

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

SPECIALTY HEALTHCARE AND)
REHABILITATION CENTER OF MOBILE)

Employer,)

and)

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

Petitioner)

Case No. 15-RC-8773

**EMPLOYER'S BRIEF IN SUPPORT OF ITS REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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NOW COMES Specialty Healthcare and Rehabilitation Center of Mobile (hereinafter “Specialty Healthcare” or “Employer”), and files its Brief In Support Of Its Request For Review of the Regional Director’s Decision and Direction of Election, issued by M. Kathleen McKinney, Regional Director, National Labor Relations Board, Region 15, on January 20th, 2009.

This Request for Review is based on the following:

The Decision raises a substantial question of law and policy because of both the absence of, and departure from, officially reported Board precedent.¹

I. STATEMENT OF THE CASE

On December 18, 2008,² the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“the Union”) filed a petition in Case No. 15-RC-8773 seeking to represent employees in the following unit:

¹ In the interest of preserving the issue in the event of appeal, the Employer notes its continued objection to the propriety of a two-member panel of the National Labor Relations Board, pending resolution of this issue by the Courts.

Included: All CNAs employed at the Mobile, AL facility;

Excluded: All Office/Clerical employees, all Dietary employees, professional employees, guards and supervisors as defined by the Act.

A Hearing was conducted on December 30, 2008, before Hearing Officer Charles Rogers in Mobile, Alabama.³ At the Hearing, the Employer explained that the Union's proposed bargaining unit was inappropriate as a matter of law, and that the only appropriate unit would include all nonsupervisory employees at the Mobile facility in a wall-to-wall unit (essentially, a service and maintenance unit, plus residuals). Accordingly, the Employer proposed a unit which included Certified Nursing Assistants ("CNAs"), Activity Assistants, Dietary Aides, Cooks, Central Supply Clerk, Staffing Coordinator, Medical Records Clerk, Maintenance Assistant, Social Services Assistant, Business Office Clerk, and Receptionist. The Employer's proposed unit contained 86 employees; the Union's petitioned-for unit contained 53.⁴

At the conclusion of the Hearing, both the Employer and the Union filed briefs in support of their positions. While the Employer provided a lengthy brief outlining the multiple problems posed by a CNA-only unit, including the potential for residual units and the proliferation of units within its facility, the Union submitted only a two-page brief in support of its Petition, in which is failed to respond to any of the issues raised at the Hearing. Nevertheless, despite the Employer's numerous and valid concerns regarding such an unprecedented and limited composition, the Regional Director (hereinafter "RD") issued her Decision and Direction of

² All dates are 2008 unless otherwise specified.

³ References to the Hearing Transcript are reflected as "(Hr. Tr. [page: line])"; Hearing Exhibits are referenced as "(Hr. Ex. [number])"; references to the Regional Director's Decision and Direction of Election are referenced as "(D&D, [page])".

⁴ At the time of the Hearing, the housekeeping and laundry employees were subcontracted to a different employer. Normally, they would be included in any service and maintenance unit found appropriate in a nursing home.

Election, and found that a unit comprised only of CNAs, and excluding all other similarly situated service and maintenance employees at the Employer's facility, was appropriate.

In so holding, the RD wholly ignored the Employer's compelling arguments, as well as Board's precedent; she also blatantly disregarded the rule of Park Manor Care Center, 305 NLRB 872 (1991) – an analysis which she admitted must control in this case, but which she never actually applied. Finally, the RD's Decision approved the first all-CNA unit to appear in any Board case – a dangerous and striking deviation from the Board's jurisprudence. Indeed, the Employer could find no reported Board or Regional Director R-case decision finding that such a unit may be appropriate, and for good reason: such an exclusive unit is both contrary to the Board's rulemaking, as well as Congress' admonition against a proliferation of units in a healthcare setting. Thus, it simply could not survive a proper application of the Park Manor standard.

Given this reality, if the RD's Decision and Direction of Election is enforced in this case, it will mean that the Board has effectively overruled Park Manor Care Center, and abandoned the analysis described therein. It would also mean that the Board has decided to ignore its own rulemaking history, as well as the Congressional mandate regarding unit proliferation and residual units. And so, for these reasons, the Employer strongly requests review of the RD's findings, asks that the Decision and Direction be vacated, and the Petition dismissed accordingly.

II. STATEMENT OF THE FACTS

Kindred Healthcare is the largest post-acute health care company in the United States. The Company has three main lines of business – it operates nursing homes, long-term/acute-care facilities (LTAC), and provides rehabilitation services to hospitals and nursing centers. (Hr. Tr. 17:7-13). Kindred's corporate headquarters are located in Louisville, Kentucky. The nursing

home function of Kindred's business operates under the corporate name Health Services Division. In the instant case, the Employer – Specialty Healthcare and Rehabilitation Center of Mobile – is part of Kindred's Health Services Division. (Hr. Tr. 18:13-20). The Health Services Division operates more than 200 nursing centers throughout the United States.

The Employer's Mobile, Alabama, facility is a four-story nursing and rehabilitation center containing 170 beds. (Hr. Tr. 89:1-6). The First floor is primarily comprised of office space, a large dining and recreation room for the residents, the kitchen/dietary area, therapy rooms, and a break room for employees. Included in the office space on the First floor are the offices for Administration, Business Office, Social Services, Medical Records, the Staffing Coordinator, Central Supply, Physical Therapy, and Respiratory Therapy. (Hr. Ex. E-2).

The Second, Third and Fourth floors (which are more or less identical replications of one another) are primarily comprised of patient/resident rooms. In addition to the resident rooms, each floor contains a floor-designated nursing station, a combined dining/activity area (Sun Porch), and small storage/supply rooms. (See Hr. Ex. E-2). A Social Services office is located on the Third floor, and the Fourth floor contains a beauty shop used by the residents of the facility. (Hr. Ex. E-2).

Reporting directly to Mays as the Executive Director are the Nursing Director; the Business Office Manager; the Social Worker; the Maintenance Supervisor; the Recreational Therapist; the Dietary Supervisor; and the Registered Dietician. In addition, all employees at the Mobile facility ultimately answer to the Administrator, who is responsible for the overall operation of the facility. (Hr. Ex. 3).

