both groups voted to join the existing bargaining unit. Thereafter, the Board certified the Union as their bargaining representative, and the Hospital refused to bargain in order to challenge the certifications. 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.)

On August 16, 2016, after the parties had completed briefing in this case, the Court issued its decision in *Rush University Medical Center v. NLRB*, 833 F.3d 202 (D.C. Cir. 2016) ("*Rush I*"). In *Rush I*, the Hospital refused to bargain with the Union to challenge the Board's certification of the Union as the bargaining representative of patient care technicians ("PCTs"), who voted in a self-determination election to join the same existing unit of nonprofessional employees

and skilled maintenance workers that the supply chain employees seek to join in *Rush II*. This unit constitutes a non-conforming unit under the Health Care Rule, 29 C.F.R. § 103.30. The Hospital argued to the Court that the Rule required that the voting group include not just the PCTs but also *all* other nonprofessional employees who were not currently represented.

Reviewing the Board’s decision for an abuse of discretion, the Court “reject[ed] [the Hospital]’s challenge to the Board’s interpretation and application of its own regulation,” *Rush I*, 833 F.3d at 205, finding instead that the Board’s interpretation of the Health Care Rule is “entirely compatible with the regulation’s terms.” *Id.* at 207. Specifically, the Court agreed with the Board’s conclusion that self-determination elections are *not* implicated by the Rule’s requirement that where “there are existing non-conforming 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) (emphasis added). The Court endorsed the Board’s explanation that the Rule “applies by its terms to ‘a petition for *additional units*’ . . . [and a]n *Armour-Globe* self-determination election, by its nature, does not involve the creation of any ‘additional units.’” *Rush I*, 833 F.3d at 207 (quoting 29 C.F.R. § 103.30(c)) (emphasis in original). The Court also recognized that the Board’s understanding of the Rule is consistent with its object to “guard[] against undue proliferation of

bargaining units in acute-care hospitals,” because a “self-determination election, by definition, involves no proliferation of bargaining units,” but instead is a mechanism for adding employees to existing units. *Rush I*, 833 F.3d at 207.

On September 26, the Board moved for summary disposition of *Rush II*, arguing that the two cases were materially identical and *Rush I* was determinative of the issues in *Rush II*. The Hospital opposed the Board’s motion. On December 21, the Court denied the Board’s motion and directed the parties, on its own motion, to “file new briefs, which, while not otherwise limited, address the effect of this court’s decision in [*Rush I*].”

Before the Court, the Hospital does not dispute that it refused to bargain with the Union. Nor does it challenge the Board’s finding that *Armour-Globe* elections are consistent with the Health Care Rule and Board precedent interpreting the Rule – issues that this Court addressed in *Rush I*. Instead, it more narrowly contends (Br. 2) that the Board abused its discretion by not considering the effect of repeated petitions and elections on a hospital 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; JA 246.) The Union has been the exclusive collective-bargaining representative of certain employees in various nonprofessional job classifications since 1967. (JA 18; JA 247.) The current collective-bargaining agreement, which is effective from September 5, 2013, to June 30, 2016, covers the following unit that contains 1000 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; JA 247.) The unit also contains the PCTs who voted to join the Union in 2014. (JA 18; JA 248.) The unit pre-dates Board changes to representation in acute-care facilities, so the unit is nonconforming.

B. Previous Representation Proceedings Involving the Nonconforming Unit

In addition to the employees represented by the Union, there is large residual unit comprised of unrepresented Hospital employees. On July 2, 2014, the Union filed a representation petition (13-RC-132042) to add a subset of the residual unit, the PCTs, to the existing non-conforming unit via an *Armour-Globe* election. *See Rush I*, 833 F.3d at 206. After the Union prevailed in the election and the Board certified the Union, the Hospital challenged the certification in this Court. The Hospital argued that an *Armour-Globe* election among the PCTs violated the Health Care Rule and that the Board abused its discretion in not directing a representation election among all the unrepresented employees. As noted above (pp. 5-6), this Court rejected that challenge and found that the directed election among the PCTs was “entirely compatible” with the Rule. *Id.* at 207.

On October 17, the Union filed another representation petition (13-RC-139061) seeking to add numerous job classifications to the non-conforming unit. After a hearing, the Regional Director determined that the proposed voting group did not constitute an “identifiable, distinct segment.” (JA 305.) Accordingly, the Regional Director dismissed the petition and denied the Union’s request for an *Armour-Globe* election because the Union failed to show that the voting group was appropriate.

