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Specialty Healthcare and Rehabilitation Center of Mobile *and* United Steelworkers, District 9, Petitioner. Case 15–RC–8773

August 26, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

I. INTRODUCTION

In this representation case, the Regional Director found that a petitioned-for bargaining unit of certified nursing assistants (CNAs) was appropriate under a traditional community-of-interest analysis. The Employer, however, contended that the only appropriate unit containing the CNAs consists of the CNAs plus all other nonprofessional service and maintenance employees at its facility. The Employer argued that the Regional Director failed to properly apply *Park Manor Care Center*, 305 NLRB 872 (1991), in which the Board addressed the standard for determining units in nonacute health care facilities in light of the Board's adoption of a rule defining appropriate units in acute care hospitals. Because this case raises important issues concerning the Board's determination of appropriate bargaining units, we invited the parties and interested amici to file briefs addressing the issues. See *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB No. 56 (2010).

After carefully considering the arguments of the parties and interested amici, we have concluded that the *Park Manor* approach to determining if a proposed bargaining unit in a nursing home is an appropriate unit has become obsolete, is not consistent with our statutory charge, and has not provided clear guidance to interested parties or the Board. We therefore overrule *Park Manor* and return to the application of our traditional community-of-interest approach in this context. In addition, we reiterate and clarify that, in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.

II. BACKGROUND

On January 20, 2009, the Regional Director for Region 15 of the National Labor Relations Board issued a Decision and Direction of Election in this proceeding, finding that the petitioned-for unit of full-time and regular part-time CNAs at the Employer's nursing home and rehabilitation facility constituted an appropriate unit in which to conduct an election. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision contending that the Regional Director erred in finding the petitioned-for unit appropriate. On February 19, 2009, the then two-member Board granted the Employer's Request for Review, and, on August 27, 2010, the Board affirmed the grant of review.

On December 22, 2010, the Board issued a notice and invitation to file briefs in this case to the parties as well as the general public. 356 NLRB No. 56. The notice requested that the parties and interested amici address issues raised by the Regional Director's finding that the petitioned-for unit of CNAs at the Employer's nursing home is appropriate. The Board asked the parties and amici to address the following questions:

> (1) What has been their experience applying the "pragmatic or empirical community of interests approach" of *Park Manor* and subsequent cases. (2) What factual patterns have emerged in the various types of nonacute health care facilities that illustrate what units are typically appropriate. (3) In what way has the application of *Park Manor* hindered or encouraged employee free choice and collective bargaining in nonacute health care facilities. (4) How should the rules for appropriate units in acute health care facilities set forth in Section 103.30 be used in determining the appropriateness of proposed units in nonacute health care facilities. (5) Would the proposed unit of CNAs be appropriate under *Park Manor*. (6) If such a unit is not appropriate under *Park Manor*, should the Board reconsider the test set forth in *Park Manor*. (7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter. (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.,* 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest." [Id., slip op. at 1–2.]

Briefs in response to the Board's invitation were filed by a broad range of interested parties.[1]

[1] The Employer and the Petitioner filed briefs, as did amici AFL–CIO; Service Employees International Union (SEIU); International

III. FACTS

The Employer operates a nursing home and rehabilitation center in Mobile, Alabama. The Petitioner seeks to represent a unit of 53 CNAs. The Employer contends that the only appropriate unit consists of its approximately 86 nonsupervisory, nonprofessional service and maintenance employees, including the CNAs.[2] There is no history of collective bargaining by any of the Employer's employees.

The Employer's facility, which the parties agree is a nonacute health care facility, consists of four floors and has beds for approximately 170 residents. The first floor includes the kitchen and dining room; the recreation/activity room; administrative, business, and other offices; the employee break room; supply and maintenance rooms; and the lobby/reception area. The remaining three floors are the nursing floors, each consisting of residents' rooms on two wings, a nursing station, a sun porch/activity room, and a supply/storage room.

For organizational purposes, the nursing home's employees are placed in one of eight separate departments: nursing, nutrition services, resident activity, maintenance, administration, medical records, central supply, and social services. The facility's executive director is the highest-ranking management official on site. The nursing director and business office manager report to the executive director. The individual heads of all but one department report to the nursing director, as do the staffing coordinator, the medical records clerk, and the data entry clerk.

A. CNAs

The nursing department consists of the 53 CNAs and the LPNs and RNs. The CNAs are directly supervised by LPNs on each nursing wing who have been designated as charge nurses. LPNs in turn are supervised by RNs designated as unit managers, who report to the nursing director. CNAs work one of three 8-hour shifts and work directly with up to 17 residents each. There are typically three to five CNAs assigned to work on each nursing floor, and each CNA is usually assigned to work in a particular area of the nursing floor. CNAs assist residents with such daily functions as grooming, oral hygiene, bathing and dressing, and incontinence care. CNAs obtain food trays for residents who have their meals on the nursing floor and assist these residents with eating. CNAs turn and lift residents in their beds, move residents to their wheelchairs, assist with ambulation for short distances, and assist residents in getting around the facility, such as to a sun porch or to the dining room. CNAs also accompany residents to appointments outside the nursing home. CNAs take residents' vital signs and monitor their daily food and fluid intake and output. CNAs complete an "Activities for Daily Living" flow sheet on which they record residents' vital signs and daily functions and activities, such as bathing, dressing, and walking. CNAs also make note of the services and therapies that residents receive on their medical charts, and they document residents' progress or lack thereof. CNAs are the only employees other than RNs and LPNs who are certified or licensed to provide certain aspects of residents' care, such as feeding and positioning.

The Employer has designated several CNAs as "restorative CNAs." These CNAs assist residents in therapeutic programs designed to maintain functions such as walking and eating or to increase residents' range of motion. Restorative CNAs also assist residents with their meals in the dining room and transport residents back to their rooms after therapeutic activities or meals.

Upon admittance to the Employer's facility, a new resident is assessed by an interdisciplinary team of employees from the nursing, nutrition services, resident activity, and social services departments to determine the resident's medical, dietary, and social needs. CNAs attend these meetings and provide input in the formulation of individual residents' care plans. CNAs may attend additional meetings of the interdisciplinary team if a resident's care plan needs to be modified as the resident's condition or needs change over time. CNAs also attend in-service training sessions.

CNAs retrieve food carts from the first floor kitchen and take them to their assigned nursing floors for residents who eat meals in their rooms or on their floor's sun porch. CNAs may be asked to contact the central supply clerk if there is a shortage of necessary supplies on the floor, and the clerk may contact a CNA if the clerk has a question about specific items that a resident under that

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Union of Operating Engineers (IUOE); American Health Care Association and National Center for Assisted Living; American Hospital Association and American Society for Healthcare Human Resources Administration; Chamber of Commerce of the United States; Senators Michael Enzi, Ranking Member, Committee on Health, Education, Labor and Pensions (HELP), Orrin Hatch, Ranking Member, Committee on Finance, and Johnny Isakson, Ranking Member, HELP Subcommittee on Employment and Workplace Safety; Coalition for a Democratic Workplace and Human Resources Policy Association; International Foodservice Distributors Association; Retail Industry Leaders Association; Georgia Chamber of Commerce; National Association of Waterfront Employers; and Douglas Motter (an individual).

[2] The Employer's registered nurses (RNs) and licensed practical nurses (LPNs) are not at issue here. The parties stipulated that LPNs should be excluded from any unit found appropriate because they are supervisors. No party seeks to include RNs, and the Regional Director excluded them from the unit based on her finding that RNs supervise LPNs. As laundry and housekeeping employees and speech, occupational, and physical therapists working at the facility are not directly employed by the Employer, their unit placement is not at issue in this proceeding.

CNA's care may need. CNAs may be contacted by the social services assistant to get certain information about a resident, for example, whether the resident met with a particular doctor.

The Employer prefers that its CNAs have a high school diploma. CNAs must be certified by the State of Alabama; certification requires that an individual complete 16 hours of classroom training and 72 hours of general education. The certification course includes the basic components of caring for geriatric and incapacitated patients, such as bathing, dressing, feeding, and the like. CNAs are required to attend specialized training on a periodic basis to maintain their certification.

The starting wage for CNAs is $8.50 per hour, and they may receive an additional 10 cents per hour for each year of experience up to 15 years. CNAs receive time and a half for overtime work. CNAs' immediate supervisors evaluate CNAs annually; the evaluation provides the basis for a possible pay increase, typically 3 percent, that must be approved by the nursing home's executive director.[3] CNAs wear the same uniform that LPNs and RNs wear. It does not appear that any employees occupying other classifications have transferred into a CNA position, although there is evidence that one CNA transferred to a unit clerk position

B. Other Employees

The Employer would include in the bargaining unit with the CNAs approximately 33 other employees whom the Employer considers to be service and maintenance employees. These employees include resident activity assistants, who design and lead individual and group recreational activities, such as games and crafts, and arrange pet, art, and music therapy; the social services assistant, who works with residents and their families to identify residents' needs and to resolve problems as they arise; the staffing coordinator, who prepares work schedules for the nursing staff, contacts replacement personnel as necessary, and determines which CNA will accompany a resident to an appointment outside the facility; the maintenance assistant, who performs routine maintenance, upkeep, and repair services on the building, grounds, and equipment; and the central supply clerk, who maintains an inventory of items used by each resident, and orders, receives, and stocks supplies.