As described above, while the Union has petitioned for a unit comprised only of the 53 CNAs employed by Specialty Healthcare, the Employer submits that the only appropriate unit in

this case would include all nonsupervisory employees in a wall-to-wall unit. Accordingly, in addition to the CNAs, the Employer's proposed unit would also contain Resident Activity Assistants, Dietary Aides, Cooks, Central Supply Clerk, Staffing Coordinator, Medical Records Clerk, Maintenance Assistant, Social Services Assistant, Business Office Clerk, and the Receptionist. And, the Employer further submits that a significant community of interest exists among these employees, and that these similarities overwhelmingly justify their inclusion in the wall-to-wall bargaining unit it has proposed in this case – a service and maintenance unit, with the inclusion of two employees who would otherwise be residuals.⁵

III. LEGAL STANDARD TO BE APPLIED

In determining whether a group of employees comprises an appropriate bargaining unit under the Act, the Board has long applied its “community of interest” standard. In applying this analysis, the Board considers a number of factors relevant to the employment relationship; these include the degree of functional integration between employees; employee skills and job functions; contact and interchange; common supervision; similarities in wages, hours, benefits; and other terms and conditions of employment. Home Depot USA Inc., 331 NLRB 1289 (2000). In addition to these factors, the Board will also consider other relevant facts, including bargaining history and traditional unit compositions. See Kalamazoo Paper Box Corp., 136 NLRB 134 (1962). Finally, the Board's precedent holds that, whenever a Petitioner seeks a unit that is not appropriate, then the Board is required to examine any alternate unit proposed by the Employer. Overnite Transportation Co., 322 NLRB 723, 663 (1996).

Where a bargaining representative petitions for a unit within a healthcare setting, however, the Board takes its traditional analysis one step further. This expanded inquiry was articulated in Park Manor Care Center, where the Board concluded that an “empirical”

⁵ The residual employees would be the Business Office Clerk and the Receptionist.

community of interest standard must be applied to bargaining units in non-acute health care facilities. In the first step of the inquiry, the usual “community of interest” factors must be considered; in addition, however, the Board explained that the fact finder must then perform a second step, and is required to consider the unit in the context of the background information gathered during the Board’s health care rule-making efforts, as well as the Congressional mandates regarding units in such facilities. Id. at 875; see also Virtua Health, 334 NLRB No. 76 (2005).

The Board’s discussion of “background information” refers to Congress’ well-established intention of avoiding “undue proliferation” of bargaining units in a health care setting. This mandate results from the desire to avoid disruption to patient care, unwarranted fragmentation of units and the resulting effect of jurisdictional disputes, work stoppages and increased costs due to whip-sawing and wage leap-frogging. In addition, however, the background information also refers to the Board’s recognition that employees within smaller organizations (such as nursing homes and other long-term care facilities) have more contact and share more interests with other employees than do their counterparts at larger hospitals. See Park Manor Care Center at 876. For example, in its rulemaking, the Board specifically recognized that nursing homes must be treated uniquely because of their holistic approach to care: to that end, the Board noted that “nursing home staffs are concerned not only with the residents’ physical well being, but also their social and psychological needs. Accordingly, there is less diversity in nursing homes among professional, technical and service employees, and the staff is more functionally integrated.” Id. at 33928, and 1567. Finally, the Board observed that, “almost no aspect of nursing home care is in the exclusive domain of any one group of employees. Thus, there appears to be a greater overlap of functions as well as greater work contact between various

nursing home non-professionals.” Id. at 33928, and 1567. In all, as a result of Congress’ admonition and the Board’s factual findings, bargaining units in a health care setting can only be found appropriate if they are formed in a way that discourages undue proliferation and the possibility of residual units, and that recognizes the unique integration of employees in a healthcare setting -- all of which is consistent with the findings of Congress, and the Board.

In applying Park Manor, then, the fact finder must necessarily undertake a two-step process. First, the traditional community of interest factors must be analyzed and weighed; secondly, the rule-making information must be considered, and a decision must be reached that is consistent with the Board’s findings, and Congress’ clear mandate. Thus, under Park Manor, a mere community of interest finding, standing alone, will be insufficient to show that a unit is appropriate; instead, that unit must also be shown to be carefully calculated to avoid undue proliferation, to appreciate the inherent contact and interchange among employees at smaller facilities, and to prevent the creation of residual units within the organization. And, where a petitioned-for unit unreasonably poses such risks in a healthcare setting, the petition must be dismissed, as a matter of law.

IV. ARGUMENT

Given the record evidence presented at the Hearing, as well as the legal framework described above, the Employer submits that the Regional Director’s Decision and Direction of Election is erroneous in two major respects. First, it is improper, because the RD ignored the weight of the evidence and failed to find a community of interest among the employees in the Employer’s proposed unit; secondly, it is erroneous as a matter of law, because the RD completely failed to perform 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. As a result of these critical errors and omissions, the Employer requests that the Board vacate the RD's Decision, and dismiss the Petition.

A. The Regional Director Failed To Give Proper Weight To The Record Evidence Establishing The Community Of Interest Among The Employees In The Employer's Proposed Wall To Wall Unit.

According to the record evidence presented at the Hearing, the non-supervisory employees working at the Employer's Mobile facility have much in common. For example, they enjoy similar wages and benefits; they share common supervision; they are subject to the same rules and policies; and they interact on a frequent – if not daily – basis. Nevertheless, in her Decision and Direction of Election, the RD ignored the bulk of this evidence, even misstating or mischaracterizing the record facts on multiple occasions; she also placed undue weight on less significant factors, or attempted to create distinctions where no legitimate distinction could properly be made. It is not surprising, then, that the resulting Decision presents as a transparent attempt to arrive at a conclusion favoring the Union. It provides only conclusory statements as to the analysis performed, baldly listing the community of interest factors, and announcing – without discussion – that each has been properly examined. (D&D, 11). On the other hand, a comprehensive analysis of the case reveals that the RD's findings in this regard are wholly unsupported by the record, and are erroneous as a matter of law.