On December 23 and 24, in response to the dismissal, the Union filed three representation petitions composed of narrower job classifications. (JA 60-61.) Two of the three newly filed petitions covered certain job classifications in the Food and Nutrition Services Department (13-RC-143497) and the Hospital's phlebotomists (13-RC-143510).² After a hearing, the Regional Director directed an election among two voting groups, certain employees in the Department of Food and Nutrition Services and the phlebotomists, and the Board upheld the directions of election. The Union lost the two elections among these voting groups.

None of these representation petitions is currently before the Court. Nor do any of the petitions affect whether the Board properly directed an *Armour-Globe* election among the supply chain employees, the voting group at issue in this case.

C. Supply Chain Employees

Aside from the 1000 represented employees, the Hospital has another 680 nonprofessional employees in a residual unit who were 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

² The third petition covered the supply chain employees, which is the voting bloc at issue in this case. The *Armour-Globe* elections involving the supply chain employees are discussed immediately below.

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; JA 250-52, 256-57.)

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; JA 1216-18, 322-23, 237-39, 250-52.)

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; JA 199, 215-16, 218, 219, 243-44, 250-52.)

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; JA 220, 221-23, 256-57.)

D. The Representation Proceeding Under Review in This Case

On December 23, the Union filed a petition seeking an *Armour-Globe* self-determination election to add the supply chain employees to the existing, nonconforming bargaining unit. (JA 60-61.) The Hospital objected to the petitioned-for voting group, claiming that it ran afoul of the Health Care 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 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.³ (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 854 (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

³ As noted above (p. 10), there were two other voting groups – Food and Nutrition Services employees and phlebotomists – in addition to the two groups of supply chain employees, for a total of four separate voting groups.

Department voted to join the existing bargaining unit. (JA 156; JA 116-17.) On April 16, the Board certified the Union as the collective-bargaining representative of the supply chain employees. (JA 156; JA 44-49.)

E. 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; JA 139-40.) The Hospital refused, prompting the Union to file an unfair-labor-practice charge. (JA 156; JA 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; JA 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; JA 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; JA 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; JA 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

This case marks the second time the Court will determine whether the Board, relying on precedent interpreting the Health Care Rule to permit self-determination elections in acute-care hospitals, properly allowed such elections at

the Hospital. In *Rush I*, the Court found that the Board’s interpretation of the Health Care Rule, as set forth in *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011), was “entirely compatible with the regulation’s terms.” *Rush I*, 833 F.3d at 207. The Court also held that self-determination elections were consistent with the Rule’s “core” purpose of preventing unit proliferation, explaining that such elections, which by definition add employees to *existing* units and do not create *additional* units, “involves no proliferation of bargaining units at any facility.” *Id.* at 203, 207 (emphasis added.)

In this case, in two separate *Armour-Globe* self-determination elections conducted by the Board, the supply chain employees chose to join the pre-existing unit of nonprofessional employees and skilled maintenance workers represented by the Union. In challenging the certification, the Hospital does not dispute the Board’s findings that the two groups of supply chain employees were appropriate voting groups and that they each share a community of interest with employees in the existing unit. The Hospital also does not challenge, nor could it, the Court’s holding in *Rush I* that the Board’s interpretation and application of the Health Care Rule in this hospital setting is consistent with the Rule’s language.

Instead, the Hospital argues that the Board’s interpretation and application of the Health Care Rule is contrary to the Rule’s underlying policy of preventing disruption caused by labor strife, because, it claims, self-determination elections

result in numerous representation petitions and ensuing elections that will disrupt patient care – an issue that the Hospital claims the Board has repeatedly ignored. The Hospital’s argument rests on a mistaken view of the Rule’s purpose, and its conclusory assertions of disruption lack record support.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN DIRECTING THE SELF-DETERMINATION ELECTIONS IN THIS CASE, AND THE HOSPITAL THEREFORE 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. In turn, employers have the duty to bargain with their employees’ chosen representative, and a refusal to bargain violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).⁴ Here, the Hospital admits (Br. 31-32) that it refused to bargain with the Union to contest the Board having certified the Union as the 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);

⁴ 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).

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).

This case involves an *Armour-Globe* self-determination election, which the Board has long recognized as the appropriate process 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.⁵ *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). In *St. Vincent*, the Board determined that an *Armour-Globe* election is permissible under the Health Care Rule inasmuch as it “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.” 357 NLRB at 855. This Court recently embraced the Board’s view in *St. Vincent* as “fully consistent ‘with the regulation itself.’” *Rush I*, 833 F.3d at 207 (quoting *St. Vincent*, 357 NLRB at 856).

