WRITTEN TESTIMONY AND STATEMENT FOR THE RECORD OF

JERRY M. HUNTER
PARTNER
BRYAN CAVE LLP

BEFORE THE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE

HEARING ON: H.R. 2346, SECRET BALLOT PROTECTION ACT, and H.R. 2347, REPRESENTATION FAIRNESS RESTORATION ACT

JUNE 26, 2013 – 10:00 A.M.

WRITTEN TESTIMONY AND STATEMENT FOR THE RECORD OF JERRY M. HUNTER, PARTNER, BRYAN CAVE LLP

Good morning, Subcommittee Chairman Roe, Ranking Member Andrews, and Members of the Subcommittee, thank you for inviting me to appear before this Subcommittee and testify today. It is certainly an honor for me to appear before this Subcommittee as a witness. My name is Jerry M. Hunter and I am a partner with the law firm of Bryan Cave LLP in St. Louis, Missouri. Prior to joining Bryan Cave, I served as the General Counsel of the National Labor Relations Board from November, 1989 through November, 1993. Earlier in my career, I worked as a Field Attorney with the Region 14 office of the NLRB in St. Louis from June, 1977 until June, 1979. I was also employed as a Trial Attorney and Senior Trial Attorney by the U.S. Equal Employment Opportunity Commission from June, 1979 until November, 1982.

My testimony today should not be construed as legal advice as to any specific fact pattern or circumstances which may form the basis for any case which may be filed with the NLRB. Additionally, my testimony is based on my own personal views in light of my previous employment as a Field Attorney and the General Counsel by the NLRB and does not necessarily reflect the views of Bryan Cave or any of its attorneys. I have been in the field of labor and employment law since I graduated from law school during May, 1977. My experience as a labor and employment law professional includes, as stated above, having been employed as an attorney by the NLRB Regional Office in St. Louis and the EEOC District Office in St. Louis, employed as labor counsel by a St. Louis Fortune 500 Corporation, served as Director of the Missouri Department of Labor and Industrial Relations, served a four year term as General Counsel of the NLRB, and employed by Bryan Cave LLP since January, 1994 where I represent management in labor and employment law.

On May 24, 1995, I was appointed by the Leadership of the United States Congress (Senate Majority Leader Robert Dole, Minority Leader Tom Daschle, Speaker of the House Newt Gingrich and Minority Leader Richard Gephardt) to serve a four year term as a member of the Board of Directors of the Office of Compliance. The Office was established by the Congressional Accountability Act of 1995 to administer the eleven statutes in the areas of civil rights and labor laws made applicable to the legislative branch by the Act. The five-member Board is responsible for administering the Office, carrying out an educational program for the House and Senate, adapting rules and regulations to implement the new laws, and serving as the appeal body for administrative complaints under the Act. A copy of my biographical sketch is attached to my written testimony as Exhibit A.

Mr. Chairman, I request that the entirety of my written testimony be entered into the record of the hearing.

Mr. Chairman, my testimony this morning addresses H.R. 2347, the Representation Fairness Restoration Act, and issues raised by the National Labor Relation Board's decision in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (Aug. 26, 2011). In Specialty Healthcare, the Board (former Chairman Liebman and Members Becker and Pearce, with Member Hayes dissenting) decided that a Regional Director must find that any unit that the union petitions for is appropriate, if the employees perform the same tasks or earned the same or similar pay. This decision will wreak havoc on employers. This decision will enable unions to organize multiple small bargaining units within one facility, thereby balkanizing an employer's operation and literally making it impossible for an employer to carry out decisions concerning hiring, promotion, employee transfer and related decisions. Employers will be subjected to a considerable increase in operational costs as they may be forced to deal with many unions which may be certified to represent very small bargaining units. Organized Labor's ability to carve out small bargaining units will not only adversely impact employers but will also have the concomitant effect of eliminating promotional opportunities for employees since union work rules generally discourage and/or prohibit cross-training and transfer of employees from one bargaining unit to another bargaining unit. Under the Board's decision in Specialty Healthcare, a regional director employed by the Board would generally be forced to hold a representation election in any unit requested by the union.

It should be noted that in Specialty Healthcare, no party to the case requested that the Board overturn the Board's 1991 decision in Park Manor Care Center, 305 NLRB 872 (1991); nor did any party request that the Board consider the Park Manor standard, which had been the applicable law for twenty years and applied by Board Members who had been appointed by both Republican and Democratic Presidents. Interestingly, the only issue before the Board which was raised by the party seeking review was a request that the Board consider whether the regional director erroneously failed to apply the standard at all. See 357 NLRB No. 83, at p. 18. Notwithstanding that neither party requested that the Board consider the viability of Park Manor, the Board, on its own volition, posed the question of whether Park Manor should continue to be the applicable standard for the parties to follow. Thereafter, the Board proceeded to overturn Park Manor. Additionally, even more troublesome, the Board created a disturbing new element to the "community of interest" test which the Board uses to determine the composition of bargaining units. In early cases, the Board considered whether employees had a "community of interest" when defining units. The factors that the Board generally considered in unit determinations included degree of functional

integration, common supervision, the nature of employee skills and functions, interchangeability and contact among employees, work situs, general working conditions, compensation, and fringe benefits. See, e.g., NLRB v. Paper Mfrs. Co., 786 F.2d 163 (3rd Cir. 1986). Difference in supervision is not a *per se* basis for excluding employees from an appropriate unit. Texas Empire Pipeline Co., 88 NLRB 631(1950). The Board has historically stated that the important consideration is still the overall community of interest among the several employees. See, United States Steel Corporation, 192 NLRB 58 (1971). By considering whether or not an employer's work enterprise was integrated and the employee shared an overall "community of interest", the Board, prior to the decision in Specialty Healthcare, avoided separating employees into small groups from other employees who performed similar or related tasks and who received the same or similar pay, where the only purpose for carving out a small group of employees would be to enhance the union's organizing efforts.

Former Member Hayes, in dissenting from the majority opinion in Specialty Healthcare, stated as follows:

> 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.
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> 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, a reformulation of the community-of-interest test.

Id. at 18. As stated above, the Board not only overturned the standard for appropriate unit determinations in the non-acute healthcare industry which had been the standard for twenty years, but it also changed its longstanding community-of-interest test, by boldly stating that the Board would no longer

address whether the petitioned-for unit is "sufficiently distinct" to warrant a separate unit. The latter part of the Board's holding reversed a thirty year old standard which had been applied by Boards appointed by both Democratic and Republican Presidents and that the current Board cited with approval as recently as 2010. Interestingly, the Board's prior approval of the community-of-interest standard included an affirmative vote by former chairman Wilma Liebman. See Wheeling Island Gaming, 355 NLRB No. 127, p. 1, fn. 2 (Aug. 27, 2010) (citing, Newton Wellesley Hospital, 250 NLRB 409, 411-12 (1980)). Although the Obama-appointed Board has overturned longstanding NLRB precedent unlike any previous Board, Republican or Democratic appointed, the decision in Specialty Healthcare may turn out to be one the most significant reversals of precedent in the history of the Agency. The Board's decision could very well lead to a multiplicity of small and fragmented bargaining units in virtually every employer's workforce in every industry in this nation. Former Member Hayes noted in his dissent that the employer in Specialty Healthcare in addition to being required to recognize a union that represents only its certified nurse anesthetists, could also find itself having to deal with a union for separate bargaining units of registered nurses, licensed practical nurses, cooks, dietary aides, business clericals, and residential activity assistants. See 357 NLRB No. 83, p. 19. Critically, all of these units would be very small, with the dietary aides having only ten members, the cooks having three members, and the activity directors having only two employees as bargaining unit members. The multiple bargaining units or microunits which likely will result from the Board's decision in Specialty Healthcare will not only make it more costly for an employer to operate, but may also result in layoffs and possible closure of the employer facility. Multiple units or microunits which could occur at one facility would also likely result in work protection clauses being included in any collective bargaining agreement which the employer may ultimately have to agree to (i.e., unit in women's shoe department and unit in men's shoe department), which would prohibit the employer from transferring employees from one department to another and, in effect, drive up the employer's operation costs.

Beyond facing these administrative burdens, employers would find themselves at increased risks of work stoppages at the hands of multiple unions which represent multiple units, each of which could halt the employer's operations if their bargaining demands were not met. Thus, an employer balkanized into multiple units faces not only the costly burden of negotiating separately with a number of different unions, but also with the attendant drama and potential work disruption, coupled with a threat that its operations could be shut down by various fractions of the workforce. Such risk is particularly high for small businesses, which almost certainly would lack the long-term reserves to withstand a shutdown.

An increase in the proliferation of bargaining units also limits the rights of employees within the workforce. Allowing the type of narrow units approved by Specialty Healthcare creates the risk that the workforce will fracture based on the communities of interest as defined by a regional director, rather than on the underlying functional realities of the positions. It is very troubling, however, by the potential freezing effect that fragmented units would have on employee advancement. As the different collective bargaining agreements inevitably will have differing provisions on transfers, promotions, seniority, position posting and preferences, etc., it will be extremely difficult, if not impossible, for an employee whose unit is limited to his or her unique job description to develop his or her career.

Only months after the Board's decision was issued in Specialty Healthcare, the business community's fears became a reality. In DTG Operations, Inc., 357 NLRB No. 175 (Dec. 30, 2011), a Board majority (Chairman Pearce and Member Becker, with Member Hayes dissenting) overruled a Regional Director's finding that the smallest appropriate unit was a wall-to-wall unit. The union had petitioned for a unit of rental service and local rental service agents and the employer sought a broader unit. The Board majority of Chairman Pearce and Member Becker found that the employees, whom the employer would have added, did not share an overwhelming community-of-interest with the employees petitioned for and that those employees sought by the union are an appropriate unit.

The Board's decision creates real threats not only to labor relations, but also to the ability of employers to remain competitive in what has clearly become a worldwide economy. Since I believe that the Board's decision in Specialty Healthcare may violate the admonition in Section 9(c)(5), 29 U.S.C. § 159 ("[I]n determining whether a unit is appropriate for the purposes specified in Subsection (b) [of this section] the extent to which employees have organized shall not be controlling"),[1] the Subcommittee should seriously consider whether the type of legislative relief proposed by H.R. 2347 is needed to correct the problems created by the Board's decision in Specialty Healthcare.

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[1] In conformity with this statutory limitation, the Board has held that a unit based solely or essentially on extent of organization is inappropriate. New England Power Co., 120 NLRB 666 (1958). See also, NLRB v. Morganton Hosiery Co., 241 F.2d 913 (4th Cir. 1957); Metropolitan Life Insurance Co. v. NLRB, 380 U.S. 438 (1965); Motts Shop Rite of Springfield, 182 NLRB 172 (1970) (Section 9(c)(5) prohibits the Board from establishing a bargaining unit solely on the basis of extent of organization).

EXHIBIT A

JERRY M. HUNTER

Jerry M. Hunter is a partner in the Commercial Litigation and the Labor and Employment Law Client Service Groups of the international law firm of Bryan Cave LLP. He practices out of the Firm's St. Louis and Washington offices where his practice involves conducting internal investigations, serving as an arbitrator and mediator, and representing management in all phases of labor and employment law, including preventative labor relations and supervisory training, affirmative action and diversity issues, labor arbitration, handling charges filed with the National Labor Relations Board ("NLRB"), the Equal Employment Opportunity Commission ("EEOC"), U.S. Department of Labor, state and local civil rights agencies and cases filed in federal and state courts.

Prior to joining Bryan Cave LLP, Mr. Hunter served as General Counsel of the National Labor Relations Board ("NLRB") from November 1989 through November 27, 1993. Mr. Hunter was nominated for the position of General Counsel of the NLRB by former President George H.W. Bush during May, 1989, and confirmed by the United States Senate during November, 1989. In that position, he supervised the Office of General Counsel and the agency's 1,800 employees; oversaw the operations of 33 regional, two sub-regional and 17 resident offices; prosecuted unfair labor practice cases before the Five Member Board; and represented the agency before the Federal District Courts, the U.S. Courts of Appeals and the Supreme Court.

Mr. Hunter previously served as Director of the Missouri Department of Labor and Industrial Relations from 1986 through November 30, 1988. Mr. Hunter was nominated for this position by former Governor John Ashcroft and confirmed by the Missouri State Senate during May, 1986. Prior to that appointment, he was employed as labor counsel by the Kellwood Company, a St. Louis, Missouri-based Fortune 500 corporation, from 1981 through May, 1986. He has also been employed as a field attorney by the National Labor Relations Board and as a senior trial attorney by the U.S. Equal Employment Opportunity Commission.

Mr. Hunter is a 1974 graduate of the University of Arkansas at Pine Bluff, where he received a bachelor of arts degree in history and government, and a 1977 graduate of Washington University School of Law in St. Louis, Missouri. Early in the spring of 1987, Mr. Hunter was awarded a Danforth Foundation fellowship to participate in the program for Senior Executives in State and Local Government at the John F. Kennedy School of Government at Harvard University in Cambridge, Massachusetts. He completed the Senior Executive program during the summer of 1987.

On May 24, 1995, Mr. Hunter was appointed by the Leadership of the United States Congress (Senate Majority Leader Robert Dole, Minority Leader Tom Daschle, Speaker of the House Newt Gingrich and Minority Leader Richard Gephardt) to serve a four-year term as a member of the Board of Directors of the Office of Compliance. The Office was established by the Congressional Accountability Act of 1995 to administer the eleven statutes in the areas of civil rights and labor laws made applicable to the legislative branch by the Act. The five-member Board is responsible for administering the Office, carrying out an educational program for the House and Senate, adopting rules and regulations to implement the new laws, and serving as the appeals body for administrative complaints under the Act.

During August, 1994, Mr. Hunter was elected as a Member of the Board of Directors of Kellwood Company, a St. Louis, Missouri based Fortune 500 Company, which is an international marketer of apparel and soft goods. Prior to the purchase of Kellwood by Sun Capital of Boca Raton, Florida during February, 2008, Mr. Hunter served as Chairman of the Corporate Governance Committee, a Member of the Executive Committee and the Lead Director for the Kellwood Board of Directors. Mr. Hunter was elected a member of the Board of Directors of the American Arbitration Association at its Annual Meeting on April 30, 1997, where he served as a Member of the Board and its Executive Committee until May, 2009.

Mr. Hunter is also a Member of the National Board of Directors of Boys Hope Girls Hope. He is a member of The College of Labor and Employment Lawyers, Inc., the American Bar, the National Bar, the Missouri Bar, the Arkansas Bar, the Mound City Bar, and the Bar Association of Metropolitan St. Louis. He is licensed to practice law in the States of Missouri and Arkansas, and is admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the District of Columbia, Fifth, Eighth and Ninth Circuits, and the United States District Court for the Eastern and Western District of Arkansas, the Central and Southern District of Illinois, the Eastern and Western District of Missouri, and the Southern District of Texas.

Mr. Hunter has been a regular selection to Best Lawyers in the United States, Chambers USA America's Leading Lawyers for Business, Super Lawyers, and Lawdragon's the One Hundred Most Powerful Employment Lawyers in America.

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PROFESSIONAL EXPERIENCE

January 1, 1994 to present

Bryan Cave LLP, St. Louis, Missouri and Washington, D.C.
Partner

As a Member of the Firm's Commercial Litigation and Labor and Employment Law Client Service Groups, my practice involves representing businesses in litigation matters and all phases of labor and employment law, including preventive labor relations and supervisory training, affirmative action and diversity issues, labor arbitrations, handling charges filed with the National Labor Relations Board ("NLRB"), the U.S. Equal Employment Opportunity Commission ("EEOC") the U.S. Department of Labor ("DOL"), state and local civil rights agencies and defending cases filed in federal and state courts wherein plaintiffs allege unlawful discrimination based upon race, color, national origin, sex, sexual harassment, age, disability, retaliation, and other alleged unlawful criteria.

December 1989 to November 27, 1993

National Labor Relations Board, Washington, D.C.
General Counsel
Nominated by President George H.W. Bush and Confirmed by the U.S. Senate

As General Counsel, duties included supervising four major divisions in the Office of General Counsel (Divisions of Advice, Operations-Management, Enforcement Litigation, and Administration); having general supervision over the 33 regional, two sub-regional and 17 resident offices; prosecuting unfair labor practice cases before the Five Member Board; and representing the Agency on matters in the Federal District Courts, the U.S. Courts of Appeals, and the U.S. Supreme Court. Responsible for supervising over 1,800 employees (407 employees in the Washington Office of the General Counsel and 1,396 employees in the field offices) and managing a budget of over $146 million.

June 1986 to November 1989

Missouri State Department of Labor and Industrial Relations
Director
Nominated by Governor John Ashcroft and confirmed by the Missouri State Senate

Duties included supervising the six divisions in the Department of Labor (Divisions of Employment Security, Workers' Compensation, Labor Standards, Missouri Commission on Human Rights, State Board of Mediation and Governor's Committee on Employment of People with Disabilities); represented the Governor's Office on Labor and employment initiatives introduced or pending in the legislature; and worked with business, labor and other groups to bring about changes in state labor and employment laws and regulations in order to enhance the state's opportunities for business growth and development. Responsible for supervising a department with over 2,200 employees and managing a budget of over $104 million.

November 1981 to May 1986

Kellwood Company, St. Louis, Missouri
Labor Counsel

Represented the company on charges filed with the Equal Employment Opportunity Commission, the National Labor Relations Board, the U.S. Department of Labor, and various state and local government agencies; provided advice and counseling to management officials on labor and employment issues, union campaigns and preventive labor relations; represented the company in hearings in federal court and before administrative agencies.

June 1979 to November 1981

Equal Employment Opportunity Commission, St. Louis, Missouri
Senior Trial Attorney
Trial Attorney

Represented the EEOC in cases brought in federal court alleging a violation of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and subpoena enforcement proceedings; reviewed administrative files following an investigation and recommended whether the Director should determine that a violation occurred; and performed other legal and administrative duties including updating the compliance and other manuals.

June 1976 to June 1979

National Labor Relations Board, St. Louis, Missouri
Field Attorney
Law Clerk

Prosecuted cases against unions and employers accused of having violated the National Labor Relations Act; investigated charges filed against unions and employers and recommended whether the Regional Director should find that a violation occurred; drafted representation case decisions and served as hearing officer in representations case hearings.

Fall 1976

Judge Albert Rendlen, Missouri Court of Appeals
Clerk

Drafted decisions on pending cases and performed legal research and other duties.

OTHER WORK EXPERIENCE

October 1981 to 1983
Webster University, St. Louis, Missouri
Adjunct Instructor in Labor Law and Regulations

LICENSED TO PRACTICE LAW

Arkansas Supreme Court - September 1977
Missouri Supreme Court - May 1978

ADMITTED TO PRACTICE BEFORE:

United States Supreme Court
United States Court of Appeals for the District of Columbia Circuit
United States Court of Appeals for the Fifth Circuit
United States Court of Appeals for the Ninth Circuit
United States District Court for the Eastern and Western Districts of Arkansas
United States District Court for the Eastern and Western Districts of Missouri
United States District Court for the Central and Southern Districts of Illinois
United States District Court for the Southern District of Texas

PROFESSIONAL ASSOCIATIONS

Member:
American Bar Association
National Bar Association
Missouri Bar Association
Mound City Bar Association
Arkansas Bar Association
Bar Association of Metropolitan St. Louis
The College of Labor and Employment Lawyers, Inc.
Phi Alpha Delta Legal Fraternity

EDUCATION

Washington University School of Law, St. Louis, Missouri
Juris Doctor May 1977

University of Arkansas, Pine Bluff, Arkansas
B.A. History and Government May 1974

LEGAL RECOGNITION

Best Lawyers in the United States
Chambers USA America's Leading Lawyers for Business

Super Lawyers
Lawdragon's One Hundred Most Powerful Employment Lawyers in America

OTHER ACTIVITIES

Member of the National Board of Directors, Boys Hope Girls Hope, October 1994 to the present

Member of the Board of Trustees, Maryville University, May, 2001 to May, 2005

Member of the Board of Directors, Kellwood Company, August 1994 to March, 2008

Member of the Board of Directors, American Arbitration Association, April, 1997 to May, 2008

Member of the Board of Directors, Office of Compliance, U.S. Congress, May 24, 1995 to May, 1999

Member, U.S. Senate Small Business Committee Advisory Council, April 1995 to 1999 (appointed by Senator Christopher Bond (R-MO), Chairman of the Committee)

Member, American Arbitration Association, National Employment Advisory Council, February 1996 to 2003

Member, National Law Council, Washington University School of Law
October 1988 to present

Secretary-Treasurer and Member of the Board
Missouri Corp. for Science and Technology - May 1986 to 1989

Member of the Board of Trustees and Chairman of the Investment Committee, Missouri State Employees Retirement System - April 1987 to 1989

Member, Governor's Advisory Council on Literacy - May 1988 to Sept. 1989

Commissioner, Missouri Opportunity 2000 Commission - January 1986 to August 1987

Commissioner, The Dr. Martin Luther King, Jr. State Celebration Commission
January 1986 to 1989