Case Nos. 12-1027 and 12-1174

In The United States Court Of Appeals For The Sixth Circuit

KINDRED NURSING CENTERS EAST, LLC
d/b/a Kindred Transitional Care And Rehabilitation—Mobile f/k/a Specialty Healthcare And Rehabilitation Center Of Mobile,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

Intervenor.

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

Case 15-RC-8773, 357 NLRB No. 83 (Aug. 26, 2011) and
Case 15-CA-68248, 357 NLRB No. 174 (Dec. 30, 2011)

BRIEF OF *AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, THE HONORABLE PHIL ROE, CHAIRMAN, THE HOUSE HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SENATOR MICHAEL B. ENZI, RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, AND SENATOR JOHNNY ISAKSON, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS AS FRIENDS OF THE COURT

Filed In Support Of The Petitioner/Cross-Respondent's Petition for Review

Stefan Marculewicz (MD Fed. Bar No. 24946)
Ilyse Schuman (DC Bar No. 995067)
LITTLER MENDELSON, P.C.
1150 17th Street, N.W., Suite 900
Washington, DC 20036
Telephone: 202.842.3400
Facsimile: 202.842.0011
E-mail: smarculewicz@littler.com
ischuman@littler.com

David A. Kadela (OH Bar No. 0036863)
Tracy Stott Pyles (OH Bar No. 0074241)
LITTLER MENDELSON, P.C.
21 East State Street, Suite 1600
Columbus, OH 43215
Telephone: 614.463.4201
Facsimile: 614.221.3301
E-mail: dkadela@littler.com
tpyles@littler.com

William Emanuel (CA Bar No. 35914)
LITTLER MENDELSON, P.C.
2049 Century Park East, 5th Floor
Los Angeles, CA 90067
Telephone: 310.553.0308
Facsimile: 310.553.5583
E-mail: wemanuel@littler.com

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-1027/12-1174 Case Name: Kindred Nursing Ctrs. E., LLC v. NLRB

Name of counsel: Stefan Marculewicz

Pursuant to 6th Cir. R. 26.1, certain Members of the 112th U.S. Congress (Amici Curiae)
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 23, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Stefan Marculewicz
Littler Mendelson, P.C.
Washington, DC 20036

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6CA-1
8/08

TABLE OF CONTENTS

PAGE

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FORM i

TABLE OF AUTHORITIES iii

I. INTEREST OF THE *AMICI CURIAE* 1

II. ARGUMENT 3

A. Specialty Healthcare Effectively Eliminates Section 9(c)(5) From The Act And Returns The NLRA To Its Pre-1947 Legislative Position. 3

1. The Plain Language of the Act and the Legislative History Establish That Congress Did Not Intend for the Board to Rely Upon the Extent of Employee Organizing as the Basis for Unit Determination. 3

2. Congress Did Not Grant the Board Authority to Define National Labor Policy Unsupported by Congressional Intent. 8

3. Specialty Healthcare Renders the Extent of Employee Organizing the Only Real Factor for Unit Determinations. 9

B. Specialty Healthcare's Impact On Collective Bargaining, The Majority Rule, Industrial Peace, And Employer Operations, Demonstrates The Importance Of The Congressional Policy Protected By Section 9(c)(5). 12

III. CONCLUSION 18

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

PAGE

CASES

American Ship Bldg. Co. v. NLRB,
380 U.S. 300 (1965) 8, 9

Botany Worsted Mills,
27 NLRB 687 (1940) 5, 7

Garden State Hosiery Co.,
74 NLRB No. 52 (1947) 5, 12, 14

Laidlaw Waste Syst., Inc. v. NLRB,
934 F.2d 898 (7th Cir. 1991) 11, 15

Lyng v. Payne,
476 U.S. 926 (1986) 8

New England Spun Silk Co.,
11 NLRB 852 (1939) 7

NLRB v. A. J. Tower Co.,
329 U.S. 324 (1946) 14

NLRB v. Brown,
380 U.S. 278 (1965) 9

NLRB v. Ins. Agents' Int'l Union,
361 U.S. 477 (1952) 9

NLRB v. Lundy Packaging Co.,
68 F.3d 1577 (4th Cir. 1995) 11

NLRB v. Metro. Life Ins. Co.,
380 U.S. 438 (1965) 6, 12

Specialty Healthcare,
357 NLRB No. 83 (Aug. 26, 2011) ..... passim

Wheeling Island Gaming,
355 NLRB No. 127 (2010) 15

TABLE OF AUTHORITIES (CONTINUED)

PAGE

STATUTES

The Labor Management Relations Act (Pub.L. 80-101, 61 Stat. 136, enacted June 23, 1947, 29 U.S.C. §§ 141, *et seq.*) 3

The National Labor Relations Act (Pub.L. 74-198, 49 Stat. 449, codified as amended at 29 U.S.C. §§ 151–169) ..... passim

OTHER AUTHORITIES

National Labor Relations Board, Twenty-Eighth Annual Report 51 (1963) 8

LEGISLATIVE MATERIALS

Congressional Record, Senate (June 12, 1947) 8, 14

H.R. Rep. No. 80-245 (1947).....5, 7

H.R. Rep. No. 80-510 (June 3, 1947) (Conf. Rep.) 7

Hearing on S. 1958 Before the Committee on Finance, Education and Labor, Indian Affairs, and Manufacturers, 74th Cong. 1458 (1935) 4

House Committee Report (April 11, 1947) 7

Legislative History of the Labor Management Relations Act (1947) 7, 8, 13, 14

S. Rep. No. 74-573 (1935) 5, 13, 14

I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae are Members of the United States Congress, The Honorable John Kline, Chairman, The House Committee on Education and the Workforce, The Honorable Phil Roe, Chairman, the House Health, Employment, Labor, and Pensions Subcommittee of the House Committee on Education and the Workforce, Senator Michael B. Enzi, Ranking Member, Committee on Health, Education, Labor, and Pensions, and Senator Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Committee on Health, Education, Labor and Pensions. The *Amici* are all currently serving in the One Hundred Twelfth United States Congress.[1]

Section 9(c)(5) of the National Labor Relations Act, as amended ("the Act" or "NLRA"), provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." The decision of the National Labor Relations Board ("Board") in *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2011) essentially removes Section 9(c)(5) from the Act, and returns the statute to its pre-1947 state. As Members of Congress, the *Amici Curiae* have a strong interest in ensuring that Congressional intent is effectuated, and believe it is

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amici Curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission.

important to apprise the Court of the significant legislative history and policy considerations that went into the passage of Section 9(c)(5). The Board's authority in this area was defined by statute. When the Board creates policy that conflicts with that statute, or circumvents the legislative process, the *Amici*, as Members of Congress, feel they have a duty to preserve the legislative decisions that went into the statute's creation. The *Amici* also believe such a major change in the law as the elimination of Section 9(c)(5) should only be made through an amendment of the statute, which is the exclusive province of Congress.

As democratically elected officials themselves, the *Amici* also believe that one of the principal considerations in defining a bargaining unit under the NLRA is to preserve and protect the notion of majority rule. Ensuring majority rule was a key consideration of Congress when it enacted Section 9(c)(5) in 1947. As such, the *Amici* believe they are uniquely positioned to address this topic and offer this Appellate Court important insight into the legislative history.

The *Amici Curiae* support the Petitioner/Cross-Respondent's Petition for Review inasmuch as the Act and legislative history establish that the Board exceeded its authority, acted in contravention of the Act, and rendered the extent of employee organization the primary, and likely only, factor relevant to establishing a bargaining unit. Because the Board's decision in *Specialty Healthcare* exceeds

the legislative authority granted to it, the *Amici* respectfully request that this Court not enforce the Board's Order in this case.

II. ARGUMENT

A. *Specialty Healthcare* Effectively Eliminates Section 9(c)(5) From The Act And Returns The NLRA To Its Pre-1947 Legislative Position

1. The Plain Language of the Act and the Legislative History Establish That Congress Did *Not* Intend for the Board to Rely Upon the Extent of Employee Organizing as the Basis for Unit Determinations

Congress did not grant the Board authority to rely upon the extent of employee organizing as the basis for determining whether a unit is appropriate for collective bargaining. The National Labor Relations Act (Pub.L. 74-198, 49 Stat. 449, codified as amended at 29 U.S.C. §§ 151–169) ("NLRA" or "the Act"), was enacted in 1935 and includes Section 9(b), which requires the Board to decide the appropriate bargaining unit in *each* case:

> "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 . . ."[2]

29 U.S.C. § 159(b).

---

[2] The remaining provisions in Section 9(b) were added by The Labor Management Relations Act (Pub.L. 80-101, 61 Stat. 136, enacted June 23, 1947, 29 U.S.C. §§ 141, *et seq.*, informally the Taft–Hartley Act), and are not relevant to the issues addressed in the instant brief.

Limitations on the Board's ability to determine the appropriateness of a bargaining unit based upon the extent of organizing, while not expressly included in the 1935 legislation, were clearly a concern of Members of Congress at the time.

> "The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. *If the employees themselves could make the decision without proper consideration of the elements which could constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant*."

Hearing on S. 1958 Before the Committee on Finance, Education and Labor, Indian Affairs, and Manufacturers, 74th Cong. 1458 (1935) (Testimony of Francis I. Biddle, Chairman of the precursor to the National Labor Relations Board) (emphasis added). The final Senate report issued before the NLRA was enacted in

1935 also portrayed Congress's intent that the *Board not rely upon the extent of organizing* when determining an appropriate unit:

> "Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. *And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.*"

S. Rep. No. 74-573 (1935) (emphasis added).

Despite expressions of Congressional intent the Board failed to honor it. Instead, it proceeded to develop precedent that condoned reliance upon the extent of organizing as a basis to determine the appropriateness of a bargaining unit. *See Botany Worsted Mills*, 27 NLRB 687 (1940) (Board decision approving unit of trappers and sorters, which comprised one department in employer's plant, expressly criticized by the House Report on Section 9(c)(5) (*discussed infra*), *see* H.R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947)). The debate came to a head in the case *Garden State Hosiery Co.*, 74 NLRB No. 52 at 326 (1947), where the Board majority endorsed and justified its use of the extent of organization as a principal criterion for defining a bargaining unit. *Id.* at 322. Board Member Reynolds wrote in a passionate dissent that "[e]ven more important, no minority group—either pro-union or anti-union—may be permitted to manipulate the

boundaries of the appropriate unit for the sole purpose of constructing another wherein it comprises a majority. Obviously indulgence in such tactics—commonly referred to in political science as 'gerrymandering'—makes a mockery of the principle of majority rule." *Id.* at 326.

In light of the failure of the Board to heed Congressional intent following passage of the NLRA in 1935, Congress amended the Act to include an *express* prohibition of reliance on the extent of organization as controlling in determination of the appropriateness of a bargaining unit. In 1947, as one of the Taft-Hartley amendments to the Act, Congress included Section 9(c)(5), which provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). Under this provision, Congress sought to preclude the Board from using the extent of employee organization as a controlling factor when determining the appropriate unit in each case. *See NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441 (1965) ("[I]n passing [Section9(c)(5)] Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization . . . [.])."

The House Report on the proposed 1947 amendments confirmed that Section 9(c)(5) was specifically targeted to "strike[]" at the Board's use of the extent of organization factor:

> "*Section 9[(c)(5)] strikes at a practice* of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 NLRB 852 (1939); *Matter of Botany Worsted Mills*, 27 NLRB 687 (1940)). *While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9[(c)(5)] provides, is not controlling*."[3]

1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 328 (1947) (House Report No. 245, April 11, 1947) (emphasis added).[4] Senator Taft also confirmed that Section 9(c)(5) was aimed at preventing Board action premised upon the "extent of organization" theory, because it was contrary to Congressional intent:

> "This [Section 9(c)(5)] amendment was contained in the House bill. *It overrules the 'extent of organization' theory sometimes used by the Board in determining appropriate units.* Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities insurance companies and other businesses whose operations are widespread. It is sufficient to answer to

---

[3] As of the House Committee Report on April 11, 1947, Section 9(c)(5) was still referred to as Section 9(f)(3). It became Section 9(c)(5) in a subsequent conference agreement. *See* Committee of Conference, House Report No. 510, June 3, 1947. The language of the statutory provision was unaltered.

[4] References to the two volume treatise on the Legislative History of the Labor Management Relations Act are abbreviated herein as "__ Leg. Hist. __."

> say that the Board evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical consideration, etc., any one of which may justify the finding of a small unit. *The extent-of-organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units.*"

2 Leg. Hist. 1625 (Congressional Record, Senate, June 12, 1947) (emphasis added). The Board itself has long recognized Congress's mandate that "[a]lthough the extent of organization may be a factor evaluated, under section 9(c)(5) it cannot be given controlling weight." *See* National Labor Relations Board, Twenty-Eighth Annual Report 51 (1963).

2. Congress Did *Not* Grant the Board Authority to Define National Labor Policy Unsupported by Congressional Intent

The Board's power "is no greater than that delegated by Congress," *Lyng v. Payne*, 476 U.S. 926, 937 (1986), and Congress did *not* grant the Board "general authority to define national labor policy by balancing the competing interests of labor and management." *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). The Board does *not* have the authority to institute a reevaluation of labor policy. "[T]hat is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the

country." *See NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499-500 (1952). As the Supreme Court explained, if Congress's policy has not yet moved in a particular direction, "we do not see how the Board can do so on its own." *Id.*, 361 U.S. at 500.

When the Board exceeds its legislative authority, the courts are the last line of defense to protect legislative policy. The Supreme Court acknowledged this duty when it wrote that:

> "Reviewing *courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.* Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. *** But . . . 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'"

NLRB v. Brown, 380 U.S. 278, 291-292 (1965), *quoting American Ship Building Co.*, 380 U.S. at 318 (emphasis added).

3. *Specialty Healthcare* Makes the Extent of Employee Organizing the Only Real Factor in Unit Determinations

In *Specialty Healthcare* the Board supplanted decades of established law and practice with a new standard that enables any group of employees in a workplace

to be found an appropriate unit for purposes of collective bargaining. The Board held that:

> "[w]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, *unless the party so contending demonstrates* that employees in the larger unit share an *overwhelming community of interest* with those in the petitioned-for unit."

Specialty Healthcare, 357 NLRB No. 83 at 17 (emphasis added). The definition of "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" is extremely broad. Its breadth becomes apparent when one considers how the Board indicated it would treat a challenge to the petitioned-for unit. The Board held that to conclude a unit is inappropriate necessitates a finding of "overwhelming" considerations established by the party challenging the appropriateness of the petitioned-for unit. *Id.* Indeed, the Board went so far as to assert that a unit that was also appropriate or even *more* appropriate would not satisfy the test. *Id.*

Because of these criteria, and the burden they impose upon the party challenging a petitioned-for unit, the standard established by *Specialty Healthcare*

makes the extent of organization a primary consideration. Not only does it provide a ready passage for a petitioner to gerrymander a bargaining unit based upon the extent of its ability to secure support from employees, but it places an insurmountable burden upon a party contesting a petition, whether an employer or a competing labor organization, to prove the unit is insufficient.[5] *See NLRB v. Lundy Packaging Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995), stating that:

> "By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization."

Id. at 1581 (*quoting Laidlaw Waste Syst., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). As a practical matter, the parameters established by *Specialty Healthcare* assign controlling weight for appropriate unit determinations to the extent of employee organization. That approach violates Section 9(c)(5), and Congressional intent.

Perhaps in an attempt to deflect the inevitable criticism that its disregard of the directives of 9(c)(5) would draw, the Board attempted to conform its holding in *Specialty Healthcare* with that statutory provision. 357 NLRB Slip Op. at 9. It did so by stating that "Congress intended to overrule Board decisions where the unit

---

[5] *Amici Curiae* believe that the Board provided such little guidance about the criteria for rebutting the presumption of an appropriate unit because the real goal of *Specialty Healthcare* is to overcome the limitations Congress imposed through Section 9(c)(5).

determined could *only* be supported on the basis of the extent of organization." *Id.* (*quoting NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 442 (1965)) (emphasis in original). "In other words, the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit." *Id.* Notwithstanding the Board's efforts to clarify how *Specialty Healthcare* conforms to Section 9(c)(5), the Board's decision brings to the forefront the extent of organization as the primary factor for consideration, and relegates to an afterthought the traditional principles used since 1947 to determine an appropriate unit.

B. ***Specialty Healthcare's* Impact On Collective Bargaining, The Majority Rule, Industrial Peace, And Employer Operations, Demonstrates The Importance Of The Congressional Policy Protected By Section 9(c)(5)**

"It has long been recognized that the democratic principle of majority rule is the basis of the National Labor Relations Act and the *sine qua non* of effective collective bargaining which the Congress prescribed as a substitute for internecine warfare between management and labor." *Garden State Hosiery*, 74 NLRB 318, 326 (1947) (Member Reynolds dissenting). Nothing is more fundamental to our democratic society. The Board's *Specialty Healthcare* decision not only contradicts the plain-language of the Act, Congressional intent, and long-standing precedent, it is also contravenes this fundamental principle behind the Act.

The legislative history confirms that the Board was charged by Congress with promoting industrial peace through effective collective bargaining, and that is why a cornerstone policy of the Act is majority rule.

> "*The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions.* Since it is well-nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And, by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. *Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chose by the majority than with numerous warring factions.*"

2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2313 (1935) (Senate Report No. 573, Congressional Record, National Labor Relations Act, 74th Congress, 1st Session) (emphasis added). Later during the debate over the 1947 amendments to the Act, Senator Taft expressed support for the fact that Section 9(c)(5) would serve to eliminate a particularly bad practical result in the workplace. He stated that "[the extent of organization theory]'s use has been particularly bad where another union comes in and organizes the remainder of the unit which results in the establishment of two

inappropriate units." 2 Leg. Hist. 1625 (Congressional Record, Senate, June 12, 1947). There can be no doubt that his remarks favored a single appropriate unit that encompassed the full complement of employees, the majority of which would decide whether a petitioning labor organization would represent them all.

The Supreme Court recognized that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary [under the Act]," and "[i]n carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in § 9(a), a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.'" *See NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330-331 (1946), *citing* S. Rep. No. 573, 74th Cong., 1st Sess. 13. It is only within this democratic framework that the Board can adopt policies and promulgate rules and regulations under the Act. Again, Board Member Reynolds noted this fact in his dissent in *Garden State Hosiery* when he wrote, "[w]here workers are bound together by the similarity of their skills and duties, and by the administration and organization of the employer's business, it is practically impossible to apply different terms and conditions of employment to separate parts of the group without encountering resentment and reproach. Indeed it was this very thought that impelled the Congress to insert the principles of majority rule into the Act." 74 NLRB at 326.

Specialty Healthcare presents a compelling argument that the Board is no longer concerned with the effectiveness of collective bargaining between the parties (despite mandates to the contrary in the Act), and is instead focused on the success rate of petitioners in representation elections. Instead of fostering an environment in which the Board considers the impact of unit determinations on the greater group of employees and the promotion of collective bargaining, *Specialty Healthcare* creates distinctions among employees in name only to further bargaining units whose scope is dictated solely by support or lack of support for a petitioning labor organization. It is axiomatic that petitioners will petition the Board to represent the group they have organized. *See Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991). The heavy burden *Specialty Healthcare* imposes on an employer or intervening labor organization to contest a petitioned-for unit demonstrates that the Board will no longer have to provide as much as a cursory review of whether the interests of the minority unit are "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *See Wheeling Island Gaming*, 355 NLRB No. 127, n. 2 (2010). *Specialty Healthcare* essentially creates a result-oriented standard that disregards the core principles of workplace democracy. This is precisely the scenario Congress intended to avoid by placing Section 9(c)(5) into the Act.

The Board's decision in *Specialty Healthcare* may lead to more bargaining units in the short term, but it will not lead to effective collective bargaining in the long term. As a practical matter, in a worst-case scenario where there is a proliferation of mini-units, an employer could find itself in a situation where it is in a near constant state of bargaining with competing mini-units. Administration of so many bargaining relationships is costly, time consuming and inefficient as employers will likely be required to establish internal structures equipped to address a host of issues with each mini unit, such as grievances, seniority, transfers, wages, benefits and other issues. A large number of mini-units would also have interests that conflicted with each other, but when convenient, they could also work together to whipsaw the employer into making unjustified concessions. A proliferation of mini-units could also threaten an employer's ability to respond to changes in technology and operations by impeding the ability to draw across departments, job classifications and shifts, situations that would be more easily accommodated if they were all in a single larger unit. Ultimately, employers will be required to split their resources, energy and focus among various competing units rather than dealing with a uniform collective bargaining process, the effect of which will undermine the labor peace and stability the Board was charged with promoting.

The Board's *Specialty Healthcare* decision will also adversely impact workers. The proliferation of mini-units could have the effect of preventing employees from developing the experience and knowledge in the workplace and making the American workplace competitive in a global economy. As a practical matter, it will be much more difficult for workers to transfer into, out of, or between mini-units, each governed by a separate collective bargaining agreement, with its corresponding seniority and bidding procedures. Ultimately, this will adversely impact worker skill development because workers will be unwilling to sacrifice their seniority in one mini-unit to transfer and learn the skills in another. At the same time, impediments created by having multiple mini-units in the same facility will also discourage employers from cross-training and enhancing the skills of the workforce. The added costs in time and resources will force many employers to pursue the path of least resistance. Such a result is untenable because it leads to things like facility closure or relocation overseas.

Employee morale within the workplace will also be negatively impacted by the proliferation of mini-units under *Specialty Healthcare* because of the risk of having multiple collective bargaining agreements, each with different terms and conditions, some of which are likely to be more favorable than others. Market conditions that exist at the time of bargaining frequently lead to different results in negotiated contracts. As market conditions fluctuate, so do contract results. The

cohesive workforce atmosphere that most employers strive to achieve is likely to suffer from the inevitable envy, competition and conflict that results from having employees work side-by-side, but who have very different terms and conditions of employment.

The Board's decision in *Specialty Healthcare* does not just violate Congressional intent, as evidenced by Section 9(c)(5), it also critically injures the productivity of the American workplace in an ever more competitive economic environment.

III. CONCLUSION

The *Amici Curiae* respect the Board's powers to interpret the law and issue decisions as allowed by Congress. However, the Board's decision in *Specialty Healthcare* exceeds its authority, and violates Section 9(c)(5) of the Act. Accordingly, for the above considerations, the *Amici Curiae* request that this Court grant Petitioner, Cross-Respondent's Request for Review, deny Respondent, Cross-Petitioner's Cross-Application for Enforcement and find the Board's decision in *Specialty Healthcare* a violation of Section 9(c)(5) of the Act.

Respectfully submitted,

***AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, THE**

HONORABLE PHIL ROE, CHAIRMAN, THE HOUSE HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SENATOR MICHAEL B. ENZI, RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, AND SENATOR JOHNNY ISAKSON, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS.

Date: April 23, 2012 **LITTLER MENDELSON, P.C.**

/s/ Stefan Marculewicz

Stefan Marculewicz (MD Bar No. 24946)
Ilyse Schuman (DC Bar No. 995067)
1150 17th Street N.W., Suite 900
Washington, DC 20036
Telephone: 202.842.3400
Facsimile: 202.842.0011
E-mail: smarculewicz@littler.com
ischuman@littler.com

David A. Kadela (OH Bar No. 0036863)
Tracy Stott Pyles (OH Bar No. 0074241)
21 East State Street, Suite 1600
Columbus, OH 43215
Telephone: 614.463.4201
Facsimile: 614.221.3301
E-mail: dkadela@littler.com
tpyles@littler.com

William Emanuel (CA Bar No. 35914)
2049 Century Park East, 5th Floor
Los Angeles, CA 90067
Telephone: 310.553.0308
Facsimile: 310.553.5583
E-mail: wemanuel@littler.com

Counsel for Amici

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure the foregoing Brief of *Amici Curiae* has been prepared using 14 point Times New Roman font and contains 4,546 words (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), relying on the word counting system of Microsoft Word, which complies with the type-volume limitation.

/s/ Stefan Marculewicz
An Attorney for *Amici*

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, I filed a true and correct copy of the foregoing "BRIEF OF *AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, THE HONORABLE PHIL ROE, CHAIRMAN, THE HOUSE HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SENATOR MICHAEL B. ENZI, RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, AND SENATOR JOHNNY ISAKSON, RANKING MEMBER, SUBCOMMITTE ON EMPLOYMENT AND WORKPLACE SAFETY, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS AS FRIENDS OF THE COURT" electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit, using the CM/ECF system, which will send notification of that filing to all counsel of record in this litigation.

/s/ Stefan Marculewicz
An Attorney for *Amici*