⁵ 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).

In its original opening brief in this case, the Hospital principally relied on its “undue proliferation” argument, which this Court has now rejected in *Rush I*. The Hospital now pivots and argues instead that the Board abused its discretion by directing the two *Armour-Globe* self-determination elections without considering the effect of repeated petitions and elections at a hospital, which, it claims, is inconsistent with the Health Care Rule’s purpose of avoiding disruption of patient care and labor discord. As shown below, the Hospital’s position mischaracterizes the core concern underlying the Rule and is foreclosed by the Court’s analysis in *Rush I*. Further, its claims of patient care disruption and labor discord are devoid of record support.

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. *Rush I*, 833 F.3d at 206 (quoting *Randell Warehouse of Az., Inc. v. NLRB*, 252 F.3d 445, 447-48 (D.C. Cir. 2001)).

The Board also 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).

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). And, as usual, 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), given that its 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).

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 Board procedure that permits a group of employees who share a community of interest with an already represented unit of employees to vote on whether to join the existing unit. *See, e.g., Rush I*, 833 F.3d at 205 (“The mechanism by which a union adds employees to an existing unit is known as an *Armour-Globe*, or self-determination, election.”). 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, directed the *Armour-Globe* elections in order for the supply chain employees to vote on their inclusion in the existing 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. *NLRB v. Raytheon Co.*, 918 F.2d 249, 252 (1st Cir. 1990). Second, the Board considers whether a particular voting group constitutes a distinct, identifiable segment of employees. *Warner-Lambert*, 298 NLRB at 995; *see also St. Vincent*, 357 NLRB at 855. 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*, 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*, 357 NLRB at 855; *Warner-Lambert*, 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. 11.

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* p. 12.

The Hospital did not challenge the underlying factual findings as to the distinct, identifiable nature of the two voting groups before the Board, and the Court therefore lacks jurisdiction to review these findings. *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).⁶ 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, the Board reasonably found two voting groups appropriate and acted well within its discretion in directing the two self-determination elections in this case.

D. Self-Determination Elections Are Not Contrary to the Health Care Rule Because They Do Not Result in Unit Proliferation, a Rationale this Court Affirmed

As discussed previously (pp. 6-7), in *Rush I*, the Hospital argued that *Armour-Globe* elections in acute-care facilities contravene the Health Care Rule.⁷ The Board rejected the Hospital’s argument, finding that self-determination elections are consistent with both the text of the Health care Rule and its purpose. This Court expressly affirmed the Board’s finding.

⁶ Further, the Hospital does not challenge these findings in its brief to the Court. *See 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).

⁷ As noted above (p. 7), the Hospital no longer argues that *Armour-Globe* elections are contrary to the Rule’s text.

1. The language and purpose of the Health Care Rule

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 “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. For over a decade following the amendment, the Board and courts struggled with “seemingly interminable disputes” over hospital unit determinations. *St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1148 (3d Cir. 1993). In an effort to put these disputes definitively to rest and to address Congress’ 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. 93-766 (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3950, the Board undertook notice-and-comment rulemaking and proposed a general definition of the bargaining units appropriate in the health care industry. Throughout the rulemaking process, the Board clearly articulated the Rule’s purpose: to effectuate Section 7 rights while preventing unit proliferation “to avoid disruption in patient care, unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages, and increased costs due to whipsaw strikes and wage leapfrogging.” *Collective-Bargaining Units in the Health Care Industry*, 52 Fed. Reg. 25142, 25143 (July 2, 1987); *see also id.*

at 25146 (“[W]e have drafted the proposed rule with the intent of affording health care employees the ‘fullest freedom’ to organize, while at the same time attempting to avoid the proliferation of bargaining units in that industry that so concerned Congress.”).

The rulemaking process also identified that Congress viewed undue unit proliferation as problematic because it can “create[] such undesirable results as excessive proliferation, interruption in the delivery of health care services, jurisdictional disputes, wage whipsawing, and the like.” *Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. 33900, 33901 (Sep. 1, 1988); *see also Rush I*, 833 F.3d at 204 (“An excessive number of bargaining units increases the prospect of jurisdictional disputes and work stoppages, potentially impairing the provision of health care services to the public.”). Notably, in publishing the final Rule, the Board commented that “whether strikes, whipsawing, or jurisdictional disputes will result if an initial organizational effort succeeds carries with it a degree of speculativeness.” *Collective-Bargaining Units in the Health Care Industry*, 54 Fed. Reg. 16336, 16346 (Apr. 21, 1989) (codified at 29 C.F.R. § 103.30).