The Employer would also include cooks, who prepare meals for residents; dietary aides, who assist cooks and deliver prepared food to the dining room or the nursing floors; the medical records clerk, who creates and maintains residents' medical records and prepares correspondence and reports; the data entry clerk, who inputs into the Employer's electronic records system residents' care plans, physicians' orders, resident cash logs and financial charges, and other resident information; a business office clerical; and a receptionist.[4]

In general, the employees whom the Employer would include in the unit report to the managers of their respective departments. The managers of all but one of these departments report directly to the director of nursing. None of the other employees are in the nursing department and therefore none report to the RNs. Most of the classifications the Employer would add to the unit have similar educational requirements. For example, cooks and dietary aides must have completed the 10th grade,[5] while employees in the remaining classifications must have a high school degree or its equivalent.[6] All employees complete the same employment application, go through the same hiring process, are required to pass a drug test, and receive the same new employee orientation.

The Employer's normal business hours are 8 a.m. to 4:30 p.m. Cooks and dietary aides typically work either of two shifts to cover the three daily meals, with the first shift starting at 5–6 a.m. and covering breakfast and lunch, and the later shift covering lunch and dinner. One activity assistant works normal business hours, while the other staggers her time to accommodate residents' after-dinner activities, which can run as late as 8 p.m. The maintenance assistant works 7 a.m. to 3 p.m. None of the other employees staff the three 8-hour shifts worked by the CNAs. All employees are hourly and paid on a biweekly basis. The starting wage rates are $7 per hour for dietary aides; $9 for cooks and the receptionist; $10 for the central supply and medical records clerks and the staffing coordinator; and $15 for the data entry clerk.

Like the CNAs, these employees receive annual evaluations under the same appraisal system and are eligible for a wage increase based on a favorable evaluation. All employees are eligible for the same benefits, such as health and life insurance, retirement and profit-sharing plans, sick leave/vacations, tuition reimbursement, and performance-based special awards programs; are subject to the same personnel policies and receive the same employee handbook; may purchase meals in the

[3] Annual merit increases may be as much as 5 percent, but they may be lower than 3 percent if there are problems with a CNA's job performance.

[4] The record contains virtually no information about the business office clerical or the receptionist.

[5] Cooks must have a ServeSafe Food Safety Certification from the State. This certification can be obtained by successfully completing a course taught by the local health department.

[6] Activities assistants typically have only a high school diploma even though the job description states that the position requires a bachelor's degree.

dining room at the same prices; wear name badges; use the same parking lot, timeclock, break room, smoking area, and bulletin boards; attend regular monthly meetings as well as occasional group meetings and in-service training sessions; and are invited to attend the annual holiday party and other social functions. Dietary aides and the maintenance assistant wear uniforms, but the uniform is different from the one worn by CNAs, LPNs, and RNs.

IV. ANALYSIS

We begin our analysis with the Employer's argument resting on *Park Manor*. After concluding that *Park Manor* should be overruled, we turn to the general principles that guide the Board's determination of whether a proposed unit is appropriate and, specifically, the question of how those principles apply when the employer contends that the smallest appropriate unit contains employees not included in the petitioned-for unit.

A. Park Manor

The Employer and its supporting amici do not question the Regional Director's finding that the CNAs share a community of interest with each other. In other words, no party or amicus suggests that the CNAs' terms and conditions of employment are too varied for them to be grouped together in the same unit. Nor would such a suggestion be credible given the facts described above. Rather than arguing that the CNAs do not share a community of interest with each other, the Employer and its supporting amici argue that the smallest appropriate unit containing the CNAs is an overall service and maintenance unit. The Employer bases its argument on the Board's decision in *Park Manor*.

The Board's decision in *Park Manor* must be understood within the context of the 1974 health care amendments to the NLRA; the resulting controversy about the amendments' implications for unit determination in acute care hospitals; the Board's effort to resolve that controversy through rulemaking; and the Supreme Court's decision in *American Hospital Assn.,* 499 U.S. 606 (1991), which upheld the Board rule and clarified the legal import of statements in the legislative history of the 1974 amendments concerning undue fragmentation of bargaining units.

Nursing homes have been subject to the Board's jurisdiction since the adoption of the NLRA in 1935. The 1974 amendments extended the coverage of the Act to nonprofit hospitals (which had been exempted by the 1947 amendments). In extending the Act's coverage to such hospitals, Congress also amended the Act to tailor certain of its provisions specifically to the health care industry, for example, requiring that labor organizations provide 10 days' notice before initiating a strike among health care employees. 29 U.S.C. § 158(g). As the Supreme Court has recognized, however, the 1974 amendments "made no change in the Board's authority to determine the appropriate bargaining unit in each case." *American Hospital Assn.,* 499 U.S. at 615.

Nevertheless, following the amendments, health care employers, in litigation under the NLRA, pointed to the following statement in both the Senate and House Reports on the amendments:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB [403] (1974), and *Woodland Park Hospital*, 205 NLRB [888] (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, [*d/b/a St. Luke's Hospital],* 203 NLRB [1232] (1973).

S. Rep. No. 766, 93rd Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted).[7]

In *American Hospital Assn.*, supra, however, the Supreme Court made clear that the statements in the committee reports are not binding on the Board: "Petitioner does not—and obviously could not—contend that this statement in the Committee Reports has the force of law." 499 U.S. at 616. Indeed, the Court observed that "legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute." Id. at 617 (citing *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 168 (1989)). Rather, the Court characterized the reports' statement as an "admonition," noting that "[i]f Congress believes that the Board has not given 'due consideration' to the issue, Congress may fashion an appropriate response." Id. As the District of

[7] The statements in the Committee Reports were elaborated upon on the floor by key legislators, see 120 Cong. Rec. 12944-45 (statement of Senator Taft, May 2, 1974); 13559-60 (statement of Senator Taft, May 7, 1974); 22575 (Statement of Senator Williams, July 10, 1974); 22949 (statement of Representative Ashbrook, July 11, 1974), although Senator Harrison Williams, Chairman of the Committee on Labor and Public Welfare and a chief sponsor of the amendments, observed that the admonition concerning proliferation was intended to leave the determination of appropriate units within the Board's broad discretion:

> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units.

Id. at 22575.

Columbia Circuit had observed earlier, "Congress, in the final analysis, decided against modifying [S]ection 9 of the Act" and the courts and the Board have "no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point." *Electrical Workers Local 474 v. NLRB*, 814 F.2d 697, 699, 700 (D.C. Cir. 1987) (emphasis in original).[8] The Act thus provides no basis for defining appropriate units in the health care industry using different criteria than are applied in other industries.[9]

Nevertheless, after the passage of the 1974 amendments and before the Supreme Court's decision in *American Hospital Assn.*, uncertainty about the import of the "admonition" in the legislative history led to serious disagreement among Board Members and between the Board and several courts of appeals concerning appropriate bargaining units in acute care hospitals. The Board sought to resolve this disagreement by exercising its rulemaking authority. Effective May 22, 1989, the Board adopted a rule defining eight appropriate units in acute care hospitals and providing that all other units are inappropriate absent "extraordinary circumstances." 54 Fed. Reg. 6336-01 (1989). The rule has generally been understood to place CNAs working in acute care hospitals in a unit including all nonprofessional service and maintenance employees. See 29 CFR § 103.30(a)(8); *Rhode Island Hospital*, 313 NLRB 343 (1993) (parties stipulated to nursing assistants' inclusion in "nonprofessional" unit).

For our purposes here, the critical fact about the Board's acute care hospital unit rule is that by its express terms it does not apply to this case or to nursing homes generally, and no party contends otherwise. Only "acute care hospitals" are covered, and the definition of acute care hospitals expressly excludes "facilities that are primarily nursing homes." The rule also expressly provides that "[t]he Board will determine appropriate units in other health care facilities . . . by adjudication." 29 CFR.§§ 103.30(a), (f)(2), and (g). The rule does not apply to nursing homes because, after conducting considerable factfinding, the Board concluded that there were "substantial differences between nursing homes and hospitals . . . which affect staffing patterns and duties." 53 Fed. Reg. 33928 (1988).

While the Employer and its supporting amici concede that the acute care hospital rule does not by its terms apply here, they argue that the Board's decision in *Park Manor* nevertheless requires that the rule be applied. The petitioning Union and its supporting amici argue the opposite. That alone suggests that our decision in *Park Manor* has done little to provide interested parties with guidance in defining appropriate units in the long-term care industry.[10] For that reason, as well as those detailed below, we have decided to overrule *Park Manor* and to apply our traditional community-of-interest standards in this case and others like it.

The Board in *Park Manor* rejected both an extension of the acute care hospital rule beyond its express terms and the formulation of a similar rule applicable to nursing homes. Yet the Board also rejected use of our traditional community-of-interest approach. Rather, the Board remanded the case to the regional director "for further consideration that takes account of (1) what was learned about nursing homes, LPNs, and technicals generally in the rulemaking proceeding that led to the Board's Rule governing units in acute care hospitals, and (2) Board cases involving nursing home units issued prior to the rulemaking." 305 NLRB at 874.

While we consider both of those factors here, we are persuaded that it is no longer sound policy to focus on a rulemaking record created over two decades ago concerning a highly dynamic industry and on cases decided even earlier. In fact, even 22 years ago, the Board acknowledged in its Notices of Proposed Rulemaking and Final Rule that the "nursing home industry is . . . in a period of rapid transition" and that "our information as to nursing homes was limited." 53 Fed. Reg. 33928; 54 Fed. Reg. 16343. It makes even less sense to rely heavily on that record today, when it was recognized at the time it was created that it was "limited" and did not provide an adequate basis for the Board to reach any conclusions concerning bargaining units in nursing homes.

