

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

RUSH UNIVERSITY MEDICAL CENTER,

and

LOCAL 743, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

NLRB Cases 13-RC-143495  
13-RC-143497  
13-RC-143510  
13-CA-152806

D.C. Cir. Nos. 15-1273 and 15-1303

**RUSH UNIVERSITY MEDICAL CENTER'S REQUEST THAT THE BOARD SEEK  
REMAND TO PERMIT FURTHER CONSIDERATION**

**I. INTRODUCTION**

In 2014 and 2015, the full NLRB, over the objection of Chairman Miscimarra and then Member Johnson, declined to consider whether the NLRB wrongly allowed incumbent unions to petition to add small residual groups of employees to existing acute care hospital bargaining units that do not comply with the NLRB's rule regarding appropriate units in acute care hospitals, 29 C.F.R. § 103.30 ("Healthcare Rule"), resulting in repetitive petitions (and negotiations if the union wins). In *St. Vincent Charity Medical Center*, 357 N.L.R.B. 874 (2011), a divided three-member NLRB panel reversed a long-standing prior requirement that a union seeking to add additional employees to an acute care hospital unit must petition for all employees residual to the appropriate unit. It applied that same rule in the above captioned proceedings.

Rush refused to bargain to challenge these issues, and the NLRB ordered Rush to bargain without considering the issue. Because the enforcement proceeding remains pending in the D.C. Circuit, the NLRB still has the opportunity under Section 10(e) of the Act, 29 U.S.C § 160(e), to petition the Court to vacate the NLRB's prior decision and remand the case to the Board so that

it can finally take up this important issue and protect hospitals from splintered elections and negotiations as the Board intended when enacting the Healthcare Rule.

Rush respectfully requests that the Board act to take up this issue now.

*St. Vincent* remains an issue of overwhelming importance and is contrary to the letter and spirit of the Healthcare Rule. Allowing an unlimited number of *Armour-Globe* elections among small groups of employees, in some cases individual classifications, results in repeated elections with the attendant bargaining obligations for each group of employees and the labor disruptions that may result from each. Member Hayes articulated those concerns in his dissent in *St. Vincent*, predicting that the Board's decision could result in an "unknown number of mini elections" that forces a hospital and its employees to shift attention from patient care to representational issues for an indeterminate amount of time, constrained only by the Union's belief of the groups of employees in which it can succeed in elections. 357 N.L.R.B. at 858 n.4.

Chairman Miscimarra and then Member Johnson raised the same concerns. They would have reconsidered *St. Vincent* if a majority of the NLRB had been willing to do so at that time. NLRB Case No. 13-RC-132042, Unpublished Order at n.1 (issued August 27, 2014); NLRB Case Nos. 13-RC-143495, 143497, and 143510, Unpublished Order at n.1 (issued March 24, 2015).

## **II. BACKGROUND**

Rush is an academic medical center in Chicago, Illinois. The Union represents some but not all of the employees who are appropriately included in the nonprofessional unit under the Healthcare Rule. The Union's bargaining unit predated the Healthcare Rule, and thus, was a nonconforming unit. NLRB Case Nos. 13-RC-143495, 143497, and 143510, Consolidated Decision and Direction of Election at 2 (issued February 23, 2015).

**A. The Precursor to this Case, *Rush I*, Involved a Petition for a Single Classification of Employees**

Since 2014, the Union has filed a series of petitions to add employees to its existing bargaining unit. The Union filed its first petition in July 2014 in NLRB Case No. 13-RC-132042. It sought to add a single classification of employees, Patient Care Technicians (“PCT”), to its existing nonconforming unit of 700 nonprofessional employees. NLRB Case No. 13-RC-132042, Decision and Direction of Election (“D&DE”) at 2 (issued July 31, 2014).

Citing *St. Vincent*, the Acting Regional Director ordered an election only in a voting unit of PCTs. NLRB Case No. 13-RC-132042 D&DE at 3-5. Rush sought review of the D&DE. In a one sentence unpublished order, the Board affirmed the D&DE, holding that it presented no substantial issues warranting review. NLRB Case No. 13-RC-132042, Unpublished Order (issued August 27, 2014). Members Miscimarra and Johnson dissented, noting that they would have granted review for the sole purpose of permitting review of *St. Vincent*, but then conceded that in the absence of a three-member majority they could not do so. *Id.* at n.1.