In 1989, the rulemaking process culminated in the promulgation of the Health Care Rule, which established, with three narrow exceptions, eight

standardized bargaining units for acute-care hospitals.⁸ 29 C.F.R. § 103.30. The Supreme Court has upheld the Rule. *Am. Hosp. Ass'n*, 499 U.S. at 619-20.

The Rule's three exceptions are: 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 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*, 357 NLRB at 854; *Crittenton Hosp.*, 328 NLRB at 880; *St. John's Hosp.*, 307 NLRB 767, 767 (1992); *St. Mary's Duluth Clinic Health Sys.*, 332 NLRB 1419, 1419-20 (2000).

Since 1967, the Union here has represented a bargaining unit consisting of some, but not all, of the job classifications usually categorized in the

⁸ The eight possible bargaining units are: 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).

nonprofessional unit under the Rule. (JA 18.) Therefore, the unit at issue is nonconforming, and, as such, is excepted from the Rule’s requirement that it comply with one of the Rule’s eight appropriate units.

2. The Board has found, and this Court has affirmed, that self-determination elections are consistent with the Rule’s language and underlying purpose because such elections do not raise unit proliferation concerns

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 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 933, 934 (1993) (quoting 29 C.F.R. § 103.30(c)); *Crittenton Hosp.*, 328 NLRB at 880 (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”). The Board has consistently maintained this interpretation and recently underscored that the “plain language” of the Health Care Rule applies only when an *additional* unit is sought. *See St. Vincent*, 357 NLRB at 855 n.8. In *St. Vincent*, the Board set forth its view of *Armour-Globe* elections as consistent with avoidance of undue proliferation of bargaining units in acute-care facilities, the underlying purpose of

the Health Care Rule. *Id.* at 855. As the Board explained, “[a]n *Armour-Globe* self-determination election . . . undeniably avoids any proliferation of units, much less undue proliferation, because it does not result in the creation of an election in a separate, additional unit.” *Id.*

In *Rush I*, when presented with the question of whether the Board properly allowed an *Armour-Globe* election at the Hospital, the Court, citing to *Kaiser Foundation Hospital*, *Crittenton Hospital*, and *St. Vincent* unequivocally upheld the Board’s interpretation as consistent with both the language and the purpose of the Health Care Rule. *Rush I*, 833 F.3d at 207. Specifically, the Court determined that applying the Rule only to new, additional units is “entirely compatible with the regulation’s terms.” *Id.* And, according to the Court, the Board’s interpretation is compatible with “the regulation’s object” because a self-determination election “by definition, involves no proliferation of bargaining units at any facility.” *Id.* As such, it does not run afoul of the Health Care Rule’s guard “against undue proliferation of bargaining units in acute-care hospitals.” *Id.* (citing *St. Vincent*, 357 NLRB at 855).

In short, the Board’s decision here is fully consistent and controlled by *Rush I*, wherein the Court upheld the Board’s reasoning in *St. Vincent*, *Kaiser Foundation Hospital*, and *Crittenton Hospital*, all of which reasonably confined the application of Section 103.30(c) to *new* units. The Union here seeks the same

process this Court just affirmed in *Rush I*: to add groups of employees to an already existing bargaining unit rather than adding an additional unit. *Rush I*, and Board precedent cited approvingly therein, confirm that the Board acts reasonably when it exempts *Armour-Globe* elections from the Rule's requirement to conform a nonconforming unit "insofar as practicable" to one of the eight standardized units. Accordingly, the Board properly directed two *Armour-Globe* elections in the same acute-care facility as the *Armour-Globe* election recently upheld in *Rush I*.

E. The Hospital's Challenges Are Meritless

The Hospital does not contend that the Board misconstrued the Health Care Rule or Board precedent by directing the self-determination elections in this case. Rather, the Hospital argues that *Rush I* does not control the outcome of this case and attempts to place significance on the multiple representation petitions filed by the Union. In the main, the Hospital faults the Board's decision in *Rush II* for failing "to consider the effect of repeated petitions and elections on a hospital." (Br. 2.) The Hospital's argument, however, fails for several reasons. First, the Hospital mischaracterizes the underlying purpose of the Health Care Rule, which is to prevent undue proliferation of units, not elections. Second, the Hospital's criticism of the Board for not considering the effect of elections on hospital operations is ill-founded. The Board weighed any possible disruption against employees' Section 7 rights and ultimately concluded that self-determination

elections avoid possible labor strife stemming from undue unit proliferation while furthering the interests of the petitioned-for employees in union representation. Finally, the Hospital's claims of patient disruption are entirely speculative and lacking record support. As we discuss below, the Board has not "stuck its head in the sand." (Br. 51.) Rather, the Board has adhered to its precedent, as set forth in *St. Vincent* and embraced by this Court in *Rush I*, that self-determination elections, which by definition allow for elections in small voting blocs, are not contrary to the Health Care Rule.