Perhaps for this reason, the Board's attempt to capture its novel approach in *Park Manor* in terms interested parties could understand and apply fell short. The Board stated:

[8] The courts of appeals as well as the Board have applied this principle to other aspects of the legislative history of the health care amendments. See, e.g., *Beverly Health & Rehabilitation Services v. NLRB*, 317 F.3d 316, 320–321 (D.C. Cir. 2003) (rejecting the Board's reliance in *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432 (1979), on similar statements in the committee reports providing that a labor organization could extend the notice time and date of a strike among employees of a health care employer by up to 72 hours without providing a new 10-day notice); *Alexandria Clinic, P.A.*, 339 NLRB 1262 (2003) (expressly overruling *Greater New Orleans* with regard to the Board's reliance on legislative history where statutory language was clear), enfd. sub nom. *Minnesota Licensed Practical Nurses Assn. v. NLRB*, 406 F.3d 1020 (8th Cir. 2005).

[9] Those traditional criteria are, however, as explained infra at fn. 19, directly tied to how particular employers have structured their workplaces and are thus acutely sensitive to differences among industries.

[10] Our dissenting colleague argues that *Park Manor* has provided clear guidance yet provides no explanation of what the decision means other than that the Board should apply the acute care hospital rules beyond their express terms.

> we do not choose at this time to substitute for either "disparity of interests" or "community of interests" yet another short-hand phrase by which units in all nursing homes or other nonacute care facilities will be measured. Instead, we prefer to take a broader approach utilizing not only "community of interests" factors but also background information gathered during rulemaking and prior precedent. Thus, as more fully set forth below, our consideration will include those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute.

Park Manor, 305 NLRB at 875 (footnotes omitted). The Board then noted, "[f]or those most comfortable with verbal formulas, perhaps this might be referred to as the 'pragmatic or empirical community of interests' approach." Id. at fn. 16.

Looking at that formulation now, with hindsight, we think that "those factors considered relevant by the Board in its rulemaking proceedings" were not sufficiently identified to provide meaningful guidance. Moreover, although "prior cases involving either the type of unit sought or the particular type of health care facility in dispute" must, of course, be considered as always,[11] many Board and court decisions in this area issued prior to the Supreme Court's decision in *American Hospital Assn.* are of questionable continued validity. See *California Pacific Medical Center v. NLRB*, 87 F.3d 304, 308–310 (9th Cir. 1996) (reviewing various courts' changed approaches after *American Hospital Assn.* in course of rejecting employer's contention that "disparity of interests" test should apply, rather than single-facility presumption), enfg. *Children's Hospital of San Francisco*, 312 NLRB 920 (1993). Ultimately, we are simply unable to understand how a "'pragmatic or empirical community of interests' approach" differs meaningfully from our traditional community-of-interest approach. The traditional community-of-interest test is intended, as the Act requires, to assure employees the "fullest freedom in exercising the rights guaranteed by th[e] Act," 29 U.S.C. § 159(b), rather than to satisfy an abstract notion of the most appropriate unit, and is thus pragmatic. In addition, it has always been informed by empirical knowledge acquired by the Board about the industry and workplace at issue. The approach suggested in *Park Manor* has actually led in the opposite direction because, rather than directing attention to the facts in the particular case and those concerning the industry as it exists at present, it proposes a backward-looking standard using facts and analysis already over two decades out of date. This approach is both confusing and misguided.

After setting forth the above-described factors to consider, the *Park Manor* Board quoted with approval the following statement from the second Notice of Proposed Rulemaking (NPRM) leading to the acute care hospital unit rule:

> [I]n exercising its discretion to determine appropriate units, the Board must steer a careful course between two undesirable extremes: If the unit is too large, it may be difficult to organize, and, when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult for the union to represent; on the other hand, if the unit is too small, it may be costly for the employer to deal with because of repetitious bargaining and/or frequent strikes, jurisdictional disputes and wage whipsawing, and may even be deleterious for the union by too severely limiting its constituency and hence its bargaining strength. [Footnote omitted.] The Board's goal is to find a middle-ground position, to allocate power between labor and management by "striking the balance" in the appropriate place, with units that are neither too large nor too small.

Park Manor, 305 NLRB at 876 (quoting 53 Fed. Reg. 33904).[12] In our view, Congress itself struck the appropri-

[11] However, understanding the unique nature of the statutory standard, which requires only that the proposed unit be *an* appropriate unit, is critical to properly applying prior precedent to determine if a proposed unit is an appropriate unit. Prior precedent holding a unit similar to a proposed unit to be appropriate in a similar setting is persuasive, but prior precedent holding a *different* unit to be appropriate in a similar setting is *not* persuasive. See *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996). Too often, parties in representation proceedings misunderstand this aspect of the statutory standard. They mistakenly cite prior cases holding that a particular unit is appropriate as support for the proposition that a different proposed unit must be inappropriate. We reiterate today that such a conclusion does not follow.

[12] Neither the NPRM nor the *Park Manor* Board cited prior Board decisions as endorsing, applying, or otherwise illustrating these principles. Nor were the principles derived from the rulemaking record or other empirical evidence. Rather, the NPRM cited as authority two legal treatises: Robert A. Gorman, *Basic Text on Labor Law* 66-69 (1976), and John E. Abodeely, Randi C. Hammer & Andrew L. Sander, *The NLRB and the Appropriate Bargaining Unit* 12-13 (rev. ed. 1981). The NPRM also cited a decision of the United States Court of Appeals for the Seventh Circuit: *NLRB v. Hillview Health Care Center*, 705 F.2d 1461, 1469–1470 (7th Cir. 1983).

In *Hillview Health*, which involved a nursing home, the Seventh Circuit upheld the Board's determination that a bargaining unit consisting solely of seven LPNs—and excluding "nurse's aides and other low—level workers"—was appropriate. 705 F.2d at 1469–1470. As to the appropriate "balance," the Seventh Circuit observed:

ate balance in adopting and amending Section 9 of the Act. Our determination of whether a proposed unit is an appropriate unit must be guided by the principles of unit determination drawn from the language of the statute, which we review below.[13]

As read by the Employer and its supporting amici, *Park Manor* holds that there is only one set of appropriate units in nursing homes and similar facilities.[14] As amici American Hospital Association and American Society for Healthcare Human Resources Administration acknowledge, "[a]s a practical matter, under *Park Manor*'s 'pragmatic or empirical community of interests approach,' the Board generally has found appropriate at nonacute care facilities *only* those units that would be appropriate at acute care hospitals," i.e., only one set of appropriate units. Brief at 16 (emphasis added). In other words, the Employer and its supporting amici would have the Board require that all employees in all nursing homes and other nonacute care facilities be limited to seeking representation in a single set of units. But the suggestion that there is only one set of appropriate units in an industry runs counter to the statutory language and the main corpus of our unit jurisprudence, which holds that the Board need find only that the proposed unit is *an* appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace. See infra at slip op. at 8-9.[15] Accepting the Employer's position "would stand on its head the statutory concept of an appropriate unit." *Overnite*, 322 NLRB at 725.

The Act itself does create a set of presumptively appropriate bargaining units[16] and the Board has created other such presumptions.[17] Indeed, the Board has specifically recognized that certain of the units defined for acute care hospitals in the rules, including the service and maintenance unit, are presumptively appropriate in nursing homes, and we continue to adhere to that principle and those holdings. See *Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603, 603 (1998) (service and maintenance unit "appropriate on its face"). See also *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1094 (2001) (service and maintenance unit "is presumptively appropriate"); *Hebrew Home & Hospital,* 311 NLRB 1400 (1993) (skilled maintenance unit); *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995) (service and maintenance unit). But the Employer suggests not that *Park Manor* creates a presumption that the units defined in the rule are appropriate in nonacute care facilities, but that *Park Manor* holds that those units are the *only* appropriate units absent exceptional circumstances.

The Employer's suggestion is at odds with our unit jurisprudence. A party petitioning for a unit other than a presumptively appropriate unit (when one exists, as it does here) bears no heightened burden to show that the petitioned-for unit is also an appropriate unit. The existing presumptions are thus consistent with the statutory requirement that the proposed unit need only be an ap-

> The statute gives little guidance to the Board on where to strike the balance but does suggest that any tilt should be in favor of unions. Section 9(b) of the Act, 29 U.S.C. § 159(b), requires the Board to "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. . . ." (Emphasis added.) . . . . Consistently with the statutory slant, the Board's unit determinations emphasize homogeneity ("community of interest") rather than the adverse effect of multiple units on the employer.

Id. at 1469 (citation omitted).

[13] Our dissenting colleague embraces this balancing approach, but does not suggest what metrics the Board should use in weighing the parties' interests, how it provides clear guidance to interested parties, or where in the Act Congress authorized such an unrestrained exercise of authority on the part of the Board.

[14] Notably, the Board in *Park Manor* expressly disclaimed such an intention: "[W]e do not have a sufficient body of empirical data as to nursing homes to make a uniform rule as to them at this time, and perhaps never will because we are not sure that all are sufficiently uniform to warrant finding the same units appropriate for all." Id. at 875.

[15] Of course, the acute care hospital unit rule represents an exception to the foregoing analysis, but it emerged out of unique circumstances: the existence of "lengthy and costly litigation over the issue of appropriate bargaining units in each case." 54 Fed. Reg. 16336 (1989). Those circumstances did not extend to nursing homes. See 53 Fed. Reg. 33928–29 (1988) ("decid[ing] to exclude nursing homes from the rule" partly because "there is no need at this time for a rule with respect to nursing homes as there has been no prolonged litigation and no party has expressed any problems in this area." Moreover, the acute care hospital unit rule was adopted prior to the Supreme Court's authoritative pronouncement on the weight to be accorded the legislative history concerning undue proliferation. While the dissent suggests that doctrinal evolution in this area should proceed via rulemaking, we note that *Park Manor* was a Board decision and that all the other principles we apply here were established via adjudication. Indeed, even in the acute care hospital rulemaking proceeding, the Board concluded that it should proceed via adjudication outside that limited context.