To this end, and as described above, the first step in the Park Manor analysis involves the application of traditional community of interest factors. When those factors are actually examined in the instant case, the overwhelming record evidence demonstrates a strong commonality among the nonsupervisory employees at the Employer's Mobile facility; such evidence is detailed below.

1. Employee Skills And Education

At the outset, the record evidence shows that all of the nonsupervisory employees at the Employer's Mobile facility are subject to similar, if not identical, educational requirements. In her Decision, however, the RD chose to ignore that evidence, and instead, placed significant weight on the fact that CNAs are certified, and that they undergo training for their positions. Specifically, in finding this factor to be determinative – and sufficient to destroy any community of interest – she stated that “CNAs must attend up to six months of special vocational training education.” (D&D, 3). This finding, however, significantly overestimates the training and educational requirements for CNAs, and completely misrepresents the evidence presented at the Hearing.

In reality, the CNA position does not require a notably different background, experience or education level than the other employees included in the Employer's proposed wall-to-wall bargaining unit. (Hr. Ex. E-8(e)). Indeed, CNAs at the Employer's facility are preferred to have a high school degree or equivalent; the similar requirements of each position are described below:

- Dietary Aide – 10th grade and above. (Hr. Ex. E-8(b)).
- Cook – 10th grade and above. (Hr. Ex. E-8(c)).
- Maintenance Assistant – High School degree or equivalent. (Hr. Ex. E-8(d)).
- Staffing Coordinator – High School degree or equivalent. (Hr. Ex. E-9(a)).
- Medical Records Clerk – High School degree or equivalent. (Hr. Ex. E-9(b)).
- Central Supply Clerk – High School degree or equivalent. (Hr. Ex. E-9(c)).
- Data Entry Clerk – High School degree or equivalent. (Hr. Ex. E-9(e)).

And, while CNAs are required to be certified, this does not involve some six-month training period as described by the RD; instead, testimony from the Hearing clearly shows that certification requires no more than 16 hours of classroom training, and approximately 72 hours of general education. (Hr. Tr. 132:3-8). Although a CNA may choose to take the training over

the course of several weeks or months, depending on the program and the individual student, there is no requirement that a CNA receive six months of training prior to occupying the position. (Hr. Tr. 132:7-19). As such, the CNAs' certification process is relatively minimal, and does not undermine any community of interest among the nonsupervisory employees in this case; to the contrary, the similarity in educational requirements underscores the similarities among the employees in the Employer's proposed unit. This conclusion is consistent with every other Board decision that has considered the issue of CNA training. See Jersey Shore Nursing and Rehabilitation Nursing Center, 325 NLRB No. 102 (1998)(a service and maintenance unit including CNAs along with other non-certified employees is presumptively appropriate in a nursing home setting); In re Marian Manor for the Aged and Infirm, Inc. 333 NLRB No. 133 (2001)(finding a unit to be presumptively appropriate when it contains CNAs, clericals, maintenance, and other service employees); The Jewish Home for the Elderly, 343 NLRB No. 117 (2004)(explaining that CNAs do not have a sufficient community of interest with other members of the nursing/teaching staff, as their training is comparatively minimal). Consequently, the RD's contrary conclusion is erroneous, and cannot be sustained.

2. Functional Interchange, Job Function, And Contact Between Employees

In addition to the similarities in education and qualifications, the record also revealed significant evidence of functional interchange, job functions, and basic contact and interaction among the employees in the Employer's proposed unit. Nevertheless, here again, the RD continued to ignore the undisputed record evidence, and instead found that there was no specific showing of functional integration between the employees in the Employer's proposed unit. In this instance, while the RD placed significant emphasis on the fact that the Employer's facility is divided into "distinct departments," she wholly ignored any evidence of how these departments

work together to provide collaborative care – a common practice at almost all nursing homes. And, while the RD acknowledged that duties did often overlap – she admitted that CNAs “may occasionally assist other departments in the delivery of food, compliance with a care plan or ensuring a resident’s participation in activities” – she ultimately discounted this evidence, and held that this was insufficient to show functional integration. (D&D, 13). Clearly, however, her conclusions in this regard fail to take into account the collaborative approach to care that is central to the operation of the Employer’s facility, and virtually all nursing homes. Furthermore, such findings underestimate the importance of care plans, meetings, and the daily realities of the overlap in job duties and responsibilities among nursing home personnel, as well as the significant evidence of daily interaction between the nonsupervisory employees at the Employer’s Mobile facility. Accordingly, once again, it is apparent that the RD’s findings are unsupported by the overwhelming evidence on the record.

From the outset, the RD failed to take into account the very nature of a long-term care facility. As demonstrated at the Hearing, the operation of a nursing home inherently involves a high level of functional integration and interchange. To this end, the facility’s Executive Director testified that, in the nursing home setting, the main goal and focus is on quality patient care; this effort necessarily “entails a collaborative effort with all departments meeting nutritional needs, psychological needs, the activity needs...[and] the clinical needs” of the residents. (Hr. Tr. 125:7-11). The Executive Director further testified that the Employer’s collaborative approach to total quality care dictates that, while all employees in the facility must perform their primary job, they must also be able to identify the needs of the resident under all circumstances. And, as a result, “there’s no department that could truly take care of these residents independent of the other departments.” (Hr. Tr. 125:14-19). Instead, all departments

must work together to provide the necessary degree of care, and this collaborative method, involving each employee, is critical to the success of the facility. (Hr. Tr. 128:17-25).

As a result of this holistic approach to patient care, the duties and functions of the non-supervisory employees at the Mobile facility overlap in many ways. The most obvious example of this functional integration between departments is the development and application of each resident's "care plan." Upon the admittance of a new resident, the facility immediately performs an assessment of the individual's dietary, social and clinical needs. Following the initial assessment, a formal care plan is developed; this plan acts as a blueprint for the needs of each resident. All jobs, and all departments – activities, social, nursing, and dietary – are involved in the development of a resident's care plan. (Hr. Tr. 127:2-11). Furthermore, after the initial care plan is developed, the different disciplines must meet to determine whether the existing care plan must be updated or modified because of a resident's changing condition or needs. (Hr. Tr. 127:13-22). At these care plan meetings, which are held at least quarterly, all disciplines (including nursing, dietary, activities, social, therapy and rehab) participate and collaborate in the process of updating the plans. As such, the very existence of the care plans establishes the inherent functional integration between the CNAs and other employees and departments within the Employer's facility.