1. The Hospital's argument relies on the mistaken premise that the Health Care Rule's underlying concern is avoiding proliferation of elections, not units

The Hospital insists that the Board has failed to "further[] its well-established policy goal of minimizing labor disruptions at hospitals." (Br. 52.) This argument erroneously assumes, however, that the Hospital has accurately identified the policy that the Board's decision attempts to further. While the Hospital initially, and properly, acknowledges (Br. 4-5) that the core purpose of the Rule is to address undue unit proliferation, it erroneously conflates unit proliferation, which the Rule *expressly* sought to prevent, with "repeated elections" (Br. 19), "rolling negotiations" (Br. 37), and "repeated organizing" (Br. 38). It also declares that the Rule seeks to prevent patient care disruption "that could result from smaller elections and the rolling negotiations and potential for strikes that

could result.” (Br. 37.) None of these supposed concerns was considered, discussed, or contemplated during the rule-making process, and the Hospital’s various declarations of the Health Care Rule’s underlying purpose are at odds with legislative and rulemaking history, the Board’s express statements, and judicial precedent.

As discussed above (pp. 26-27), the legislative history makes clear that the Rule is rooted in the Board’s desire to heed congressional warning to avoid undue proliferation of bargaining units in health care institutions. S. Rep. No. 93-766 (“Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry.”). After Congress extended the Act to cover hospitals, the Board confronted “seemingly interminable disputes” concerning appropriate units, and the Board, as well as the courts, reached inconsistent decisions. *St. Margaret*, 991 F.2d at 1148. This inconsistency over appropriate units – and the resulting inability to control unit proliferation – directly precipitated the Board’s proposed Health Care Rule. *See Am. Hosp. Ass’n*, 499 U.S. at 615-17 (discussing congressional admonishment and the Health Care Rule).

The rule-making history likewise leaves little doubt that the Health Care Rule sought to prevent unit proliferation. *See Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. at 339005 (“Under rulemaking as under adjudication, we intend at all times to be mindful of avoiding undue proliferation,

not only because this desire was expressed in the legislative history, but also because it accords with our own view of what is appropriate in the health care industry.”); Collective-Bargaining Units in the Health Care Industry, 52 Fed. Reg. at 25146 (“In formulating our proposed rule, we have, of course, kept firmly in mind Congress’s admonition against proliferation of health care bargaining units”). The Board and courts have similarly been unequivocal in identifying the aim of the Rule as stemming unit proliferation. *See, e.g., St. Vincent*, 357 NLRB at 855 (recognizing that goal of Health Care Rule was to “avoid undue proliferation of bargaining units in acute care facilities”); *Rush I*, 833 F.3d at 204 (“the Rule addressed Congress’s concerns about undue proliferation of bargaining units in health care facilities”).

2. The Board appropriately considered and rejected the Hospital’s arguments

Having decided what the policy *ought to be*, rather than what it is, the Hospital then takes the Board to task for not explaining how the Board’s rationale is consistent with the Hospital’s mischaracterization of the Health Care Rule’s purpose. To the contrary, however, the Board made clear that all the issues presented by the Hospital in *Rush II* were controlled by *St. Vincent*, where the Board addressed concerns that *Armour-Globe* elections in acute-care facilities contravene the Health Care Rule and expressly rejected those concerns as ill-

founded inasmuch as *Armour-Globe* elections do not trigger unit proliferation. *St. Vincent*, 357 NLRB at 854-55.

Throughout *Rush II*, the Board expressly relied on *St. Vincent* and its rationale. The Regional Director's Decision and Direction of Election states: "In *St. Vincent*, the Board held that the union was not required, under the [Rule], to include the remaining, unrepresented residual employees. In doing so, the Board specifically found that a self-determination election is not contrary to the [Rule], and avoids any proliferation of units as it does not result in the creation of a separate, additional unit." (JA 22.) The Regional Director then applied *St. Vincent* to the petitions at issue here, which "contemplate[] self-determination elections among a subset of the [Hospital's] unrepresented, residual employees, to determine whether these employees desire to become part of an already-existing unit of non-professionals represented by the Union." (JA 22.) The Regional Director concluded that the "petitions do not contemplate the creation of new or distinct units, and therefore are not contrary to the Health Care Rule." (JA 22.) Given this explicit analysis by the Regional Director in the Decision and Direction of Election, the Hospital's argument (Br. 47) that the Regional Director failed to explain how his decision was consistent the Rule is unfathomable.

