Nos. 20-1076 & 20-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ST. JAMES MEDICAL GROUP

Petitioner/Cross-Respondent
v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ST. JAMES MEDICAL GROUP,	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 20-1076 & 20-1153
	)	
v.	)	Board Case No.
	)	19-CA-242468
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

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

A. Parties, Intervenors, Amicus. In Case Nos. 20-1076 and 20-1153, St. James Medical Group ("the Employer") is the petitioner before the Court, and the Board is the respondent before the Court. The Employer and the Board's General Counsel appeared before the Board in Case 19-CA-242468.

B. Ruling Under Review. The case involves the Employer's petition to review a Board Decision & Order issued on February 12, 2020 (369 NLRB No. 29).

C. Related cases. The ruling under review has not been before the Court previously.

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Dated at Washington, DC
this 1st day of October 2020

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* Authorities upon which we chiefly rely are marked with asterisks.

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

St. James Medical Group (the Employer) petitions for review, and the National Labor Relations Board (the Board) cross-applies to enforce, a Decision and Order issued by the Board on February 12, 2020, and reported at 369 NLRB

No. 29. (D&O 1-3.)[1] The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petitions and application were timely; the Act provides no time limits for such filings.

The Board's Decision and Order is based, in part, on findings made in the underlying representation (election) proceeding, Board Case No. 19-RC-233533, wherein the Employer and the Montana Nurses Association (the Union) appeared before the Board. In that proceeding, the Board found the petitioned-for unit to be appropriate, and the Union prevailed in the ensuing election. The record in that representation case 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); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. 29 U.S.C. § 159(d). The Board

[1] In this proof brief, "BX" and "RX" refer to Board and Employer exhibits, respectively. "Tr." refers to the hearing transcript and "Br." refers to the Employer's brief. "D&O" refers to the Board's Decision and Order, whereas "DDE" refers to the Decision and Direction of Election. References preceding a semicolon are to the Board's findings; those following are to supporting evidence. In the final brief, these references will be converted to joint appendix citations.

retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF ISSUE

Whether the Board acted within its broad discretion in excluding the advanced practice practitioners from the petitioned-for unit and thus properly found that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the duly certified collective-bargaining representative of the Company's registered nurses.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This unfair-labor-practice case concerns the Board's finding that the Employer violated Section 8(a)(5) and (1) of the Act by admittedly refusing to recognize or bargain with the Union as the certified representative of a unit of registered nurses. The question before the Court is whether the Union's certification was proper based on the Board's findings and procedural rulings in the representation proceeding.

I. THE REPRESENTATION PROCEEDING

A. The Union Files a Petition To Represent the Registered Nurses

On January 3, 2019, the Union filed a petition with Region 19 of the Board seeking to represent a unit of 12 registered nurses working at the four clinics in Butte and Boulder, Montana. (BX3.) The Employer contended that the only appropriate unit must also contain the advanced practice practitioners. (BX3.)

A hearing officer held a pre-election hearing, which established the following facts.

1. The Employer's operations and organizational structure

The Employer operates three non-acute outpatient health clinics around Butte, Montana that are part of the Employer's larger organization.[2] The clinics are on Crystal Street, Porphyry Street, and the Montana Tech campus. The three clinics report to the Employer's clinic manager, who, in turn, reports to a hierarchy within the larger organization. The three outpatient clinics operate as a department within the Employer's larger organization. (DDE 1; Tr. 13-17, BX2, BX3, RX1.)

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[2] A fourth clinic in Boulder, Montana was originally included in the unit description. However, the Regional Director issued a supplemental Decision and Direction of Election, wherein he amended the unit description and omitted any reference to the Boulder facility due to "the fact there are no full-time, part-time, or per-diem registered nurses employed at [that] facility and, in consideration of the issue that the Boulder facility may or may not be operated by the Employer." (Supp. DDE at 1.)

The Crystal and Porphyry clinics are organized by practice group. There are six practice groups at the Crystal clinic: pediatrics, internal medicine, family practice, neurology, cardiology, and integrated behavioral health. The Crystal clinic also contains lab facilities and the comprehensive primary care program (CPC), which integrates medical and behavioral health aspects of care. The Porphyry clinic has two practice groups: urology and obstetrics/gynecology. The smaller Montana Tech clinic is not divided by practice group and provides a wide range of services. (DDE 1; Tr. 13-17, 23-26, 30-33, 89.)

Across its clinics, the Employer has other employees, including physicians, licensed practical nurses, medical assistants, and administrative staff. The Employer's 12 registered nurses and 8 advanced practice practitioners work in the clinics and practice areas as depicted in the table below.[3] (DDE 1-2; Tr. 17-20, 23, 107-13, 123, BX3.)

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[3] The Decision and Direction of Election refers generally to all excluded employees as "advanced practice practitioners." At the hearing, the parties referred to the nurse practitioners and physician assistants as advanced practice practitioners and to the other excluded employees as a behavioral health specialist and social workers. Relatedly, the Decision and Direction of Election refers generally to social workers, whereas the parties referenced one behavioral health specialist and two social workers during the hearing. Neither party filed a request to review the Regional Director's characterization of either the excluded employees generally as "advanced practice practitioners" or the characterization of the behavioral health specialist as a social worker.

Clinic	Practice Area	Registered Nurses	Advanced Practice Practitioners[4]
	Family Practice	4	2
	Internal Medicine		1
	Pediatrics	1	
	Neurology	1	
	Float	2	
	CPC	1	
	Behavioral Health		3
Porphyry	Urology	1	1
	OB-GYN	1	1
Montana Tech		1	

2. The job functions, skills, and supervision of the registered nurses and advanced practice practitioners

The registered nurses provide direct care to patients, such as administering medications, performing diagnostic tests, monitoring medical equipment, and tracking and charting test results. Registered nurses also assist in exams, procedures, and treatments under the direction of a primary care provider. The Employer's registered nurses share the same skill set, training, education, and

[4] The Employer sets forth (Br. 8) a similar table in its brief but omits the three social workers. The Employer's tally for the advanced practice practitioners is therefore only five (rather than eight). The Employer likewise appears to have omitted the registered nurse at the Montana Tech facility from its tally of nurses, as well as the two floats and the one registered nurse in the CPC practice area, and it indicates that there are two (rather than one) nurses in Pediatrics. Its tally of registered nurses is therefore only 9, rather than 12. The Board's table is taken directly from the Decision and Direction of Election and is supported by the record. (DDE 2; Tr. 17-20, BX3.)

licensure. The manager of operations supervises the registered nurses, which includes having responsibility for their schedule and discipline. (DDE 3-4; Tr. 66-67, 78, 96-97, 115, 117, RX5.)

Nurse practitioners and physician assistants are primary care providers. Like physicians, they diagnose patients and determine appropriate treatment or how to further assess a patient's condition. As primary care providers, nurse practitioners and physician assistants independently prescribe medications and treatments, order diagnostic tests, and refer patients for medical services. Once they have made these decisions, they direct others, such as nurses, to carry them out. The Employer's nurse practitioners and physician assistants have the same job description. The chief executive physician supervises the nurse practitioners and physician assistants. That supervision includes having responsibility for their schedules—in consultation with the employees themselves—and discipline. (DDE 3-4; Tr. 66-69, 71, 74-79, 88, 96, 97, 117-18, RX6.)