The Union prevailed in the election and Rush tested the certification in Case No. 13-CA-139088. The Board denied Rush’s test of certification, but Members Miscimarra and Johnson again noted their desire to review *St. Vincent*. 362 N.L.R.B. No. 23, slip op. at 1 n.3 (Feb. 27, 2015). The D.C. Circuit deferred to the NLRB’s expertise and enforced the Board’s order requiring Rush to bargain with the Union regarding PCTs. *Rush University Medical Center v. NLRB*, 833 F.3d 202 (D.C. Cir. 2016).<sup>1</sup>

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<sup>1</sup> Because of the importance of the issues, the American Hospital Association appeared as *amicus curiae* in the proceedings before the D.C. Circuit in *Rush I*.

**B. Rush II, the Matter Currently before the D.C. Circuit, Demonstrates the Perils of the Board's Decisions in St. Vincent and Rush I**

Following on its success in the first election, the Union followed up with additional petitions, just as Rush and the dissenters predicted, targeting small groups of employees while leaving the vast majority of nonprofessional employees in limbo.

While the test of certification in *Rush I* was still pending, the Union filed three more petitions in late December 2014 seeking to represent additional small groups of employees. Those additional petitions, and the Board and Circuit Court proceedings following thereafter, are collectively referenced herein as *Rush II*.

- In NLRB Case No. 13-RC-143495, the Union's petition covered nonprofessional employees in Rush's Supply Chain Department who worked both in the hospital and at its warehouse, a facility located about a mile away from Rush's main campus.
- In NLRB Case No. 13-RC-143497, the petition covered certain unrepresented nonprofessional employees in Rush's Food and Nutrition Services department.
- In NLRB Case No. 13-RC-143510, the petition covered only Phlebotomists.

The three petitions included only about 167 of the remaining 680 unrepresented employees.<sup>2</sup> NLRB Case Nos. 13-RC-143495, 143497, and 143510, Consolidated Decision and Direction of Election at 2 (issued February 23, 2015).

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<sup>2</sup> These three petitions followed *another* petition filed by the Union, NLRB Case No. 13-RC-139061, which sought to represent a grouping of employees likely dictated by the Union's strategy of where it could win an election. It covered only a seemingly random grouping of employees in various departments, without regard to Rush's administrative divisions or the relationship of the employees in the various classifications. The Regional Director for Region 13 issued a Decision and Order in 13-RC-139061 on December 10, 2014 dismissing the petition because the petition did not seek a distinct and identifiable grouping of employees. The Union filed the three petitions in 13-RC-143495, 13-RC-143497, and 13-RC-143510 about two weeks later, covering many of the same employees from the dismissed petition.

After a pre-election hearing, the Regional Director for Region 13 ordered *four* elections under the three petitions, again applying *St. Vincent* and refusing to consider or address Rush's concerns about the effects of multiple elections on acute care hospitals. The Regional Director ordered two elections in Case No. 13-RC-143495: one election for the Supply Chain employees who worked at Rush's main campus, and another for the Supply Chain employees at Rush's warehouse. *Id.* at 24. In Case No. 13-RC-143497, the Regional Director ordered an election among all remaining unrepresented nonprofessional employees in Food and Nutrition Services, including several classifications that the Union omitted from its petition. *Id.* The Regional Director concluded, citing *St. Vincent*, that the petition in Case No. 13-RC-143510 covering Phlebotomists was appropriate and ordered an election among the employees in that classification. *Id.*

Rush requested review of the Regional Director's Consolidated D&DE. In another single sentence unpublished order, the Board again denied review. NLRB Case Nos. 13-RC-143495, 143497, and 143510 Unpublished Order (issued March 24, 2015). Former Member Johnson dissented from the denial of review. In doing so, he remarked as follows:

But the broader question is posed here whether, despite being permissible under *St. Vincent*, the piecemeal organizing and the conducting of so many elections to add employees to a non-conforming unit at acute care hospitals is consistent with the intention behind the Health Care Rule. Member Johnson believes that allowing a rolling series of petitions, as here, contravenes one of the key purposes of the Health Care Rule: streamlining the representation process and minimizing the disruption that results from questions concerning representation arising at acute health care facilities.

*Id.* at n.1.

The Union lost the elections among the Food and Nutrition Services employees and the Phlebotomists. It prevailed in the two elections among the Supply Chain employees in Case No. 13-RC-143495.

In NLRB Case No. 13-CA-152806, Rush tested the two certifications resulting from the two elections for the Supply Chain employees in Case No. 13-RC-143495. In the order granting the General Counsel's motion for summary judgment, Member Johnson again noted that he would have granted review in the underlying representation proceeding to consider whether *St. Vincent* was correctly decided. *Rush University Medical Center*, 362 N.L.R.B. No. 163, slip op. 1 at n.1 (Aug. 7, 2015).