The Hospital further points to (Br. 37-38, 44-46) various times when it claims the Board failed to respond to concerns over disruptions caused by *Armour-*

Globe elections in a hospital setting. Specifically, the Hospital cites Member Hayes' dissent in *St. Vincent* (Br. 45), comments by Members Miscimarra and Johnson in denying review of the direction of election at issue in *Rush I* (Br. 37-38), and Member Johnson's comment in denying review of the direction of elections at issue in this case (Br. 44-46). At each turn, however, the Board was not silent. Rather, the Board has consistently maintained that *St. Vincent* controls the issue of *Armour-Globe* elections being permissible in acute-care facilities because they do not implicate the Health Care Rule's goal in avoiding undue unit proliferation. The Board's answer to the Hospital's repeated objection has always been that, in the context of self-determination elections, there is no disruption flowing from unit proliferation, which is the purpose behind the Rule, because such elections do not increase the number of units. The Hospital is simply unwilling to accept the Board's answer.

The Hospital contends (Br. 45, 46) that reliance on *St. Vincent* is insufficient, because it does not explain how the Board's rationale comports with the regulation's purpose of "limiting disruption caused by organizational activity." The Hospital similarly claims that the Board's reliance on *St. Vincent* does not address how the Board will prevent "repeated organizing in small groups," which the Hospital claims the Rule was meant to do. Again, as discussed above (pp. 32-

34), in discounting the Board's reliance on *St. Vincent* as insufficient, the Hospital misstates the Rule's underlying purpose.

Thus, the Hospital's claim that the Board refused to consider the policy behind the Rule or the Hospital's concerns regarding patient care (Br. 49) fails to recognize that the Board had already articulated its rationale. In *St. Vincent*, the Board fully explained its view of self-determination elections under the Health Care Rule in similar circumstances. Indeed, as Member Johnson pointed out in the Board's decision denying the Hospital's request for review in *Rush II*, the Regional Director, in ordering the elections here, "correctly applied *St. Vincent*." (JA 43.) It would serve no purpose to re-articulate that rationale in denying the Hospital's request for review in this case. The Board has fully explained how its rationale is consistent with the Health Care Rule's clear purpose to avoid undue unit proliferation, and this Court has affirmed that rationale.

3. The Hospital's claims of disruption are unsupported by the record and purely speculative

The Board is not "willfully blind" to "the reality of labor relations as they apply to hospitals." (Br. 43.) Rather, the Board (JA 21-22) properly resolved the conflict between the employees' Section 7 rights and the Hospital's concern for patient care by balancing the employees' rights guaranteed by the Act against the "conflicting legitimate interests" of the Hospital, including its interest in preventing disruption of patient care. *Beth Israel Hosp.*, 437 U.S. 483, 501 (1978).

The results of such balancing by the Board are “subject to limited judicial review.”

Id.

The Hospital’s unsupported arguments concerning patient care disruption undermine the basic organizational rights of employees to join an existing unit through a self-determination election, a right that this Court has now recognized. *See Rush I*, 833 F.3d at 207. 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. *Beth Israel*, 437 U.S. 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*, 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.

Dissatisfied with the balance the Board struck in favor of the employees' statutory rights, the Hospital points to (Br. 3, 6, 8, 19, 26, 31, 48-51) the Union's multiple petitions as evidence, per se, of patient care disruption.⁹ The conduct of the elections in this case, however, does not substantiate this claim. Here, after the Regional Director determined that, in fact, four voting blocs were appropriate for the employees covered by the Union's three petitions, he directed *Armour-Globe* elections in each of the four voting groups to take place on the same two days (March 25 and 26). With one exception, all four groups voted in the same locations during the same windows of time.¹⁰ To the extent that the Hospital attempts to paint a picture of non-stop elections being conducted at the expense of patient care, the facts here establish that the *Armour-Globe* elections among the four voting groups, as determined by the Board, occurred largely in the same manner as a single, wall-to-wall election, which the Hospital sought, would have been conducted.

⁹ The Hospital (Br. 7, 15, 47) 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.