Social workers, including the behavioral health specialist, assist patients with obtaining additional support that is necessary for their medical care. They are not primary care providers; nor do they diagnose patients or direct medical care. The manager of operations supervises the social workers, whereas the chief executive physician supervises the behavioral health specialist. (DDE 3-4; Tr. 55, 60, 80, 82, 85-87, 101, RX8.)

While certain advanced practice practitioners may perform registered nurse tasks, they do not do so as part of their regular duties. Registered nurses, nurse practitioners, and physician assistants may use the same medical instruments in the course of their own duties. (DDE 3; Tr. 51-54.)

With respect to training and licenses, the nurse practitioners have the same underlying skills and training as the registered nurses but have also obtained an additional degree. The physician assistants and social workers (including the behavioral health specialist) undergo different training and licensure than both registered nurses and nurse practitioners. (DDE 3; RX5, RX 6, RX 7, RX 8.)

3. Registered nurses act in multidisciplinary teams for patient care and have no interchange with other employees

All employees work within a system designed to ensure the proper treatment of patients. Within that system, for example, a nurse practitioner or physician assistant may order a test that a registered nurse later administers, and a registered nurse may consult with a social worker on support services for a patient. Employees record each step of treatment in a central electronic record-keeping system, which is accessible to others. (DDE 3; Tr. 51-52, 54, 88-91.) As in any modern health care setting, this system is integrated, but "each employee in this system, from providers to nurses to administrative staff, is performing [his/her] own discrete and well-defined role." (DDE 4.)

Registered nurses and advanced practice practitioners working within a practice area have regular contact. For example, a registered nurse and physician assistant assigned to the family practice at the Crystal clinic would frequently work together seeing patients and providing complementary care. All employees within each clinic also have a daily "huddle" attended by a representative from each practice area. (DDE 4; Tr. 23-36.)

The registered nurses and advanced practice practitioners have contact with one another as a result of working in the same building, such as having shared break rooms, and receive invitations to all staff potlucks, holiday parties, and similar social events. Registered nurses have nursing staff meetings, which the advanced practice practitioners do not attend. Nurse practitioners and physician assistants attend regular meetings of providers, along with physicians, that registered nurses do not attend. There are no permanent or temporary transfers between registered nurses and the advanced practice practitioners, and the Employer does not replace an absent nurse practitioner or social worker, for instance, with a registered nurse or vice versa. Occasionally, registered nurses will move between facilities. (DDE 4; Tr. 65, 69-79, 82, 85, 94, 103, 105-06.)

4. Salary, schedule, and other terms and conditions of employment of the registered nurses

Registered nurses and social workers are paid on an hourly basis. Nurse practitioners, physician assistants, and the behavioral health specialist are salaried.

The Employer's human resource policies, benefits, and parking facilities apply universally to all employees. Likewise, all employees receive training through an online system. If the topic is generally applicable, such as a human resource policy, then the training is substantively the same for all employees, whereas trainings specific to the job duties of a position are tailored to job classification. (DDE 4; Tr. 39-42, 55, 58, 65, 72, 74, 76, 80, 85, 105-06.)

B. The Board Determines that a Unit Limited to Registered Nurses Is Appropriate and Directs an Election

On January 22, 2019, the Board's Regional Director issued a Decision and Direction of Election based on the facts established at the hearing and *PCC Structurals, Inc*., 365 NLRB No. 160, 2017 WL 6507219, Nos. 20-1256, 20-1257 (D.C. Cir.) (oral argument scheduled Nov. 12, 2020). The Regional Director, following the directive in *PCC Structurals*, applied the standard for non-acute care facilities established in *Park Manor Care Center*, 305 NLB 872 (1991). The Regional Director analyzed and ultimately found that the Union's petitioned-for unit of registered nurses share a community of interest sufficiently distinct from the interests of the advanced practice practitioners to warrant a separate bargaining unit. In making this finding, the Regional Director relied, in part, on the parties' stipulation that the registered nurses, except for a per-diem registered nurse employed at the Montana Tech clinic, share a community of interest among themselves. (BX2.) He accordingly directed that an election be held.

The Board held the election on February 14, 2019, and the tally of ballots showed that all 12 registered nurses eligible to vote voted in favor of the Union. The Board certified the Union on February 22, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, part-time, and per-diem registered nurses employed by Respondent at its clinics located at 435 S. Crystal Street, 305 W. Porphyry Street, and 1300 W. Park Street in Butte, Montana; excluding all other employees, guards and supervisors as defined by the Act.

The Employer filed a request for review with the Board, challenging the Union's certification based on the appropriateness of the bargaining unit, which the Board (Chairman Ring, Members McFerran and Kaplan) denied.

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

In April and May 2019, the Union requested that the Employer recognize and bargain with the Union. The Employer refused. The Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint, alleging that the Employer's failure to bargain violated Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1). The Employer admitted its refusal but defended on the ground that it was testing the validity of the Union's certification as bargaining representative. On August 26, the Board's General Counsel filed a motion for summary judgment, and the Board transferred the proceeding to the Board and issued a Notice to Show Cause why the motion should not be granted.

The Employer reiterated its challenges to the Board's unit determination. It also argued that *Boeing Co*., 368 NLRB No. 67, 2019 WL 4297642, slip op. at 3 (Sept. 9, 2019), which issued after the Decision and Direction of Election, provided "clearer guidance regarding . . . *PCC Structurals*" and "established the need to correct the erroneous analysis of the [Regional Director] and Board panel." (Employer Resp. to Show Cause at 2.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 12, 2020, the Board (Chairman Ring and Members Kaplan and Emanuel) granted the General Counsel's motion for summary judgment and found that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. The Board found that all representation issues raised by the Employer were or could have been litigated in the representation proceeding. (D&O 1.) It also found that the Employer neither offered to adduce newly discovered or previously unavailable evidence nor alleged any special circumstance that would require the Board to reexamine the Regional Director's Decision. (D&O 1.) The Board rejected the Employer's contention that *Boeing* established "special circumstances warranting reconsideration," explaining that *Boeing* "did not create any new issues here." (D&O 1 n.1.)

The Board's Order requires the Employer to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with,

restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (D&O 1.) Affirmatively, the Board's Order requires the Employer to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit, to embody any understanding reached in a signed agreement, and to post a remedial notice. (D&O 1-2.)

SUMMARY OF ARGUMENT

The registered nurses unanimously chose the Union as their exclusive collective-bargaining representative, and the Board found that the Employer violated the Act by refusing to recognize and bargain with the Union. The Employer admits this ongoing refusal but argues that it is justified because the represented unit of registered nurses is inappropriate and, consequently, the Union's certification is invalid. Because the Board acted well within its discretion in finding the nurses unit appropriate and certifying the Union, the Employer's conduct is unlawful.

The Act requires the Board "to decide in each case" the appropriate bargaining unit for purposes of collective bargaining. 29 U.S.C. § 159(b). In fulfilling that duty, the Board need only select an appropriate unit, not the most appropriate unit. If the Board-certified unit is appropriate—even if other units would also be appropriate—the unit determination is valid. Here, the Board found

the registered nurses unit appropriate under *PCC Structurals*, which requires application of the Board's traditional community-of-interest test, and *Park Manor*, which directs the Board in cases such as this one—involving non-acute health care facilities—to consider precedent and evidence collected during the Board's health care rulemaking. The Employer has failed to meet its heavy burden of proving that the unit is truly inappropriate.

