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STATEMENT TO THE RECORD

Hearing on Culture of Union Favoritism: Recent Actions of the National Labor Relations Board
U.S. House Committee on Education and the Workforce

September 22, 2011 – 10:00 a.m.

Good morning Committee Chairman Kline, Mr. Miller and Members of the U.S. House Committee on Education and the Workforce. It is an honor and pleasure to appear again before the Committee as a witness. My name is G. Roger King,[1] and I am a partner in the Jones Day law firm. My testimony today should not be construed as legal advice as to any specific facts or circumstances. Further, my testimony is based on my own personal views and does not necessarily reflect those of Jones Day or its attorneys. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers, with a mix of union and non-union work forces. I have been a member of various committees of The American Bar Association, The Society for Human Resource Management (SHRM) and The American Society of Healthcare Human Resources Association (ASHHRA) and I also participate in the work of other trade and professional associations that are active in labor and employment matters. A copy of my CV is attached to the written version my testimony as Attachment A.

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

Mr. Chairman, my testimony this morning addresses the following points regarding the recent initiatives undertaken by the National Labor Relations Board ("NLRB", "the Board", or "Agency").

- **THE UNPRECEDENTED ACTIVIST AND PRO-LABOR RECORD OF THE CURRENT BOARD.**

The unpredictability and ever-changing nature of Board case law has been a cause of frustration and a concern for employers, labor organizations and employees for many years. Further, the procedural and substantive problems associated with the Board frequently having to meet its statutory obligations with less than a full complement of members and the highly politicized process to fill Board vacancies has proven to be a detriment to the Agency, including the public perception of its ability to carry out its mission in an unbiased and even-handed fashion. Substantial policy changes in the direction of the Board, or as certain academic commentators have noted, "policy oscillation" by the Board have continued to increase in recent

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years resulting in allegations from both the labor and management community of the Board being "highly politicized." Indeed, given the statutory framework with which the Board was created, and the authority of a sitting president to nominate a majority of the members of the Board from his party, or representative of his labor and management philosophy, it is not surprising that the Board faces substantial obstacles in carrying out its statutory duties.

The direction of the current Board, however, is troubling. Indeed many from the employer community believe that the Board will not judge the merits of any case before it on an unbiased basis. Irrespective of one's feelings and position on labor-management issues, objectively, the current Board, through adjudication, rulemaking and proposed rulemaking, has implemented one of the more active agendas pursued by any Board in the history of the Agency. Further, it has engaged in these initiatives in a timeframe that is perhaps also unmatched in any other period in the over 75 years since the Board was established. Such recent activism reached an unfortunate high point on August 26 of this year.[2] On that day, the Board overturned substantial precedent in at least three cases.[3] These decisions furthered an already activist agenda and represented part of a regulatory approach that has resulted in at least nine major policy initiatives by the Board in the last few months, all designed to further the ability of a union to either become the representative of employees in a small or fragmented bargaining unit, or to avoid altogether a secret ballot election. Such regulatory activism comes at a time when President Obama and other in his administration have instructed federal agencies to reduce regulatory red tape and enhance, however possible, measures to ensure job retention and job creation. One example of the current Board's activist agenda is its initiatives to pursue two rulemaking proposals within a period of a few short months, contrasted with the cautious and thoughtful approach that Boards in both Republican and Democrat administrations have taken in this area. Indeed in the history of this Agency it has only engaged in two rulemaking initiatives, only one of which was successful—the Acute Healthcare Bargaining Unit Rules.

Mr. Chairman, I know there are certain viewpoints in the employer community that would welcome the demise of the National Labor Relations Board. Certainly I have heard comments welcoming the Board's shutdown if it is reduced to a two-member status at the end of this year, which is possible given the fact that Member Becker and nominee Terence Flynn's nominations are still pending in the Senate, and Member Becker's recess appointment expires on December 31. As you are aware, pursuant to the U.S. Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (June 17, 2010), the Board will not be able to adjudicate cases in such a status. I do not agree with this line of thinking, as I believe it is quite important to have an adjudicatory body in this country available to resolve workplace disputes. Notwithstanding the current controversies surrounding the Board, I believe that representatives of management, labor, and other constituencies would concede that the Board over the years has helped contribute to the overall labor relations stability in this country, particularly compared to

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[2] Former Chairman Wilma Liebman's term expired on August 27, 2011, leaving the Board with now-Chairman Mark Pearce and recess-appointed Member Craig Becker, both Democrats, and Member Brian Hayes, a Republican.

[3] There may be other cases in which former Chairman Liebman participated but the Agency has yet to formally release such decisions.

the constant labor unrest and difficulties evidenced in other parts of the world. There are many fine employees that carry out the Board's mission of promptly and efficiently conducting elections and resolving, in an expeditious manner, day to day workplace disputes. Perhaps the structure of the Board and its underlying statutory framework do need to be reexamined. But it is exceedingly important that we have a neutral and unbiased agency available to resolve issues that arise between labor and management. For the reasons outlined below, Mr. Chairman, however, the current direction of the Board, including the ill-advised complaint issued by the Board's Acting General Counsel against the Boeing Company, needs to change course. All parties – labor, management, and employees – that bring matters before the Board deserve to have their disputes adjudicated and resolved in an unbiased and consistent manner.

- **ARTIFICIAL CREATION OF ISSUES BY THE BOARD FOR POLICY CHANGE**

While the Board certainly has the authority to engage in both adjudication and rulemaking, a deeply troubling trend has emerged from the current Board wherein it has been deciding issues that are not actually before it, and even more troubling, making changes to law and procedure where no changes are warranted.

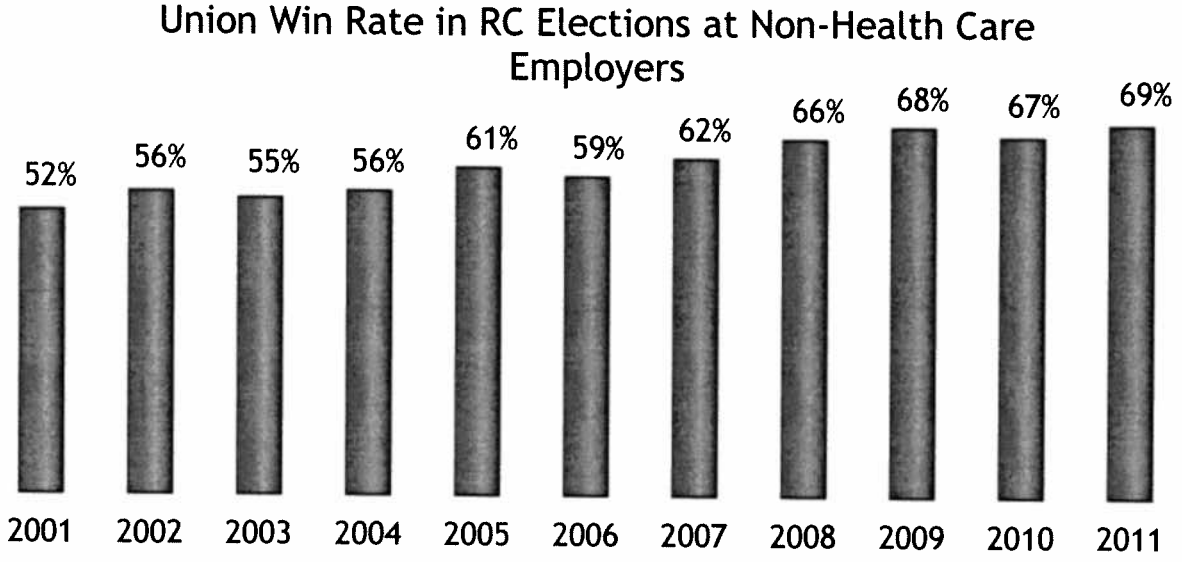
For example, in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), no party to the case asked the Board to overturn *Park Manor Care Center*, 305 NLRB 872 (1991), nor did they ask the Board to consider the *Park Manor* standard, which had been applied for twenty years by both Republican and Democrat Boards. Rather, the party seeking review in that case asked the Board to consider whether the Regional Director erroneously failed to apply the standard at all. *See* 357 NLRB No. 83, at *18. Nonetheless, the Board, of its own volition, posed the question of whether *Park Manor* should continue to be followed and then proceeded to overturn *Park Manor*. Additionally, on an even more important note, the Board created a particularly disturbing new element to the community of interest test for bargaining unit determinations, which I will discuss in a moment. Member Hayes suggested that the Board's actions were intentional, stating that "[t]hey know full well that a petitioned-for CNA unit would ordinarily be found inappropriate under the *Park Manor* test, but it serves their greater purposes to overturn that test to get to the issue they really want to address, that is, a reformulation of the community-of-interest test." *Id.*

Likewise, in *Roundy's Inc.*, Case No. 30-CA-17185, the Board asked interested parties to comment on "[w]hat bearing, if any, does *Register Guard*, 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in non-employee access cases?" While *Register Guard*'s first holding that employer e-mail systems should be treated as employer property for Section 7 purposes under the National Labor Relations Act ("NLRA" or "the Act") is not even arguably at issue in *Roundy's, Inc.*, it would be improper for the Board to attempt to reverse *Register Guard's* second holding, which defined "discrimination," through *Roundy's Inc.*.

Further, the Board's Notice of Proposed Rulemaking (NPRM) regarding representation case procedures may be the most egregious example of the Board overreaching to change precedent and procedure without any basis whatsoever for doing so. Indeed, based on the Board General Counsel's Annual Summary of Operations, the Board is routinely exceeding its own time targets for representation cases. The NLRB's internal objective in representation cases is to

complete elections within 42 days of the filing of a petition. *See* NLRB General Counsel, Summary of Operations (Fiscal Year 2010), G.C. Mem. 11-03, at 5 (Jan. 10, 2011). In 2010, regional offices of the Board exceeded this objective completing initial elections in representation cases in a median of 38 days from the filing of the petition and conducting 95.1% of all initial representation elections within 56 days of the filing of a petition.[4]

Finally, the union win rate in petitions going to an election has consistently exceeded 60% in recent years as demonstrated by the following chart relying on Board statistics.



Simply stated, the Board, in recent months, has proceeded to create its own agenda, irrespective of the issues presented to it in its case adjudication and in the rulemaking area has also proceeded to attempt to implement change without an established need or record to support such initiatives.

- **ESTABLISHMENT OF "GERRYMANDERED" BARGAINING UNIT DETERMINATION STANDARD THAT WILL RESULT IN FRAGMENTED AND NUMEROUS MICRO OR SMALL UNITS.**

On August 26, 2011, the Board released its decision in *Specialty Healthcare*. The Board in this 3-1 decision, over the dissent of Board Member Brian Hayes, not only overturned the standard for unit appropriateness determinations in the non acute health care industry which had

[4] Decisions or supplemental reports issued in cases involving post-election objections and/or challenges requiring a hearing were issued in a median of 70 days, exceeding the Board's goal by 10 days. Decisions or supplemental reports issued in cases addressing post-election objections and/or challenges not requiring a hearing were issued in a median of 22 days, also exceeding the Board's goal by 10 days. *See* NLRB General Counsel, Summary of Operations (Fiscal Year 2010), G.C. Mem. 11-03, at 5 (Jan. 10, 2011)

been in place for 20 years, but also significantly altered its traditional community of interest test explaining that the Board would no longer address whether the petitioned-for unit is "sufficiently distinct" to warrant a separate unit. The latter part of this holding, additionally, reverses a 30-year old standard that had been applied by Republican and Democrat Boards and that the current Board cited with approval as recently as last year. Indeed, such approval included an affirmative vote by then Chairman Liebman. *See Wheeling Island Gaming*, 355 NLRB No. 127 at *1 fn. 2 (Aug. 27, 2010) (citing, *Newton Wellesley Hosp.* 250 NLRB 409, 411-12 (1980)). The Board's decision in *Specialty Healthcare* may turn out to be one of the most significant reversals of precedent in recent Board history and may, in fact, lead to a multiplicity of small and fragmented bargaining units in virtually every employer's workforce in the country. One would be hard pressed to think of an initiative by a federal agency that could have had a more of a negative impact on job retention, job creation, and productivity in this country. For example, as Member Hayes noted in his dissent, the employer in *Specialty Healthcare* beyond now being required to recognize a union that represents only its certified nurse anesthetists,[5] could also find itself dealing with separate bargaining units of RNs, LPNs, cooks, dietary aides, business clericals, and residential activity assistants. *See* 357 NLRB No. 83 at *19. Further, those units would be incredibly small, with the dietary aides having only 10 members, the cooks three members, and the activity directors unit consisting of only two employees.

- **THE BOARD'S PROPOSED EXPEDITED (QUICKIE) ELECTION RULES LACK A FACTUAL FOUNDATION, ARE NOT CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND SOUND ADMINISTRATIVE LAW PRINCIPLES, AND VIOLATE FUNDAMENTAL DUE PROCESS RIGHTS OF EMPLOYEES AND EMPLOYERS.**

The Board, on July 22, 2011, in another 3-1 decision, again over the dissent of Member Hayes, published an extensive and far reaching number of proposed new election rules—the most extensive proposed rulemaking changes in the Board's history. Such proposed rules would modify over 100 sections and subsections of the current Board Regulations and include changes which span over 35 3-column pages of the Federal Register. Further, the Board, over the objection of a number of employer groups, including HR Policy Association (HR Policy), SHRM, the U.S. Chamber of Commerce and other similar groups, required all interested parties to file comments regarding such proposed rule changes within only a 60-day period and refused to extend such comment period. Indeed, the 60-day period for comments is the minimum amount of time under President Obama's Executive Order 13,563 and, given the extensive nature of such proposed rules, such time period should have been extended.

Likewise, Executive Order 13,563 requires that "*[b]efore issuing a notice of proposed rulemaking*, each agency, where feasible and appropriate, *shall seek the views of those who are likely to be affected*, including those who are likely to benefit from and those who are potentially subject to such rulemaking." (Emphasis added.) However, the Board did not do so for the vast

[5] The Board recently opened the ballots that were impounded in the *Specialty Healthcare* election and the union prevailed by a vote count of 39-17.

majority of the proposed rules in the NPRM.[6] The Board's disregard of the requirements of Executive Order 13,563 not only demonstrates administrative agency arrogance, but is also a one-sided and extremely biased approach with respect to how the important process of conducting secret ballot elections should be carried out by the Agency.

If the Board intends to publish a Final Rule, it must affirmatively vote to do so while it still has a quorum of three members before December 31, 2011. The last comments submitted to the Board were submitted on September 7, 2011. Based on the number of working days remaining between September 7 and December 31, the Board would need to review over 650 comments per day to consider all 51,576 comments. Simply put, if the Board proceeds to issue a Final Rule in such a time frame, it will be hard for individuals to accept that the Board actually read and thoughtfully considered the comments submitted.

The proposed rules are literally a procedural and substantive "mine field" for employers. There are a considerable number of procedural and substantive deficiencies with such proposed Board rules, which are outlined later in my testimony.

- **THE BOARD'S REVERSAL OF PRECEDENT IN ITS *LAMONS GASKET* AND *UGL-UNICCO SERVICE CO.* DECISIONS ALSO EVIDENCES ITS IDEOLOGICAL APPROACH TO CASE LAW ADJUDICATION, AND SUCH DECISIONS INAPPROPRIATELY WILL DELAY OR DEPRIVE EMPLOYEES OF THE RIGHTS TO VOTE IN BOARD-CONDUCTED SECRET BALLOT ELECTIONS.**

Again, on August 26, 2011, the Board reversed its 2007 decision in *Dana Corp.*, 351 NLRB 434 (2007) (*Dana I*). The decision in question, *Lamons Gasket Co.*, 357 NLRB No. 72 (Aug. 26, 2007), eliminated a 45-day period for employees to exercise their Section 7 rights to file a decertification petition or for a rival union to file a petition after an employer voluntarily recognized a union and before the Board's recognition bar could take effect. Under this decision, employees will now be prohibited from filing a petition for election for "a reasonable period of time," which the Board defines as "no less than 6 months after the parties' first bargaining session and no more than one year." *Id.* at *10. Member Hayes, again in dissent, characterized the Board's decision as "a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise." *Id.* at *11.

There are numerous policy considerations that encourage and support employers and unions from entering into recognition agreements. A wide variety of such agreements have resulted in labor relations stability between unions and employers, including particularly those that culminate with a Board-conducted secret ballot election. Under such agreements, if the union is successful, it obtains the "election bar" protection for a minimum of one year, in most circumstances, restricting the right of a rival union to intervene and to permit the parties to

[6] The only areas where the Board did solicit input in its rulemaking proposals included (i) a request for interested parties to comment on a change in the Board's "blocking charge" policy, which pertains to the procedure where elections are held in abeyance during the pendency of resolution of unfair labor practice charges; (ii) what remedies, if any, should be imposed on improper release of confidential employee information; and (iii) whether the Board should permit electronic signatures on union authorization cards.

negotiate a collective bargaining agreement. However, it is difficult to understand Labor's negative reaction to the Board's holding in *Dana I* and the Board's subsequent criticism of *Dana* in *Lamons Gasket Co.* As the majority in *Lamons Gasket Co.* noted, election petitions were only filed in 102 of the 1,333 requests for *Dana* notices. *Id.* at *4. Moreover, elections only occurred in 62 cases, with the voluntarily-recognized union winning the vast majority of those elections. Simply stated, it is difficult to understand why providing employees with notice of their rights to an election in *Dana* cases was so repugnant, particularly when the Board was contemporaneously requiring the posting of employee rights in other scenarios.

In the third decision, also issued on August 26, 2011, on another 3-1 vote, again over the dissent of Member Hayes, the Board considerably narrowed the opportunity for employees to determine, by secret ballot election, whether an incumbent union should continue to be recognized after the sale of a business. *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (Aug. 26, 2011). This case involves the federal labor law "successorship doctrine" wherein an employer that purchases the assets of a unionized business and retains at least a majority of the seller's unionized workforce must recognize and bargain with the incumbent union. Under this doctrine, an employer has the legal option not to accept the current terms and conditions of employment and bargain with the incumbent union for a new contract. Such employer also has the option to adopt the existing bargaining agreement. If the employer elects the option to bargain for entirely new terms and conditions of employment, it now will be penalized, as will the employees in question, by the imposition of a bar prohibiting an election for one year after the commencement of bargaining. If, however the employer accepts the collective bargaining agreement as the starting point for bargaining with the incumbent union, such an election would only be barred for six months. In either case, the impact is that employees will lose the rights that they previously had to have a secret ballot election conducted shortly after the transaction in question and may ultimately be denied all together, any right to participate in a Board-conducted secret ballot election to determine whether the incumbent union still represents a majority of bargaining unit members.

- **THE BOARD'S LANGUAGE IN ITS NEW MANDATED WORKPLACE POSTER IS NOT BALANCED, AND THE BOARD, IN ALL LIKELIHOOD, HAS EXCEEDED ITS STATUTORY AUTHORITY BY IMPLEMENTING SUCH RULE.**

On August 30, 2011, on a 3-1 vote, again over the dissent of Member Hayes, the Board published a Final Rule requiring all employers subject to the NLRA to post notices informing their employees of the right to unionize under the NLRA and to engage in collective bargaining. *See* 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. § 104). The Board engaged in this action despite President Obama's Executive Order 13,563, which directs federal agencies to minimize the imposition of new rules and follow certain requirements, as discussed above. This new rule also creates a new category of unfair labor practices dictating that employers who fail to post the required notice will be found to have violated 29 U.S.C. § 159(a)(1). Additionally, the Board will consider, under such new rule, ignoring the six-month statute of limitations period contained in 29 U.S.C. § 160(b) if an employer fails to post the notice. Finally, under such new rule, an employer that fails to post the notice may also be found by the Board to have illegal motives and "animus" toward a union in a wholly independent unfair labor practice proceeding, thereby shifting the presumption of guilt on to an employer in such a proceeding.

This new rule has already been challenged by a number of employer groups in federal district court and even if such courts ultimately conclude that the Board has the statutory authority to require the posting of such notices, the language in the Board's poster does not include a complete statement of all of the rights that employees have under the NLRA, nor does the Board's required language include a clear and concise statement of the rights of employees to decide not to form and join a union or to decide not to continue to remain in a union. Member Hayes, in his dissent to the new rule, estimated that such rule will impose new obligations on approximately six million employers, the vast majority of whom are small or mid-size employers.

- **THE BOARD'S ACTIVIST AGENDA DEMONSTRATES A DISREGARD FOR SOUND PUBLIC POLICY, HAS RESULTED IN REJECTION OF BOARD PRECEDENT WITH LESS THAN A FULL COMPLEMENT OF MEMBERS AND UNDERMINES THE AGENCY'S CREDIBILITY AND NEUTRALITY.**

As noted above, prior to the expiration of former Chairman Liebman's term, the Board only had three confirmed members (Chairman Liebman, Member Mark Pearce and Member Hayes). Member Becker was serving, and continues to serve, on a recess appointment basis. It is submitted that the Board should not proceed to overturn precedent and engage in such an activist agenda with only three members, particularly since only two have been confirmed by the United States Senate. I realize that there are differing views on what the Board practice has been in the past with respect to overturning precedent without a full Board being confirmed. When I previously testified before this Committee on a similar topic, I quoted former Chairman Liebman's dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 97 (2007), where she stated that, "[g]iven the Board's well-known reluctance to overrule precedent when at less than full strength (five Members), the Board could not have been signaling to the court that a full-dress reconsideration of *Meijer* was in the offing." In a February 25, 2011, publicly-released letter to Subcommittee Chairman Roe, then Chairman Liebman took issue with my citation to her quote. *See Ltr. to Chairman Roe,* February 25, 2011, attached hereto as Attachment B. Although the cite to former Chairman Liebman's quote was correct, she went on to explain her position by stating that "[t]he Board's tradition...is not to overrule precedent with fewer than three votes to do so," citing to *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 at *2 fn. 1. In that footnote, she and then Board Member and now Chairman Pearce explained that "[d]uring those relatively rare periods when it has had only three members, the Board has not hesitated to reverse prior decisions, *where there was a unanimous vote to do so*." *Id.* (emphasis added). Given the fact that there are now only three sitting members of the Board (including only two confirmed Board Members), one would expect the Board to follow its "tradition" not to reverse precedent—whether by adjudication or rulemaking—without three votes to do so. Will the present Board, under the leadership of Chairman Pearce, follow his previous commitment on this point?

- **ADDITIONAL CONSIDERATIONS REGARDING THE BOARD'S *SPECIALTY HEALTHCARE* DECISION.**

The Board's decision in *Specialty Healthcare* is, as noted above, flawed for a number of reasons. Not only did the Board reach an issue that was not actually before it—whether to

reverse *Park Manor*—but the Board then went further to apparently modify the long and well accepted community of interest standard as applied to all employers.[7] The Board's decision appears to invite unions to petition for the narrowest-possible unit and is particularly flawed for a number of legal reasons. Such substantive legal issues and concerns are outlined in detail in the *amicus* brief filed with the Board in this case by the Coalition for a Democratic Workplace and HR Policy Association. A copy of such *amicus* brief is attached hereto as Attachment C.

The Board's decision in *Specialty Healthcare* attempts to establish an entirely new and difficult standard—the overwhelming community of interest test—for an employer to meet if it attempts to expand a unit which is petitioned for by a union. The Board stated such new standard as follows:

> 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 that employees in the larger unit *share an overwhelming community of interest* with those in the petitioned-for unit.

357 NLRB No. 83 at *12-13 (emphasis added) (footnotes omitted). One significance of this description of the post-*Specialty Healthcare* unit determination analysis is that it omits a critical step that the Board reaffirmed just last year. In *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, then-Chairman Liebman and Member Schaumber wrote that:

> the Board's inquiry 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 establishment of a separate unit. The Board has a long history of applying this standard in initial unit determinations.

Id. at *1 fn. 2 (internal quotation and citation omitted).

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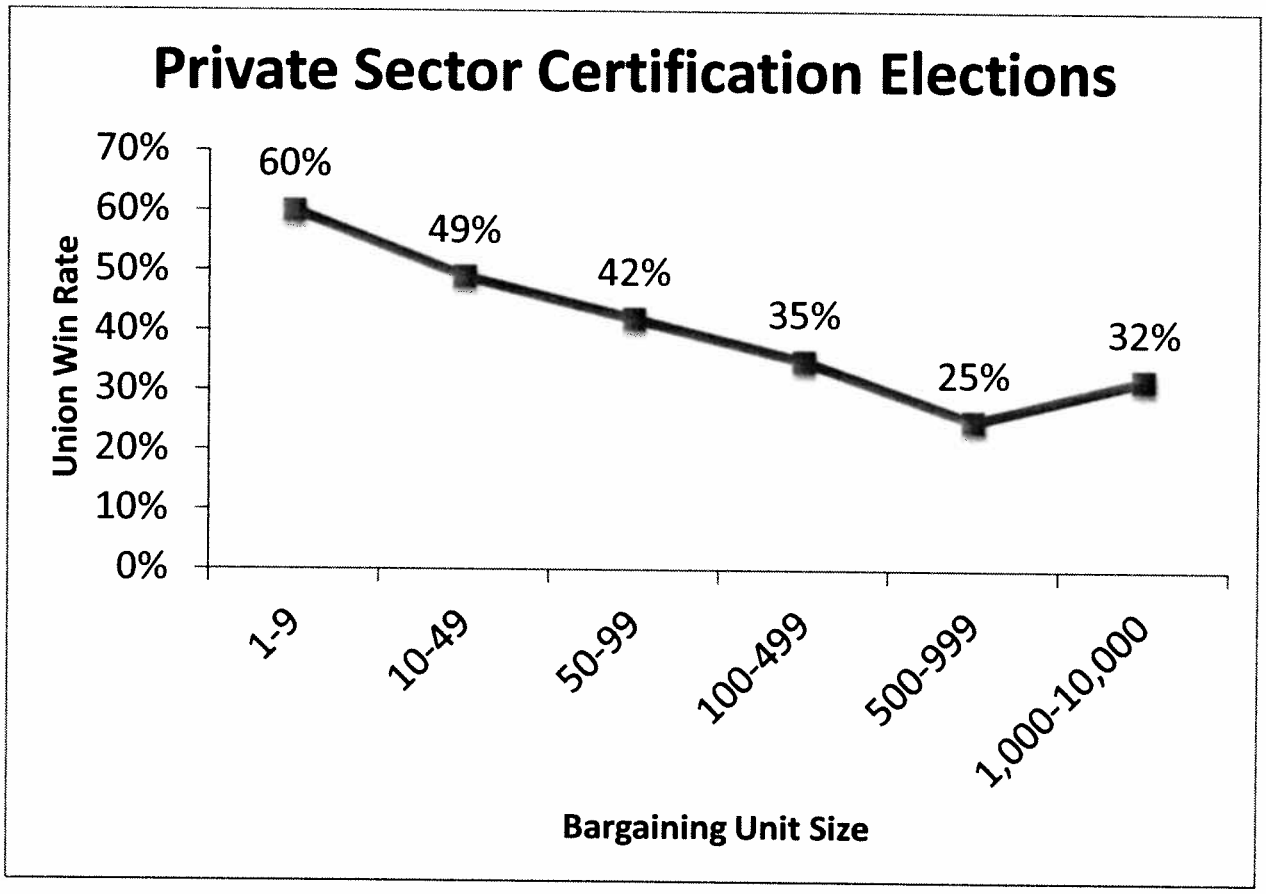
[7] Employers in the acute care industry, where unit appropriateness determinations are governed by separate Board regulations, will continue to apply those regulations. *See* 29 C.F.R. § 103.30.

After *Specialty Healthcare*, it appears that a union is no longer required to identify a unit that is "sufficiently distinct" from other employees to warrant considering them an appropriate unit. As a result, it is reasonable to expect that unions will seek smaller or micro units with fewer employees, making it far easier to win elections and obtain a foothold in previously unorganized employers or to expand union presence in partially unionized work settings. Indeed, it is easy to track the objective of the *Specialty Healthcare* majority here by reviewing historical NLRB data that establishes clearly that the smaller the voting unit, the greater the chance the union has to prevail. A chart outlining such data, prepared by Professor Bronfenbrenner of Cornell University, states as follows:



Source: The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison, Kate Bronfenbrenner and Tom Juravich, Cornell University ILR School, Oct. 1, 1994.

The increased potential for gerrymandered numerous smaller units, however, also presents additional significant issues for both employers and employees. In *Specialty Healthcare* itself, Member Hayes noted that the majority's rule could produce separate appropriate units for registered nurses, licensed practical nurses, cooks, dietary aides, business clericals, and residential activity assistants. *See* 357 NLRB No. 83 at *19. Thus, counting the CNA-only unit approved by the majority, Specialty Healthcare—an employer of approximately 100 employees, *see id.* at *13—could find itself with seven bargaining units, seven collective bargaining agreements, seven discipline schemes, seven wage and benefits schemes, etc. Each bargaining

unit will also likely seek to protect work performed exclusively by unit members, attempting to put contractual walls around the unit's work. Doing so impairs an employer's ability to assign work in the most efficient manner, resulting in a loss of productivity that detracts from, rather than enhances, economic competitiveness.

Beyond facing these administrative burdens, employers would find themselves at increased risks of work stoppages at the hands of multiple units, each of which could halt the employer's operations if their bargaining demands were not met. *See Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984) (noting that "[t]he different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike.") 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 ceased by self-interested fractions of the workforce. *See id.* Such risk is particularly high for small businesses, who almost certainly would lack the long-term reserves to withstand a shutdown. Their options—capitulate or close shop—are bleak not only for the business owners, but also for the employees of those small businesses.[8]

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. I am most troubled, however, by the potential freezing effect that fragmented units would have on employee advancement. When the varied collective bargaining agreements inevitably have differing provisions on transfers, promotions, seniority, position posting and preference, 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.

Unfortunately, as reflected in the attached brief submitted by Coalition for a Democratic Workplace and HR Policy Association, these arguments were submitted to the Board and were rejected. The Board's decision creates real threats not only to labor relations, but also to the ability of employers to remain competitive in this economy and provide the jobs the current Administration seeks. I encourage the Committee to seriously consider whether the Board's decision in *Specialty Healthcare* is true to the Labor Management Relations Act's goals of regulating dealings between employees and employers while "promot[ing] the full flow of

[8] The Board's NPRM concludes that the proposed representation case procedures will not have a significant impact on a substantial number of small entities and, as such, the Board is not required to comply with the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* *See* 76 Fed. Reg. 36,833. Such statement is simply unsupportable. For all the reasons stated herein and in the comments submitted by numerous small business, the Proposed Rule would have a profound impact on small businesses. The Board's similar decision to not comply with the Regulatory Flexibility Act with respect to the Notice Posting Final Rule is one of the bases for the U.S. Chamber of Commerce's lawsuit challenging the Final Rule.

commerce...." 29 U.S.C. § 141(a). It appears that legislative relief will be needed to correct this unfortunate decision.[9]

- **ADDITIONAL CONSIDERATIONS REGARDING THE BOARD'S PROPOSED ELECTION RULES.**

While the Board's rulemaking regarding representation case procedures is still pending, there is reason to be concerned that, as with the notice posting rulemaking, there will be very little change between the Board's Proposed Rule and the Final Rule. Indeed, as noted above, the scope and reach of such proposed rules are unprecedented and exceedingly complex. They are also extremely controversial. For example, as of Monday, September 19, 2011, the Board's rulemaking docket on www.regulations.gov contained 51,576 public submissions or comments in response to the Board's Notice of Proposed Rulemaking. I encourage the Committee and its staff to review a sampling of the comments. Some comments, particularly those submitted by individual citizens, reveal a deep-seeded distrust of the Board's motives in the rulemaking, indicating that the Board is, in fact, losing institutional credibility. But other comments illustrate that the Board's Proposed Rule makes for poor labor policy both procedurally and substantively. Excerpts from the comments submitted by HR Policy Association and SHRM are attached as Attachment D.

From a procedural standpoint, the Board has engaged in this rulemaking on an highly accelerated timetable, without first soliciting input from interested parties, apparently to make a decision while the Board still has an operating quorum—albeit with one Member whose nomination stalled in the Senate. The Board's NPRM proposed to modify over 100 sections and subsections of the current Board regulations—changes which spanned over 35 three-column pages of the Federal Register. As discussed above, the Board's allowance of 60 days may be a permissible amount of time for an agency to accept comments, and is the *minimum* amount of time under Executive Order 13,563. But, when various organizations filed a request to extend the comment period, the Board denied the request, requiring parties to comment on extensive modifications to the Board's representation case procedures in an unreasonably short period of time. The Board's additional failure to follow the Executive Order's requirement of seeking input from interested parties before issuing an NPRM is also unfortunate.

Another procedural flaw with the rulemaking involves the Board's current composition. While, as discussed elsewhere, the Board may decided to adopt, on a 2-1 vote, a rule that

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[9] If, as expected, the Board has only two sitting members at the end of 2011 and, therefore, pursuant to the U.S. Supreme Court decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (June 17, 2010), will be precluded from engaging in adjudication, the decision in *Specialty Healthcare* will continue to be Board law for the foreseeable future and therefore will be applied by the Board's various regional directors. An employer faced with application of *Specialty Healthcare* at that point would not have an avenue for appeal, given the fact that the Board in Washington would not be permitted to issue a decision in the case in question until a third Board member is either appointed or confirmed. Further, given the fact that the only avenue for an employer to contest such unit determination matters is to refuse to bargain, have the Board's General Counsel issue a Section 8(a)(5) refusal to bargain charge and appeal the ultimate issuance of a complaint by the Board on such charge to a United States Circuit Court of Appeals, there may be more than the usual delay in having the decision in *Specialty Healthcare* overturned.

reverses precedent, doing so would violate the Board's "tradition" of requiring at least three votes to reverse precedent, as recognized by former Chairman Liebman and current Chairman Pearce, and would be exceedingly poor public policy and create unfortunate precedent. As the Board's NPRM notes, there have been few, if any, substantial changes to the Board's representation case procedures for the past 70 years. *See* 76 Fed. Reg. 36,813-14. It is difficult to understand what reason there is to change the rules now, in a matter of months, other than opportunism.

Substantively, certain comments submitted to the Board, including those of HR Policy Association and SHRM, objected that the Board's proposed changes were in excess of the Board's rulemaking authority, were substantively unnecessary, were contrary to the Act, or all of the above. Further, the proposed rules evidence exceedingly poor public policy and, in all likelihood, will exacerbate, rather than alleviate, labor tension between employers and employees and, in the pursuit of faster elections, it sacrifices the Board's appearance as a neutral party.

For instance, one of the central changes contained in the NPRM is the requirement that the non-petitioning party—almost always the employer—raise every potential issue at the initial election hearing or waive those issues. As a result, there is a significant risk that the employer will follow the approach of civil defendants in lawsuits and litigate every potential issue to avoid the risk of waiver. Doing so would only extend, rather than accelerate, pre-election hearings.

Another central change is the so-called 20% rule, which would require an election hearing officer to close the hearing and the regional director to direct an election when the only issue in dispute involves the voter eligibility of less than 20% of the voting unit. It appears that the result of the 20% rule is that an election would occur with the voting eligibility and unit placement of those individuals in doubt, only to be resolved in the event that their votes would determine the outcome of the election, in which case a hearing would be held and none of the NPRM's desired time saving would have been achieved. Accordingly, the likely result of the proposed rule change is that the dispute will have been prolonged with the status of the employees in question remaining in dispute. Not only does this increase labor tension in the workplace and on specific individual employees, but it also is contrary to the Act's goals of "encouraging practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151.

The Board's Proposed Rule is also flawed in that it conflicts with portions of the Act and, by doing so, likely violates both the Board's rulemaking authority under Section 6 and Section 706(2)(A) of the Administrative Procedure Act, which requires that any rule promulgated by the Board must not (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A). Specifically, by so drastically limiting the scope of the pre-election hearing and allowing the regional director or hearing officer to deny the non-petitioning party a meaningful pre-election hearing through the 20% rule, the Proposed Rule is directly contradictory to Section 9(c)(1) of the Act, which requires the Board to hold "an appropriate hearing" prior to an election.

The Board's NPRM on representation procedures also requested parties to comment on what sanctions, if any, should be imposed on organizations that impermissibly utilize or disseminate employee confidential information that would be required in the lists to be furnished

to such organizations in the pre-election period. 76 Fed. Reg. 36,821. Hopefully the Board will reconsider its new requirement that employers provide personal telephone numbers and personal e-mail addresses to the Board and the petitioning party. However, if the Board should ultimately implement a rule requiring dissemination of such information, in addition to available state and federal legal remedies, the following sanctions should be imposed:

- Any organization improperly utilizing or disseminating employee confidential information should be prohibited, for one year following the misuse of such information, from filing any petition for representation for any bargaining unit with the NLRB.

- Any organization improperly utilizing or disseminating such employee confidential information should be required to take all reasonable and appropriate steps to remedy the violation.

- Any organization improperly utilizing or disseminating such information should be required to send, to each employee whose information has been improperly used and disseminated, a letter of apology. Such letter should describe what steps have been taken to remedy the improper use of the information.

The potential information that an employer may be required to furnish to the Board and petitioning parties regarding its employees, however, is not just information of great importance to employees. Such information also constitutes important employer property. Indeed, the inappropriate release and utilization of such information could lead to improper recruiting of valuable company employees not to mention other interference by third parties with the employer's workers. As such, petitioning organizations should be required to treat such employer property with the utmost care.

Additionally, not only does the NPRM make substantial changes to the rules of representation cases, but it also then strips the right to review of decisions made under those new rules. The Proposed Rule strips from employers any right to review the hearing officer's determinations prior to an election and, in nearly all cases, even after an election. Instead, if an employer believes that the election was improper, the fastest avenue to review will be to refuse to bargain—clearly contrary to the Act's goals of resolving disputes—and litigate the resulting Section 8(a)(5) violation through an administrative law judge, the Board, and finally a U.S. Court of Appeals. In that instance, again, the desired time-saving aspects of the NPRM are lost.

The Board's proposed changes—ending the hearing when only 20% of the unit is left in dispute, stripping appeal rights, etc.—are all in the sake of holding faster elections. The Proposed Rule requires that the pre-election hearing be held within seven days of the petition being filed—an unreasonably short amount of time—and, once the hearing is completed, an election directed without post-hearing briefs, decisions on open issues, or further appeal on "the earliest date practicable consistent with th[e] rules." See 76 Fed. Reg. 36,838 36,842 (to be codified at 29 C.F.R. §§ 102.63(a)(1), 102.67(b)). Such a truncated "quickie" election process threatens to eliminate the "appropriate hearing" required by Section 9(c)(1) of the Act and does so unnecessarily, given the Board's current success against its own targets for representation case processing as discussed previously above.

Further, but perhaps most substantively problematic, is the one-sidedness of the proposed changes. Under the proposed rule, the employer has an obligation to raise every potential issue or waive raising it at a later date. The employer also has the obligation to propose what unit it would stipulate was appropriate, assuming that the employer does not consent to the petitioned-for unit. Indeed, this obligation will now be even more challenging with the Board's confusing "overwhelming community of interest" standard established in its *Specialty Healthcare* decision. The proposed rule requires the employer to provide voter eligibility lists within hours of an election being directed, and requires that the list include private information of the employer's employees, including home addresses, telephone numbers, and e-mail addresses.

Finally, it is important to understand the potential dual impact of the Board's decision in *Specialty Healthcare* and its objective with respect to the proposed new election rules. Simply stated, the proposed rule provides unions with faster elections and *Specialty Healthcare* gives the unions smaller units that are easier to win. Such two-pronged approach will result in all probability in numerous highly-fragmented voting units with virtually no time for employers to state their position and more importantly for employees to intelligently communicate with one another regarding the merits or lack thereof of unionization. As noted above, the Board has been extremely efficient in the processing of petitions for election and, as also noted, the union's "win rate" is already in excess of 60%. Accordingly, there simply is not a documented need or logical reason for the Board to proceed to adopt its proposed new election rules.

- **OTHER PENDING BOARD CASES OF SIGNIFICANCE.**

In addition to the above outlined-matters, there are other cases pending before the Board that raise significant legal and policy issues. In each of these cases, the Board has requested participation by interested parties in the form of requests for *amicus* briefs.[10] Such cases include the following:

- *Roundy's Inc.* – In *Roundy's Inc.*, the Board proposes to return to a line of cases twice rejected by a United States Court of Appeals. Specifically, the Board is considering a return to the rule that "an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation." The Board also appears to be considering whether to use *Roundy's Inc.* as a vehicle to overturn *Register Guard*, 351 NLRB 1110 (2007), setting forth the definition of "discrimination" over then-Member Liebman's dissent.

- *DR Horton, Inc.* – In *DR Horton, Inc.*, the Board will address whether an employer violates Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement requiring employees, as a condition of employment, to (1) submit all employment disputes to individual arbitration, (2) waive their rights to a judicial forum for such disputes, and (3) waive the right to consolidate claims or proceed as a class or collective action.

[10] Copies of the Board's Notices and Invitations to File Briefs and filed briefs can be found on the Board's website at http://www.nlrb.gov/cases-decisions/invitations-file-briefs.

- *Hawaii Tribune-Herald* – The Board in *Hawaii Tribune-Herald* appears poised to expand whether, and if so when, an employer has an obligation to provide a union with statements it obtains during an investigation into employee misconduct. The Board's Notice and Invitation to File Briefs explains that current Board precedent does not require employers to produce "witness statements" that it obtains during an investigation. The Board has stated it is seeking a clearer definition of what constitutes an exempt "witness statement."

- *Chicago Mathematics & Science Academy Charter School, Inc. – Chicago Mathematics & Science Academy Charter School* involves issues regarding the Board's jurisdiction, and appears to affect only charter schools, a small but growing number of employers. In a dispute between CMSA and the AFL-CIO, the Board will address whether the school is a "political subdivision" and exempt from the Board's jurisdiction. Alternatively, CMSA seeks to be covered by the Board, rather than the Illinois Educational Labor Relations Board.

Hopefully, as noted above, the Board will follow past practice and procedure and not issue any decisions in these cases unless there is unanimity of the current sitting three Board Members. Indeed, if precedent is to be overruled in any pending case, the past practice of requiring three affirmative votes to overrule precedent certainly should be followed.

- **CONCLUSION**

In conclusion, Mr. Chairman, I would be happy to take any questions the Committee might have regarding my testimony.

Attachment A

G. Roger King

Roger King represents employers in employment relations matters, concentrating on matters arising under the National Labor Relations Act, state and federal equal employment statutes, the Americans with Disabilities Act, and the Family and Medical Leave Act. In addition, Roger's practice consists of representing employers in collective bargaining negotiations, grievance and arbitration matters, and litigation in state and federal trial and appellate courts regarding a broad spectrum of labor-related matters.

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Related Services

- Labor & Employment
- Trial Practice
- Health Care
- Collective Bargaining, Contract Enforcement & Union Organizing
- Employment Aspects of Corporate Transactions
- Health Care
- Health Care Compliance Counseling & Regulatory Advice
- Labor & Employment Health Care Law
- NLRB Proceedings & Appeals
- Single & Multiple Plaintiff Employment Litigation

Roger's experience also includes non-competition, tortious interference with business, substance abuse testing, issues under the Fair Labor Standards Act, Office of Federal Contract Compliance Programs matters, wrongful discharge claims, and the development and review of employee policies and procedures.

Clients and organizations that Roger has recently worked with include: Appalachian Regional Healthcare (ARH), American Society for Healthcare and Human Resources Administration (ASHHRA), Bellevue Hospital, Benefis Healthcare, Bon Secours Health System, California Hospital Association, Carilion Health, Catholic Healthcare Partners, Cedars-Sinai Medical Center, Columbus Symphony Orchestra, Community Health Partners, Community Health System, Delphi Automotive, Firelands Regional Medical Center, First American Title Insurance Company, Fisher Titus Medical Center, Forum Health, General Motors Corporation, HCA, Hospital Association of Southern California, HR Policy Association, Humility of Mary Health Partners, Kaleida Health System, Kettering Health Network, Kindred Health Care, Lakeland Regional Medical Center, Laurel Health Care Company, Lourdes Health System, Mary Rutan Hospital, MedStar Health System, National Beef Packing Company, Northwestern Memorial Healthcare, Norton Healthcare, Ohio Bankers Association, Ohio Grocers Association, Ohio Hospital Association, Premier Health, PETsMART, ProMedica Health System, RCA/Thomson multimedia, St. Luke's Health System, St. Peter's Hospital, Sisters of Charity of Leavenworth Health System, TALX, Texas Health Resources, Trinity Health, United Church Homes, University Hospitals Health System, Yale-New Haven Health System, and Verizon.

Roger is a Fellow of The College of Labor and Employment Lawyers and a member of the following bar associations, including the labor relations section of each: American, District of Columbia, Ohio State, and Columbus; a member of the Ohio Chamber of Commerce Labor Advisory Committee, the Society for Human Resource Management (SHRM), the American Health Lawyers Association, and the American Society for Healthcare Human Resources Administration (ASHHRA).

In 2003 he was appointed to Miami University's Richard T. Farmer School of Business Advisory Council. Roger has served as a board

JONES DAY

member of the American Health Lawyers Association, a member of the National Employment Relations Committee of SHRM, is presently serving on the Advocacy Committee of ASHHRA, and is a member of the Ohio State Bar Association Labor and Employment Council. Roger has testified before U.S. Congressional committees, is frequently quoted on labor issues in publications, and has been an active speaker and author for various groups throughout the U.S. on labor and employment relations matters.

Honors and Distinctions

Repeatedly recognized by: *Chambers USA: America's Leading Lawyers for Business*, the *NLJ*'s "Who's Who of Employment/Labor Lawyers," *Ohio Super Lawyers*, *The Legal 500*, and for the past 20 years, *The Best Lawyers in America*

Admitted

Ohio and District of Columbia

Education

Cornell University (J.D. 1971); Miami University (B.S. 1968)

Government/Military Service

Professional Staff Counsel, U.S. Senate Committee on Labor (1973-1975); Captain, U.S. Air Force, Judge Advocates General Division (1972-1973); Labor Relations Counsel to U.S. Senator Robert Taft Jr. (1971-1973)

JONES DAY

Attachment B

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 25, 2011

The Honorable Phil Roe
Chairman, Subcommittee on Health, Education,
Labor, and Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe:

I have served as the Chairman of the National Labor Relations Board since January 20, 2009, when I was appointed by President Obama. I have served on the Board since November 14, 1997, when I was confirmed by the Senate after having been nominated by President Clinton. Since then, I was reappointed by President Bush and confirmed by the Senate to a second term in 2002 and a third term in 2006. My current term is set to expire on August 27, 2011.

On February 11, 2011, the Subcommittee held a hearing entitled "Emerging Trends at the National Labor Relations Board." I respectfully request that this letter be included in the hearing record. The views expressed in it are mine alone.

Of the witnesses who testified at the hearing, two were sharply critical of the Board's recent actions: G. Roger King and Philip A. Miscimarra, both attorneys in private practice representing management clients. I will not attempt to respond in comprehensive detail to the assertions made by Mr. King and Mr. Miscimarra. But I do feel obliged to address the main thrust of their testimony: that the Board is somehow overreaching its statutory authority, invading the province of Congress and abandoning long-established institutional norms. Such accusations are simply untrue.[1]

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[1] Mr. King, a critic of the present Board, was a champion of the prior Board, which itself was no stranger to controversy, as a hearing held by this Subcommittee in 2007 evidences. See "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights," Joint Hearing before the House Subcommittee on Health, Employment, Labor and Pensions and

1. *The Proper Role of a Board with Fewer than Five Confirmed Members*

In his written testimony before the Subcommittee, Mr. King argues that the current Board -- because it consists of four members (not the full five provided for in the National Labor Relations Act) and because it includes one recess appointment[2] -- should not issue major decisions, reconsider existing precedent, or pursue rulemaking. Such "self-imposed restraint," Mr. King insists, is required by the Board's past practice and by "sound public policy."[3]

In fact, accepting Mr. King's view would mean a sharp break with Board tradition and would disable the Board from carrying out its statutory duty. A review of the Board's history shows why. The statute has provided for five Board members since 1947. Between August 1, 1947, and today, the Board has had five sitting members (including both Senate-confirmed members and recess appointees) less than two-thirds of the time. And vacancies on the Board have become far more common – indeed, chronic – in recent years. The last time that the Board had five confirmed members was August 21, 2003, more than seven years ago.

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the Senate Subcommittee on Employment and Workplace Safety (December 13, 2007). The contrast between Mr. King's recent testimony and his prior writings about the prior Board is striking. In 2006, Mr. King observed:

> While both management and labor interests and their advocates certainly have the right to analyze, support or criticize Board decisions, certain of the recent verbal outcries regarding Board decisions are highly partisan, and have the appearance of being part of a coordinated effort to chill and discourage present Board members from addressing many of the important issues and cases before them. Further, an equally unfortunate ancillary part of this apparent coordinated campaign is the suggestion that the Board is no longer a legitimate part of the country's administrative jurisprudence system.

G. Roger King, "'We're Off to See the Wizards,' A Panel Discussion of the Bush II Board's Decisions ... and the Yellow Brick Road Back to the Record of the Clinton Board," paper presented to the Section of Labor and Employment Law, American Bar Association, at p. 1 (2006). Mr. King deplored "Board bashing," argued that "recent attempts to marginalize the Board are ill-advised," observed that the "efficiency and productivity of the Board continues to serve as a role model for many Federal agencies," and noted that "Board precedent from time to time no doubt will continue to be reversed in the future – which is not necessarily bad." *Id.* at pp. 12-13.

[2] Member Craig Becker is serving under a recess appointment. His nomination was filibustered in the Senate in the last Congress, even though a majority of the Senate favored his nomination.

The three confirmed members of the Board are myself, Member Mark Pearce, and Member Brian Hayes. There is one vacancy on the Board.

[3] G. Roger King, Statement to the Record, p. 2 (Feb. 11, 2011).

Needless to say, the Board has often issued major decisions, including decisions overruling precedent, with fewer than five confirmed members. For example, on July 17, 2002, a divided Board issued *MV Transportation*, 337 NLRB 770 (2002), eliminating the successor-bar rule and overruling *St. Elizabeth Manor*, 329 NLRB 341 (1999). At the time, the Board consisted of four members (three Republicans and one Democrat). The three-member majority that overruled precedent consisted entirely of recess appointees: then-Chairman Peter Hurtgen, Member William Cowen, and Member Michael Bartlett. I was the only confirmed Board member, and I dissented. The current Board has announced its intention to reconsider *MV Transportation.* See *UGL-UNICCO Services Co.*, 355 NLRB No. 155 (2010). Mr. King has criticized the Board for doing so, but by his own standard, *MV Transportation* – decided with less than a full Board and without a single confirmed member in the majority – would seem to have been a wholly illegitimate exercise of power.

There is no shortage of decisions in which the prior Board overruled precedent, despite the fact that the three-member (Republican) majority included one or more recess appointees. For example, in 2004, a divided Board overruled precedent in (among other cases) decisions involving the right of employees in non-union workplaces to have a coworker present during investigatory interviews,[4] the employee-status of university teaching assistants,[5] pro-union conduct by supervisors,[6] and bargaining units including joint employees of two employers.[7] The three-member majority in each case included one recess appointee (then-Member Ronald Meisburg). In 2006, a divided Board overruled precedent involving a union's photographing of employees; there were then two recess appointees (then-Member Peter Schaumber and then-Member Peter Kirsanow) in the three-member majority.[8] In 2007, a divided Board overruled precedent in several cases, including (but not limited to) decisions involving the voluntary-recognition bar,[9] the burden of proof for backpay claims,[10] the filing of decertification petitions following unfair labor practice settlements,[11] and the backpay period for union salts subjected to hiring discrimination.[12] In all of these cases and others, the three-member majority included a recess appointee (then-Member Kirsanow).

The approach of the prior Board, to be sure, was not unprecedented. Indeed, the Board has repeatedly overruled precedent when it consisted of only three members in all, but the decision was unanimous. The greatest number of examples comes from the (Republican majority) Board of 1985.[13] A leading instance is *Sears, Roebuck Co.*, 274 NLRB 230 (1985), which involved the right of non-union workers to have a co-worker present at investigatory interviews.

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4 *IBM Corp.*, 341 NLRB 1288 (2004).

5 *Brown University*, 342 NLRB 483 (2004).

6 *Harborside Healthcare,* 343 NLRB 906 (2004),

7 *Oakwood Care Center*, 343 NLRB 659 (2004).

8 *Randell Warehouse of Arizona*, 347 NLRB 591 (2006).

9 *Dana Corp.*, 351 NLRB 434 (2007).

10 *St. George Warehouse*, 351 NLRB 961 (2007).

11 *Truserv Corp.*, 349 NLRB 227 (2007).

12 *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

13 See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 fn. 1 (2010) (concurring opinion) (collecting cases).

Let me be clear that I am not criticizing the practice of prior Boards. In none of my dissents in the more recent decisions cited did I suggest that the majority acted improperly because of how it was constituted. What I do contend, however, is that Mr. King's position has little if any support in the Board's history. The Board's tradition, rather, is not to overrule precedent with fewer than three votes to do so, as Member Pearce and I have explained in a recent concurring opinion.[14] Whether the Board consists of three, four, or five members in total, and whether the three-member majority includes recess appointees, has generally made no difference.

In his testimony at page 2, Mr. King quotes -- without explaining the context -- a statement from my partial dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77 (2007). My dissent in that case in no way supports Mr. King's criticism of the current Board.

In *Schreiber Foods*, the point of contention between Member Schaumber and myself was how to interpret a statement in the Board's 2002 opposition to a petition for writ of certiorari, submitted to the Supreme Court, involving an earlier Board decision, *Meijer, Inc.*, 329 NLRB 730 (1999). In his own partial dissent, Member Schaumber argued that the Board should overrule *Meijer*. He contended that the Board, in its opposition, had essentially promised the Supreme Court that *Meijer* would be reconsidered by the Board (and thus that there was no need for the Court to review the decision). I disagreed with Member Schaumber's reading of the opposition, pointing out that at the time, the Board had only three members, and at most two of them would have supported overruling *Meijer*, since I had been in the majority in that decision. "Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members)," I wrote, "the Board could not have been signaling to the Court that full-dress reconsideration of *Meijer* was in the offing." 349 NLRB at 97. While my statement in *Schreiber* arguably could have been more precise, I was referring to the Board's tradition that three *votes* are required to overrule precedent, and not asserting that a Board of fewer than five members would never do so.[15]

All of this said, I certainly believe that the ideal situation is for the Board to operate with five, Senate-confirmed members. That ideal, however, has been increasingly difficult to achieve. In my more than 13 years on the Board, I have served as the *sole* member (for six weeks) and on two-, three-, four-, and five-member Boards. Indeed, the Board recently spent a full 27 months with only *two* members, a truly unfortunate situation that led to an adverse Supreme Court decision after Member Schaumber and I, pursuant to a prior delegation by the other Board members and relying on a legal opinion from the Department of Justice, continued to issue decisions where we could reach agreement.[16] When the Board has a lawful quorum (at least three

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[14] *Id.*, slip op. at 2 & fn. 1 (citing cases).

[15] More often than not, given the make-up of the Board, a three-vote majority is formed when the Board comprises five members and divides three-two. But, as the cases I have cited above illustrate, the Board has, in fact, reversed precedent with three votes when it was at *less* than full strength, consisting of three or four members. At the time of the *Meier* opposition, however, the Board consisted of just three members: two recess appointees, Member Bartlett and Member Cowen, and myself. I had been in the majority in *Meijer*. A two-one Board, adhering to tradition, would not have overruled *Meijer* and would not have told the Supreme Court that it intended to do so.

[16] *New Process Steel, L.P. v. NLRB*, ___ U.S. ___, 130 S. Ct. 2635 (2010).

members), it has the authority to decide any case that comes before it and to engage in any rulemaking permitted by the statute. Given the chronic vacancies that have plagued the Board in recent years, it would be an abdication of the Board's statutory duty to defer acting on important issues until, at some unknowable time in the future, it has five confirmed members. As I have pointed out, it has been more than seven years since that ideal has been realized.

2. *The Proper Role of the Board in Shaping Federal Labor Policy*

In his written testimony, Mr. Miscimarra suggests that the current Board is somehow intruding into the exclusive province of Congress. That suggestion is unwarranted.

It is indisputable that the Board has only the authority that Congress has given it in the National Labor Relations Act. The statute informs, guides, and ultimately constrains everything the Board does. The Supreme Court, in turn, is the ultimate arbiter of what the statute means.

In determining how narrow, or how broad, the Board's authority is, then, it is necessary and proper to turn to the Supreme Court's decisions applying the National Labor Relations Act. Here is what the Supreme Court has said in one, typical decision:

> This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy....
>
> This Court therefore has accorded Board rules considerable deference.... We will uphold a Board rule as long as it is rational and consistent with the Act, ... even if we would have formulated a different rule had we sat on the Board.... Furthermore, a Board's rule is entitled to deference even if it represents a departure from the Board's prior policy.

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990) (citations omitted). These principles follow from the fact that the National Labor Relations Act is, in many respects, written in general terms and, within those fairly wide limits, leaves it to the Board to develop specific legal rules regarding unfair labor practices and union representation elections. As the Supreme Court has observed, the Board, "if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978).

Mr. Miscimarra's testimony offers a view of the Board's authority as sharply limited, a view that seems to give very little weight to what the Supreme Court has said, again and again. He then criticizes certain recent decisions of the Board as amounting to policy changes that only Congress can make. It is certainly true that Congress has the ultimate authority to address any and every issue of labor law considered by the Board. Where Congress has addressed an issue, there is no question that the Board is duty-bound to apply the law. But if Congress has *not* spoken – and this will often be the case – the Board has the authority and the duty to decide the issue, as the Supreme Court has repeatedly recognized. If the Board oversteps its authority, of course, the federal courts can overturn its decision.

Mr. Miscimarra cites the Board's recent decisions finding a union's stationary display of large banners near a secondary employer's worksite to be lawful. The lead decision on this issue is *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (2010). The National Labor Relations Act nowhere refers to banners. The key statutory provision, Section 8(b)(4) (ii), rather, uses very general language: a union may not "threaten, coerce, or restrain" a secondary employer. Does the stationary display of a banner violate that prohibition? That is a classic question of labor law policy -- never addressed, incidentally, by any earlier Board decision or by the Supreme Court. And it is a question that requires consideration of serious First Amendment constitutional concerns, as well, as the *Eliason* decision explains. Notably, every federal court to consider the question has found bannering displays to be lawful – rejecting the view of the prior Board General Counsel, who sought to enjoin the displays pending litigation before the Board. See *Eliason*, supra, 355 NLRB No. 159, slip op. at 1 fn. 3. The Board had the authority and the duty to decide *Eliason* and similar cases. It could not simply wait for Congress – which has not amended the Act with respect to secondary activity by unions since 1959 – to decide the question. In my view, the *Eliason* decision was correct, but it is subject to review in the federal appellate courts and ultimately by the Supreme Court.

The same is true of the Board's decision in *Dana Corp.*, 356 NLRB No. 49 (2010). Nothing in the language of the Act answers the question posed there – the legality under Section 8(a)(2) of a pre-recognition framework agreement – and neither does any previous decision of the Board or the Supreme Court.[17] Section 8(f) of the Act, invoked by Mr. Miscimarra, involves pre-hire agreements in the construction industry, and it has no bearing at all on the issue posed in *Dana*. With all due respect, his suggestion that "this is another area where policy changes should originate in Congress" is very difficult to comprehend. Meanwhile, the Board's decision has been praised by other commentators.[18]

Finally, Mr. Miscimarra points to *New York University*, 356 NLRB No. 7 (2010), which involves the question of whether university graduate assistants are statutory employees for purposes of the Act. The Act's definition of "employee," Section 2(3), says that the term "shall include any employee," except for certain specified exclusions (e.g., "agricultural laborer[s]"). No one argues that graduate assistants are specifically excluded. Again, the general language of the Act leaves the issue for the Board to decide, within appropriate limits. The Supreme Court has made that much clear, in upholding the Board's decision that union salts are statutory employees.[19] Any determination of who is, and who is not, a statutory employee necessarily involves determining the coverage of the Act. Whenever the Board finds employee status, then, it could be argued that it is somehow expanding the Act's scope. But that argument is unsound, unless one accepts the curious proposition that the Board has the authority only to find that contested categories of workers are *not* statutory employees.

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[17] The Board's decision explained with great care why an earlier Board decision cited by Mr. Miscimarra, *Majestic Weaving Co.*, 147 NLRB 859 (1964), was not controlling.

[18] See Andrew M. Kramer and Samuel Estreicher, *NLRB Allows Pre-recognition Framework Agreements*, 245 New York L.J. 4 (Feb. 23, 2011).

[19] See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

In sum, the Board has addressed, and will address, the sorts of questions that every prior Board has ruled upon. In doing so, it will be fulfilling exactly the role that Congress envisioned for the Board, when it enacted the National Labor Relations Act in 1935. And its decisions will be subject to judicial review, with the federal courts sometimes agreeing, and sometimes disagreeing, with the Board. Speaking for myself, I have previously made clear my view that the Board operates under significant constraints – the language of the statute, its own precedent, and judicial review – and that fundamental changes in federal labor law can come only from Congress.[20]

3. *The Board's Recent Requests for Briefing in Certain Cases*

Among the most perplexing of the criticisms made by Mr. King is his objection to the Board's requests in certain cases for *amicus* briefs. Mr. King describes this as "indirect rulemaking." While I do not believe that it is appropriate for me to comment publicly on cases that are pending at the Board, I have no hesitation in defending, as a general matter, the practice of inviting *amicus* briefs.

This practice plainly serves three important interests: open government, fair process, and informed decision-making. Surely it is better to tell the public what issues the Board intends to consider, and to permit interested persons to participate in the Board's decision-making process, than it is to keep the public in the dark and to exclude stakeholders from participation. And surely it is better that the Board have the benefit of the views of the larger labor-management community, not just the perspectives of the parties to a particular case.

* * *

For the reasons I have explained, I believe that the criticisms of the Board offered at the hearing are unwarranted.[21] What are the "emerging trends" at the Board? I think there are three.

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[20] For example, in remarks delivered as part of the Access to Justice Lecture Series at Washington University Law School on February 17, 2010, I said: "I do not think that fundamental changes in labor law – as opposed to incremental improvements – can reasonably be expected to come from the National Labor Relations Board, whoever serves there."

[21] I might add, however, that the Board has never been a stranger to criticism or controversy. As one commentary observed a quarter century ago:

> The only change [over the years] has been in the nature of the Board's critics – sometimes management, sometimes labor, sometimes both – depending on which group felt at any given moment that its ox had been gored by the conflicting interpretations given to various sections of the law by the shifting majorities in control of the NLRB in Democratic and Republican administrations. The list of the Board's detractors is by no means confined to those directly involved in the cases before it for adjudication. The roster has embraced almost everyone at one time or another—Presidents of the United States, Congress, the federal judiciary, and that most insatiable of faultfinders, the press.

A. H. Raskin, *Elysium Lost: The Wagner Act at Fifty,* 38 Stan. L. Rev. 945, 948 (1986).

First, greater productivity in decision-making, reflecting the Board's new quorum and with it, the ability to decide cases and to avoid deadlock. Second, greater transparency and public participation in its decision-making – perhaps at the price of greater controversy, but with a corresponding gain in the fairness and quality of the Board's decision-making process. Third, a willingness to take carefully considered steps to keep the National Labor Relations Act vital, as exemplified in the Board's unanimous decision to begin awarding compound interest on backpay awards to employees victimized by unfair labor practices – more than 20 years after the Board was first urged to adopt that remedial change.[22]

Thank you for the opportunity to submit this statement. I appreciate the Subcommittee's interest in the Board's work, and I look forward to a respectful dialogue about the important issues that the National Labor Relations Act requires the Board to address.

Sincerely,

Wilma B. Liebman
Chairman

cc: Hon. Robert Andrews, Ranking Member

22 *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Attachment C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPECIALTY HEALTHCARE & REHABILITATION CENTER OF MOBILE	)	
and	)	CASE 15-RC-8773
UNITED STEELWORKERS, DISTRICT 9, PETITIONER	)	

BRIEF OF *AMICI CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE AND HR POLICY ASSOCIATION IN SUPPORT OF RESPONDENT EMPLOYER

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OTHER AUTHORITIES

Coalition for a Democratic Workplace ("CDW")[1] and HR Policy Association (together, "*Amici*") respectfully submit this brief *amici curiae* to address, among other things, the proper standard for the National Labor Relations Board ("NLRB" or "the Board") to apply when determining whether a petitioned-for unit is appropriate in industries other than the acute or non-acute health care industry. Specifically, *Amici* urge the Board to refrain from answering questions seven and eight posed in its Notice and Invitation to File Briefs (hereinafter "Notice") because the instant case is not an appropriate case to examine such important issues.[2] Instead, the Board should answer only the question presented to interested parties—the proper application of *Park Manor Care Center*, 305 N.L.R.B. 872 (1991)—and refrain from addressing the remaining questions posted in its Notice. If the Board concludes that it will address in *Specialty Healthcare* the issues raised in questions seven and eight despite our objection, *Amici* urge the Board to refrain from abandoning the "community of interest" test that has guided employers and labor organizations for decades.[3]

STATEMENT OF INTEREST

Coalition for a Democratic Workplace is a coalition that represents employers and associations and their workforce in traditional labor law issues. Consisting of hundreds of members, who represent millions of employers, CDW was formed to give its members a voice on labor reform, specifically, the Employee Free Choice Act. More recently, CDW has advocated for its members on a number of labor issues including non-employee access, an

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[1] Signatory members of CDW are listed in Appendix A.

[2] Question seven asked for the parties' views on the following issue: "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." Question eight asked "Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 N.L.R.B. 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.'"

[3] *Amici* also adopt the arguments made in the amicus brief for the American Hospital Association and American Society for Healthcare Human Resources Administration.

employee's right to have access to organizing information from multiple sources, and, in this case, on unit determination issues.

CDW's members—the vast majority of whom are covered by the National Labor Relations Act ("NLRA" or "the Act") or represent organizations covered by the NLRA—have a strong interest in the way the Act, and specifically Sections 9(b) and 9(c), is interpreted and applied by the Board. Regarding the Board's interpretation of the Act, CDW's members have a substantial and compelling interest in the Board's interpretation of what is an "appropriate" unit. For instance, if the Board were to adopt a rule resulting in a vast proliferation of narrow units, CDW's employer members would be burdened with administering a number of different contracts covering only a few of its employees, not to mention the constant state of bargaining and related workplace disruptions that would accompany a proliferation of units.

Further, as to the Board's administration of the Act, CDW's members are interested in ensuring that the Board administers the Act in a just, efficient manner authorized by statute. Specifically, CDW's members have an interest in guaranteeing that the Board stays within the confines of its authority when it applies the Act to employers and employees such as CDW's members.

HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The Association consists of more than 300 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce, and 20 million employees worldwide. Since its founding, one of

HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

With the exception of those subject to the Railway Labor Act, all of the member companies of HR Policy are employers subject to the NLRA. These members have a considerable stake in how the Act is interpreted.[4]

ARGUMENT

I. The Board Should Not Reach Questions Seven Or Eight Of The Notice And Invitation For Briefing

A. *The Issue Of Whether To Apply A Presumption In All Industries Is Not Before The Board*

In the case before the Board, the Regional Director (hereinafter "RD") was asked to decide the appropriateness of a unit comprised exclusively of certified nursing assistants (CNAs) at one of Specialty Healthcare's non-acute health care facilities. In making the appropriateness determination, the RD was required to apply *Park Manor Care Center*, 305 N.L.R.B. 872, which has provided the unit determination standard unique to non-acute care facilities for nearly 20 years. But, in his decision, the RD failed to properly apply *Park Manor Care Center* and held—for the first time—that an all-CNA unit was appropriate. When Specialty Healthcare appealed the RD's decision to the Board, which gave rise to the Notice in this matter, it raised two arguments. First, the Employer argued that the RD's decision "is improper, because [it] ignored the weight of the evidence and failed to find a community of interest among the employees in the Employer's proposed unit." Employer's Br. In Support of its Request for Review of the Regional Director's Decision and Direction of Election at 7. Second, the Employer objected that the RD's decision "is erroneous as a matter of law, because the RD completely failed to perform

[4] In lieu of a Statement of the Case, *Amici* adopt by reference the Employer's Brief In Support Of Its Request For Review Of The Regional Director's Decision and Direction of Election. Relevant facts of the case will be discussed throughout *Amici's* brief.

the second step of the *Park Manor* analysis, and never considered the Board's factfinding, the possibility of a proliferation of units, or the potential creation of residual units in this case." *Id.* at 7-8.

As clearly indicated by the issues raised in the Employer's Brief seeking review, and as noted in Member Hayes's dissent in the Notice, the issue of whether to clarify or overrule *Park Manor* is not properly before the Board.[5] But even if the continued validity of *Park Manor* were before the Board, there is nothing in this case that would justify the Board to "hold that a unit of all employees performing the same job at a single facility is presumptively appropriate...as a general matter" or that units are *ipso facto* appropriate if they are a "'readily identifiable...group whose similarity of function and skills create a community of interest.'" Notice at 2 (quoting *American Cyanamid Co.*, 131 N.L.R.B. 909, 910 (1961)).

The Board has recognized that both acute and non-acute health care facilities present unique issues with respect to unit appropriateness that require the application of a unit appropriateness standard differing from every other industry. *See* 53 Fed. Reg. 33,900 (Sept. 1, 1988) (codified at 29 C.F.R. Part 103); *Park Manor*, 305 N.L.R.B. at 875-76 (discussing factors unique to health care industry that require a test different from the "disparity of interests" or "community of interest" test). Thus, even if the Board were to reach the issue of whether to overrule *Park Manor*, the Board should stop there. There is no issue in the case currently before the Board warranting it to reconsider the validity of unit appropriateness standards "as a general matter."

The dissent to the Board's Notice suggests that the Board is engaging in "broad scale rulemaking" by reaching the *Park Manor* issue and, by advancing questions seven and eight, potentially abusing its discretion to choose between adjudication and rulemaking under *NLRB v.*

[5] The amicus brief of AHA and ASHRRA advances a similar argument, which *Amici* support and incorporate by reference.

Bell Aerospace Co., 416 U.S. 267 (1974). While *Amici* recognize the Board's discretion to determine whether to engage in adjudication or rulemaking, and that—with the sole exception of its rulemaking in the acute care industry—unit determination issues have been decided by either Congress or the Board's adjudication procedures, we agree with the dissent on this point.[6] Even though the Board has discretion to choose between adjudication and rulemaking, there is "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973). When the Board, as it has done here, reconsiders such important and well-established "policy-type rules or standards" such as the community of interest test, it must do so cautiously.

For instance, rather than injecting the issues raised in questions seven and eight into this case through a request for *amicus* briefs, the Board should consider a more thoughtful approach. When the Board last considered wholesale revisions to unit determinations standards, it engaged in a deliberate and thoughtful rulemaking process that included multiple hearings across the country and the taking of thousands of pages of testimony from dozens of witnesses. *See* 53 Fed. Reg. 33,900, 33,900 (Sept. 1, 1988). *Amici* respectfully suggest that the consideration of one of the most important areas of Board law—the standard analysis to apply in determining what is an appropriate voting unit—should only be considered in a comprehensive, thoughtful process such as rulemaking, rather than attempting to solicit the ad hoc views of interested parties through *amicus* briefs in adjudication. *See Pfaff v. U.S. Dept. of Housing*, 88 F.3d 739, 748-49 n.4 (9th

[6] *Amici* echo the concerns of the dissent, the AHA, and ASHHRA that, depending on the changes the Board attempts to implement, the Board may be—through adjudication—improperly promulgating a rule that is generalized in nature, prospective, based on undisputed facts, and results from a legislative-type judgment that would be an abuse of discretion under *Bell Aerospace Co.* and the Administrative Procedure Act (APA). Regardless of the legal requirements, however, as a matter of policy and precedent, the Board should engage in rulemaking if it decides to reconsider the validity of the extremely important issue of unit appropriateness standards across all industry.

Cir. 1996) ("[a]djudication is best suited to incremental developments to the law, rather than great leaps forward."). Where, as here, the issues raised in questions seven and eight do not exist in the case before the Board, it is particularly inappropriate to make such a "great leap" in the Board's law regarding unit appropriateness via adjudication. Given that the Board took the precautions of rulemaking when it modified the appropriate unit standard as applied to the acute care industry, surely the Board should undertake those same protections and careful consideration before revising the standard as applied to *all* industries.[7]

Finally, in any event, this issue should not be decided until the Board is operating with a full complement of confirmed members. While the Board has reconsidered or even reversed precedent in the past with less than a full complement, *amici* suggest that proceeding to consider the extremely important community of interest test without a full complement of confirmed Board members is not good public policy and also establishes inappropriate precedent for future Boards. There simply is no reason to rush to a decision with a Board with only three confirmed Members on issues as important as those presented in the *Specialty Healthcare* Notice.

B. *The Board Has Failed To Demonstrate That A Change In The Community Of Interest Standard Is Necessary*

Additionally, the Board's rationale for reconsidering standards—either in the non-acute care industry or generally—is unsupported by the Board's own data. The Notice issued states that "the Board's standards for determining if a proposed unit is an appropriate unit have long been criticized as a source of unnecessary litigation" and that "[i]f...the Board determines that the standard applicable in long-term care facilities can be clarified to prevent unnecessary litigation and delay, we believe it will have a duty to at least consider whether any such revision

[7] As the Ninth Circuit noted in *Pfaff*, the Administrative Procedures Act contains numerous mechanisms, such as the notice and comment rulemaking procedure, that allow for comment on a concrete set of proposals. *See* 88 F.3d at 748-49 n.4. Further, rulemaking would require the Board to consider the impact that any rule would have on businesses, particularly small businesses, and otherwise comply with the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act of 1996.

should apply more generally." Notice at 3. However, data from the Board suggests that very few election cases reach the RD's office, let alone the Board.[8] Tables 9 and 10 of the Board's Annual Report for Fiscal Year 2008 reveal that nearly 90% of the RC cases closed during that year were closed before an RD or the Board issued a decision. Of the 2,388 RC cases disposed of during FY 2008, only 183 of them (7.6%) resulted in an RD- or Board-directed election. The numbers for FY 2009 are nearly identical, with 90% of RC cases disposed of before the RD or Board issued a decision, and 146 of 2,002 cases (7.3%) resulting in a directed election. And, as *amicus* Chamber of Commerce of the United States of America notes in its brief, the Board's publicly available data reveals that unit determination issues are not overly delayed by litigation. According to the Chamber of Commerce's brief, of 107 elections in the Health Care and Social Assistance industry in FY 2009, 87 of them occurred by stipulation or consent with a median time of 40 days between petition and election.

Data specific to the health care industry likewise reveals that the vast majority of election and representation cases are resolved long before reaching the RD or Board. During October 2010 through January 2011, 109 elections were held in the Health Care and Social Assistance industries, which includes Ambulatory Health Care Services, Hospitals, Nursing and Residential Care Facilities, and Social Assistance. Of those elections, 87% were either consent (24) or stipulated (71) elections. One of the 109 elections was an expedited election. The remainder—13 elections (12%)—were directed by an RD. The Board was not required to direct a single election during that period.[9] Thus, while it is difficult to discern what portion of these cases

[8] Unless otherwise noted, all reports and data cited in this section are publicly available at http://www.nlrb.gov.

[9] In order to further assess the issues raised in the Notice, *Amicus* CDW filed an information request with the Board on February 2, 2011 requesting data on the number of representation cases in general industry and in the Health Care and Social Assistance industry. While parts of the information requested were provided in massive databases three (3) business days before the deadline for briefing, other parts remain pending. *Amici* maintain that if the Board insists on injecting issues into cases through requests for *amicus* briefs, it is incumbent upon the Board to produce information in a readily available and useful format to allow all interested parties and stakeholders to

were in non-acute care facilities, the data reveals that the Board's concern of employers litigating unit determination issues to delay an election is unfounded.

Thus, contrary to the Board's concerns, actual data shows that the vast majority of representation cases result in an election by agreement of the parties. And at any rate, there is no guarantee that changing the law will alleviate the perceived problems. If the Board were to adopt an approach making "same job" units presumptively appropriate, it is likely that employers will become *more* litigious as they seek to expand the units and avoid the significant burdens of unit proliferation. Accordingly, *Amici* request that the Board refrain from addressing questions seven or eight in the *Specialty Healthcare* Notice.

II. Employees Who Perform The Same Job At A Single Facility Should Not Constitute A Presumptively Appropriate Unit

Question seven of the Board's Notice asks whether the Board should "hold that a unit of all employees performing the same job at a single facility is presumptively appropriate" in either the non-acute health care industry or "as a general matter." Notice at 2. *Amici* respectfully submit that the Board should reject such an approach, as it did in *Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127 (Aug. 27, 2010).

In *Wheeling Island Gaming*, the Board was asked to review an Acting RD's decision that a petitioned-for unit of only poker dealers was inappropriate "because poker dealers did not have a community of interest separate and distinct from that of craps, roulette, and blackjack dealers." *Id.* Slip Op. at 1. A Board panel majority of Chairman Liebman and Member Schaumber agreed and affirmed the Acting RD's decision. *Id.*

(continued...)

submit meaningful comment. *Amici* request that the Board complete the response to the information request to the extent that it has not yet done so. *Amici* further reserve the right to supplement the record with its analysis of the data provided on March 3, 2010.

Dissenting, Member Becker would have reversed the Acting RD's decision and found that a unit of only poker dealers was appropriate because the unit "has a rational basis" based on the dealers' community of interest. *Id.* Slip Op. at 2. Member Becker found that any shared community of interest with other employees, such as blackjack, craps or roulette dealers, was irrelevant. *Id.* Under the dissent's view, "it should be emphasized that from the perspective of employees seeking to exercise their rights under the Act, one clearly rational and appropriate unit is all employees doing the same job and working in the same facility. Absent compelling evidence that such a unit is inappropriate, the Board should hold that it is an appropriate unit." *Id.*

Chairman Liebman and Member Schaumber rejected Member Becker's novel approach. Both Chairman Liebman and Member Schaumber agreed that the "same job" approach failed to consider whether the employees in that same job had a community of interest "sufficiently distinct" from other employees to warrant the establishment of a separate unit. *Id.* Slip Op. at n.2. Further, while the Board does not make appropriateness determinations based on size of the unit alone, a unit could be found inappropriate if it "'is *too narrow in scope* in that it excludes employees who share a substantial community of interest with employees in the unit sought.'" *Id.* (quoting *Colo. Nat'l Bank of Denver*, 204 N.L.R.B. 243 (1973) (emphasis added in *Specialty Healthcare*)). In addition, Member Schaumber also dissented from Member Becker's approach on the basis that it "gives effect to the statutory prohibition against defining a unit based on the extent of a union's organizing," contrary to Section 9(c)(5). *See id.* and Section II.B, *infra.*

The standard described in question seven of the Notice should be rejected for the same reasons the Board rejected the standard proposed by Member Becker in *Wheeling Island*

Gaming. As the Board noted in *Wheeling Island Gaming*, that standard is flawed and contrary to established Board law and the plain language of the NLRA.

A. *A "Same Job" Presumption Fails To Consider Whether The Unit Is "Sufficiently Distinct" And Is Contrary To Board Law And The National Labor Relations Act*

Adopting a standard that would create a presumption of appropriateness for employees in the same job at the same facility fails for both legal and public policy reasons. The proposed standard ignores one of the central and "necessar[y]" factors in the unit appropriateness analysis: "whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *Wheeling Island Gaming*, 355 N.L.R.B. No. 127, Slip Op. at *1 (quoting *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980)) (emphasis added by *Wheeling Island Gaming*); *see also, e.g.*, *Virtua Health, Inc.*, 344 N.L.R.B. 604 (2005) (refusing to create unit of only paramedics because they did not have a sufficiently distinct community of interest from other employees); *Pratt & Whitney*, 327 N.L.R.B. 1213 (1999) (refusing to create separate unit of engineers because there was no sufficiently distinct community of interest from other engineers); *Sheridan Peter Pan Studios, Inc.*, 144 N.L.R.B. 3 (1963) (denying certification to unit of only photographers where they were only a segment of the employer's administrative department).

Undoubtedly, employees who work in the same job in the same facility will have certain common interests. However, "[t]he Board's inquiry into the issue of appropriate units, even in a non-health care industrial setting, never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Newton-Wellesley Hospital*, 250 N.L.R.B. at 411. Requiring a "sufficiently distinct" factor in the appropriateness analysis serves important objectives of the Act by avoiding proliferation of units and by assuring "to employees the fullest freedom in exercising the rights guaranteed by" the NLRA. *See* 29

U.S.C. § 159(b) ("The Board shall decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.") (emphasis added).

First, presuming that a "same job" unit is appropriate would result in the proliferation of units, which both Congress and the Board have attempted to avoid. When Congress amended the NLRA in 1974 to cover the health care industry, it indicated concern about the proliferation of bargaining units in that industry, where there were many separate professional and vocational specialties each of which could plausibly form a unit that could paralyze the facility. *See* S. Rep. No. 766, 93d Cong. 2d Sess. 5 (1974); H. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974); *see also NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1469-70 (7th Cir. 1983) (discussing proliferation in health care industry); *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984) (proliferation in general industry). And, as the Board has recognized "[i]t is well established that the 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, Ltd.*, 327 N.L.R.B. 556, 556 (1999); *see also Colo. Nat'l Bank of Denver*, 204 N.L.R.B. at 243 (rejecting petitioned-for unite as "too narrow in scope in that it excludes employees who share a substantial community of interest with employees in the unit sought.").

Adopting a "same job" presumption would essentially eliminate the "sufficiently distinct" factor from the appropriateness analysis and, by doing so, would create in all industries the concern that Congress saw in the health care industry—employers faced with multiple fragmented units, each of which could halt the employer's operations if their demands were not satisfied. *See Cont'l Web Press*, 742 F.2d at 1090 ("The different unions may have inconsistent

goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike.")[10] Thus, an employer balkanized into multiple units is burdened with not only the costly burden of negotiating separately with a number of different unions, but also the attendant drama and potential work disruption, coupled with a threat that its operations could be ceased by self-interested fractions of the workforce. *See id.* This type of fractious dealing and conflict between multiple interest groups, with multiple voices, is the type of conflict that Section 9(b) and the community of interest test are meant to avoid. *See Oakwood Care Ctr.*, 343 N.L.R.B. 659, 662-63 (2004).

Additionally, the proliferation of collective bargaining agreements in a single facility can lead to the establishment of barriers that will prevent an employer from efficiently running its operation. For instance, each bargaining unit will likely seek to protect work performed exclusively by the unit members, thereby attempting to put contractual walls around the unit's work. This will impair an employer's ability to assign work in the most efficient manner, even if employees inside and outside of the unit are equally capable of performing the work (*i.e.*, blackjack dealers versus poker dealers). This loss in productivity will detract from, rather than enhance, economic competitiveness. Thus, establishing narrow units will not advance the goal of having a competitive workplace and can undermine the viability of an operation, which will not produce future job opportunities – important goals in today's global environment.

Likewise, the proliferation of units also creates workplace barriers limiting the rights of employees. Allowing "same job" units also creates the risk of balkanizing the workforce by forming communities of interest based on such unit determination, rather than the underlying

[10] Additionally, *Amici* support the argument made by the AHA and ASHHRA as it relates to *Four Seasons Nursing Center of Joliet*, 208 N.L.R.B. 403 (1974) and *Woodland Park Hospital, Inc.*, 205 N.L.R.B. 888 (1973). As the AHA and ASHHRA note, Congress's citation to *Four Seasons* and *Woodland Park* indicate that its concerns with unit proliferation were not limited to the acute care industry. Thus, the Board should carefully consider the likelihood that a "same job" standard would result in an increased number of narrow units.

functional reality of the positions. But perhaps most troublesome is the freezing effect that fragmented units would have on employee advancement. When the varied collective bargaining agreements inevitably have differing provisions for transfers, promotions, seniority, position posting and preference, 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.

The standard proposed in question seven is inappropriate for a second reason: it is contrary to Section 9(b)'s admonition that the appropriateness determination "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter." *See* 29 U.S.C. § 159(b). As multiple courts have recognized, "'the union will propose the unit it has organized.'" *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995) (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) and citing *Cont'l Web Press, Inc.*, 742 F.2d at 1093). By announcing a presumption of appropriateness for units based on job title, the Board invites unions to petition for the election it can win, rather than the election for a unit that is sufficiently distinct to justify a separate status. As a result, employees who want union representation but who perform a job with others who do not want representation either lose their opportunity to organize or become part of an extremely small unit with virtually no bargaining power or leverage. *See Cont'l Web Press, Inc.*, 742 F.2d at 1090 ("[B]reaking up a work force into many small units creates a danger that some of them will be so small and powerless that it will be worth no one's while to organize them, in which event the members of these units will be left out of the collective bargaining process."). Of course, overly-narrow units also disenfranchise those who wish to cast a vote *against* organization, as is their right under Section 7. Limiting a petition to only one job within a function (i.e., poker dealers rather than poker, blackjack, craps, and roulette dealers), disenfranchises the vote of the employee in the petitioned

for unit who would vote "no" to representation, particularly if the votes within the entire function may have included more "no" votes.[11] But regardless of how the line-drawing is done, a standard that allows for the establishment of artificially ***created*** narrow and isolated units to win the vote does not "assure...employees the fullest freedom" in organization.

In sum, a petitioned-for unit cannot be "appropriate" unless it has a community of interest "sufficiently distinct" from those excluded from the desired unit. Applying a presumption based along job description lines alone abandons this important part of the appropriateness determination and, in doing so, will result in a proliferation of units that hinders, rather than encourages, both the collective bargaining process and the rights of individual employees. Accordingly, *Amici* respectfully submit that the Board should not adopt the standard proposed in question seven.

B. *A Presumption Of Appropriateness Violates Section 9(c)(5)*

Section 9(c)(5) of the NLRA, added in 1947 through the Labor Management Relations Act, states that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). The legislative history of Section 9(c)(5) reveals that the Senate adopted the House-proposed amendment "to discourage the Board from finding a bargaining unit to be appropriate *even though such unit was only a fragment of what would ordinarily be deemed appropriate*, simply on the extent of organization theory." 93 Cong. Rec. 6601 (1947) (emphasis added). As the Board recognizes, Section 9(c)(5) "was intended to prevent fragmentation of appropriate units into smaller inappropriate units." *Overnite Transp. Co.*, 322 N.L.R.B. 723, 725 (1996) (*Overnite Transp. I*) (citing Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free*

[11] Of course, if the union thought it would win a larger unit, it would petition for it. ""[T]he union will propose the unit it has organized."" *NLRB v. Lundy Packing Co.*, 68 F.3d at 1581.

Choice, 18 Case W. Res. L. Rev. 479, 503-04 (1967)). While the Board may consider extent of organizing as *a* factor in the appropriate analysis, the extent of organizing may not be "the *controlling* factor" in the appropriateness determination. *See NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965) (emphasis added); *accord Lundy Packing Co.*, 68 F.3d at 1580; *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978); *Overnite Transp. I*, 322 N.L.R.B. at 724.

In *Wheeling Island Gaming*, Member Schaumber noted that the dissent's standard for unit determinations likely violated Section 9(c)(5). Member Hayes's dissent from the Notice in this case raises similar concerns. Because, like the dissent's position in *Wheeling Island Gaming*, the standard proposed in question seven makes extent of organizing the controlling factor in determining whether the presumption of appropriateness applies, the standard violates Section 9(c)(5).

The standard proposed in question seven fails under any meaningful reading of Section 9(c)(5). Under the proposed standard, a union would appear to be entitled to a presumption of appropriateness as long as it only organizes employees in the same job at a single facility—that is, as long as the extent of the union's organization does not reach beyond a single job, the unit is presumed appropriate. In that case, the extent of the union's organization is the only factor that triggers the presumption, violating Section 9(c)(5)'s prohibition.

The standard proposed in question seven discusses a presumption, but does not indicate whether the presumption is rebuttable or irrebuttable. Of course, if the presumption is irrebuttable and the Board intends to select a petitioned-for unit as *the* appropriate unit based solely on the extent of the union's organization, Section 9(c)(5) is clearly violated. But even if the presumption is rebuttable, similar to the standard advanced by Member Becker in *Wheeling*

Island Gaming, the standard still creates a Section 9(c)(5) violation under the Fourth Circuit's reasoning in *Lundy Packing Co.*

Much like the proposed standard in question seven and the *Wheeling Island Gaming* dissent, the Board in *Lundy Packing Co.* "adopted a novel legal standard" under which "any union-proposed unit is presumed appropriate unless an 'overwhelming community of interest' exists between the excluded employees and the union-proposed unit." 68 F.3d at 1581. The Court found that this standard violated Section 9(c)(5), notwithstanding the chance to rebut the presumption, because "[b]y presuming the union-proposed unit proper . . . the Board effectively accorded controlling weight to the extent of union organization." *Id.* Likewise, the proposed standard in question seven "effectively accord[s] controlling weight to the extent of union organization" as long as the union limits its organization to employees in the same job in a single facility.

Finally, this is not a case where extent of organization is only one of multiple factors. The presumption of appropriateness proposed by the Board will result in an appropriateness determination based *only* based on the extent of the organized and petitioned-for unit. The D.C. Circuit has distinguished *Lundy Packing Co.* where the Board "did not presume the Union's proposed unit was valid," but considered multiple other factors and made findings on the record. *See Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 423 (D.C. Cir. 2008). Similarly, in *Overnite Transp. Co. v. NLRB*, 294 F.3d 615 (4th Cir. 2002) (*Overnite Transp. II*), the Fourth Circuit affirmed an RD's decision that noted the union's desires concerning the composition of the unit, but also applied the community of interest factors and case law. 294 F.3d at 620. But the standard proposed in question seven is far different from those in *Blue Man Vegas* or *Overnite Transportation II* as it does not require record findings or consideration of case law. Rather,

based on the petition alone, the Board proposes to deem a unit presumptively appropriate. Such a presumption is clearly contrary to Section 9(c)(5) and should not be adopted by the Board.

III. *American Cyanamid* Does Not Support A Single Job Unit

In question eight, the Board asks whether it should "find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 N.L.R.B. 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.'" Notice at 2. However, the passage quoted from *American Cyanamid* is rather unremarkable, when considered in context: the Board simply decided in that case that "on the basis of the evidence in this record...maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation." 131 N.L.R.B. at 910. Thus, *American Cyanamid* simply applies the community of interest factors and finds that the petitioned-for unit of employees performing the maintenance functions at that place of employment constituted an appropriate unit. Cases applying *American Cyanamid* do so in the context of what is an appropriate unit for maintenance employees, and not for any holding regarding "employees [who] are readily identifiable as a group."

Member Becker's dissent in *Wheeling Island Gaming* applies a flawed interpretation of the holding in *American Cyanamid*: that having a *separate identity* is sufficient, without "requir[ing] a showing that the terms and conditions of employment of the maintenance employees substantially differed from all other employees of their employer." *See* 355 N.L.R.B. No. 127, Slip Op. at *2-3. Further, Member Becker objected that while making a showing of special and distinct interests might be appropriate in severance cases, "it is not appropriate in determining whether a proposed unit of organized employees is an appropriate unit." *Id.* at *3. Again, the *Wheeling Island Gaming* panel majority rejected this argument, noting that "[t]he

Board has a long history of applying [the "sufficiently distinct"] standard in initial unit determinations," citing *Monsanto Co.*, 183 N.L.R.B. 415 (1970), and *Harrah's Ill. Corp.*, 319 N.L.R.B. 749 (1995). *See also Virtua Health, Inc.*, 344 N.L.R.B. 604 (refusing to find a unit limited to paramedics appropriate because they are not sufficiently distinct from other employees).

Member Becker correctly notes that both the community of interest test and the requirement of a showing of distinctness are traced to *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962)—a unit severance case. However, the factors from that case are routinely applied in cases involving previously unrepresented employees. *See, e.g.*, The Developing Labor Law 643 n. 21 (Higgens, Ed.) (2006). And, when the Board recently summarized the appropriateness analysis, the focus was not on the employees' identity—as Member Becker suggests it should be—but on the underlying distinctness of the function performed by the employees in the petitioned-for unit:

> In determining whether a unit of employees...is appropriate, the Board considers whether the employees are organized into a separate department; have *distinct skills and training*; have *distinct job function* 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 N.L.R.B. 123, 123 (2002) (emphasis added). Undoubtedly, employees who satisfy the community of interest test will often be "readily identifiable" as a group separate from other employees. But Member Becker's reading of *American Cyanamid* places the proverbial cart before the horse: an employee's distinctiveness of function, functional integration, frequency of contact, and interchange with other employees gives them a community of interest and, in all likelihood, a separate identity. But the identity, alone, does not

create a community of interest and justify a finding that the identifiable employees warrant a separate and appropriate unit.

The Board, therefore, should decline to find a unit appropriate based solely on a finding that all employees in the proposed unit share a common job description. Such an approach not only totally disregards years of well-established and sound Board jurisprudence, but also such an approach would violate Sections 9(b) and 9(c)(5) of the Act. Thus, the Board should continue to apply the traditional community of interest test as articulated in footnote 2 of the majority opinion in *Wheeling Island Gaming*.

CONCLUSION AND SUMMARY OF RESPONSES TO QUESTIONS

For the foregoing reasons, *Amici* respectfully request the Board to refrain from addressing the issues raised in questions seven and eight or, in the alternative, to refrain from adopting the standards raised in those questions. In the event that the Board chooses to answer questions seven and eight, *Amici* submit the following responses.

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.*

Amici respectfully submit that the answer is "no." A "same job" presumption fails to consider whether the unit is "sufficiently distinct" as required by Board law and further violates Section 9(c)(5) of the Act by relying exclusively on the extent of organization.

8. *Should the Board find a proposed unit appropriate if, as found in American Cyanamid Co., 131 N.L.R.B. 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."*

Amici respectfully submit that the answer is "no." While sharing a community of interest may create a "readily identifiable...group," the shared identity is insufficient to warrant the creation of a separate bargaining unit. Rather, the Board should continue to focus on the traditional community of interest test and the distinct nature of skills, training, work, and job function between employees included and excluded from the unit sought.

Respectfully submitted,

/s/ G. Roger King
G. Roger King
Andrew M. Kramer
R. Scott Medsker

Dated: March 8, 2011

Counsel for *Amici Curiae*

APPENDIX A

National Organizations (49)

American Bakers Association
American Fire Sprinkler Association
American Foundry Society
American Hospital Association*
American Hotel and Lodging Association
American Meat Institute
American Pipeline Contractors Association
American Seniors Housing Association*
American Trucking Associations
Assisted Living Federation of America*
Associated Builders and Contractors
Associated General Contractors of America
Brick Industry Association
Center for the Defense of Free Enterprise
College and University Professional Association for Human Resources
Federation of American Hospitals
Food Marketing Institute
Forging Industry Association
Heating, Airconditioning & Refrigeration Distributors International (HARDI)
Independent Electrical Contractors
Industrial Fasteners Institute
International Association of Amusement Parks and Attractions
International Council of Shopping Centers
International Foodservice Distributors Association*
International Franchise Association
International Warehouse Logistics Association
Metals Service Center Institute
Modular Building Institute
National Association of Chemical Distributors
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Council of Farmer Cooperatives
National Council of Textile Organizations
National Federation of Independent Business
National Grocers Association

National Mining Association
National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
North American Die Casting Association
Printing Industries of America
Retail Industry Leaders Association*
Snack Food Association
Society for Human Resource Management
Truck Renting and Leasing Association

State and Local Organizations (28)

Arkansas State Chamber of Commerce/Associated Industries of AR
Associated Builders and Contractors Inc., Greater Houston Chapter
Associated Builders and Contractors, Inc. Central Ohio Chapter
Associated Builders and Contractors, Inc. Central Pennsylvania Chapter
Associated Builders and Contractors, Inc. Delaware Chapter
Associated Builders and Contractors, Inc. Eastern Pennsylvania Chapter
Associated Builders and Contractors, Inc. Heart of America Chapter
Associated Builders and Contractors, Inc. Inland Pacific Chapter
Associated Builders and Contractors, Inc. Keystone Chapter
Associated Builders and Contractors, Inc. Michigan Chapter
Associated Builders and Contractors, Inc. Mississippi Chapter
Associated Builders and Contractors, Inc. Nevada Chapter
Associated Builders and Contractors, Inc. Rhode Island Chapter
Associated Builders and Contractors, Inc. Rocky Mountain Chapter
Associated Builders and Contractors, Inc. Southeast Texas Chapter
Associated Industries of Massachusetts
Capital Associated Industries, Inc., Raleigh and Greensboro, NC
Charleston Metro Chamber of Commerce
Flagstaff Chamber of Commerce
Kansas Chamber
Little Rock Regional Chamber of Commerce
Management Association of Illinois
Montana Chamber of Commerce
Nevada Manufacturers Association
New Jersey Motor Truck Association
Texas Hospital Association
Virginia Trucking Association

West Virginia Chamber of Commerce

These organizations have filed separate amicus briefs in this case. They also have joined this brief as members of CDW and support the arguments herein.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2011, a true and correct copy of the Brief of *Amici Curiae* Coalition For A Democratic Workplace And HR Policy Association In Support of Respondent Employer was electronically filed with the National Labor Relations Board and was served by e-mail upon:

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/s/ G. Roger King
G. Roger King

Attachment D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMENTS OF HR POLICY ASSOCIATION AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT REGARDING NOTICE OF PROPOSED RULEMAKING REPRESENTATION—CASE PROCEDURES, 76 FED. REG. 36812 (JUNE 22, 2011)

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On behalf of their members, a diverse and robust group of employers operating in the United States, HR Policy Association ("HR Policy" or the "Association") and The Society for Human Resource Management ("SHRM" or the "Society")[1] (collectively, the "Organizations") submit the following comments in response to the National Labor Relations Board's ("NLRB's" or the "Board's") Notice of Proposed Rulemaking regarding Representation-Case Procedures (the "NPRM"). (76 Fed. Reg. 36812).

I. Overview of Comments

- **The Procedural Background – The Board is Requiring Comment to Its Proposed Extensive Election Rule Changes in an Unprecedented Short Period of Time.**

On June 22, 2011, pursuant to a 3-1 vote with Member Brian Hayes dissenting, the NLRB issued the NPRM regarding "rules and regulations governing the filing and processing of petitions relating to the representation of employees for collective bargaining with their employer." 76 Fed. Reg. 36812 (June 22, 2011). The NPRM proposes to modify 29 C.F.R. §§ 102.60-102.114.[2] and includes proposed changes to modify over 100 sections and subsections of

[1] The following chapters and state councils of SHRM have specifically joined in this submission: Alabama SHRM State Council, Arkansas SHRM State Council, Baldwin County SHRM, Bay Area Human Resource Executives Council, Big Country SHRM, Butler-Warren Ohio SHRM Chapter, California SHRM State Council, Cedar Valley SHRM, Chattanooga SHRM, Delaware SHRM State Council, DelMarVa SHRM, Eastern Iowa Human Resources Association, Eastern Shore SHRM, Fond du Lac Area Human Resources Association, Four Rivers SHRM, Fox Valley Chapter of SHRM, Georgia SHRM State Council, Greater Madison Area SHRM, Greater Valdosta SHRM Chapter, Human Resource Association of Greater Detroit, Human Resources Association of Southern New Jersey, Human Resource Management Association of New Mexico, Human Resource Management Association of West Central Missouri, Illinois Fox Valley SHRM, Indiana SHRM State Council, Iowa SHRM State Council, Kalamazoo Human Resource Management Association, Kansas State Council of SHRM, Kentucky SHRM State Council, Lake Country Human Resources, Maryland SHRM State Council, Michigan SHRM State Council, Minnesota SHRM State Council, Missouri SHRM State Council, Mobile Alabama SHRM, North Carolina SHRM State Council, Northeast Tennessee Society of SHRM, Northwest Arkansas Human Resources Association, Northwest Georgia SHRM Chapter, Northstate SHRM, Pennsylvania SHRM State Council, Rhode Island SHRM Chapter, Rhode Island SHRM State Council, South Central Indiana Human Resources Association, Stateline SHRM, Tennessee Valley Chapter of SHRM, Texas SHRM State Council, Western Kansas Human Resource Management Association, Wyoming SHRM State Council, York SHRM.

[2] The NPRM also proposes to remove and reserve 29 C.F.R. §§ 101.17-101.30, 103.20 and to merge certain subject matter set forth in those sections into the revised 29 C.F.R. §§ 102.60-102.114.

the current Board regulations and span over 35 three column pages in the Federal Register. The Notice also required any party that desired to submit comments regarding such proposed rules to do so on or before August 22, 2011. The Board subsequently, on another 3-1 vote with Member Hayes again dissenting, denied the request of the Organizations and other interested parties to extend the comment period regarding such proposed rules and hold hearings after the filing of such comments. Accordingly, the Board majority is requiring all interested parties to fully submit their comments in a period of only 60 days -- an unprecedented short period of time, particularly given the proposed extensive modifications and changes to the Board's election procedures.[3]

Further, as Member Hayes indicated in his dissent to the proposed rules, the process utilized by the majority in adopting such rules may be in violation of the Government in the Sunshine Act. (5 U.S.C. § 552b). Unfortunately, sufficient information is not available to determine whether such a violation occurred. In addition, as other interested parties have noted, the Board majority may have violated the Regulatory Flexibility Act (5 U.S.C. §§ 601 *et seq.*) in certifying that the proposed rules would not have an adverse impact on small business entities.

Finally, the approach that the Board majority has taken with respect to the instant proposed rules is in stark contrast to the detailed and thorough approach the Board undertook in 1987 before adopting its healthcare unit rules. (52 Fed. Reg. 25142-49). Indeed, there the Board provided interested parties approximately four (4) months to provide comments with an initial due date of October 30, 1987. After four (4) public hearings, the Board extended the written

[3] The Board did provide for interested parties to request to present oral testimony regarding the proposed rules. Oral testimony was received by the Board on July 18 and 19, 2011. Such testimony, however, was restricted to select presenters and then only five minutes was permitted for each presentation. The Organizations, at such hearing, presented testimony in opposition to the proposed rules, as did other employer organizations. Finally, the board has also provided a fourteen (14) day period for the parties to file comments replying to comments submitted during the initial comment period.

comment period and issued a second Notice of Proposed Rulemaking on September 1, 1988. (*See* Second Notice of Proposed Rulemaking, 52 Fed. Reg. 33900-33935 (September 1, 1988)). This notice was followed by another 6-week period for written comment. Ultimately, the Board promulgated the final rule on April 21, 1989 -- almost two (2) years after the initial notice. (29 C.F.R. §103.30).

- **The Board has Failed to Articulate and Document a Need for Its Proposed Rules, Especially in Light of Its Excellent Results in Timely Processing Election Petitions.**

The NLRB has a legitimate statutory responsibility to continuously evaluate its practices and procedures to assure that they serve the legitimate purposes of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, as amended ("NLRA" or "Act"), and to take affirmative action to rectify legitimate problems with the administration of the Act. Such responsibility, however, is to be carried out on a fully informed and neutral basis. This statutory responsibility does not compel the conclusion, however, that existing rules need to be changed in the absence of a compelling justification and a fully documented record supporting such proposed changes.

According to the NLRB majority, the primary purpose for the proposed amendments to the procedural rules in representation cases is to "gain the efficiency and savings that would result from the streamlining of its procedures." (76 Fed. Reg. 36829). Specifically, the Board majority in the NPRM provided three (3) reasons for its proposed new rules:

1. *First*, the NLRB claims that the amendments "would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation."

2. *Second*, the Agency asserts that the amendments would "simplify representation case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request."

3. *Third*, the Board maintains that the amendments would "allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election."

(76 Fed. Reg. 36812).

The Board majority failed to furnish, however, any factual support for its conclusions and apparently did not engage in any meaningful analysis of even its own considerable data before reaching the above stated assertions. Indeed, in a response to a Freedom of Information Act ("FOIA") request filed by the Organizations and other interested parties, the Board failed to identify any analysis that it has undertaken to describe why the proposed rules are necessary -- including why certain cases are delayed beyond the Board's standard time targets.[4]

Further, the above "justifications" are not borne out by the actual experiences of parties participating in representation case proceedings before the Board. Indeed, under the current procedural rules, the NLRB consistently meets or exceeds its representation case processing objectives. Moreover, while the NLRB claims that the amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, the NPRM fails to specifically identify those barriers and similarly fails to explain how the proposed amendments will ameliorate these alleged barriers. Finally, as more fully described below, many of the proposed amendments would violate the hearing requirement provided for in Section 9(c)

[4] HR Policy, SHRM, and numerous other organizations submitted a FOIA request to the Board on July 15, 2011, seeking information in the Board's possession to better educate themselves on the Board's procedures and the alleged causes of delay in representation cases. However, much like the NPRM itself, the information produced by the Board fails to identify any specific causes of election delay, nor does it indicate how those delays would be remedied by the proposed rule. To the extent that the information produced does identify any particular cause of delay, it appears that cases involving blocking charges routinely take hundreds of days from petition to election, thus artificially increasing the Board's average time from petition to election in all cases. If the Board has information, data, surveys, reports, analyses, or any other quantitative measure in its possession that supports the need for the proposed rule, we request that the Board identify and release such information so that interested parties may meaningfully comment.

of the NLRA, present due process issues, and complicate, rather than simplify, current representation case procedures.

- **The Board Failed to Seek Comments and Suggestions from Interested Parties Before Issuing Proposed Rules.**

Before embarking on wholesale revisions to existing procedures in representation cases, the NLRB should provide a comprehensive and inclusive process for all stakeholders to provide their views and experiences *before* issuing proposed regulations. In this regard, the NLRB's NPRM constitutes a significant departure from the historical practices. For instance, the NLRB made no effort to encourage any public discussion with respect to the content and scope of the NPRM before issuing it. In doing so, the Board summarily dismissed the possibility of any points of agreement among stakeholders whereby the Board could achieve improvements in election procedures through a consensual approach or negotiated rulemaking as opposed to one that simply adopts a skewed ideological approach. Such action is contrary to President Barack Obama's instructive (but not binding) Executive Order 13563, which specifically states that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." As Member Hayes noted in his dissent "at the very least" the proposals "should have been previewed for comment by the Board's standing Rules Revision Committee and by the Practice and Procedures Committee of the American Bar Association." (76 Fed. Reg. 36830).

- **The Board's Proposed Rules are Arbitrary and Capricious, Violate the Administrative Procedure Act, the Section 9 Hearing Requirement of the National Labor Relations Act, and also Fail to Provide Necessary Due Process Protections for Non-Petitioning Parties.**

Significantly, the NPRM, as drafted, is subject to plausible, if not compelling legal challenges. Pursuant to the requirements of Section 6 of the Act and Section 706(2)(A) of the

Administrative Procedure Act ("APA") any rule promulgated by the Board must not (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A). The proposed revisions to the NLRB's representation case procedures arguably do not meet this standard. Additionally, the provision of the NPRM that would allow the regional director or hearing officer to deny the non-petitioning party a pre-election hearing is directly contradictory to Section 9(c)(1) of the Act, which requires the Board to hold "an appropriate hearing" prior to an election.[5]

Further, many of the proposed amendments are invalid because they are arbitrary and capricious. For example, the proposed regulations would improperly convert representation cases from investigatory to adversarial proceedings with the Board abdicating many of its investigatory functions in favor of a quasi-judicial role. In proposing such a radical change in representation case hearings, the Board has failed to recognize its concomitant duty to provide due process protections to all parties that participate in such adversarial administrative proceedings. Further, the Board's attempt to analogize its new approach in representation proceedings to the Federal Rules of Civil Procedure is misguided, inaccurate and wholly lacking in legal support. Many of the proposed amendments would also place substantial burdens on non-petitioning parties, including employers, without placing any corresponding burdens on petitioners (primarily, labor unions). Moreover, the amendments would limit the ability of employers to communicate with their employees regarding union issues, erode due process rights, stifle the parties' ability to create a legitimate hearing record, and eliminate opportunities for

[5] The Board's abdication of its statutory responsibility in this respect is wholly unjustified and is not sound public policy.

meaningful Board and appellate court review of contested election-related issues. In addition, the proposed amendments authorizing a regional director to direct an election without first resolving disputes regarding the appropriateness of the petitioned-for unit and unit placement issues would create confusion, adversely impact free speech rights of employers and other interested parties, and would likely result in increased unfair labor practice and election objection litigation.

Finally, the proposed rules attempt to move virtually all election-related disputed issues until after the election process has been completed. As noted above, not only will such a procedure increase litigation, but it also will place employers in potentially difficult legal and practical situations during the pendency of any potential appeal of Board rulings. Given the process an employer must go through to have a federal court of appeals review any disputed issue regarding an election -- including the configuration of the voting unit -- there is often considerable delay in the ultimate resolution of post-election issues. Specifically, employers must first refuse to bargain with the selected union, have the Board issue a complaint on a refusal to bargain basis and then, and only then, can the employer appeal disputed issues to the appropriate court of appeals. Such appeal process can take months, if not years. During the pendency of such appeals, the selected union is presumed to be the majority representative of unit employees and an employer proceeds, at its peril, if it makes unilateral changes in terms and conditions of employment that are mandatory subjects of bargaining. The proposed rules, as noted above, delay, if not attempt to remove all together, disputed election issues until after the election has been completed. The proposed rules increase the number and complexity of potential post-election disputes and therefore place employers in even greater peril during the post-election period if they desire to appeal any election related issue. Indeed, as a practical

matter, such rules will further complicate employer decision making particularly with respect to potential changes in health insurance and pension plan areas during the pendency of the appeal period. Any changes in the Board's election rules should reduce, rather than increase, uncertainty with respect to employer changes in terms and conditions of employment during the pendency of post-election appeals and reduce the number of disputed election issues.

- **The Proposed Rules Requiring Employers to Furnish Employee Personal Contact Information, Including E-mail Addresses, Presents Serious Employee Privacy and Employer Property Right Issues.**

The Board's proposed rules require that an employer furnish to the Board, and a petitioning party, employee contact information including personal telephone numbers and personal e-mail addresses of potential voting unit employees. Such a requirement appears with respect to multiple lists that an employer would be required to furnish in the pre-election time frame. It is unclear whether such confidential information include work addresses and work phone numbers or are personal e-mail addresses and personal phone numbers of employees. The Board at least noted the potential for abuse in the use of such information by asking for comment as to what remedies should be put in place if a party obtaining such information misuses same. (76 Fed. Reg. 36821). Notwithstanding such remedial concerns, the Board should clarify its position with respect to such requested information and further engage in additional analysis as to the need for the use of such private information of employees.

- **Electronic Signatures on Union Authorization Cards Should not be Permitted.**

The Board seeks comment from interested parties as to whether electronic signatures should be permitted on union authorization cards or on union petitions seeking a representation election. The potential for fraud, misuse and confusion regarding this approach is self-evident. Indeed, the National Mediation Board ("NMB"), by way of example, strictly prohibits such a

practice. Further, the often misleading and unreliable nature of union authorization cards makes such suggested approach ill advised. Accordingly, the Board should not proceed further in this area.

- **The Board Should Review Its Blocking Charge Procedure After Its Proposed Election Rules Have Been Withdrawn and in the Context of Any Potential New Review of Representation Processing.**

The Board majority also seeks comment from interested parties regarding whether its current blocking charge procedures should be modified or rescinded. The current blocking charge procedure is a significant contributor to cases and petitions that are processed beyond the Board's current time targets. While the Organizations commend the Board's concern regarding this area, this subject should be reviewed after the proposed rules have been withdrawn and in the context of a balanced and thorough review of all election-related issues.

- **If the Board Requires Employers to Furnish Confidential Employee Information, Strong Sanctions Should be Imposed Regarding any Improper Dissemination and Utilization of Such Confidential Information.**

The Board also has asked for comments regarding what sanctions, if any, should be imposed for the improper use and utilization of any confidential employee information it may require an employer to furnish to the Board and to petitioning parties in the pre-election process. While the Organizations believe that such information should not be required to be furnished -- rendering the Board's request for comments on this issue moot -- if such requirements for release of this confidential information are adopted by the Board, at a minimum, the following sanctions should be imposed:

- Any organization improperly utilizing or disseminating employee confidential information should be prohibited, for one year following the misuse of such information, from filing any petition for representation for any bargaining unit with the NLRB.

- Any organization improperly utilizing or disseminating such employee confidential information should be required to take all reasonable and appropriate steps to remedy the violation.

- Any organization improperly utilizing or disseminating such information should be required to send a letter of apology to each employee whose information has been improperly used and disseminated. Such letter should describe what steps have been taken to remedy the improper use of the information.

Finally, in addition to the significant employee property rights at issue, the Board should recognize the important *employer* property rights to such information. Indeed, among other concerns, the inappropriate release and utilization of such information could lead to potential improper recruiting of valuable company employees and other interference by third parties with the employer's workers.

- **As a Matter of Public Policy and Precedent, a Three Member Board (Only Two of Whom have been Confirmed by the Senate) Should not Proceed to Consider and Vote on the Proposed Rules.**

Finally, given the fact that Board Chairman Wilma Leibman's term expires on August 27, 2011, there, in all probability, will only be three (3) sitting Board Members involved in reviewing the numerous comments that are anticipated to be filed by parties regarding the proposed rules. Additionally, only two of such Members will have been confirmed by the United States Senate. As a matter of sound public policy, and precedent, the Board should not proceed to consider such important comprehensive changes to Board election policies and procedures until it has a full complement of confirmed members.

- **The Board Should Withdraw the Proposed Rules or Reject Such Rules.**

In summary, the NPRM seeks sweeping changes that are procedurally and substantively defective. Further, the Board's proposed election rules and its other pending initiatives clearly

raise questions as to the credibility and neutrality of the Agency.[6] Given the NLRB's consistent success in processing representation cases, there is no legitimate justification for the proposed amendments, and the Board should withdraw the NPRM in its entirety. In the alternative, the Board should reject its proposed rules. If the Board, at a future point when it has a fully-confirmed complement of members, desires to reconsider this area, it should do so in a thoughtful and balanced manner and provide interested parties the appropriate opportunities to provide oral testimony and written comments before promulgating any final rules.

II. Statement of Interest

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively,

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[6] In addition to the Board's proposed rulemaking in the instant matter, the Board, within the last year, has: i) requested comment on rulemaking requiring employers to post a notice informing employees of their rights under the NLRA, 75 Fed. Reg. 80410 (Dec. 22, 2010); (ii) invited *amicus* briefs in *DR Horton, Inc.*, 12-CA-25764, regarding whether an employer violated Section 8(a)(1) by requiring employees to waive all rights to a judicial forum and denying the arbitrator the ability to consolidate claims or proceed to hear contested issues on a class or collective action; (iii) invited *amicus* briefs in *Hawaii Tribune-Herald*, 37-CA-7043 and related cases, regarding whether an employer has a duty to provide a union with statements provided to the employer in the course of its investigation into alleged employee misconduct; (iv) invited *amicus* briefs in *Chicago Mathematics & Science Academy Charter School, Inc.*, 13-RM-1768, addressing whether an Illinois charter school falls under the jurisdiction of the NLRB or an Illinois labor relations board; (v) invited *amicus* briefs in *Specialty Healthcare*, 356 N.L.R.B. No. 56, asking whether the Board should continue to adhere to *Park Manor Care Center*, 305 N.L.R.B. 872 (1991), or whether there should be a presumption that employees in the "same job" make up an appropriate unit; (vi) invited *amicus* briefs in *Roundy's Inc.*, 30-CA-17185, addressing the appropriate standard to review allegations of unlawful employer discrimination in nonemployee access cases and specifically asking whether the Board should continue to adhere to *Sandusky Mall Co.*, 329 N.L.R.B. 618 and what bearing, if any, *Register Guard*, 351 N.L.R.B. 1110, has on the Board's standards for unlawful discrimination in nonemployee access cases; (vii) invited *amicus* briefs in *Lamons Gasket Co.*, 31-RD-1578, where the Board asked for *amici*'s experience under *Dana Corp.*, 351 N.L.R.B. 434 (2007), which, after an employer voluntarily recognized a union, allowed employees 45 days' to file a decertification petition or to support another union, specifically asking whether, in light of the parties' experiences, *Dana Corp.* should be overturned; (viii) *amicus* briefs in *UGL-Unnico Service Co. & Grocery Haulers, Inc.* 355 N.L.R.B. No. 155, where the Board is considering overturning *MV Transportation*, 337 N.L.R.B. 770 (2002), and requiring a successor to bargain with an incumbent union for a reasonable period of time without any challenge to the union's majority status and asking for *amici*'s views on whether *MV Transportation* applies in a "perfectly clear" successor situation.