¹⁰ The Supply Chain Tech-Warehouse employees had only one voting window on March 25, and voted in the warehouse break room. The other three voting groups shared the same two windows of time on March 25, and voted in Armour Room 994. (SA 1-4.)

The Hospital wrongly faults (Br. 47-48) the Regional Director and the Board for not acknowledging certain evidence as establishing patient care disruption, broadly claiming that “[a]ll that evidence was in the record.” (Br. 48.) Specifically, the Hospital refers to an offer of proof regarding elections in 2004 and 2006 made in the October 2014 hearing in *Rush I* and testimony from Shanon Shumpert, Director of Employee-Labor Relations, during the hearing on the representation petition that the Board ultimately dismissed for lack of an appropriate voting group (13-RC-139061). With respect to the Regional Director, the Hospital’s post-hearing brief *never* referred to either the offer of proof or Shumpert’s testimony. (JA 261-83) While the Hospital generally argued to the Regional Director that it objected to *Armour-Globe* elections because of alleged disruption, nowhere in its brief did the Hospital cite to or rely on the offer of proof or Shumpert’s testimony to support its claim of disruption. The Hospital must not criticize the Regional Director for its own failure to argue that the offer of proof and Shumpert’s testimony supported its disruption claim.

Further, in its Request for Review of the Regional Director’s Consolidated Decision and Direction of Election, the Hospital generally claimed that the offer of proof established disruption to its operations, but it provided no specific evidence supporting that claim or record citations to the offer of proof. (JA 108, 111, 112.) Similarly, the Hospital’s Request for Review omitted *any* reference, general or

otherwise, to Shumpert's testimony. The Hospital's criticism, therefore, of the Board's purported failure to address this proof of disruption rests on the improper assumption that the Hospital provided any evidence for the Board to consider. *See* 29 C.F.R. § 102.67(e) (“[A]ny request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. . . . [T]he request must contain a summary of all evidence or rulings bearing on the issues together *with page citations from the transcript[.]*”) (Emphasis added); *see also Colonial Manor*, 253 NLRB 1183, 1184 (1981).

Notwithstanding the Hospital's failure to raise these evidentiary matters to the Regional Director and the Board, the Hospital relies on (Br. 47-48) a vague offer of proof and unpersuasive testimony in an attempt to show patient disruption rather than focusing on how the elections *actually* occurred. First, the Hospital claims (Br. 48) that the record in *Rush I* establishes “the disruptive effect of election campaigns based on past experiences from 2004 and 2006.” (Br. 7.) The record does no such thing. The Hospital's offer of proof at the October 2014 hearing in *Rush I* concerned two wall-to-wall elections at the Hospital, one conducted a decade earlier in 2004 and another conducted in 2006. Aside from the obvious staleness of the Hospital's proffered evidence and its questionable relevance to the smaller *Armour-Globe* elections here, the offer of proof from the

2014 proceeding was nebulous. It referred to unspecified difficulties in staff coverage when employees voted in 2004 and 2006, time spent by employees discussing the elections, and unspecified complaints from patients and families. (JA 385.) The Hospital's offer regarding two elections in different classifications of employees failed both to identify a single instance of disruption to its operation during the decade-old elections and to allude to specific documents or testimony that, if admitted, would have shown any effect, much less a disruptive one, on patient care. The "evidence" provided by the Hospital was far from convincing. Indeed, this Court did not find the Hospital's evidence compelling when it upheld the direction of election in *Rush I*, notwithstanding the Hospital's same patient care disruption assertions.

Shumpert's testimony suffers from the same flaw as the offer of proof. Shumpert generally testified that as a result of the election at issue in *Rush I*, employees were distracted (JA 323) and managers and unit directors complained to her about disruptions caused by union activity (JA 324). Shumpert's testimony was short on specifics and tinged with the Hospital's dangerous assumption that "anything that takes [the Hospital] off [delivering healthcare to patients] can be viewed as disruptive. . . . It's disruptive in the sense that it's a distraction from [the employees'] normal job." (SA 6.) Further, its claim of disruption ignores the fact that the Hospital *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. In short, the testimony cited by the Hospital fails to demonstrate that any issue of patient disruption is tethered to reality rather than hypothetical, generalized concerns.