[16] The Act provides that the Board shall decide whether "the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Based on this statutory language, the Board has held that units consisting of all employees of an employer, all employees in a particular craft, or all employees at a particular plant are presumptively appropriate. See, e.g., *Greenhorne & O'Mara, Inc.,* 326 NLRB 514, 517 (1998) (petitioned-for employerwide unit is presumptively appropriate); *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966) (setting forth factors for determining when craftwide unit is appropriate); *Hilander Foods*, 348 NLRB 1200, 1200 (2006) ("single-facility unit is presumptively appropriate").

[17] See, e.g., *Groendyke Transport*, 171 NLRB 997, 998 (1968) (single-terminal units are presumptively appropriate regarding drivers); cf. *Colorado Interstate Gas Co.*, 202 NLRB 847, 848–849 (1973) (systemwide units are "optimal" for public utilities, and Board "is reluctant to fragmentize them, absent compelling circumstances").

propriate unit, because they merely shift the burden to the party arguing that a petitioned-for and presumptively appropriate unit is inappropriate. In contrast, the Employer and its supporting amici read *Park Manor* to create the opposite of presumptively appropriate units: an entire set of conclusively or nearly conclusively inappropriate units in the subacute care hospital health care industry.

The Employer's argument based on *Park Manor* thus runs counter to the Supreme Court's observation that the "[w]ide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter." *NLRB v. Hearst Publications, Inc*., 322 U.S. 111 (1944) (footnote omitted). Indeed, the Court has further observed, "[t]he issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). Thus, determination of whether a proposed unit is an appropriate unit requires "examination of the facts of each case" and cannot be based on "conclusory rationales." *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980).

For all these reasons, we have determined that continuing to apply *Park Manor* is not consistent with our statutory charge, that *Park Manor*'s approach has become obsolete, and that *Park Manor* failed to provide clear guidance to interested parties or the Board. We therefore overrule *Park Manor* and return to the application of traditional community-of-interest considerations in determining if a proposed unit is an appropriate unit in nonacute health care facilities.

B. Application of the Traditional Principles of Unit Determination

Having decided to no longer follow *Park Manor*'s idiosyncratic approach, and instead to apply the Board's traditional approach in cases involving long-term care facilities, we begin with the language of the Act.

As the Supreme Court has recognized, Section 9(a), "read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees." *American Hospital Assn.*, 499 U.S. at 610. The Act does not specify the unit within which employees must organize for purposes of collective bargaining. Rather, it provides for the filing of a petition seeking an election in a specified unit. Section 9(c)(1)(A) provides for the filing of a petition "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." The Board has construed that statutory first step in the representation case process to permit the petitioner to describe the unit within which "a substantial number of employees . . . wish to be represented."

Procedurally, the Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds no further. As the Board recently explained, "the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends." *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2 (2010). See also *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, of course, the employees have proposed a unit consisting of a set of employees who are clearly identifiable as a group: all employees in the CNA classification.

The Act further declares in Section 9(b) that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The first and central right set forth in Section 7 of the Act is employees' "right to self-organization." As the Board has observed, "Section 9(b) of the Act directs the Board to make appropriate unit determinations which will 'assure to employees the fullest freedom in exercising rights guaranteed by this Act.' i.e., the rights of self-organization and collective bargaining." *Federal Electric Corp*., 157 NLRB 1130, 1132 (1966).[18]

The Board has historically honored this statutory command by holding that the petitioner's desire concerning the unit "is always a relevant consideration." *Marks Oxygen Co.,* 147 NLRB 228, 229 (1964). See also, e.g., *Mc-Mor-Han Trucking Co*., 166 NLRB 700, 701 (1967) (reaffirming "polic[y] . . . of recognizing the desires of petitioners as being a relevant consideration in the making of unit determinations"); *E. H. Koester Bakery Co*.,

[18] The right to "self-organization" is a species of the right to freely associate. See *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("[t]he right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly"). A key aspect of the right to "self-organization" is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing that "individuals' selection of those with whom they wish to join in a common endeavor" is a key element of freedom of association). Thus, employees exercise their Sec. 7 rights not merely by petitioning to be represented, but by petitioning to be represented in a particular unit. The statute commands that we assure employees the fullest freedom in exercising all these rights, including the right to choose whom to associate with, when we determine whether their proposed unit is an appropriate one.

136 NLRB 1006, 1012 (1962). Section 9(c)(5) of the Act provides that "the extent to which the employees have organized shall not be controlling." But the Supreme Court has made clear that the extent of organization may be "consider[ed] . . . as one factor" in determining if the proposed unit is an appropriate unit. *NLRB v. Metropolitan Life Insurance Co*., 380 U.S. 438, 442 (1965). In *Metropolitan Life*, the Court made clear that "Congress intended to overrule Board decisions where the unit determined could *only* be supported on the basis of the extent of organization." Id. at 441 (emphasis added). 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. Thus, both before and after the adoption of the 9(c)(5) language in 1947, the Supreme Court had held, "[n]aturally the wishes of employees are a factor in a Board conclusion upon a unit." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941). We thus consider the employees' wishes, as expressed in the petition, a factor, although not a determinative factor here.

We proceed, then, to determine if the employees' proposed unit consisting of all CNAs is "a unit" appropriate for the purposes of collective bargaining under Section 9(a). Again, the Supreme Court has recognized that the language of Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit." *American Hospital Assn.*, 499 U.S. at 610 (emphasis in original). In other words, as the District of Columbia Circuit has held, "[m]ore than one appropriate bargaining units logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979)). See also *Overnite*, 322 NLRB at 723 ("It is well-settled then that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining.").

In making the determination of whether the proposed unit is an appropriate unit, the Board's "focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). In determining whether employees in a proposed unit share a community of interest, the Board examines:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, Inc., 338 NLRB 123, 123 (2002). Accord: *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8 (D.C. Cir. 2008) (to determine if a community of interest exists, the Board typically looks at the similarity of wages, benefits, skills, duties, working conditions, and supervision of the employee); *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001) ("In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration.").[19]

Here, employees in the proposed unit clearly (and undisputedly) share a community of interest. The Regional Director so concluded based on the CNAs' "[d]istinct training, certification, supervision, uniforms, pay rates, work assignments, shifts, and work areas." The CNAs, of course, all occupy the same job classification. The CNAs in the Employer's nursing department are unlike all the other employees the Employer would include in the unit. Thus, they wear distinctive nursing uniforms unlike all the other employees, most of whom wear no uniform at all. Because they are in the nursing department, the CNAs' immediate and intermediate supervision (by LPNs and RNs) is separate and distinct from all other employees'. The primary duty of the CNAs, unlike all the other employees, is the direct, hands-on care of facility residents. As a consequence, CNAs at this facility and nationwide experience unique risks and are subject to unique requirements. Only CNAs are routinely exposed to blood and other bodily fluids. Only CNAs

[19] It is highly significant that, except in situations where there is prior bargaining history, the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace. As the Board has recognized, "We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). In other words, in determining whether employees in the proposed unit share a community of interest, the Board both insures that they can be fairly represented by a single representative and that bargaining will occur within boundaries that make sense in the employer's particular workplace. This is true not simply because most of the facts at issue (lines of supervision, skill requirements, wage rates, etc.) are established by the employer, but also because the lines across which those facts are compared are typically drawn by the employer: lines between job classifications (as here), departments, functions, facilities, and the like.

routinely perform the physically demanding tasks of assisting residents with repositioning and ambulation.[20]

The CNAs' distinctive duties are further evidenced by the fact that, at this facility and across the nation, Federal regulations require that CNAs, unlike all nonnursing staff, must be certified by the State and have a minimum of 75 hours of training within 4 months of hire. 42 CFR § 483.75(e).[21] CNAs, unlike the other employees, must also undergo periodic training in order to maintain their certification. Lacking such certification, other employees are barred from performing key CNA tasks such as assisting residents with eating and positioning. CNAs are the only employees required to staff three 8-hour shifts. CNAs are the only employees assigned to work exclusively in particular areas of the residential wings. CNAs also are paid according to a distinct wage scale although the scale falls within the range of those used to compensate the other employees. There is only "limited and unspecific" interaction among the CNAs and the other employees, as the Regional Director found, and CNAs rarely if ever interact with some of the other employees, such as the maintenance assistant, cooks, data entry clerk, business office clerical, and receptionist. There is no evidence of significant functional interchange or overlapping job duties. Finally, the Regional Director correctly found "no evidence" of transfers into the CNA position from the other job classifications and only one such transfer out of the CNA position.

Applying traditional community of interest factors to these facts,[22] we have little difficulty in concluding that the petitioned-for unit is an appropriate unit.

C. Application of the Traditional Standard When the Employer Contends that the Smallest Appropriate Unit Contains Employees not in the Petitioned-For Unit

Having overruled *Park Manor* and thus rejected the Employer's argument for a categorical application of the acute care hospital unit rule to nursing homes, and having found that the CNAs are clearly identifiable as a group and share a community of interest, we come to the question of what showing is required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees.

It is clear what types of showings are not sufficient. Given that the statute requires only *an* appropriate unit, once the Board has determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate. Stated in terms directly relevant to this case, "the Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate." *Montgomery Ward & Co*., 150 NLRB 598, 601 (1964) (citing cases). Because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate. More must be shown. As the District of Columbia Circuit held, "[t]hat the excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit." *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The Seventh Circuit has agreed: "[I]t is not enough for the employer to suggest a more appropriate unit; it must 'show that the Board's unit is clearly inappropriate.'" *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (quoting *NLRB v. Aaron's Office Furniture*, 825 F.2d 1167, 1169 (7th Cir. 1987)).

