

United States Senate

WASHINGTON, DC 20510-2101

March 8, 2011

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570

Re: *Specialty Healthcare and Rehabilitation Center of Mobile*, Case: 15-RC-8773
Letter Brief *Amicus Curiae* of United States Senators Michael B. Enzi, Orrin
Hatch and Johnny Isakson

Dear Mr. Heltzer:

We respectfully submit this letter in response to the National Labor Relations Board's ("Board") *Specialty Healthcare and Rehabilitation Center of Mobile* Notice and Invitation to File Briefs dated December 22, 2010. As United States Senators and members of the Health, Education, Labor and Pensions ("HELP") Committee, we have a vested interest in the outcome of the underlying case. When an independent government agency, acting within its discretion, creates policy that conflicts with federal statute, or attempts to circumvent the legislative or rulemaking process, Congress must weigh in to ensure constitutional boundaries are not crossed. What we have learned from various stakeholders is that the decision in *Specialty Healthcare* could result in changing the determination of appropriate bargaining units in every workplace under the Board's jurisdiction. We believe such a major change should only be done by amending the statute, which is the exclusive province of Congress.

While we are concerned that the Board's decision may infringe upon the constitutional duties of Congress, we are equally concerned with the method in which the Board is seeking to affect this sweeping change. The Board may and generally does make policy through adjudication. When the Board does so, we agree it should seek input from interested parties by inviting them to file *amicus* briefs. A request for briefs is not, however, an adequate substitute for rulemaking and the Board's discretion to make policy through adjudication is not without limits. Inviting interested parties to submit *amicus curiae* briefs is perhaps designed to appear akin to the comment period under the Administrative Procedure Act ("APA"). However in actuality, this process is far less open and transparent and lacks the safeguards Congress has imposed to protect Americans from unfair and inappropriate governance. Asking parties to submit

comments or even communicate with the Board in the adjudication process involves various legal procedures. We imagine the average union worker or small business owner, who wants to express their opinion in this case, would find the various legal and administrative hurdles in the process prohibiting. On the other hand, few of those same burdens exist when any individual wants to submit comments in response to a Notice of Proposed Rulemaking. When the Board is looking well beyond the facts of the case presented and contemplating something as important as changing the determination of appropriate bargaining units in every workplace under the Board's jurisdiction, as it is here, it has an obligation to the public to do so within the confines of the deliberative, open rulemaking process.

Since 2010, the Board has invited parties to submit briefs in at least six other significant decisions. The number of cases within this short time frame in which Board has announced its intent to implement significant policy changes raises concerns that the Board may be forcing policy through adjudication that should be properly considered through rulemaking, thereby circumventing the protections of the APA. This emerging trend at the Board and its outcome may well warrant future Congressional oversight and limitations.

Our personal backgrounds include starting and growing small businesses that eventually created hundreds of jobs. With this background, we naturally consider all of the small businesses that will be affected by any policy decision. We hope the Board will also consider how altering the standard for determining an appropriate bargaining unit could leave many small businesses with costly new workforce expenses and impair the efficiency of workplaces, as it would be obligated to do under the APA. We have heard great concern about such potential changes from small business and other stakeholders which we will briefly discuss in this letter. We ask the Board to consider these concerns before deciding whether *Specialty Healthcare* is the appropriate mechanism to change the standard to determine appropriate bargaining units in all industries.

We understand that the Board would be taking an unusual step in issuing a sweeping change based on a decision involving an occupation-specific fact pattern. Clearly, the Board typically sets and occasionally changes policy when it decides cases. Those decisions, however, are linked directly to the underlying complaint. Neither of the parties in *Specialty Healthcare* sought any change like that being considered currently. Under the NLRA, the Board is granted authority to occasionally conduct rulemaking under the APA.¹ We have noted that the Board has cautiously exercised its rulemaking

¹ 29 USC § 156 ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act] subchapter II of chapter 5 of Title 5...").

power over its 77 year history. The Board has finalized a new rule using APA rulemaking only once in the late 1980's when it issued a Final Rule on appropriate bargaining units in acute healthcare facilities.² The Board chose not to include non-acute care facilities in the rule, but instead decided those industry units would continue to be determined by adjudication.³ If the Board feels that there is a need to create a new standard for not only non-acute care facility bargaining units, but units in every industry, it is free to commence a new rulemaking effort as they did with acute care facilities.

After the rule on acute care facilities, the Board issued a decision in *Park Manor Care Center Inc.* that addressed the standard for appropriate bargaining units in non-acute care facilities, since they were specifically excluded from the new rule.⁴ The majority of the Board in the present case cites *Park Manor* as an example of when the Board has created a new, industry-wide standard based on an occupation-specific fact pattern. This assertion is incorrect as *Park Manor* did not establish a uniform rule on determining an appropriate bargaining unit in non-acute care facilities, but rather remanded the case for further fact finding.⁵

Similar to the reasoning in *Specialty Healthcare*, the Board stated in *Park Manor* (decided 20 years ago) that the non-acute health industry is in a "period of rapid transition" and growth. If the industry was going through such a transformation back then that the Board found it inappropriate to issue a broad new occupation-wide standard, it would seem a decision in *Specialty Healthcare* to change the standard in all industries is a major break from precedent and the Board has not provided justification for doing so. We urge the Board to follow its precedent in *Park Manor* and its progeny, and issue a decision that specifically addresses the facts of the non-acute healthcare workplace in question.