The test of certification is currently pending before the D.C. Circuit as Case Nos. 15-1273 and 15-1303, with oral argument scheduled before a three-judge panel on December 6, 2017.

It is this case, *Rush II*, that Rush asks the NLRB to have vacated and remanded so that it can finally take up these important issues.

### **III. ARGUMENT**

#### **A. The Board Has the Authority to Petition the D.C. Circuit to Remand *Rush II* to Permit Further Consideration**

The Board still has the authority to petition the D.C. Circuit for a voluntary remand of the matter. Given the national importance of these issues to the delivery of healthcare in acute care hospitals, the Board should exercise its discretion to do so, and consolidate this matter with any others currently pending before the Board presenting similar issues.

The Supreme Court held in *Ford Motor Co. v. NLRB*, 305 U.S. 364, 369-70 (1939) that a circuit court of appeals has discretion under its powers of equity to grant a motion for remand

filed by the Board or another agency to reconsider its decision. The Board has filed such motions in the past so that it may reconsider the law.

For instance, in *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 999 n.15 (D.C. Cir. 1972), a case principally relating to the proper forum for a petition for enforcement, the Board sought a voluntary remand from the D.C. Circuit to reconsider the pending appeal under a case it recently decided. Because the D.C. Circuit determined that venue was appropriate in another court, it left the decision to that court.

Circuit Courts of Appeal have granted motions for voluntary remand. In *E.I. Du Pont de Nemours & Co. (Chestnut Run) v. NLRB*, 733 F.2d 296 (3d. Cir. 1984), the Board moved for a voluntary remand after its order had already been enforced and a petition for rehearing *en banc* was filed. According to the dissenting judge, the principal basis for the Board's remand was that it had another case before it that caused it to reconsider the decision before the court. *Id.* at 299.

The *E.I. du Pont* Court granted the Board's motion for a voluntary remand, principally in deference to the "Board's special expertise in interpreting the Act." *Id.* at 297-98. The Court disagreed with the notion that "the deference required of us evaporates entirely after a Board decision is submitted to a court for review." *Id.* at 298 n.1. It further stated, "[W]e nonetheless believe that the Board's expertise informs its judgment that a case requires reconsideration in much the same fashion as it informs the Board's prior decision on the merits of that case." *Id.*

Requesting a voluntary remand to reexamine the issues presented in this case would be no different than the outcome if the Court remanded the case: the decision in the unfair labor practice case arising from the test of certification would be vacated and the underlying representation case reopened for further proceedings. *Tito Contractors, Inc.*, 362 N.L.R.B. No. 119 (2015), *enf. denied* 847 F.3d 724 (D.C. Cir. 2017), unpublished Board Decision in 05-CA-

149046 directing Regional Director to reopen representation matter in 05-RC-117169 (September 26, 2017).

**B. The Issues Presented Are of Singular Importance for Acute Care Hospitals, and Warrant a Remand so that the New Board Can Take Them Up**

While the NLRB has used this procedural mechanism to recall cases only rarely, this is a case where the Board should exercise this power. The risks to patient care created by the Board's decisions, beginning with *St. Vincent*, are obvious. The strategy endorsed by the Board countenanced a divide-and-conquer tactic for unions to file rolling representation petitions in acute care hospitals with exiting nonconforming units, something the NLRB has sought to avoid and Member Hayes predicted in his dissent in *St. Vincent*. Here, the Union took that strategy to its logical extreme by filing five petitions in six months, and three simultaneous petitions for small groups of employees, leaving all other unrepresented nonprofessional employees on the sidelines for an indeterminate period of time.

As Member Johnson noted in his dissent to the denial of Rush's Request for Review in Case Nos. 13-RC-143495, 143497, and 143510, the Board enacted the Healthcare Rule to minimize the disruption to acute care hospitals and their patient care operations by streamlining the representation process. Allowing an interminable number of small elections in penny packets of employees as small as a single classification (which the Union did *twice* at Rush) is wildly inconsistent with that goal.

**1. The Panel Majority Misinterpreted the Healthcare Rule in *St. Vincent***

The Board should consider whether the interpretation of the Healthcare Rule it expressed in *St. Vincent* is consistent with the Rule's stated purpose. The majority in *St. Vincent* based its interpretation on a slender reed: the text of 29 C.F.R. § 103.30(c), which provides that when a

“petition for additional units” is filed where a nonconforming unit exists, such petition should “comport, insofar as practicable, with the appropriate unit set forth in” the Healthcare Rule.

The majority in *St. Vincent* construed the language of 29 C.F.R. § 103.30(c) in the strictest possible manner. It reasoned that, because the Rush petitions were not for additional units but rather to add to an existing unit, the Rule did not apply. But that makes no sense, because the Board never explained in *St. Vincent* or either Rush case why hospitals with existing nonconforming units should receive less protection than those with units that have been organized since the Rule became effective. The Board’s policy on this issue thus blows a gaping hole in the protections that the Healthcare Rule was designed to provide. *St. Vincent*, 357 N.L.R.B. at 857-58, 857 n.2 (Member Hayes, dissenting).

Contrary to the majority in *St. Vincent*, there is an easy and eminently “practicable” way to bring the existing nonconforming unit into compliance with the Healthcare Rule: require an *Armour-Globe* election among all nonprofessional employees at Rush. The Union agrees; it filed two *Armour-Globe* petitions in 2004 and 2006 for all remaining unrepresented nonprofessional employees. See *Rush University Medical Center*, NLRB Case No. 13-RC-21158; *Rush University Medical Center*, NLRB Case No. 13-RC-21439.

2. **The Panel Majority in *St. Vincent*, and the Board in Defending the Decision Before the Court of Appeals, Disregarded the Purpose of the Healthcare Rule and Other Bedrock Principles of Board Law**

In addition to ignoring the purpose of the Healthcare Rule, the Board has also ignored its own rules about collective bargaining for groups of employees who are added to an existing unit. In defending this case before the D.C. Circuit, the General Counsel has gone to astonishing lengths to hide from well-established caselaw holding that newly-represented groups of employees do not fall under the terms of existing collective bargaining agreements, and thus, the employer and union must separately bargain over the group of employees until such time as the

collective bargaining agreement is due for renegotiation. *See, e.g., Wells Fargo Armored Service Corp.*, 300 N.L.R.B. 1104 (1990).

Of course, because the employees to be added are not covered by the no-strike clause in the existing collective bargaining agreement, there is nothing to prevent them from striking or engaging in other disruptions to operations. They might use the negotiation process as an opportunity to pit themselves against another group of employees for the purpose of wage leapfrogging. That, in turn, could lead to a whipsaw strike.

But in the rulemaking process for the Healthcare Rule, the Board explicitly stated that such outcomes are to be avoided. In its first Notice of Proposed Rulemaking with regard to the Health Care Rule, published in the Federal Register on July 2, 1987, the Board explained the purpose of the rulemaking process for the Health Care Rule as follows:

In so doing, the Board must effectuate section 7 rights by permitting bargaining in cohesive units, units with interests both shared within the group and disparate from those possessed by others; weighed against this must be Congress' expressed desire to avoid proliferation in order 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.

284 N.L.R.B. at 1518.

The Board also ignores the disruptive effect of election campaigns on a hospital's operations. Although Rush presented such evidence at the pre-election hearing for Case Nos. 13-RC-143495, 143497, and 143510, it is nearly a truism that elections divert employees' attention from their jobs and cause them to focus upon the decision regarding representation. While section 7 rights are important and employees have the right to determine whether or not they wish to be represented for purposes of collective bargaining, the Board's role is to strike the appropriate balance between those rights and the ability of a hospital to care for its patients. As Members Hayes, Miscimarra, and Johnson all recognized, the decision in *St. Vincent* ignores that

balance and sharply tips the scales in favors of unions, at the expense of hospitals and their patients.

**C. The Interest in Establishing a Coherent National Policy on the Issues Presented by This Case Outweighs any Arguments Regarding Delay**

The Union may oppose this request, claiming that it delays the representation process for the employees in Rush's Supply Chain Department who voted in favor of Union representation. But the issue here – determining appropriate voting units in acute health care institutions with existing nonconforming units – is one of national importance. Getting the law correct on a going-forward basis is important to ensure that the representational rights of employees are balanced with appropriate protections for acute care hospitals.

**IV. CONCLUSION**

The Board has an opportunity to right the wrongs that it imposed on Rush and all other acute care hospitals by its decisions in *St. Vincent* and the Rush representation cases. It can do so by moving for a remand of *Rush II* so that the full Board can consider whether the three-member panel correctly decided *St. Vincent*.

Dated: Chicago, Illinois  
November 7, 2017

Respectfully submitted,

RUSH UNIVERSITY MEDICAL CENTER

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## CERTIFICATE OF SERVICE

On November 7, 2017, I filed the foregoing Request for Review electronically with the Executive Secretary of the National Labor Relations Board, and pursuant to the Board's Rules and Regulations, served true and correct copies via electronic mail upon the following recipients:

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s/ Kenneth F. Sparks \_\_\_\_\_