The Board, applying *PCC Structurals*, acted within its discretion in approving the registered nurses unit and rejecting the Employer's contention that only a combined unit of registered nurses and advanced practice practitioners was appropriate. Under *PCC Structurals*, the Board engages in a three-part inquiry. The first two steps of the analysis involve complementary inquiries as to whether the petitioned-for employees share a community of interest amongst themselves and then whether those shared interests are "sufficiently distinct" from those of excluded employees to warrant a separate unit. The third step requires a consideration of any guidelines the Board has established for appropriate unit configurations in the specific industry at issue.

Here, the Board found, based on the parties' joint stipulation, that the registered nurses share a community of interest. Indeed, the evidence shows that they share the same skills, job function, supervision, and other terms and conditions of employment. The Board then found that the nurses share a

community interest sufficiently distinct from that of the excluded employees. Notably, the nurses have specialized training and separate supervision, perform distinct job functions, maintain unique licensing that prevents job interchange, lack independent ability similar to the nurse practitioners and physician assistants who direct the nurses' work, and have different terms and conditions of employment, including their status as hourly, rather than salaried, employees. The Board found that those meaningfully distinct bargaining interests, connected to the nurses' core daily functions and requisite qualifications, outweighed the functional integration resulting from the Employer's multidisciplinary team approach to patient care.

At the third step of the analysis, the Board, adhering to *Park Manor*'s teachings, considered the evidence and findings established through the Board's health care rulemaking process and precedent involving non-acute care facilities. Those considerations fully support the Board's finding that a nurses-only unit is appropriate.

As the Board's decision makes clear, there is no merit to the Employer's argument that the Board applied the wrong standard and gave only lip service to *PCC Structurals*' requirement of determining whether employees excluded from the unit have meaningfully distinct interests that outweigh any similarities with the included employees. The Board properly applied the three-part analysis articulated in *PCC Structurals*, including its requirement that the Board, at the last step,

consider the particular industry at issue. Here, that industry is non-acute health care; therefore, the Board followed *Park Manor*'s guidance to consider the Board's health care industry rulemaking and precedent at the third and final step. The Employer also mounts several unpersuasive challenges to the Board's factual findings. And the Employer's stated concern regarding proliferation of units and residual units provides no basis for disturbing the Board's exercise of discretion in this case.

STANDARD OF REVIEW

The Supreme Court and this Court have recognized that the Board's determination of an appropriate unit "involves of necessity a large measure of informed discretion, and [consequently] the decision of the Board . . . if not final, is rarely to be disturbed." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). Accordingly, the Court grants "great deference to the Board's selection of bargaining units," and reviews such determinations for an abuse of discretion. *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012); *see Country Ford Trucks*, 229 F.3d at 1186 (affirming the Board because petitioner "fail[ed] to demonstrate that [the Board] abused its discretion in making the unit determination"). The Court will not disturb the Board's unit determination unless it is "arbitrary and unreasonable" and will only overturn a unit determination that is

"truly inappropriate." *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1179 (D.C. Cir. 1987). Nor will a reviewing court "substitute its own judgment for a rationally supported position adopted by the Board." *Local 627 IUOE, AFL-CIO v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979). The Board's underlying findings of fact are "conclusive" under Section 10(e) of the Act if they are supported by substantial evidence on the record as a whole, even if "the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

ARGUMENT

An employer's refusal to recognize or bargain with the duly certified bargaining representative of its employees violates Section 8(a)(5) and (1) of the Act. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 961-62 (D.C. Cir. 1999). Here, the Employer has admittedly refused to recognize or bargain with the Union to contest the Board's certification of the Union as the exclusive representative of its registered nurses. If the Court upholds the Board's certification of the Union, the Employer has violated the Act. *Id*.

As shown below, the Board acted well within its discretion in determining that a separate unit of registered nurses is appropriate under *PCC Structurals*, 365 NLRB No. 160, 2017 WL 6507219 (Dec. 15, 2017); and *Park Manor Care Center*, 305 NLRB 872 (1991), and in rejecting the Employer's claim that the smallest

appropriate unit must include the advanced practice practitioners. The Employer's arguments that the Board erred in applying the traditional community-of-interest standard for assessing unit appropriateness and failed to provide a reasoned explanation of its rationale sufficient for court review lack merit.

THE BOARD ACTED WELL WITHIN ITS DISCRETION IN FINDING THE REGISTERED NURSES UNIT APPROPRIATE, SO THE EMPLOYER'S ADMITTED REFUSAL TO RECOGNIZE AND BARGAIN WITH THE UNION VIOLATES SECTION 8(a)(5) AND (1) OF THE ACT

A. Applicable Principles

Section 9(a) of the Act allows for a majority of employees in a bargaining unit "appropriate for such purposes" to select an exclusive bargaining representative. 29 U.S.C. § 159(a). Section 9(b) of the Act grants the Board broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case, "to assure to employees the fullest freedom in exercising the rights guaranteed by the[e] Act." 29 U.S.C. 159(b). As the Supreme Court has stated, "[t]he Board's discretion in this area is broad, reflecting Congress' recognition of the need for flexibility in shaping the [bargaining] unit to the particular case." *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985).

Courts have long held that the Board's task is to determine simply whether the proposed grouping constitutes "*an* appropriate unit," *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015) (internal quotations omitted; emphasis

in original)—not "necessarily *the* single most appropriate unit," *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). *Accord Local 627*, 595 F.2d at 848) ("More than one appropriate bargaining unit logically can be defined in any particular factual setting . . . [and] it is not [the] duty [of the reviewing court] to determine whether other units would be appropriate or inappropriate."). The Board therefore need only choose one unit from among the range of units appropriate in each factual situation; it need not choose the most appropriate unit. *Am. Hosp. Ass'n*, 499 U.S. at 610; *accord PCC Structurals*, 2017 WL 6507219, at *4 n.7.

When, as here, an employer asserts that a petitioned-for unit must include additional employees, the Board applies *PCC Structurals* and determines "whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." 2017 WL 6507219, at *9. To assess community of interest, the Board considers its traditional factors, such as whether employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work (including job overlap between classifications); are functionally integrated with other employees; have interchange and frequent contact with other employees; have distinct terms and conditions of employment; and separate supervision. *Id.* at *13 (citing *United Operations, Inc.*, 338 NLRB

123, 123 (2002)); *accord Boeing Co.*, 368 NLRB No. 67, slip op. at 3. No one factor is dispositive. *Id.*

The two complementary inquiries ask whether the petitioned-for employees share a community of interest amongst themselves and whether those shared interests are "sufficiently distinct" from those of excluded employees to warrant a separate unit. *PCC Structurals*, 2017 WL 6507219, at *9; *accord Boeing*, 368 NLRB No. 67, slip op. at 3. Stated otherwise, the Board analyzes whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *PCC Structurals*, 2017 WL 6507219, at *13 (quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)); *accord Boeing*, 368 NLRB No. 67, slip op. at 3; *see also Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (noting that the Board's analysis considers whether petitioned-for unit shares community of interest "in distinction from other employees").[5]