Several stakeholders have also expressed concern that a new more limiting standard for determining the appropriate size of a bargaining unit would effectively eliminate an important protection under the NLRA. Currently, the "extent to which the employees have organized shall not be controlling" in determining the appropriate size of a bargaining unit.⁶ Instead, the Board must look to a variety of factors, including the

² Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16336 (April 21, 1989).

³ 29 CFR § 103.30(g).

⁴ 305 NLRB 872 (1991).

⁵ *Id.* at 16-17.

⁶ 29 USC § 159(c)(5).

“community of interests” test to determine the appropriate bargaining unit for each workplace. Based on the Board’s Notice in *Specialty Healthcare*, it is clear the majority favors a new, limited standard of “same job, same facility.” Member Becker favored such an approach in his dissent in *Wheeling Island Gaming, Inc.*⁷

Under a “same job, same facility” test, unions could create very small bargaining units targeted to those employees who want to join a union, and as long as they had the same job in the same facility such a unit would be appropriate. The extent to which employees have organized would be the main and likely only factor in establishing a bargaining unit - a direct violation of section 9(c)(5) of the NLRA. As stakeholders have informed us, unions could simply target a small group of employees to organize and create a bargaining unit out of those willing to join a union and possibly sign authorization cards, leaving out employees not as inclined to unionize. This is exactly the result Congress intended to avoid when it amended the NLRA to include section 9 (c)(5).

From a small business persons’ perspective, such a change would result in manifold negotiating obligations that are not just costly and burdensome, but also create undue pressure to pre-negotiate with union leaders in order to design a manageable negotiating partner. Employers would face a balkanized workplace of multiple micro-unions, any one of which could hobble operations at any time by initiating workplace disruptions. These unions would have interests that conflict with one another as well as typical antagonism with the employer. Inevitably, there will be some employees who do not meet any bargaining units’ job title or are considered undesirable to the unions due to their resistance to unionization, and will therefore be left out of any bargaining unit at all. These employees will become greatly disadvantaged in a workplace dominated by competing factions. A “same job, same facility” test would not just violate Congressional intent as evidenced by section 9(c)(5), it would also produce grave harm to the productivity of American workplaces in an ever more competitive economic environment.

Board members have stated that inviting interested parties to file briefs is fair and sound, and permits public participation.⁸ But we must ask, what is wrong with the process under the APA that also provides public participation through a comment period

⁷ 355 NLRB No. 127 (Aug. 27, 2010).

⁸ See, e.g., *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 556 at 2 (“We strongly believe that asking all interested parties to provide us with information and argument...is the fairest and soundest method of deciding whether our rules should remain the same or be changed...”); see also Letter from Chairman Wilma Liebman to Rep. Phil Roe, Chairman, Subcommittee on Health, Education, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives (Feb. 25, 2011).

and requires economic impact analyses? To use an underlying case that exclusively involves non-acute care facilities as a vehicle to affect a major change to all industries is wrong and should not be done via adjudication. While we respect the powers of the Board to interpret the law and provide specific legal rules not covered by Congress, the apparent intent of the Board majority in *Specialty Healthcare* would go too far. We urge the Board to issue a decision only relating to the facts of the underlying case.

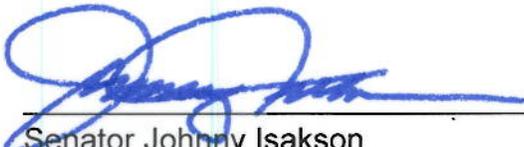
Sincerely,



Senator Michael B. Enzi
Ranking Member, Committee on Health,
Education, Labor and Pensions (HELP)



Senator Orrin G. Hatch
Ranking Member, Committee on Finance



Senator Johnny Isakson
Ranking Member, HELP Subcommittee on
Employment and Workplace Safety

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

SPECIALTY HEALTHCARE AND REHABILITATION
CENTER OF MOBILE

AND

CASE 15-RC-8773

UNITED STEELWORKERS, DISTRICT 9,
PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 8, 2011, a copy of the foregoing *amicus* letter brief has been served by way of facsimile upon the following case participants and counsel of record:

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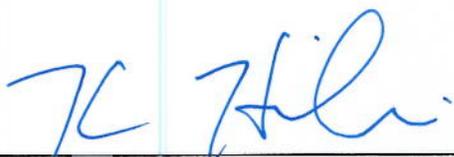
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