Nor is a unit inappropriate simply because it is small.[23] The fact that a proposed unit is small is not alone a relevant consideration, much less a sufficient ground for finding a unit in which employees share a community of interest nevertheless inappropriate.[24] As the Supreme

[20] The distinct nature of the CNAs' duties is evidenced by the fact that CNAs suffer a much higher incidence of workplace injury than the other classifications the Employer would include in the unit. Nationwide, CNAs were in the 98th percentile for injury rates in 2007, suffering more nonfatal injuries than either correctional officers or firefighters. Occupational Outlook Handbook; BLS, 2009 Nonfatal Occupational Injuries and Illnesses: Private Industry, State Government, and Local Government, Chart 5 (Nov. 9, 2009), at http://www.bls.gov/iif/osh/case/osch0043.pdf.

[21] Federal law imposes other unique requirements on CNAs, for example, that the states maintain a registry of all certified CNAs and make available to the public any findings of neglect or abuse by CNAs. 42 CFR § 1396r (e)(2)(A) and (B).

[22] The dissent repeatedly insists that we have altered the traditional community-of-interest test. We have not done so. Rather, we have applied that test and the dissent makes no effort to demonstrate that we have done so erroneously.

[23] In fact, the proposed unit of CNAs in this case is over twice the median size of units found appropriate prior to Board-supervised elections in the last decade. 76 Fed. Reg. 36821 (June 22, 2011) (stating that median unit size from 2001 to 2010 has been 23–26 employees).

[24] Only in the case of a unit composed of a single employee is small size disqualifying. See, e.g., *Mount St. Joseph's Home for Girls*, 229 NLRB 251, 252 (1977); *Luckenbach Steamship Co.*, 2 NLRB 181, 193 (1936) ("the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain"). But the Act permits the Board to find a unit appropriate so long as it contains more

Court has observed, "A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, *Pittsburgh Plate Glass Co*. v. *NLRB*, 313 U.S. 146, 165 (1941), and prevents a minority interest group from being submerged in an overly large unit, *Chemical Workers Local 1* v. *Pittsburgh Plate Glass Co*., 404 U.S. 157, 172–173 (1971)." *NLRB v. Action Automotive*, 469 U.S. at 494 (parallel citations omitted). The Board has articulated a "polic[y] of not compelling labor organizations to seek representation in the most comprehensive grouping." *Mc-Mor-Han Trucking Co*., 166 NLRB at 701. "A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless 'an appropriate unit compatible with that requested unit does not exist.'" *Overnite*, 322 NLRB at 723–724 (citations omitted); see also *Federal Electric Corp*., 157 NLRB at 1132. "The issue," the Board recently made clear, "is not whether there are too few or too many employees in the unit." *Wheeling Island Gaming*, 355 NLRB No. 127, slip op. at 1 fn. 2 (2010).

Nor does Section 9(c)(5) in any way favor larger units. Senator Taft specifically rebutted objections to the 1947 amendments, which he cosponsored and which introduced the language now in Section 9(c)(5) into the Act, on this ground, explaining, "It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographic considerations, etc., any one of which may justify the finding of a small unit." 2 Leg. Hist. 1624 (1947) (Congressional Record, Senate, June 12, 1947). In other words, if employees in a proposed unit share a community of interest, the unit is not inappropriate, nor would finding it appropriate violate Section 9(c)(5), simply because it is small.

When the proposed unit describes employees readily identifiable as a group and when consideration of the traditional factors demonstrates that the employees share a community of interest, both the Board and courts of appeals have necessarily required a heightened showing to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees. Although different words have been used to describe this heightened showing, in essence, a showing that the included and excluded employees share an overwhelming community of interest has been required. Citing a number of Board decisions, the District of Columbia Circuit held in *Blue Man Vegas, LLC v. NLRB,* 529 F.3d 417 (D.C. Cir. 2008), that the proponent of the larger unit must demonstrate that employees in the more encompassing unit share "an overwhelming community of interest" such that there "is no legitimate basis upon which to exclude certain employees from it." 529 F.3d at 421. Using a Venn diagram to illustrate its point, the Court explained that, considering traditional community-of-interest factors, two groups have an "overwhelming community of interest" when the factors "overlap almost completely." Id. at 422. The Board has articulated the same standard. See, e.g., *Laneco Construction Systems,* 339 NLRB 1048, 1050 (2003) ("we reject the Employer's argument that the Lang-supplied carpenters and helpers shared such an overwhelming community of interests with its solely-employed carpenters and helpers that a unit excluding the former employees would be inappropriate"); *Lundy Packing Co*., 314 NLRB 1042, 1043 (1994) (holding that the exclusion of certain employees from the petitioned-for unit did not render it inappropriate because the excluded employees did "not share such an overwhelming community of interest" with employees in the unit), enf. denied 68 F.3d 1577 (4th Cir. 1995);[25] cf. *United Rentals*, 341 NLRB 540, 541 (2004) ("overwhelming and undisputed evidence of overlapping duties and interchange between the excluded employees and the petitioned-for employees, and of their common terms and conditions of employment").

We acknowledge that the Board has sometimes used different words to describe this standard and has sometimes decided cases such as this without articulating any clear standard. For example, while explaining that the Board "never addresses solely and in isolation, the question whether the employees in the unit sought have interests in common with one another," the Board recently

than one eligible employee. Id.; *Copier Care Plus*, 324 NLRB 785 (1997) (two-person unit); *Sonoma-Marin Publishing Co.*, 172 NLRB 625 (1968) (three-person unit at time of certification).

[25] While the Fourth Circuit denied enforcement in *Lundy*, the D.C. Circuit later explained in *Blue Man Vegas* that this was not because the Board's overwhelming-community-of-interest standard improperly gives controlling weight to the extent of organization. *Blue Man Vegas*, 529 F.3d at 422–423. "As long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." Id. at 423. Thus, the court in *Blue Man Vegas* held that the Board had applied the correct legal standard, id. at 427, but had not first made the necessary findings. Here, we make clear that employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria before the Board applies the overwhelming-community-of-interest standard to the proposed larger group. Thus, the rule disapproved by the court in *Lundy*, as quoted in the dissent ("Under this new standard, *any union-proposed unit* is presumed appropriate unless an 'overwhelming community of interest' exists between the excluded employees and the union-proposed unit") is vastly and crucially different from the standard we apply here.

indicated that the inquiry must proceed to determine "whether the interests of the group sought are sufficiently distinct from those of other employees." *Wheeling Island Gaming*, 355 NLRB No. 127, slip op. at 1 fn. 2 (emphasis and citation omitted). See also *Seaboard Marine,* 327 NLRB 556, 556 (1999) ("sufficiently distinct community of interest"). Of course, that language leaves open the question of what degree of difference renders the groups' interests "sufficiently distinct." Nevertheless, the Board has repeatedly used words that describe a heightened standard, for example, holding that a proposed unit was "too narrow in scope in that it excludes employees who share a *substantial* community of interest with employees in the unit sought." *Colorado National Bank of Denver*, 204 NLRB 243, 243 (1973) (emphasis added and footnote omitted). Even in a single case, such as *Lundy Packing*, the Board has used different terms to describe the same standard, requiring an "overwhelming community of interest" and holding that excluded employees need not be included because they did "not share such a *close* community of interest" with the included employees. 314 NLRB at 1045 (emphasis added). In an earlier case, the Board used yet other words to describe the degree of overlap required to render a proposed unit in which employees share a community of interest inappropriate. Citing characteristics common to employees in the smaller unit and excluded employees, the Board held, "these factors are not *so significant* as to require the inclusion of all the employees in a single unit." *Mc-Mor-Han Trucking Co*., 166 NLRB at 701–702 (emphasis added).[26]

Absolute precision and predictability, of course, are not possible in this highly fact-specific endeavor engaged in with regard to diverse workplaces.[27] However, the use of slightly varying verbal formulations to describe the standard applicable in this recurring situation does not serve the statutory purpose "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act." Nor does it permit employers to order their operations with a view toward productive collective bargaining should employees choose to be represented. We therefore take this opportunity to make clear that, when 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[28] that employees in the

[26] See also *Engineered Storage Products Co.*, 334 NLRB 1063, 1063 (2001) ("test is whether the community of interest they share . . . is *so strong* that it requires or mandates their inclusion in the unit") (emphasis added); *Lawson Mardon, U.S.A.,* 332 NLRB 1282, 1282 (2000) ("such a *substantial* community of interest . . . so as to require their inclusion in the same unit") (emphasis added); *United Rentals*, 341 NLRB at 542 (same); *J. C. Penney Co.*, 328 NLRB 766, 766 (1999) ("employees share *such a strong* community of interest with the employees in the unit found appropriate that their inclusion is required") (emphasis added); *Home Depot*, USA, 331 NLRB 1289, 1289 (2000) ("we disagree . . . that this evidence of job overlap and employee interchange is *significant enough* to warrant the conclusion that the [petitioned-for] drivers do not constitute a functionally distinct group with a distinct community of interest") (emphasis added); *Ramada Inns, Inc*., 221 NLRB 689, 690 (1975) (only "if functions and mutual interests are *highly integrated* [is] an overall unit alone appropriate") (emphasis added); *Monsanto,* 183 NLRB 415, 416 (1970) ("any separate community of interest . . . *largely submerged* in the broader community of interest").

[27] Twenty years ago, Judge Easterbrook observed, "Chaos there may be, but this is nothing new. Unit-determination decisions have been ad hoc since 1935." *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 890 (7th Cir. 1991). But that is hardly a standard to aspire to in this area fraught with implications for the effective exercise of statutory rights.