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[5] *PCC Structurals* overruled the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC* v. *NLRB*, 727 F.3d 552 (6th Cir. 2013). *Specialty Healthcare* set forth a two-part framework for when a union sought to represent a unit of employees. First, the Board, after considering the traditional criteria, would find the petitioned-for unit to be an appropriate unit if the employees shared a community of interest. *Specialty Healthcare*, 357 NLRB at 945-46. Then, the proponent of a larger unit had to demonstrate that the additional employees "share 'an overwhelming community of interest"' with the petitioned-

After examining these two inquiries, the Board considers any guidelines established for specific industries regarding appropriate unit configurations. *PCC Structurals*, 2017 WL 6507219, at *13*; accord Boeing*, 368 NLRB No. 67, slip op. at 3. In *PCC Structurals*, the Board expressly reinstated the standard announced in *Park Manor* setting forth the applicable health care industry considerations for unit determinations. *PCC Structurals*, 2017 WL 6507219, at *1 n.3. *Park Manor* requires the Board to consider precedent involving either the type of unit sought or the type of health care facility in dispute and factors considered relevant by the Board in, and evidence presented during, certain rulemaking proceedings it undertook to address recurring concerns regarding unit determinations in the acute care setting. 305 NLRB at 875. Further, the Board observed in *Park Manor* that the general principles in the rulemaking record "are equally applicable to unit determinations in non-acute care facilities." *Id.* at 876. The Board explained that in considering the information and factors gathered and discussed during the rulemaking, and then applying them to a "number of cases" at non-acute facilities, "certain recurring factual patterns will emerge and illustrate which units are typically appropriate." *Id.* at 875 (internal citations and quotations omitted).

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for employees, "such that there 'is no legitimate basis upon which to exclude certain employees from"' the petitioned-for unit because the traditional community-of-interest factors "'overlap almost completely." *PCC Structurals*, 2017 WL 6507219, at *2 (citing *Specialty Healthcare*, 357 NLRB at 944).

1. Evidence presented and factors considered during the Board's health care rulemaking concerning registered nurses as an appropriate unit

In July 1987, prompted by the "seemingly interminable disputes" over hospital unit determinations, the Board embarked on rulemaking to establish appropriate bargaining units in the health care field. *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1148 (3d Cir. 1993); 29 C.F.R. § 103.30; *see also Am. Hosp. Ass'n*, 499 U.S. at 608. A two-year process of hearings and notice-and-comment period culminated in the Board's issuance of the Health Care Rule, which provided that, with three exceptions, eight specifically defined units would constitute the only appropriate units in acute care hospitals. 29 C.F.R. § 103.30. Among the eight specified units was the Board's determination that registered nurses in acute care hospitals constitute a discrete group whose distinctive interests warrant separate representation. In making that determination, the Board relied on unique work schedules; unique responsibilities; common supervision by other nurses; separate labor market and distinct wages from those of other professionals; separate education, training, and licensing requirements; interaction with other RNs and lack of regular and recurring contact with other professionals; lack of interchange; and history of representation and collective bargaining in separate units. *See* Collective-Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33900, 33911-33914 (proposed Sept. 1, 1988).

In developing the rule, the Board sought to find a middle-ground position and "steer[ed] a careful course between two undesirable extremes"—allocating power between labor and management by "striking the balance" in the appropriate place, with units that are neither too large nor too small. *Id.* at 33904. The Board wanted to avoid both a large unit that was difficult to organize and may "contain too diversified a constituency," and a unit that was too small that may be costly for the employer "because of repetitious bargaining, [] frequent strikes, jurisdictional disputes, and wage whipsawing, and may even be . . . too severely limiting the union's constituency and [] bargaining strength." *Id.*

The Board's administrative record details the unique collective-bargaining interests of nurses and demonstrates how those interests warrant a separate bargaining unit. For example, concerning the unique responsibilities of registered nurses, the Board observed that "other professionals specialize, and have intermittent contact with patients, nurses are unique in that their profession demands continuous interaction with patients." *Id.* at 33911. And the Board also noted that registered nurses are most often supervised by a nurse in the chain of command. *Id.*

Concerning wages, the administrative record established a singular labor market for nurses, which depresses nurse salaries "even within the framework of hospital compensation." 53 Fed. Reg. at 33912. Unlike other medical professions

such as pharmacists, the collected data showed that there is no outside pressure forcing hospital wages higher, and "when nurses and employers bargain about wages, they look to wages of registered nurses at other hospitals, not at wages of other professionals." *Id.* Moreover, the data showed that registered nurses have short career ladders, "quickly levelling out after relatively brief experience." *Id.* Nurses, therefore, conduct wage negotiations from the foregoing "unique disadvantages" despite the demand for their services. *Id.*

In considering the appropriateness of a nurse-only unit, the Board also considered that "licensing requirements may actually conflict with the requirements and practices of other professions." 53 Fed. Reg. at 33912. For example, a registered nurse's license requires nurses to complete incident reports on medication dosage errors made by other workers. That reporting requirement may cause "antagonism between the [nurses] and other professionals, which might impede collective bargaining by the professionals as a group." *Id.*

During rulemaking, the Board received "much evidence" regarding the "team concept" that is often employed in hospitals—both nursing teams and multidisciplinary teams. After careful review of all the information and argument submitted, the Board concluded that neither team concept "detract[s] from the separate appropriateness of [registered nurse] units. . . . More importantly, the fact that the [registered nurses] may interact and work with other professionals on

teams does not alter the separateness of their identity." *Id.* at 39913. The interactive approach organizes the elements of patient care but does not "alter each licensed professional's responsibility for his or her individual scope of practice." *Id.* The Board also considered cross-training and interchange between nurses and other employees and found that such replacement was limited due to hospital codes precluding such and licensing restrictions on both nurses and other professional employees. *Id.*

Rulemaking also revealed that nurses have historically had a strong preference for separate representation. And though nurse preference is not dispositive for determining an appropriate unit, the Board considered that "while bargaining could undoubtedly proceed in any one of a number of configurations, this does not necessarily answer the question whether a separate unit of [registered nurses] might not also be appropriate; or better reflect the wishes, needs and interests of [registered nurses], other professionals, and perhaps even health care providers themselves." 53 Fed. Reg. at 39913. In this regard, the record also contains nurse testimony that they "view collective bargaining, in their own unit, as the vehicle for improvement in their working conditions and for allowing them a voice in patient care." *Id.*

Nurses' preference for separate representation is likewise consistent with record evidence showing that "other professionals do not appear to react favorably

to their inclusion with [registered nurses]. The other professionals often do not participate in the organizing campaigns and are hostile to being included in bargaining units with [registered nurses]." *Id.* at 33914. The hostility stems in part from the concern of other professionals that their interests will not be "given priority" because nurses have several issues of unique concern to them. *Id.*

In short, based on these and other considerations—the foregoing discussion was not intended to be exhaustive of the administrative record—the Board ultimately concluded that registered nurses alone constitute an appropriate unit in acute care facilities.

2. Precedent concerning unit determinations of registered nurses in non-acute care facilities

Park Manor, in addition to directing the consideration of background information gathered during the rulemaking process, requires an examination of precedent relevant to unit determinations in non-acute care facilities. 305 NLRB at 875. In precedent involving such facilities, the Board has recognized that information gathered during the rulemaking process is "to be taken into account when deciding the appropriate unit in a non-acute healthcare setting," and that this information is instructive when examining factors relevant to the unit determination analysis. *Charter Hosp. of St. Louis*, 313 NLRB 951, 954 n.8 (1994).