Still, disciplines do not only work together in the care plan context; they also participate in regular employee meetings and training functions. (Hr. Tr. 150:9-14; Hr. Ex. E-7(a); . Ex. E-7(b)). Moreover, in addition to various training and in-service meetings, the Employer also conducts daily "stand up" meetings where representatives from each department receive a general overview of everything that happened in the facility during the course of the previous day and/or shift. (Hr. Tr. 151:20-25). While it is mostly supervisory employees who attend the

daily “stand up” meetings, these employees are expected to pass details of the meeting along to their respective teams; this too shows the comprehensive integration of the disciplines within the facility.

While the RD acknowledged the existence of the care plans, and the fact that all disciplines work together in providing care and attending related meetings, these facts ultimately held no weight in her analysis. (D&D, 10). This, however, was not the only evidence she chose to ignore in reaching such a finding.

Indeed, even without the evidence of meetings and care plans, the record in this case further establishes that each of the employees in the Employer’s proposed unit interact on a regular – if not daily – basis. For example, while the RD placed significant weight on her finding that CNAs are “the only employees assigned to work the floors and tend to the designated residents,” and noting that CNAs work with residents throughout the four floors of the facility, she failed to give any weight whatsoever to the fact that CNAs are not the only ones who do so. (D&D 5; 11). In reality, the same is true for the Activity Assistants, who work with certain residents throughout the facility, including inside patient rooms. (Hr. Tr. 116:18-25). The Maintenance Assistant also performs work throughout the entire facility, working wherever maintenance is required. (Hr. Tr. 130:16-22). The Staffing Coordinator spends as much as three to four hours a day working “on the floor” with CNAs and other employees, and the Medical Records Clerk is frequently “out on the floors” retrieving medical records, setting up patient charts, retrieving patient records, and working with ADL charts. (Hr. Tr. 135:12-17; Hr. Ex. 9(b)). The Central Supply Clerk moves throughout the building as well, as she maintains and stocks supply closets located at the nursing stations on each floor; at the Hearing, one CNA

testified that she saw the Central Supply Clerk every day or every other day, for anywhere from 20 to 30 minutes. (Hr. Tr. 139:17-25; 140:1-9; 57:11-14; 140:7-10).

Moreover, the interaction is not limited to different employees simply working in the same area at the same time – the evidence further demonstrates that every employee in the Employer’s proposed unit is required to interact with other nonsupervisory employees, from other departments, in the course of performing their jobs.

CNAs must work closely with the Activity Assistants to understand residents’ activity needs, and to ensure that each resident’s needs are, in fact, being met. (Hr. Tr. 119:15-25 and 120:1-19). Activity Assistants, in turn, must coordinate patient activities with all staff, including the CNAs. (Hr. Tr. 117:20-25). CNAs must also work with the Staffing Coordinator in order to locate replacement personnel to cover shifts of employees who have called-off work. (Hr. Tr. 136:1-5). At the Hearing, the testimony of one CNA established that interaction with the Staffing Coordinator is frequent, as the disciplines must work together whenever there is a call-off or a need for leave. (Hr. Tr. 58:1; 75:4-11). CNAs and the Staffing Coordinator must also work together in arranging which CNA will take patients to doctors’ appointments, as the Staffing Coordinator prepares those schedules, as well. (H. Tr. 78:10-12).

The Medical Records Clerk must interact with the CNA in compiling the data recorded by CNAs on the ADL flow charts; as a result, the clerk is frequently “out on the floors” retrieving ADL charts and other documents maintained at the nursing stations. (Hr. Ex. 9(b); Hr. Tr. 137:9-25). Similarly, the Central Supply Clerk – who is responsible for stocking and maintaining supply closets located at the nursing stations on each floor of the facility – also works with CNAs to ascertain special needs or supply requirements of the residents. (Hr. Tr.

140-13-25). Indeed, the Supply Clerk is often told directly by CNAs of the need for various supplies.

Additionally, even employees who are not usually out on the floors have demonstrated interaction with nonsupervisory employees from different departments. For example, CNAs are permitted to receive phone calls while working; it is the Receptionist who receives these calls, and takes messages for the CNAs. (Hr. Tr. 76:6-10). The CNAs and Dietary employees – both Cooks and Dietary Aides – are also in contact on a daily basis, as one cooks and prepares the food for delivery, and the other picks up and delivers the food to the resident. (Hr. Tr. 122:9-20). They interact whenever a CNA must communicate a resident's dietary need to the Cooks or to a Dietary Aide in order to ensure that the resident's request is met; the same interaction occurs if a resident receives the wrong food, or if a meal is missing. (Hr. Tr. 123:1-11). Additionally, CNAs often come into contact with Dietary Aides when CNAs accompany residents to the dining room to assist them with eating. (Hr. Tr. 72:13-15). Finally, the record evidence shows that Dietary Aides and Cooks both work together to cook meals for the CNAs when they request to purchase a meal. (Hr. Tr. 156:13-25).

Given these facts, the record evidence in this case clearly establishes a high degree of interaction and integration between the CNAs and the other individuals in the Employer's proposed unit; it further establishes that these elements are necessary in the operation of the facility. Nevertheless, even in the face of this overwhelming evidence, the RD still refused to find that any of these examples constituted "interaction" between the disciplines, and allowed only that CNAs "may see" or "may occasionally see" the majority of the employees described above. Based on this mischaracterization of the facts, she concluded – without further analysis – that no community of interest existed with respect to this factor. Clearly, however, the RD's

findings here are patently incorrect, and it is apparent that this undisputed evidence was entirely sufficient to show functional interchange among the employees in the Employer's proposed wall-to-wall unit of service and maintenance employees and residuals.

But even with the RD discounting all of the Employer's previous evidence of integration, the record evidence shows one more example of the interchange among nonsupervisory employees at the Employer's facility – namely, the history of transfers between departments. To this end, the record establishes numerous instances of employees transferring from one position to another, within the family of job classifications sought in the wall-to-wall unit.

And yet, once again, the RD dismissed this evidence as well, finding it insignificant, because no employee transferred *into* a CNA position; as for the evidence showing that at least one employee transferred *out* of a CNA position and into a different department within the last two years, the RD concluded that this also carried no weight, as it “only happened once.” (D&D, 13). And so, here again, the RD's Decision reflects a conscious attempt to discount the Employer's evidence in order to find in favor of the Union – regardless of the facts that must be ignored along the way.

In reality, the evidence shows that transfers are frequent at the Employer's facility. The following examples of job transfers from one classification to another were offered at the hearing:

- In October of 2007, a Receptionist was promoted to the position of Unit Clerk. (Hr. Ex. E-10(a)).
- In June of 2007, a CNA was promoted into a Unit Clerk position. (Hr. Ex. E-10(b)).
- In 2000, a dietary worker moved into a Data Entry Clerk position. (Hr. Ex. E-10(c)).
- In April of 2008, an employee was promoted from Cook to Central Supply Clerk. (Hr. Ex. E-10(d)).

Notably, the record further reflects that these are not the only interdepartmental transfers during these time periods, and that others likely occurred, as well. (Hr. Tr. 165:13-16). In all, this evidence also serves to show the overlap between non-supervisory employees at the Mobile facility, and demonstrates the fluidity of the working environment, further supporting a strong finding of integration in this case; still, this too was ignored in the results-oriented RD's Decision, and as a result, in this regard as well, her Decision is wholly inconsistent with the facts of this case.

3. Common Supervision

In considering supervision, the RD concluded that CNAs had different supervision than the other employees in the Employer's proposed unit, because "CNAs are directly supervised by the LPNs and RNs." (D&D, 12). As such, she concluded – again without discussion – that the "immediate supervision by the LPNs and RNs indicates that a separate unit of CNAs is appropriate." (D&D, 12). Still, this serves only as another example of the RD misstating the facts of the case.

Instead, the common element of supervision here is the supervision by the DON, and ultimately, the facility Administrator. In all, CNAs report to LPNs, who report to the Unit Manager RNs; the Unit Managers then report to the Director of Nursing. Meanwhile, Activities assistants report to an activities manager, who reports to the Director of Nursing. Data entry clerks report to the Medical Records clerk, who reports to the Director of Nursing. (Hr. Tr. 161:2-7). In fact, almost every employee in the Employer's proposed unit either reports directly to the DON, or to a direct supervisor who *then* reports to the DON. Moreover, every employee in the proposed unit ultimately reports to the Executive Director.

Clearly, this constitutes common supervision, and the fact that an employee may report to an immediate supervisor before being accountable to the DON does not destroy the community of interest here – indeed, even the CNAs in the Union’s proposed unit do not all share the same supervisor or unit manager; they report to different charge nurses on different units. The only common thread among the CNAs themselves is that their individual unit manager reports to the DON – just like the majority of the other service and maintenance employees described in Employer’s proposed unit. And, like everyone else in the Employer’s proposed unit, the CNAs answer ultimately to the Director. (Hr. Tr. 88:18-22). As such, the element of common supervision also weighs in favor of a strong community of interest here, and – contrary to the RD’s findings – does nothing to suggest that a CNA-only unit is the appropriate unit in this case.

4. Similarities in Wages, Hours, And Benefits

With respect to wages, hours, and benefits, the evidence of a community of interest among the employees in the Employer’s petitioned-for unit is particularly strong. In this regard, the record repeatedly shows that these employees enjoy very similar – if not entirely identical – pay, benefits, and terms and conditions of employment. Still, here again, the RD chose to ignore the evidence, or to focus instead on insignificant distinctions between the employees; nevertheless, as her analysis continues to be unsupported by the bare facts, her conclusions concerning this factor simply cannot be sustained.

i. Wages

In considering wages, the RD she set forth the facts, acknowledging that the starting rate for CNAs is \$8.50 per hour, that “Dietary Aides receive \$7.00 per hour, Cooks \$9.00 per hour, Receptionist \$9.00 to \$10.00 per hour, the Central Supply Clerk, Medical Records Clerk, and Scheduling/Staffing Clerk, \$10 per hour and the Data Entry Clerk receives \$15-16 per hour.”

(D&D, 8). She then further acknowledged that “CNAs, Dietary Aides, and Cooks all receive an additional 10 cents per hour based on years of experience up to fifteen years.” (D&D, 8). Finally, she noted that “overtime pay is paid time and a half for all employees.” (D&D, 8).

And still, even after reciting such obvious similarities – similarities which clearly demonstrate that the wage rates of CNAs fall squarely within the middle of the range of other employees in the Employer’s proposed bargaining unit – the RD still concluded the CNAs’ wages to be “distinctive,” and held that “CNA wage rates are different from the other employees.” (D&D, 11). At no time, however, does the RD not explain how she arrived at this patently incorrect conclusion.

In looking at all of the employees who would be contained in the Employer’s proposed unit, the starting wages can be arranged as follows:

- Dietary Aide - \$7.00/hr
- CNA - \$8.50/hr
- Cook - \$9.00/hr
- Receptionist - \$9.00/hr
- Central Supply Clerk - \$10.00/hr
- Medical Records Clerk - \$10.00/hr
- Staffing Coordinator - \$10.00/hr
- Data Entry Clerk - \$15.00/hr

Clearly, with the exception of the higher-paid Data Entry Clerk, the starting wage for all non-supervisory positions at the Mobile facility is very similar, ranging from \$7.00 (Dietary Aide) to \$10.00 per hour (Central Supply Clerk/Medical Records Clerk/Staffing Coordinator). And, at \$8.50 an hour, the CNAs fall precisely in the middle of this range. For the RD to conclude that the CNAs’ wages are distinct, then, is completely without basis, and baldly misstates the record evidence.

The RD also gave no weight whatsoever to the Employer’s policy of awarding monetary credit for prior experience in another health care-related position, or to the manner in which such

prior experience may impact an employee's starting wage. Indeed, the evidence showed that CNAs receive the same financial credit for years of experience as the other employees in the Employer's proposed "wall-to-wall" unit – \$0.10 for every year of prior experience. This amount is a lower amount than the one made available to the facility's nurses; they receive \$0.15 per year of experience.

Finally, the RD ignored the evidence of annual wage increases, which are also identical among the nonsupervisory employees. As explained at the Hearing, all employees in the Employer's proposed unit are subject to the same annual evaluation process, and are evaluated on or around their anniversary date by their immediate supervisor. (Hr. Tr. 114:12-25). Based on the annual evaluation, the immediate supervisor will make a recommendation as to the annual increase (if any) an employee will receive. All recommendations of this nature are then approved or modified by the Executive Director. (Hr. Tr. 115:1-5). Clearly, in this respect as well, the non-supervisory employees at the Mobile facility share the same community of interest; this, however, held no weight for the RD – something which further undermines her findings in this regard.

ii. Hours

With respect to hours, again, the RD baldly refused to acknowledge any similarities among the non-supervisory employees. Once more, the RD concluded – without discussion – that significant differences exist between CNAs and the other employees in the Employer's proposed unit, primarily due to the fact that CNAs work a three shift schedule, which differs from the other employees. Again, however, her finding misses the point.

While it is true that the CNAs work on one of three shifts – 6 a.m. to 2 p.m., 2 p.m. to 10 p.m., and 10 p.m. to 6 a.m. – what the RD overlooked is the fact that these schedules are

typically consistent with those of other non-supervisory employees at the Mobile facility. For example, the Activities Assistants cover two shifts per day, one of which is staggered to accommodate the resident's needs in the evening hours; their shifts can start at 8, and the second shift can run as late as 7:00 or 8:00 p.m. (Hr. Tr. 120:20-25; 121:1-5). All Dietary employees are normally scheduled over two shifts in order to cover three meals; the first shift begins as early as 5:00 or 6:00 a.m., with the later shift scheduled to cover the evening meal and typically ending around 10:00 p.m. – identical to the 1st and 2nd shifts of the CNAs. (Hr. Tr. 124:1-6). In another example, the Maintenance Assistant is typically scheduled to work a shift beginning at 7:00 a.m. and ending at 3:00 p.m., quite similar to a 1st shift CNA. (Hr. Tr. 130:16-22). In all, the evidence shows that the shifts of the CNAs are not as different as the RD suggests, and certainly are not different enough to warrant any employee's exclusion from the bargaining unit.

iii. Benefits

As similar as the nonsupervisory employees may be with respect to wages and hours, in terms of benefits, these similarities are even more pronounced – indeed, they are completely identical. To this end, testimony at the Hearing showed that employees at the Employer's Mobile facility are also eligible for participation in the following benefit programs:

- Health insurance/medical plan (includes flexible spending, dental and wellness plan options) (Hr. Tr. 23:3-18 and 25:5-11).
- 401(k) Retirement Plan (Hr. Tr. 24:15-23).
- Profit Sharing (Hr. Tr. 25:21-25).
- Employee Assistance Program (Hr. Ex. E-1).
- Group Life Benefit (Hr. Ex. E-1).
- Group Disability Benefit (Hr. Ex. E-1).
- Supplemental life and disability benefits (Hr. Ex. E-1).
- Time Off benefits (sick/vacation/PTO/Holidays) (Hr. Ex. E-1).
- Wellness (Hr. Ex. E-1).
- Employee Discount Programs (Hr. Ex. E-1).
- "Pay in Lieu of Benefits" Option (Hr. Ex. E-1).
- Tuition Reimbursement (Hr. Tr. 26:7-15).
- PEAK Award (performance based awards) (Hr. Tr. 26:18-25).

- Holiday Turkey (Hr. Tr. 27:5-10).
- Medicare Settlement Fund Distributions (Hr. Tr. 27:11-24).
- “Zero Deficiency Bonus” (Hr. Tr. 28:1-13).
- “Above and Beyond” Employee Recognition Program (Hr. Tr. 28:24-25 and 29:1-5).
- “Angel Care” Program (Hr. Tr. 29:6-12).

To out it simply, the undisputed evidence demonstrates that each and every non-supervisory employee at the Mobile facility is eligible for the same benefits. The fact that this factor is identical should have contributed significantly to a finding of a community of interest – somehow, however, while the RD dismissively recounted some of these similarities, she again chose to give no weight whatsoever to this factor, thereby demonstrating once more the erroneous nature of her Decision, and her misapplication of the law in this case.

5. Other Evidence Establishing A Community Of Interest

Finally, along with the specific factors described above, the Hearing also revealed additional factual evidence of a community of interest among the employees in the Employer’s proposed unit. And, although each factor, standing alone, is not determinative, they are traditionally considered in any community of interest analysis, as they tend to show the basic day to day commonalities between the employees in a proposed unit. This, however, is something the RD failed to do, and this evidence is something else that her conclusions blatantly ignore.

Nevertheless, the record here shows that all employees in the Employer’s proposed unit complete the same application for hire, and undergo the same hiring process. They all receive the same “new employee orientation”. (Hr. Tr. 109:21-25 and 110:1-20). After they are hired, their evaluations are conducted in the same manner, on their anniversary date, by their immediate supervisor. Through the duration of their employment, all employees are paid on a bi-weekly basis.

The evidence also shows that all of the employees use the same parking lot; all employees “punch-in” at the same time clock; all use the same break room. They use the same smoking area, and all receive communications on the same bulletin boards (Hr. Tr. 98:16-25; 98:4-9). They are all required to regular monthly meetings and occasional group meetings regarding matters of special interest. (D&D, 4). All employees are required to wear an identical name badge and closed-toe shoes (Hr. Tr. 102:11-15). All employees have the option of purchasing meals through the dietary department, all are eligible for PEAK program bonuses, and all can receive a \$100 bonus if the facility receives zero areas of deficiency in state inspections. (D&D, 9). All employees are also eligible for special recognition and monetary rewards for exceptional performance. (D&D, 9). Finally, all employees are invited to attend the Company Christmas party and other social functions, and all employees receive a turkey during the holiday season. (Hr. Tr. 108:6-9). And, while the RD acknowledged many of these commonalities in hiring, evaluations, and other terms and conditions of employment, not surprisingly, none of these factors carried any weight in her analysis.

Of even greater significance – but also discounted by the RD – is the fact that all nonsupervisory employees at the Employer’s Mobile facility are subject to the same policies and procedures. To this end, the Employer presented its Health Services Division Handbook at the Hearing, and explained that this Handbook applies equally to all of the employees at the Mobile facility. (Hr. Ex. E-1; Hr. Tr. 18:10-23). The Handbook is distributed to employees during the employee orientation, and it – as well as the policies contained therein – applies equally to all employees without regard to department or position. (Hr. Tr. 19:16-19). Some examples of such policies and rules include:

- Standards of conduct
- Performance Improvement

- Attendance and Punctuality
- Corrective Action
- Confidentiality
- Outside Employment
- Company Communications
- Personal Appearance and Dress
- Inspections
- Telephone Usage
- Cell Phones and Pagers
- Smoking
- Solicitation and Distribution
- Company Vehicles

Given this overwhelming similarity, the Employer again submits that the various, identical terms and conditions of the employees in this case also demonstrate their strong community of interest, and serve as further evidence of the appropriateness of the Employer's proposed wall-to-wall unit; such evidence also demonstrates the degree to which the RD's Decision was in error, and provides further justification for why her Decision cannot be sustained by the Board.

6. Bargaining History

Finally, although the Board has acknowledged that both bargaining history and the traditional composition of bargaining units should be considered in a unit analysis – something which the Employer addressed in its post-hearing brief – this was another element ignored by the RD. And, as such, she never once acknowledged that the unit she was approving was entirely different from any unit that has previously been approved in a healthcare setting, or that it amounted to a wholesale repudiation of the traditional unit composition.

As the Employer pointed out in its brief, while the Employer's facility in question does not have a bargaining history, during the Hearing, Vice President of Labor Relations Ed Goddard was able to shed light on Kindred's corporate-wide bargaining experience; he also provided

some long-term care industry perspective. With respect to Kindred, Goddard testified that the Company has twenty-seven nursing homes that have employees represented by unions, and which are covered by collective bargaining agreements. (Hr. Tr. 22:1-16). And, of those 27 facilities, Goddard testified that not one has a bargaining unit or a labor agreement that covers only certified nursing assistants. (Hr. Tr. 22:8-16). Such a unit simply does not exist anywhere else. Moreover, Goddard testified that each of Kindred's bargaining units were wall-to-wall service and maintenance units, which at a *minimum* would include dietary and housekeeping and laundry to the extent housekeeping and laundry were not outsourced.

Indeed, Goddard testified that he has worked in the nursing home industry in a labor relations capacity for ten years; he serves as the Chair of a Long-Term Care Industry Labor relations group and, as a result, is very familiar with industry patterns with respect to bargaining units in this field. (Hr. Tr. 21:14). In that capacity, Goddard explained that he is not aware of any bargaining units in the industry comprised solely of CNAs, unless agreed to as a result of a stipulated unit. Once again, the Employer informed the RD that such exclusionary units simply do not exist (unless as the result of a rare stipulation), and there is simply no evidence of a CNA-only unit being found appropriate in any other facility. In fact, as the Employer also pointed out, there is no precedent whatsoever suggesting that an all-CNA unit is proper, and no published NLRB case in which such a unit has been found to be appropriate. Instead, units containing CNAs have also historically included non-supervisory employees from other service departments, such as laundry, dietary, maintenance, and housekeeping; by contrast, the unit proposed by the Union in this case, and blindly rubber-stamped by the RD, flies in the face of established precedent. And, as such, given the bargaining history and established practice of the industry, along with the strong showing of community of interest outlined above, the Employer

again submits that the only appropriate unit in this case must include all non-supervisory employees, and that the Union's petitioned-for unit is simply inappropriate as a matter of law, and that the RD's Decision must be vacated.

7. **The RD's Decision And Direction Of Election Is In Clear Error**

Having ignored the bulk of the evidence of a community of interest among the employees in the proposed wall-to-wall unit, the Regional Director ultimately concluded that "Distinct training, certification, supervision, uniforms, pay rates, work assignments, shifts, and work areas all demonstrate that the CNAs share a community of interest and form an appropriate bargaining unit." (D&D, 11). Of course, as described in detail above, this is simply untrue.

Throughout her Decision, it is apparent that the RD has consistently tailored her findings to reach a conclusion in favor of the Petitioner. In doing so, her Decision hinges on her findings of small, frequently semantic differences between the CNAs and the other nonsupervisory employees. These differences are strictly minor, however, and the distinctions she draws – for example, under her analysis, \$8.50 an hour cannot be compared to \$9.00 – often border on the ludicrous. More troubling, however, is the fact that her findings blatantly misrepresent the facts at hand in this case.

Still, the RD's attempts to find and exploit these inconsequential distinctions ultimately serve no purpose, because the Board has never required every employee within a bargaining unit to be precisely the same. Indeed, this is particularly true in wall-to-wall units. See, e.g., Marian Manor, 333 NLRB 1084, 1094 (2001)(since rule-making, "the Board has held that a service and maintenance unit in a nursing home is presumptively appropriate"...where the Board included into this unit maintenance department employees, medical secretary, and switchboard operator (emphasis supplied)); Lincoln Park Nursing Home, 318 NLRB 1160 (1995)(including

receptionist and other clericals in the service and maintenance unit).⁶ Incredibly, the RD's analysis fails to address the presumptive propriety of a service and maintenance unit in any fashion whatsoever.

In all, the undisputed evidence actually shows that the education, training and skills of a CNA are not remarkably different than the other jobs in the Employer's proposed wall-to-wall unit. Their wages are substantially similar, and fall comfortably within the range of those performing other jobs in the Employer's proposed wall-to-wall unit. Their supervision is generally the same, as most report ultimately to the DON; they enjoy identical benefits, and they share in the same terms and conditions of employment. Finally the evidence shows that the CNAs at the Mobile facility have frequent – if not daily – contact with other employees in the Employer's proposed wall-to-wall unit, and that all of these individuals work together in a well-established “collaborative effort:” to provide resident care. Thus, the CNAs are not separate and distinct from the other non-professional employees in the Employer's facility, and would certainly not constitute an appropriate unit by themselves; a unit composed of all of the nonsupervisory employees, however, would be appropriate under the Act.

As such, while the community of interest between CNAs and the various classifications discussed above may vary slightly, the fact remains that the inclusion of each of these positions in one unit is nonetheless warranted, because all share in the same community of interest in reaching their overall goal of providing holistic care. And, this conclusion becomes particularly

⁶ The following Regional Director decisions that can be found at www.nlr.gov further support the Employer's contentions: Care One, LLC, Case 22-RC-12116 (Kendellen, 2001)(RD found petitioned-for unit of dietary employees and housekeeping and laundry classifications not appropriate because it would fractionalize the traditional senior care facility unit by excluding many employees who share a community of interest; RD determines that CNAs, maintenance, and recreation/therapy aides must also be included in a case strongly analogous to the instant case); Glenview Senior Living Center, Case 8-RC-16806 (Calatrello, 2006)(medical records clerk should be in service and maintenance unit).

inescapable when considering the second factor of Park Manor – something which is discussed in detail below, and something which, once again, the RD completely failed to do.

B. The Regional Director Failed To Conduct The Analysis Required By The Board In Park Manor Care Center

As described above, the Board has long held that unit appropriateness in a long-term health care facility is determined by the standard set forth in Park Manor Care Center, 305 NLRB 872 (1991). And, as further explained, this precedent sets forth a two-part test, in which a unit is analyzed first based on community of interest factors, and then analyzed again in light of the rulemaking considerations, as well as the Congressional mandates recognized by the Board.

Here, the RD acknowledged that Park Manor is the controlling precedent in this case; nevertheless, she then failed to apply the appropriate test. (D&D, 10-11). Indeed, on page 11 of her Decision, she explained that: “I am applying the principles set forth in Park Manor Care Center...the Park Manor test for determining the appropriateness of a bargaining unit is the community of interest test together with ‘background information gathered during rulemaking and prior precedent.’” (D&D, 10-11). And yet, despite this pronouncement, the RD then decided that she was not required to consider the Park Manor factors, concluding instead that “the scope of my inquiry is limited to the appropriateness of the smaller unit consisting of the CNAs identified in the Petition.” (D&D, 11). As such, having decided – without elaboration – that an all-CNA unit would be appropriate, the Regional Director abandoned the Park Manor precedent and concluded her analysis, failing to give even cursory consideration to the second necessary prong of the standard. As a remarkable result, neither background information, nor rulemaking, nor Congress’ mandate is mentioned again by the RD; and, neither the threat of unit proliferation, nor the possibility of residual units, warrants so much as a footnote in her Decision.

In this case, had the RD actually considered the proliferation of units, the possibility of residual units, or the Board's factfinding regarding nursing homes, she would have reached the inescapable conclusion that a wall-to-wall unit is the only unit that satisfies the Park Manor standard. As such, the RD clearly erred in concluding that an all-CNA bargaining unit, excluding all other service and maintenance employees, was appropriate. (D&D, 10).

Instead, what the RD's Decision conspicuously fails to mention is the fact that, by excluding other non-supervisory employees, she has created the possibility of multiple small, residual, non-conforming units at the Employer's Mobile facility. As described above, the Union's petitioned-for unit contains only CNAs, and excludes the 33 employees whom the Employer submits should properly be included. Nevertheless, in directing an election in the petitioned-for unit in this case, without any discussion or analysis of the potential consequences, the RD has effectively created the possibility for numerous additional units at the Mobile facility – all containing service and maintenance employees who, under any reasonable interpretation of the facts, share a strong community of interest. This result is one that the Board has repeatedly recognized must be avoided. 54 Fed. Reg. 16336, 285 NLRB 1580 (1989); Virtua Health, 334 NLRB No. 76 (2005)(finding an EMT-only unit inappropriate, in part because it excluded other similar employees and could have resulted in a number of nonconforming residual units); see also Levine Hospital, 219 NLRB 327, 328 (1975). This, however, has escaped the RD, who has undertaken no such inquiry, and has, in fact, made no mention of the potential issue. Instead, she has simply treated health care units as any other industry. Such an approach, however, is totally contrary to these important Board policies.

As such, it is apparent that the RD's Decision has failed to heed the policy of Board, or the mandate of Congress. She has completely ignored the second prong of the Park Manor

standard, and has undertaken no analysis whatsoever of the residual unit issue. Accordingly, she demonstrates no concern for the operational integrity of the organization, as well as the needs of patients, family members and the community. To the contrary, she has baldly crafted a unit of unprecedented exclusivity, specifically tailored to fit the Union's demand, and to comply with the apparent organizational objectives of the Petitioner in this case. As a result, the Employer submits that allowing her Decision to stand would amount to an abrogation of Park Manor, and the principles and considerations central to that case. Indeed, this Decision – and the approval of an unprecedented all-CNA unit – serves as a departure from both well-recognized case precedent and the express desires of Congress in enacting the Health Care Amendments. And so, for this reason as well, the Employer submits that the RD's Decision should not be sustained by the Board, and that the Petition in the instant case should be dismissed in its entirety.

V. **CONCLUSION**

As such, for the foregoing reasons, the Employer respectfully requests that the Board vacate the Decision and Direction of the Regional Director, and dismiss the Petition in this case.

Respectfully submitted, this 9th day of February, 2009.



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ATTORNEYS FOR SPECIALTY HEALTHCARE
AND REHABILITATION CENTER OF MOBILE

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIFTEEN**

SPECIALTY HEALTHCARE AND)
REHABILITATION CENTER OF MOBILE)

Employer,)

and)

Case No. 15-RC-8773

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

Petitioner)

CERTIFICATE OF SERVICE

I certify I have filed one electronic copy of the Employer's Post Hearing via the NLRB website. In addition, I certify that I have filed 8 copies of the foregoing brief via UPS Overnight Delivery to:

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