[28] While prior Board decisions do not expressly impose the burden of proof on the party arguing that the petitioned-for unit is inappropriate because the smallest appropriate unit contains additional employees, allocating the burden in this manner is appropriate for several reasons.

First, because it is well established that "the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends," *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2, the Board should find the proposed unit to be an appropriate unit under the circumstances here unless the employer both contends and proves that a larger unit is the smallest appropriate unit.

Second, as when the petitioned-for unit is presumptively appropriate**,** after there has been a showing that the petition describes employees who are readily identifiable as a group and share a community of interest, the Board can and should find the proposed unit to be an appropriate unit unless an opposing party proves otherwise. See *Allen Health Care Services*, 332 NLRB 1308, 1309 fn. 3 (2000) ("when the unit sought is presumptively appropriate, the burden is on the employer to show that the unit is inappropriate") (citing *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999)).

Finally, the allocation of the burden is appropriate because the employer is in full and often near-exclusive possession of the relevant evidence. The Board has allocated the burden of proof for this reason in defining the scope of appropriate units both pre and postelections. See *Capri Sun*, 330 NLRB 1124, 1126 fn. 8 (2000) ("It is the Employer . . . that tenders the evidence of these transfers in support of its argument that the petitioned-for unit is not appropriate, and it is the Employer that possesses and maintains the records which would support its assertions. In these circumstances, the burden to establish the time frame of the transfers is on the Employer"); *Harold J. Becker Co.*, 343 NLRB 51, 52 (2004) (when employer argued that employees should be included in the unit as dual-function employees, the Board held, "It is the Employer, of course, who is in the best position to establish that status, because it has superior access to the relevant information."); cf. *O. E. Butterfield, Inc.*, 319 NLRB 1004, 1006 (1995) (in disputes over whether striker replacements are temporary or permanent, the Board held that, "Because an employer is the party with superior access to the

larger unit share an overwhelming community of interest with those in the petitioned-for unit.[29]

For example, employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a "fractured" unit. A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit. *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). "[T]he Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis." *Seaboard Marine,* 327 NLRB 556, 556 (1999).[30] If the proposed unit here consisted of only selected CNAs, it would likely be a fractured unit: the selected employees would share a community of interest but there would be "no rational basis" for including them but excluding other CNAs.[31] If the proposed unit here consisted of only CNAs working on the night shift or only CNAs working on the first floor of the facility, it might be a fractured unit. Cf. *Wheeling Island Gaming*.[32] In other words, no two employees' terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries. But the proposed unit of all CNAs is in no way a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit or even a more appropriate unit.

While application of this standard, of course, still turns on the facts in particular workplaces, we anticipate that clarifying its verbal formulation and application will reduce litigation. Making clear what the party objecting to a petitioned-for unit must contend and demonstrate, when the petitioned-for unit contains employees readily identified as a group who share a community of interest, will also produce more predictable and consistent results.

As fully explained above, the employees the Employer seeks to include in the proposed unit do not share an overwhelming community of interest with the CNAs. Thus, the Employer's contention fails in this case.

D. There is no Undue Proliferation Here

Despite what the Supreme Court has now made clear is the nonbinding nature of Congressional statements about proliferation of bargaining units in the legislative history of the health care amendments, the Board has nevertheless respected the suggestion that it seek to avoid undue proliferation. In *St. Mary's Duluth Clinic*, 332 NLRB 1419, 1421 fn. 10 (2000), the Board recognized the Supreme Court's holding on proliferation (holding that nonincumbent union may represent separate residual unit in healthcare industry, notwithstanding "congressional admonition against . . . undue proliferation"). While this administrative deference to nonstatutory statements may, in some future case, be in tension with the Board's statutory duty to require only that a proposed unit be an appropriate unit,[33] there is no such conflict here because there is no undue proliferation or even danger of undue proliferation.[34]

The 53 CNAs in this case[35] appear to constitute over 50 percent of the Employer's employees, and only the CNA unit is before us. Generally, CNAs comprise as much as 70 percent of all staff in nursing homes. BLS, Nursing and Psychiatric Aides, in Occupational Outlook Handbook 156 (1010–1011 ed.). Neither finding the proposed unit of CNAs appropriate in this case, nor creating a precedent supporting future holdings that such

relevant information, the burden should logically be placed on it to show that it had a mutual understanding with the replacements that they are permanent.")

[29] While our dissenting colleague criticizes the standard we articulate above, he does not parse the language in our prior cases addressing this precise issue or offer any alternative standard consistent with those cases.

We note that the Board has developed various presumptions and special industry and occupation rules in the course of adjudication. Our holding today is not intended to disturb any rules applicable only in specific industries other than the rule announced in *Park Manor*.

[30] We read this language in *Seaboard* to suggest only that a unit is "too narrow in scope" only if it has no "rational basis," i.e., it is fractured, because, as explained above, small size alone is not disqualifying.

[31] Even if the proposed unit contained all employees occupying a nominally distinct classification, the proposed unit would be a fractured unit if, in fact, the employees in the classification did not perform distinct work under distinct terms and conditions of employment. See, e.g., *Wal-Mart Stores,* 328 NLRB 904 (1999) (finding that meatcutters alone were not an appropriate craft-based unit because they no longer performed work distinct from that of the other meat department employees).

[32] The dissent asserts that the holding here effectively overrules *Wheeling Island Gaming*, but, as demonstrated in our citations to that decision here and elsewhere in our opinion, the majority holding there is, in fact, an integral part of our analysis here.

[33] The Board frankly acknowledged in *Newton-Wellesley*, a decision issued before the Supreme Court clearly described the legislative history's lack of legal force, that there have been a "number of situations in which the Board has refused to approve units that, in any other context, would amount to appropriate units." 250 NLRB at 412.

[34] For this reason, the dissent's suggestion that we ignore Congress' admonition in this regard is misplaced, as is the specter of undue proliferation of units in future cases that the dissent raises.

[35] Notably, in *Four Seasons Nursing Center*, 208 NLRB 403 (1974), and *St. Luke's Hospital,* 203 NLRB 1232 (1973), the two Board cases involving nursing homes cited with approval in the 1974 Committee Reports, the proposed nursing home units found inappropriate by the Board contained two and seven employees, respectively. The acute care hospital case cited with approval in the Committee Reports, *Woodland Park Hospital,* 205 NLRB 888 (1973), involved a proposed unit of 10–12 x-ray technicians in a workplace of 41–48 technical employees and, presumably, hundreds of other employees.

units are appropriate in other nursing homes, risks undue proliferation of bargaining units.

In general, there would seem to be much less risk of "undue proliferation" of units in nursing homes than in acute care hospitals because there are fewer employees occupying fewer separate classifications in nursing homes. Amici American Health Care Association, National Center for Assisted Living, Assisted Living Federation of America, American Seniors Housing Association, Leading Age, and Alliance for Quality Home Care assert that today "the trend is clearly toward a *less* compartmentalized approach" in long-term care. Brief at 17. Citing the rapid expansion of "assisted living communities," these amici state that "[b]ecause of [residents'] lower acuity levels, these assisted living communities are less heavily staffed and need employ fewer professional and technical employees." Brief at 20. In other words, long-term care workplaces seem to be evolving even further away from the intensively staffed and highly specialized acute care hospital paradigm that motivated congressional concern about undue fragmentation in 1974.

Finally, we note that none of the parties or amici has offered any evidence showing that organizing and representation in units other than those defined in the acute care hospital unit rule has led to adverse consequences for residents of nursing homes, nursing home operators, or the general public.[36] There is no evidence of "jurisdictional disputes or work stoppages," "wage 'leapfrogging' and 'whipsawing,'" or increased costs. 120 Cong. Rec. 12944–12945 (May 2, 1974) (statement of Senator Taft). Rather, the parties raise abstract specters that do not comport with our experience in labor relations in the health care industry or more generally.

In *Manor Healthcare Corp.*, 285 NLRB 224 (1987), the Board acknowledged the "seriousness of Congress' concern" about undue proliferation of units in health care workplaces and the resulting possibility of "an increased risk of work disruption or other adverse consequences." Id. at 226. Accordingly, the Board provided that when its traditional criteria lead to the conclusion that a proposed unit is appropriate (in that case because the proposed single-facility unit was presumptively appropriate), the health care employer could nevertheless respond by "providing a reasonable basis for finding an increased risk that is substantial." Id. No such showing has been made here.

Giving due consideration to the danger of undue proliferation of bargaining units in the health care industry, we find that it does not alter our conclusion, above, that the proposed unit of CNAs is appropriate.

V. CONCLUSION

Our dissenting colleague is simply wrong when he says that "[t]oday's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." Our decision adheres to well-established principles of bargaining-unit determination, reflected in the language of the Act and decades of Board and judicial precedent. The changes in the law made here are relatively modest ones:

> (1) We overrule one decision, *Park Manor*, which had created a unique test for unit determinations in nonacute health care facilities (the "pragmatic or empirical community of interests" test).
>
> (2) We hold that the traditional community of interest test—to which we adhere—will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule (including cases formerly controlled by *Park Manor*).
>
> (3) We set out a clear test—using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit—for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees. In such cases, the employer must show that the excluded employees share an "overwhelming community of interest" with the petitioned-for employees.

We have fully explained why these changes further the policies and purposes of the Act, as they have long been understood.[37]

In light of all of the foregoing, we find that the petitioned-for Certified Nursing Assistants constitute an appropriate unit. Accordingly, we remand this proceeding to the Regional Director for further appropriate action.