Next, the Hospital claims (Br. 48) that the Board failed to consider its argument that election proliferation, as opposed to *unit* proliferation, disrupted patient care. Rather than ignoring the Hospital's concerns, the Board determined that the proffered fears, which did not go to the Rule's core purpose in preventing unit proliferation, were outweighed by the organizational rights of employees. *See, e.g., Beth Israel*, 437 U.S. at 501 (balancing employee rights guaranteed by the Act against the "conflicting legitimate interests" of employers). In this regard, while the Hospital has the legitimate interest of preventing disruption to patient care, the Hospital must provide support for its disruption claim. *See, e.g., Mass. Society for Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 48 (1st Cir. 2002) ("[W]e see no evidence presented to the Board that disruption would be likely to occur. Without such evidence, we will not require the Board to take into consideration mere unsupported speculation . . ."); *Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 457 (2d Cir. 1994) (rejecting employer's unsubstantiated claim that wage

“whipsawing” would jeopardize patient care); *Northrop Grumman Shipbuilding*, 357 NLRB 2015, 2020 n.16 (2011) (“[S]peculation about the impact of unit size on collective bargaining and labor relations stability is exactly that, wholly unsupported by evidence of any kind.”). But the Hospital cites no record support for its stated fears of labor strife flowing from multiple elections. Indeed, noticeably absent from the Hospital’s evidentiary record is 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 nonetheless the Hospital cannot pinpoint a single example across these three attempts to build a record of disruption. Under these circumstances, the Hospital reveals only its failure to offer persuasive, specific evidence, not the Board’s willful ignorance.

In lieu of evidence, the Hospital relies on pure conjecture in an attempt to show disruption. The Hospital speculates (Br. 40) that fringe employees added to an existing unit could strike or picket because, before bargaining is complete, they are not covered by any collective-bargaining agreement. The Hospital also fears that negotiations following a “rough and tumble” election may lead to strikes. (Br. 43.) The Hospital then posits that these elections “create[] the circumstances that

lead to whipsaw strikes and wage leapfrogging.”¹¹ (Br. 46.) Such speculative claims are insufficient to outweigh the employees’ organizational rights.¹² And, in any event, the Hospital’s premise that elections and ensuing negotiations are “rough and tumble affairs” (Br. 43) is faulty, at best. Neither is intrinsically acrimonious. The premise also ignores the Hospital’s role; both parties exercise a certain amount of control with respect to elections and negotiations. Moreover, where, as here, the basic framework governing employment for the unit to which the voting groups have been added already exists, the parties do not start negotiations anew.

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, it assumes that one large election must necessarily be less disruptive than “rolling elections” (Br. 52) 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

¹¹ Likewise, the Hospital speculatively likens (Br. 38 n.13) a self-determination election to whipsawing and leapfrogging, which are understood in the multi-employer bargaining context to pressure particular employers to remain a part of the multi-employer agreement. The Hospital’s unsupported claims fall short.

¹² The Hospital unpersuasively asserted similar fears of strikes and work stoppages before the Court in *Rush I*.

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, at its core, the Hospital's argument against the Board's direction of elections in this case represents little more than its fundamental but unsupported disagreement with the appropriateness of *Armour-Globe* elections in a hospital setting. Because an *Armour-Globe* election by definition involves fewer employees than a wall-to-wall petition, there is always the potential for multiple petitions, elections, and negotiations where these types of elections are permitted. To argue, as the Hospital does, that these concerns necessarily counsel against a self-determination election is to oppose the very process itself. But, this Court has definitively foreclosed this objection in affirming the Board's decision in *Rush I* to allow *Armour-Globe* elections in acute-care facilities as consistent with the Health Care Rule and Board precedent.

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 2017

STATUTORY ADDENDUM

29 U.S.C. § 153(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 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 159 of this title and certify the results thereof, except that upon the filing of a request therefor 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.

29 U.S.C. § 157

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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1)

UNFAIR LABOR PRACTICES BY EMPLOYER. It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

29 U.S.C. § 158 (a)(5)

UNFAIR LABOR PRACTICES BY EMPLOYER. It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 159(b)

DETERMINATION OF BARGAINING UNIT BY BOARD

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this 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 (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; 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

29 U.S.C. § 160(a)

POWERS OF BOARD GENERALLY

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(e)

PETITION TO COURT FOR ENFORCEMENT OF ORDER; PROCEEDINGS; REVIEW OF JUDGMENT. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. § 160 (f)

REVIEW OF FINAL ORDER OF BOARD ON PETITION TO COURT

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 any United States

court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 C.F.R. § 103.30

Appropriate bargaining units in the health care industry.

(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:

(1)**Hospital** is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2)**Acute care hospital** is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3)**Psychiatric hospital** is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term **rehabilitation hospital** includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(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.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.

**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 10,642 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 3rd day of May, 2017

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

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2017, 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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Dated at Washington, DC
this 3rd day of May, 2017