In at least three cases involving a non-acute care psychiatric facility, the Board has found an all-nurse unit appropriate. *See McLean Hosp. Corp.*, 311 NLRB 1100, 1112 (1993); *Holliswood Hosp.*, 312 NLRB 1185, 1195 (1993); *Charter Hosp.*, 313 NLRB at 954. In all three cases, the Board found that "the factors [that] supported the Board's decision to permit separate nurses units in acute care hospitals [were] present . . . and justif[ied] a similar result." *McLean Hosp.*, 311 NLRB at 1112; *Holliswood Hosp.*, 312 NLRB at 1195 ("A review of the factors [that] supported the Board's decision to permit separate [registered nurse] units at acute care hospitals, with an analysis of the work of [registered nurses] at the Employer's [psychiatric] facility, compels the conclusion that the Employer's [nurses] have distinct functions and collective-bargaining interests."); *Charter Hosp.*, 313 NLRB at 954 (observing that "most" of the "[f]actors relied on by the Board [in rulemaking]" were present).[6]

Each of the three cases identified specific rulemaking findings to support the Board's determination that an all-nurse unit was appropriate in a non-acute care facility. Specifically, the Board in *McLean Hospital* considered nurses' unique scheduling concerns and tasks, which differentiated them from the remaining

[6] Precedent pre-dating the rulemaking likewise supported separate units for registered nurses. *See, e.g.*, *Newton-Wellesley Hosp.*, 250 NLRB 409, 411 (1980) (finding an all-nurse unit appropriate in an acute care facility with a psychiatric unit).

professionals even though there was some overlap of function resulting from a team care approach. 311 NLRB at 1112. The Board also found significant to the unit analysis other factors such as the "differences in the level and methods of compensation," no position substitution, separate supervision by other registered nurses, and administrative segregation within a department of nursing. *Id.*

In *Holliswood Hospital*, the Board rejected the employer's preference for a single wall-to-wall unit of professional and non-professional employees. 312 NLRB at 1195. In finding an all-nurse unit appropriate, the Board relied on such rulemaking factors as unique staffing, no substitutions for nurses, and separate supervision. *Id.* It also found that the multidisciplinary treatment team approach did not detract from a finding that an all-nurse unit was appropriate. *Id.*

Further, the Board in *Charter Hospital* rejected the employer's sought-after unit of all professional employees, including social workers. The Board found that the all-nurse unit sought by the union was appropriate based, in part, on: "unique work schedules; unique responsibilities; common supervision by other nurses; separate labor market and distinct wages from those of other professionals; separate education, training, and licensing requirements; interaction with other [registered nurses] and lack of regular and recurring contact with other professionals; lack of interchange; and history of representation and collective bargaining in separate units." *Charter Hosp.*, 313 NLRB at 954.

Turning to precedent involving other types of non-acute care settings, in *Jefferson Health System*, the Board determined that an all-nurse unit was an appropriate unit in a home health facility. 330 NLRB 653, 657 (2000). Seeking guidance from evidence presented during the rulemaking process, the Board rejected the employer's argument that a combined unit of nurses and other professional employees, including various types of therapists and social workers, was the *only* appropriate unit. *Id.* The Board dismissed the argument that the facility's team approach to care detracted from the appropriateness of an all-nurse unit and relied on such factors as distinct duties (nurses were responsible for direct patient care), hourly pay for nurses, and lack of cross-over and interchange in job function due to specialized training and licensure. *Id.*

The Board reached the same conclusion in *Marian Manor for the Aged & Infirm, Inc*., 333 NLRB 1084, 1095 (2001), which analyzed whether an all-nurse unit was appropriate in a nursing home setting. Relying on virtually the same factors as it did in *Jefferson Health*, the Board likewise declined to find that a combined unit of nurses and other professionals was the *only* appropriate unit. *Id.*

Applying the foregoing principles required by *Park Manor* and gleaned from the Board's health care rulemaking and applicable precedent involving non-acute care facilities, we now show, the Board acted well within its discretion in finding that the Employer's registered nurses constitute *an* appropriate unit for the

purposes of collective bargaining. The Employer cannot show the Board abused its discretion in finding that a combined unit of registered nurses and the advanced practice practitioners is the *only* appropriate unit.

B. The Registered Nurses Constitute an Appropriate Unit

The Board reasonably found, based on substantial evidence in the record and hewing to the holdings and rationale in *PCC Structurals* and *Park Manor*, that the Employer's registered nurses share a community of interest amongst themselves and that their shared interests are sufficiently distinct from the interests of excluded employees.

1. Registered nurses share a community of interest

Consistent with the parties' stipulation and the holding in *PCC Structurals*, the Board found (DDE 6) that the petitioned-for employees share a community of interest. *See PCC Structurals*, 2017 WL 6507219, at *13; BX 1. Given that the registered nurses have distinct skills, training, and job functions and are supervised separately, there is little question that the unit satisfies the first step of *PCC Structurals.*[7] (DDE 6.)

[7] Before the Court, the Employer does not contest the Board's finding (DDE 5) that the per-diem registered nurse working at the Montana Tech clinic shares a community of interest with the other registered nurses.

2. Registered nurses' interests are distinct from those of excluded employees

The Board then proceeded to the second step under *PCC Structurals* and broadened its inquiry to examine the interests of the Employer's advanced practice practitioners. The Board found that the shared interests of the registered nurses were sufficiently distinct from those of the excluded employees and that those distinctions warranted a separate nurses-only unit.

Job functions. The Board recognized that despite sharing some medical equipment, the actual job duties of the nurses and advanced practice practitioners vary significantly. Specifically, nurses provide direct patient care. *See McLean Hosp.*, 311 NLRB at 1112 (finding that where "traditional nursing tasks still constitute a significant aspect of [registered nurses'] role," such tasks "differentiate[] them from remaining professionals"). Notably, much of their work is done at the direction of the Employer's nurse practitioners and physician assistants.

By contrast, the nurse practitioners and physician assistants—both primary care providers and similar enough in their duties to share a job description—exercise considerable independence and authority in their daily functions. For example, they diagnose patients and determine an appropriate treatment. They also prescribe medications and treatments, order diagnostic tests, and refer patients for other medical services. Registered nurses are vested with no similar independence

or authority. Rather, as the Board found, "once [the nurse practitioners and physicians assistants] have made these decisions, they give direction to others, such as nurses . . . to carry [them] out." (DDE 3.)

The Board also considered that "[t]here is no evidence in the record of job overlap between the registered nurses and the advanced practice practitioners." (DDE 3.) Indeed, registered nurses are not authorized to diagnosis patients or independently direct care, which is a core job function of both the nurse practitioners and physician assistants. To be sure, certain advanced practice practitioners (not including social workers) *may* be allowed to perform registered nurse tasks, but the record contains no evidence that they do so as part of their regular duties. Such distinctions support a finding that petitioned-for employees share a community of interest sufficiently distinct from the interests of excluded employees. *See, e.g, McLean Hosp.*, 311 NLRB at 1111 (finding all-nurse unit appropriate, in part, because licensing requirements for registered nurses and the other professionals proscribe cross-training and interchange).

As for social workers, substantial evidence supports the Board's finding that there is "little basis for suggesting they must be included in a unit with registered nurses." (DDE 6.) They are not primary care providers and have a distinct job description, serving a "unique role" within the Employer's care system. (DDE 6.) They do not provide direct care, nor do they diagnose patients. Rather, they

coordinate and assist with additional support services for patients. These substantial differences in job functions supports the Board's determination that a registered-nurses unit is appropriate. *See, e.g.*, *Charter Hosp.*, 313 NLRB at 954 ("[I]t is also clear that staff [registered nurses] are hired to perform functions distinct from those performed by the other professionals."); *accord Va. Mason Med. Ctr.*, 35 F. App'x 4, 5 (D.C. Cir. 2002) (affirming Board's choice of an appropriate unit in non-acute care outpatient facility because excluded employees "direct[ed] all other patient care employees, earn[ed] substantially more than other professionals, and [had] different direct supervision").

Skills and qualifications. The Board also found that employees' respective skills and qualifications support finding the nurse-only unit appropriate. The registered nurses share the same skill set, receive the same training and education, and possess the same license, while the advanced practice practitioners "undergo specialized training and must maintain unique licensing." (DDE 6.) And "physician assistants and social workers have different training and licensure from the registered nurses." (DDE 5.) These differences counsel against including advanced practice practitioners in the unit with the registered nurses, because the "specialized training and licensure required … prevents other professionals from performing [registered nurse or licensed practical nurse] work and vice versa." *See, e.g.*, *Marian Manor*, 333 NLRB at 1094.

Contact and interchange. The Board also considered that while the registered nurses and excluded employees have frequent contact at the clinics, it was "limited to the type of contact that simply results from working in the same building . . . or having the same employer" (DDE 4), such as having shared break rooms and getting the same party invitations. That is not the type of work-related contact that supports including the excluded employees in the unit. *See, e.g.*, *Marian Manor*, 333 NLRB at 1096 (observing "substantial work-related contact" between petitioned-for and excluded employees). Further, registered nurses have nursing staff meetings, which advanced practice practitioners do not attend, and nurse practitioners and physician assistants attend regular meetings of providers that registered nurses do not attend. (DDE 4.)

Regarding interchange, there is no dispute that such transfers do not occur between the registered nurses and the excluded employees. As found by the Board, the Employer does not replace an absent registered nurse with any other employee, nor do registered nurses fill in for the physician assistants, nurse practitioners, or social workers.

Terms and conditions of employment. Although registered nurses and advanced practice practitioners are subject to the same human resources policies, the Board found that those similarities were offset by the fact that they "are not uniquely shared by the registered nurses and advanced practice practitioners, but

instead are terms and conditions of employment shared by all employees." (DDE 6.) The Board emphasized, however, that the registered nurses "differ in important terms and conditions of employment," most notably "being hourly employees while advanced practice practitioners are salaried." (DDE 6.) Different pay structures, thus, further supports the Board's finding that the nurses shared distinct interests. *Jefferson Health*, 330 NLRB at 657 (relying, in part, on hourly pay structure unique to registered nurses in finding sufficiently distinct interests).

Functional integration, departmental organization, and supervision. Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. The Board has found evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *See, e.g, Transerv Sys., Inc.*, 311 NLRB 766, 766 (1993).

Here, the registered nurses and the advanced practice practitioners work within a system that focuses on patient care and operates "as single department within the Employer's larger organization." (DDE 2-3.) That team approach is commonly used in the health care industry and, the Board acknowledged, demonstrates a "degree of functional integration." (DDE 4.) However, the Board has found a team approach to patient care non-persuasive in the functional

integration analysis. *See, e.g.*, 53 Fed. Reg. at 33913; *McLean Hosp.*, 311 NLRB at 1113 n.35 ("[A]cute care hospitals also use multidisciplinary teams to some degree, but the Board found that the team concept did not detract from the appropriateness of [registered nurse] units."). Moreover, here, "the record also demonstrates that each employee in this system, from providers to nurses to administrative staff, is performing their own discrete and well-defined role." (DDE 4.) That evidence weighs against requiring that the advanced practice practitioners be included in the nurse unit.

And with regard to supervision, the Board found it significant that registered nurses are supervised separately from the other employees. *See id.* at 1122 ("In finding an all-[registered nurse] unit appropriate I also rely on the fact that the vast majority of the registered nurses, like the nurses in acute care hospitals, are administratively segregated within a department of nursing and are separately supervised by other registered nurses."). Indeed, it is eminently reasonable that there is a different chain of command for the nurses and that the chief executive physician—a doctor—supervises primary care providers such as the physician assistants and nurse practitioners

Based on the foregoing, the Board properly found that "the advanced practice practitioner positions have important and significant distinguishing features that weigh against requiring that they be included in a bargaining unit with

registered nurses." (DDE 6.) These distinct interests—akin to interests that the Board has relied on to find that a separate nurses-only unit is appropriate at acute care facilities—support the Board's conclusion here that the nurses at this non-acute care facility constitute an appropriate unit.

3. Evidence gathered during rulemaking and precedent likewise support a finding that a registered nurse unit is appropriate

The Board, after completing steps one and two of the *PCC Structurals* analysis, then engaged with the last step, which requires it to examine the appropriate units in the industry involved. In making that inquiry, the Board is, as discussed previously, guided by *Park Manor*, which instructs the Board to look at applicable precedent and the evidence gathered during rulemaking, with the goal of recognizing "certain recurring factual patterns" of appropriate units in non-acute care settings. 305 NLRB at 875. The Board began its analysis by noting that the health care rule "recognizes registered nurses as an appropriate bargaining unit." (DDE 6.)

The Board then relied on five cases involving non-acute care facilities where the Board reviewed the factors supporting the decision to permit separate nursing units at acute care hospitals and applied those considerations to the nurses' work at a non-acute facility. (DDE 6; citing *Jefferson Health*, 330 NLRB at 653; *Marian Manor*, 333 NLRB at 1094; *Charter Hosp.*, 313 NLRB at 954 (2000); *Holliswood*

Hosp., 312 NLRB at 1185; *McLean Hosp.*, 311 NLRB at 1100). As shown above (pp. 26-29), this precedent contains an exacting discussion of the findings from the health care rulemaking process coupled with a detailed consideration of those findings and their relevancy to the bargaining interests of registered nurses in non-acute care settings. The Board here considered factors identical to those considered in that precedent—factors that have been found to be unique to nurses in their workplaces, such as training, licensing, job duties, supervision, interchange, and pay. By relying on those cases to support its finding that the proposed unit is an appropriate one, the Board adopted the thoughtful discussions contained therein and the attendant explanations as to well-settled principles concerning an appropriate unit of registered nurses. Indeed, the Board explained their applicability to the case at hand, noting that those cases, like this one, concern "registered nurses constitut[ing] a sizeable homogenous grouping of professionals, whose specialized training and licensure requirements clearly prevent other professions from performing their work." (DDE 6.) Thus, the Board recognized, as *Park Manor* instructed, that this case falls within "a certain recurring factual patter[n]" illustrating that an all-nurse unit is appropriate. 305 NLRB at 875.

In short, based on a stipulated community of interest among the registered nurses, distinct factors distinguishing the nurses in significant and relevant ways from the excluded employees, and applicable precedent and rulemaking findings

supporting a nurses-only unit, the Board did not abuse its discretion in rejecting the Employer's contention that a combined unit was more appropriate. Indeed, the Board needed only to find that the petitioned-for unit was *an* appropriate unit. It properly did so here.

C. The Employer's Arguments that a Separate Unit of Registered Nurses Is Inappropriate Lack Merit

In the main, the Employer argues (Br. 44-48) that the Board failed to offer a sufficient rationale for its finding that the nurses constitute an appropriate unit, pressing three points to support its argument. Its three claims are that the Board: (1) failed to apply the correct standard and strayed from the three-step process set forth in *Boeing*; (2) made erroneous fact findings; and (3) failed to apply standards specific to non-acute care facilities. Each claim is meritless.

1. The Board provided a sufficient rationale and applied the proper standard

The Board's decision is not, as the Employer claims, a "tally sheet of job traits" (Br. 42) lacking a rationale sufficient for judicial review. Rather, the Board, consistent with *PCC Structurals* and *Boeing*, comparatively weighs and analyzes the interests of the petitioned-for and excluded employees. In doing so, the Board relied on—and adhered to—precedent involving registered nurses in similar non-acute care settings. The Employer ignores the cases cited by the Board, which explore the rulemaking's extensive findings and evidentiary support for the

collective-bargaining interests of registered nurses. By relying on those cases, the Board adopts their rationale. Thus, the Employer's challenge that the Board insincerely considers the governing standard and offers no substantive analysis errantly assumes that cases are decided in a vacuum, devoid of governing precedent.

The Board's approach is reasonable given the well-established and robust body of case law involving unit determinations for registered nurses in many different types of care settings, as well as the comprehensive rulemaking process. And, contrary to the Employer's view (Br. 44), the Board's invocation of precedent, which offers both a coherent explanation and supporting rationale, is consistent with *Boeing* and *Constellation Brands* in explaining the basis for finding an appropriate unit. *See Boeing*, 368 NLRB No. 67, slip op. at 3; *Constellation Brands*, 842 F.3d at 794-95. The Employer therefore wrongly accuses the Board of not "articulat[ing] why" (Br. 45) it reached its result. Specifically, the Board noted the distinct interests of the registered nurses and the advanced practice practitioners—their differences in duties, supervision, and pay. It then pointed to cases discussing these very distinctions and why such distinctions rendered a unit of nurses appropriate.

The Employer also asserts (Br. 48)—despite the Board's clear invocation of *PCC Structurals* and *Park Manor*—that the Board applied its prior standard

articulated in *Specialty Healthcare*. Not so. The Board's decision plainly analyzes "whether employees in the proposed unit share a community of interest sufficiently distinct from the interests of employees excluded from that unit to warrant a separate bargaining unit," consistent with the directive of *PCC Structurals* and *Boeing*. In arguing that the Board applied *Specialty Healthcare*, the Employer stresses (Br. 49) the similarities and downplays (Br. 50) the differences between the petitioned-for employees and the excluded employees and complains (Br. 51-52) that the Board gave too much weight to similarities that were not deemed meaningful in *Boeing*. But *Boeing* did not involve registered nurses or any health care profession; rather, the unit involved production and maintenance employees working for a commercial aircraft manufacturer. Because *Park Manor* teaches that the Board must look to the particular industry involved, the Employer cannot plausibly maintain (Br. 53) that the facts here are "not meaningfully different" than *Boeing*. That the Board accorded different weight to certain interests among technicians constructing an airplane tail is of no analytical value to the present case.

Nor does the Employer make headway by relying on (Br. 52-53) readily distinguishable cases involving registered nurses. For example, in *Upstate Home for Children*, 309 NLRB 986, 987 (1992), the Board rejected an all-nurse unit because the excluded employees shared supervision with the nurses and performed

the same medical functions as the nurses, and the job interchange among employees was frequent. And in *Mount Airy Psychiatric Center*, 253 NLRB 1003, 1006 (1993), the nurses did not prepare or administer medication, and the removal of that nursing responsibility made the nurses and the excluded employees "stand in an identical position." As such, the Board rejected an all-nurse unit because the excluded employees performed "virtually the same duties . . . substituted for each other, and had the same supervision and the same benefits." *Id.* None of the factors deemed relevant in those two cases is present here.

2. The Employer's disagreements with the Board's factual findings provide no basis to disturb the Board's unit determination

The Employer next criticizes the Board's factual findings, claiming the Board "misstate[s] or unfairly characterizes the record" or lacks support for its findings. (Br. 54.) This criticism does not withstand scrutiny.

The Employer first contends (Br. 54-55) that the Board erred in its functional integration analysis and failed to support or explain its finding. As discussed above, functional integration generally refers to when employees' work constitutes integral elements of an employer's business. *See Transerv Sys.*, 311 NLRB at 766. The Board found during its rulemaking process, the team care approach does not necessarily demonstrate "functional integration" or otherwise detract from finding that a separate nurses unit is appropriate. As explained in

Jefferson Health, for example, rather than demonstrate functional integration, the team approach ensures that the "elements of patient care are organized but that [] consideration did not 'alter each licensed professional's responsibility for his or her individual scope of practice.'" 330 NLRB at 657 (citing 53 Fed. Reg. at 33913); *accord Charter Hosp.*, 313 NLRB at 954 (nurses working in teams with other professionals "does not alter the separateness of their identity") (quoting 53 Fed. Reg. at 33913); *Holliswood Hosp.*, 312 NLRB at 1196 (nurses' "distinct functions . . . set[] them apart from" other professional employees).

As these cases and discussions make clear, the Board rejects the notion that a multidisciplinary team approach to patient care necessarily weighs against a finding that a nurses-only unit is appropriate. As the Board properly emphasized here, nurses, along with other employees involved in patient care, "perform[] their own discrete and well-defined role." (DDE 4.) The Employer's argument is at odds this well-established principle based on precedent applying the evidentiary findings made during the rulemaking process and ignores that social workers cannot perform nursing work and the registered nurses act *at the direction of* the Employer's nurse practitioners and physician assistants. For these reasons, the Employer is wrong to say that the Board was "not clear" (Br. 55) when it relied on discrete nursing functions to find that functional integration of patient care did not diminish a finding that a separate nurses unit is appropriate.

Further, the Employer claims that the Board "misstated facts" concerning job overlap (Br. 55), pointing to the shared use of tools and "continuous daily contact" among the nurses and advanced practice practitioners. Those claims ignore other relevant facts found by the Board. Specifically, while both nurses and the excluded employees attend meetings where patients are discussed, the nurses and the excluded employees also attend treatment meetings separate from one another. And the Employer overlooks the Board's finding that the employees' daily contact "simply results from working in the same building . . . for the same employer." (DDE 4.)

Nor can the Employer show error by the Board's reliance on separate supervision, where hiring, discipline, and scheduling among the two groups are entirely separate. Its claim that the excluded employees share supervision or have "ultimate hierarchical sameness" (Br. 57) with the nurses is contradicted by the record. As the Board found, the "chief executive physician would have the *ultimate authority* over any discipline of the advanced practice practitioners," (DDE 4)—an individual who has no role in the supervision of nurses.

And lastly, the evidentiary support collected during rulemaking puts to rest the Employer's claim (Br. 57-58) that the Board has not explained the significance of licensing differences among the included and excluded employees—the

attendant findings clearly explain that licensing and training differences often preclude job interchange among employees.

In short, the Board used the proper standard and sufficiently explained its rationale. The Act requires only an appropriate bargaining unit. *See Am. Hosp. Ass'n*, 499 U.S. at 610. Therefore, the singular question before the Court is whether the unit the Board certified was appropriate, not whether it was the most or only appropriate units. *Dodge of Naperville*, 796 F.3d at 38. The Employer has failed to show error.

3. The Board properly considered standards specific to non-acute care facilities, including avoiding unit proliferation and concern for residual employees

Contrary to the Employer's contention (Br. 60-62), the Board addressed and respected congressional admonition that the Board make unit determinations with "due consideration" given "to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 766, 93rd Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). Indeed, the health care rule itself discusses proliferation and provides that the "evidence in the record does not support the assumption that the recognition of [registered nurse]-only units will lead to a demand by other professional groups to organize as separate units." 53 Fed. Reg. at 3391. Moreover, concern over undue unit proliferation does not prohibit the Board's discretion to determine an appropriate unit. In fact,

the Supreme Court found that the "admonition" from the committee reports is not binding on the Board and does not have "the force of law." *Am. Hosp. Ass'n*, 499 U.S. at 616-17 ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute"); *accord Int'l Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 712-13 (D.C. Cir. 1987) (noting that because the committee report containing the admonition could not "serve as an independent statutory source having the force of law," the admonition "'is not appropriate for application by the courts in deciding . . . whether the Board has abused its discretion' under the Act") (quoting *Mary Thompson Hosp. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980)). The Court went on to note that "[i]f Congress believes the Board has not given "due consideration" to the issue, Congress may fashion an appropriate response." *Id.* at 617.

Here, the Board exercised its discretion and determined that the registered nurses—despite unit proliferation concerns—constituted an appropriate unit. Specifically, the Board observed that its "rules promulgated to avoid such proliferation recognize registered nurses as an appropriate bargaining unit." (DDE 6.) And while the Employer correctly notes that the rules do not expressly apply to acute care facilities (Br. 61), *Park Manor* establishes the relevancy of the rule to the non-acute care setting. And, none of the reasons listed by the Employer for not applying the rule to a non-acute care facility applies here. Further, the Employer's

list of concerns cannot override the distinct interests between the nurses and the excluded employees. The Employer's argument cherry picks that part of the health care rule that it likes—that the Board ought to avoid undue proliferation—and rebuffs that part of the rule that it dislikes—that registered nurses can constitute a separate unit notwithstanding unit proliferation concerns.

The Employer cites to (Br. 62) *NLRB v. Frederick Memorial Hospital, Inc.*, 691 F.2d 191, 194 (4th Cir. 1982). That case has little relevancy as it predates the Board's health care rule. In any event, the Board in that case specifically rejected the argument that a "[registered nurse]-only unit will lead to a demand by other professionals to organize as separate units." *Id.*

The Employer contends (Br. 63-67) that the Board's precedent does not support its finding and instead cites cases that it claims demonstrate that a unit of registered nurses and other professionals is appropriate. But the employer's cases are inapposite. Neither *Midway Hospital Medical Center, Inc.*, 330 NLRB 1420 (2000), nor *Schnurmacher Nursing Home*, 327 NLRB 253 (1998), *enforcement denied in part*, 214 F.3d 260 (2d Cir. 2000), involved a unit determination. Rather, the Board resolved objections related to election conduct in *Midway* and the supervisory status of certain employees in *Schnurmacher*. *Rockridge Medical Care Center*, 221 NLRB 560 (1975), is a unit determination case, but its relevancy—like that of *Frederick Memorial*—is limited, at best, as it predates the

Board's rulemaking. Therefore, the Board in *Rockridge Medical* was not guided by the factual findings of the health care rule or the requirements of *Park Manor*. And for the reasons already discussed (p. 33), the Employer's reliance (Br. 63) on *Upstate Home for Children* and *Mount Airy* is misplaced. Given the nonprobative, unpersuasive value of these cases to the question before the Board, the Employer's assertion that the Board "ignored" (Br. 64) these cases misses the mark.

The Employer's remaining challenges (Br. 64-67) to the Board's consideration of precedent are meritless. The Employer simply walks through each of the cases cited by the Board, identifies factors that differ from the present case while ignoring the commonalities, and then summarily asserts that these differences render the case inapposite. That the cited precedent is not identical in all regards to the present unit determination is an insufficient basis to urge the Court to disregard precedent relied on by the Board in exercising its discretion. The Employer seeks to substitute its judgment for that of the Board.

Lastly, the Employer claims that the Board should have avoided the creation of a residual unit and not "strand" the other eight professionals "in a small, arbitrary grouping without collective-bargaining representation." (Br. 69.) It thereby attempts to convince the Court that it should deny the registered nurses the representation they sought out and voted for, solely because a wholly separate group of employees, who are not seeking union representation, were not included

in an appropriate collective-bargaining unit. The Employer's concern for the future representational options of the advanced practice practitioners is unconvincing. As the Supreme Court stated, "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996).

Further, like the desire to avoid proliferation of units, the desire to avoid residual units cannot circumscribe the Board's discretion in determining appropriate units. Here, the Board's finding that the registered nurses shared a community of interest sufficiently distinct from the interests of the employees excluded from that unit to warrant a separate bargaining unit cannot be overridden by a concern about the creation of a residual unit. None of the cases cited by the Employer (Br. 68-69) suggests otherwise—indeed they support Board discretion in the first instance. *See, e.g., Int'l Bedding Co.*, 356 NLRB 1336, 1337 (2011) (discussing disfavoring of residual units only after finding a community of interest); *Sutter W. Bay Hosps.*, 357 NLRB 197, 200 (2011) (same). And the possibility of a one-person residual unit, which would foreclose representation altogether for the one excluded employee, has no application to the present facts. *See Klochko Equip. Rental, Co.*, 361 NLRB No. 49, 2014 WL 4809816, at *1 n.1 (Sept. 26, 2014), *enforced*, 657 F. App' x 441 (6th Cir. 2016).

CONCLUSION

The Board respectfully requests that the Court grant the Board's application for enforcement, deny the petition for review, and enforce the Board's Order in full.

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National Labor Relations Board

OCTOBER 2020

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ST. JAMES MEDICAL GROUP	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 20-1076 &
v.	)	20-1153
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No.
	)	19-CA-242468
Respondent/Cross-Petitioner	)	
	)	

ADDENDUM

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National Labor Relations Act, as amended, 29 U.S.C. §§ 151, et seq.

Section 7 (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.

Section 8(a)(1) (29 U.S.C. § 158(a)(1))
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.

Section 8(a)(5) (29 U.S.C. § 158(a)(5))
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.

Section 9(a) (29 U.S.C. § 159(a))
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 9(b) (29 U.S.C. § 159(b))
The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this 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.

Section 9(c) (29 U.S.C. § 159(c))

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2)

In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the

ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3)

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

(4)

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

(5)

In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

Section 9(d) (29 U.S.C. § 159(d))

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10(a) (29 U.S.C. § 160(a))

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.

Section 10(e) (29 U.S.C. § 160(e))

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.

Section 10(f) (29 U.S.C. § 160(f))

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in 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) of this section, 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.

UNITED STATES COURT OF APPEALS
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	)	19-CA-242468
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 11,127 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6). The PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

/s/ David Habenstreit
David Habenstreit
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Dated at Washington, DC
this 1st day of October 2020

UNITED STATES COURT OF APPEALS
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	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020, 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 using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit
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Dated at Washington, DC
this 1st day of October 2020