[36] We consider this significant given that the notice and invitation to file briefs specifically asked parties to "submit empirical and practical descriptions of their experience," 356 NLRB No. 56, slip op. at 2, and given the fact that briefs were filed by parties with broad, deep, and extended experience in the industry, including amici United States Chamber of Commerce, American Hospital Association, American Society for Healthcare Human Resources Administration, American Health Care Association, National Center for Assisted Living, Assisted Living Federation of America, American Seniors Housing Association, Leading Age, and the Alliance for Quality Nursing Home Care. Indeed, amicus American Healthcare Associationsindicates that it has members with long-term care facilities where nursing assistants are represented in separate units, yet it presents no evidence and did not even suggest that such representation has led to any adverse effects. Brief at 15 fn. 11.

[37] As in our opinions in *Lamons Gasket* and *UGL*, we firmly believe that the dissent's extraordinary accusations should only be answered through careful analysis of the Act, the policies embedded therein, and prior precedent. Our answer is thus fully contained in the opinion above.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for further appropriate action in accordance with this Decision.

Dated, Washington, D.C. August 26, 2011

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction. My colleagues' opinion stunningly sweeps far more broadly even than suggested by the questions posed in the notice and invitation to file briefs to which I previously dissented.[1] It is regrettable enough that they mischaracterize and overrule *Park Manor*,[2] which established a balanced legal standard maintained in nonacute care health care unit cases without controversy for 20 years (and without any objection from the party seeking review in this case). In the process, they essentially nullify the Board's practice of taking guidance from legislative history cautioning against proliferation of units in the health care industry *and* they set the stage for erosion of the unit rule adopted in 1989 for acute care facilities after an exhaustive rulemaking process. Beyond that, the majority accepts as the definitive standard for unit determinations in all industries an "overwhelming community of interest" test that will make the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances. The wording of the test may be different, but in practical effect this is the standard espoused by the dissent and rejected by a Board majority in *Wheeling Island Gaming, Inc.* [3]

I. THE PROCESS

This decision is the culmination of an ill-considered journey. The parties involved did not request any broad inquiry. The Employer requested review because the Regional Director erroneously failed to apply *Park Manor* in determining that a petitioned-for unit of certified nursing assistants (CNAs) in the Employer's nursing home facility was appropriate for bargaining. However, the majority seized on this opportunity to solicit comment on questions ranging far beyond the issue actually presented in this case. For this reason, I took the unusual step of dissenting from the notice and invitation to file briefs.[4]

In that dissent, I expressed the view, to which I adhere, that the majority is overstepping the bounds of its discretion in making sweeping changes to established law through this adjudication, without adhering to any approximation of a rulemaking procedure that would comply with requirements under the Administrative Procedures Act (APA) designed to safeguard the process by ensuring scrutiny and broad-based review. This is particularly so because, under *Park Manor*, the test for determining appropriate units in the nonacute health care industry is informed by the exhaustive rulemaking process engaged in over 20 years ago when the Board first took on the task of determining appropriate bargaining units in the entire health care industry. I make the additional note here that the majority's choice of adjudication in this instance also runs afoul of President Obama's Memorandum on Transparency and Open Government,[5] making clear that independent agencies have an obligation to do much more than provide minimal due process to assure that regulatory actions implement the principles of transparency, participation, and collaboration.

Even assuming the propriety of proceeding by adjudication, the briefing results here provide no reason to change longstanding and noncontroversial Board precedent. In response to questions concerning the continued viability of *Park Manor*, parties and amici agreed that there is no imperative to change that law, although, as the majority notes, there was disagreement on how to resolve this case under existing law, with several union-side briefs advocating reinterpretation of the precedent. Moreover, little information was provided in response to questions concerning emerging factual patterns in nonacute care facilities and experience under *Park Manor* affecting employee free choice.

The final briefing questions went well beyond the facts and issues presented and asked if the Board should find

[1] *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB No. 56 (2010).

[2] 305 NLRB 872 (1991).

[3] 355 NLRB No. 127 (2010) (opinion of Chairman Liebman and former Member Schaumber; Member Becker dissenting).

[4] *Specialty Healthcare*, 356 NLRB No. 56, , slip op. at 4–6 (2010).

[5] 74 Fed. Reg. 4685, 4685–4686 (Jan. 26, 2009).

"presumptively appropriate" units, in nonacute care facilities or as a general rule, comprised of employees performing the same job in the same facility or, similarly, employees "readily identifiable as a group" based on similarity of function and skills.[6] The silence in response to the Board's solicitation of support for such a broad reformation of representation case law speaks volumes.

In sum, despite being given every opportunity to do so, the parties and amici, with perhaps a single exception, did not express support for a strikingly new unit determination standard within or outside of the health care industry. Nevertheless, my colleagues respond not only by overruling *Park Manor* but also by redefining the test for determining an appropriate unit in both nonacute healthcare facilities and all other nonhealth care industries. This is perhaps the most glaring example in cases decided recently of my colleagues initiating a purported empirical inquiry into the effects of extant precedent, only to end by overruling that precedent in the absence of any factual justification, for the purely ideological purpose of reversing the decades-old decline in union density in the private American work force.[7]

II. THE OVERRULING OF *PARK MANOR*

In the rulemaking process preceding publication of the final health care rule, the Board acquired extensive information regarding nonacute care institutions, such as nursing homes. Although acknowledging that rapid transition within the nonacute care segment of the industry and significant differences among types of facilities made it difficult to establish uniform rules, the Board recognized that there was generally less diversity and more functional integration in nursing homes among various employee groupings.[8] In the final rule itself, the Board decided to limit its unit determinations to acute health care facilities and to leave to case-by-case adjudication the determination of appropriate units in nonacute health care facilities, including nursing homes.

After the Supreme Court affirmed the health care rule in *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) (*AHA*), the Board in *Park Manor* addressed the issue of what test to apply in adjudicating appropriate unit issues in the nonacute health care sector. It determined to use a variant of the traditional community-of-interest test, stating that

> we prefer to take a broader approach utilizing not only ''community of interests'' factors but also background information gathered during rulemaking and prior precedent. Thus, as more fully set forth below, our consideration will include those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute. We hope, however, that after various units have been litigated in a number of individual facilities, and ''after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.''[9]

The Board also stated that the general principle in its health care rule of striking a balance between units that are too large, making union organizing difficult, and too small, creating the potential for repetitious bargaining and/or frequent strikes, was "equally applicable to unit determinations in nonacute care facilities."[10]

Today, notwithstanding the enhancement of the original rulemaking record and precedent through the accumulation of 20 years of litigation experience in a variety of nonacute care facilities, the majority now overrules the *Park Manor* test. They contend that (1) any reliance on the Congressional admonition against unit proliferation in the health care industry[11] is unfounded; (2) a backwardlooking test relying on a dated health care rulemaking record and on precedent in cases prior to that rulemaking makes no sense for the determination of appropriate units in a highly dynamic industry; and (3) the difference between the *Park Manor* test and the Board's traditional community of interest test is not readily understandable.

In sum, the majority claims that the "idiosyncratic" *Park Manor* test is obsolete and fails to provide clear guidance "to interested parties or the Board…" I, on the other hand, perceive a difference between old and obsolete. Further, I fail to see why my colleagues seem so confused about the *Park Manor* test when there is no

[6] "(7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter. (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are 'readily identifiable as a group whose similarity of function and skills create a community of interest.'" 356 NLRB No. 56, slip op. at 2.

[7] See *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), and *UGL-UNICCO Service Co.,* 357 NLRB No. 76 (2011).

[8] Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33900 at 33927-33929 (1988).

[9] 305 NLRB at 875 (footnotes omitted).

[10] Id. at 876.

[11] Committee Reports for the 1974 amendments conferring Board jurisdiction over nonprofit health care industry employers. S. Rep. No. 766, 93rd Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted).

evidence in this record or in the history of litigation under *Park Manor* that "interested parties" are as confused.

First, as to the significance of the Congressional admonition that the Board should give due consideration to preventing proliferation of bargaining units in the health care industry, the majority is obviously correct that the Supreme Court instructed in *AHA* that this admonition did not have the "force of law."[12] Nevertheless, the Board relied in part on the admonition when limiting to eight the number of units in acute care facilities. The Court did not say it was impermissible to do so in the exercise of the Board's broad discretion to make appropriate unit determinations pursuant to Section 9(b) of the Act.

For the present case, it is enough to say again that there is nothing wrong, and much right, about considering the admonition as well under the *Park Manor* test. The admonition itself was addressed to unit determinations in the entire health care industry. Its application seems particularly apt in the nonacute care branch of that industry where the record in the health care rulemaking proceeding suggested that broader groupings of employees in a more highly integrated and homogenous workforce would tend towards finding fewer appropriate units than in the larger, more highly skilled, and specialized work force of acute care facilities. Thus, guided by the admonition, the Board in *Park Manor* declared that it would seek to strike a balance between units deemed too large and those deemed too small. The majority considers this to be contrary to the Board's statutory obligation. Obviously, I disagree, and I question whether they seriously contend that the Board should ignore the admonition, finding as many bargaining units appropriate as petitioned for, until such time as Congress puts the force of law behind its warning.

Second, as to the majority's claim of infirmity in *Park Manor*'s continuing reliance on an "obsolete" health care rulemaking record, there is little in the present record to suggest that dynamic growth in the nursing home industry or the entire nonacute health care sector has been accompanied by any fundamental changes in the nature of work performed since that record was compiled. There is no basis for finding that nursing homes and other nonacute care facilities do not still have more functionally integrated and homogenous staffs than in acute care facilities. In particular reference to CNAs, the petitioned-for employee group in this case, amicus Service Employees International Union (SEIU), provided the most detailed description of their work as primary caregivers to support the assertion that this work is significantly different and more important than that of other nonprofessionals in nursing homes. But SEIU did not describe these attributes as recently gained as the result of industry transformation. In fact, some details given about CNA work and job requirements predated the Board's health care rule. Conversely, amicus American Health Care Association & National Center for Assisted Living (AHCA) presented data indicating that, despite expansion and diversification, the functions of employees of long-term health care institutions remain basically unchanged. AHCA also notes the recent trend toward the interdisciplinary team model that further breaks down functional barriers between job classification and results in a less compartmentalized approach, thus making the Board's observations of over 20 years ago even more relevant today.

In any event, contrary to the majority, *Park Manor* did not envision that the Board would simply look backward to "questionable" precedent predating rulemaking. As noted in the briefing request, *Park Manor* envisioned that subsequent cases would establish recurring patterns to illustrate which units are typically appropriate in nonacute care settings. One such recurring pattern reflected in post-*Park Manor* precedent has been to combine CNAs with others in a comprehensive service and maintenance unit. In fact, a search of the Board's records in response to a Freedom of Information Request from AHCA identified only four cases in which an election was directed in a CNA-only unit, all pursuant to stipulated election agreements.[13] More to the point, until my colleagues got involved, no one has indicated a problem with this pattern. I do not dispute the importance of CNAs or the majority's description of their duties in this nursing home setting, but I find no support there for the conclusion that change in the Board's historical approach is warranted.

Finally, as to the majority's claim that the difference between the *Park Manor* test and the traditional community-of-interest test is not understandable, I profess some skepticism. The Board has applied *Park Manor* for approximately two decades without apparent misunderstanding by the parties. The number of contested cases to come before the Board under this test is quite few. The majority sua sponte chose to raise the issue whether the Board should adhere to this test, and it found little support for overruling it in briefs filed by the parties and amici.

[12] 499 U.S. at 616.

[13] I am aware of no case, and the majority did not cite to one, in which the Board itself has determined in a representation case that a disputed petitioned-for unit of CNAs was appropriate under *Park Manor*.

All of this is of little consequence to my colleagues. They know full well that a petitioned-for CNA unit would ordinarily be found inappropriate under the *Park Manor* test, but it serves their greater purpose to overrule that test in order to get to the issue they really want to address, that is, a reformulation of the community-of-interest test.

III. THE MAJORITY'S "COMMUNITY-OF-INTEREST" TEST

The majority purports to apply "traditional community-of-interest" principles in making unit determinations for nonacute health care facilities. However, their definition of these principles is far from traditional and will have the intended dramatically different results in appropriate unit determinations for all industries. In this respect, it takes some time to pick through the majority's recitation of undisputed, well-established unit determination principles to get to the marrow of their opinion. Once there, we discover that "[w]hen the proposed unit describes employees clearly identifiable as a group and when consideration of the traditional factors demonstrates that the employees share a community of interest," an employer opposing this unit as inappropriate because it excludes certain employees bears a heightened burden of proving "that the included and excluded employees share an overwhelming community of interest."

The phrase "overwhelming community of interest" is familiar, but taken out of its ordinary context. In accretion cases, where a party seeks to add a group of previously unrepresented employees to an existing bargaining unit, the Board takes a restrictive approach in order to assure that those employees are not unfairly deprived of their right to vote on the question of representation. Accordingly, "accretion is found only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted."[14]

Obviously, the paramount concern supporting a restrictive inclusion rule in accretion cases has no relevance to initial appropriate unit determination cases, where any employee included in the unit found appropriate will have the opportunity to vote on the question concerning representation. Nevertheless, the "overwhelming community of interest" test has infrequently crept into such unit determinations. Most notably, in *Lundy Packing*, 314 NLRB 1042, 1043 (1994), the Board reversed the Regional Director and found that the disputed group of technicians did not have to be included in the petitioned-for unit of service and maintenance unit employees because the technicians did not share such an overwhelming community of interest with those employees. The Fourth Circuit emphatically disagreed with this test, and its resulting exclusion of the technicians. The court stated

> The Board . . . adopted a novel legal standard which effectively accomplished the exclusion. Under this new standard, any union-proposed unit is presumed appropriate unless an "overwhelming community of interest" exists between the excluded employees and the union-proposed unit: "Here, [the Board] find[s] . . . that the technicians do not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners' objections." *Lundy Packing Co., Inc.,* 314 N.L.R.B. 1042, 1043 (1994). 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. This is because "the union will propose the unit it has organized." *Laidlaw Waste Systems, Inc. v. NLRB,* 934 F.2d 898, 900 (7th Cir.1991); *see Continental Web Press, Inc. v. NLRB,* 742 F.2d 1087, 1093 (7th Cir.1984) ("the fact that [ ] the union wanted a smaller unit . . . could not justify the Board's certifying such a unit if it were otherwise inappropriate"). Given the community of interest between the included and excluded employees here, it is impossible to escape the conclusion that the QA/LTs' ballots were excluded "in large part because the Petitioners do not seek to represent them." *Lundy Packing,* 314 N.L.R.B. at 1046 (Member Stephens, dissenting). In fact, the Board has as much as admitted that it gave controlling weight to the Unions' proposal: "[A] unit including [quality control] employees might also have been an appropriate unit had such a unit been sought by the Petitioners." *Lundy Packing,* 314 N.L.R.B at 1044.[15]

Particularly as applied to petitioned-for units that are not presumptively appropriate—and a unit is not presumptively appropriate simply because it consists of employees who share a community of interest among themselves—the overwhelming community-of-interest test is not materially different from the "same job, same place" unit determination standard espoused by the dissent and rejected by a Board panel majority in *Wheeling Island*

[14] *E. I. Du Pont, Inc.,* 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).

[15] *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1581 (4th Cir. 1995) (citation omitted).

Gaming, supra.[16] As explained there, in a correct application of the traditional community of interest test, the Board "'never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests 'in common.' Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.' *Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980) (emphasis added)." Id. slip op. at 1 fn. 2.

Not only does the majority here effectively overrule *Newton-Wellesley* in this case, but they distort the meaning of the aforementioned passage by suggesting it supports ending an appropriate unit analysis upon finding that the petitioned-for unit employees share a community of interest among themselves. The "overwhelming community of interest" test they endorse cannot be reconciled with the traditional appropriate unit test identified in *Newton-Wellesley*, and provides no answer to the criticism of that test voiced by the *Lundy* court.[17] The majority concludes that its approach comports with Section 9(b)'s statement that the Board shall ensure employees the fullest freedom in exercising their rights, stressing that among these rights is the right to self-organize.[18] However, as the *Lundy* court made clear, Board effectuation of this right may not go so far as to give controlling weight to extent of organization, in contravention of Section 9(c)(5).[19]

This is not an abstract debate over legal hokum. The difference between the *Park Manor* test that should be imposed to determine the appropriateness of the petitioned-for CNA unit and the "overwhelming community of interest" test that my colleagues impose has vast practical ramifications. As mentioned by the *Lundy* court, this test obviously encourages unions to engage in incremental organizing in the smallest units possible. In the present case, it seems quite clear that, if petitioned for, under the majority's test there could at least be separate appropriate units found for RNs, LPNs, CNAs, cooks, dietary aides, business clericals, and residential activity assistants. In *Park Manor* itself, there could have been separate appropriate units for RNs, LPNs, kitchen employees, laundry employees, housekeepers, activities assistants, maintenance employees, office clericals, and guards. This would represent an extraordinary fragmentation of the work force for collective-bargaining purposes, a situation that cannot lend itself to the labor relations stability to which my colleagues so often dedicate their efforts.

IV. CONCLUSION

It is not difficult to perceive my colleagues' overall plan here. First, in this case, they define the test of an appropriate unit by looking only at whether a group of employees share a community of interest among themselves and make it virtually impossible for a party opposing this unit to prove that any excluded employees should be included. This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units. Next, by proposing to revise the rules governing the conduct of representation elections to expedite elections and limit evidentiary hearings and the right to Board review, the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation.[20]

[16] Today's majority includes dissenting Member Becker from *Wheeling Island Gaming*, as well as Chairman Liebman, who was in the majority there.

[17] To the extent that the majority relies on the court's opinion in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008), I respectfully suggest that that case was wrongly decided, based both on an inapt analogy to accretion law and inapposite precedent. It is also arguably inconsistent with the circuit's own precedent. See *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515 (1999).

[18] The majority refers to the constitutional freedom of association to support the proposition that extent of self-organization is of paramount concern in unit determinations. There has never been any serious suggestion that the right to organize is unrestrained. Nor has any constitutional infirmity been raised or found in the Act's mandates that the Board must decide in each case whether a unit is appropriate for bargaining or that the extent of organizing not be controlling.

[19] See, e.g., *American Hospital Assn.*,499 U.S. at 611 (Congress "chose not to leave [appropriate unit decisions] up to employees or employers alone.").

[20] See Notice of Proposed Rulemaking on Election Procedures, 76 Fed. Reg. 36812 (June 22, 2011), and my dissent therein at 36829–36833. One could reasonably argue that the burden imposed here on employers contesting the appropriateness of a petitioned-for unit represents a premature and improper partial implementation of the proposed election rules.

This initiative puts our agency beyond the pale of reasoned adjudication. It enlists the Board's Regional Offices, who will have little option but to find almost any petitioned-for unit appropriate, in a campaign to support union organization where the recent independent efforts of unions to persuade employees to join or remain with them in large numbers have failed. I fully recognize that partisan shifts in Board membership are most often followed by shifts in the law that favor unions or employers, but I do not think it appropriate to bend the law or the Agency's service so far as my colleagues propose to do.

Dated, Washington, D.C. August 26, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD