THE NEW “APPROPRIATE” FOR BARGAINING UNIT DETERMINATIONS:

THE EMPLOYER’S PERSPECTIVE ON SPECIALTY HEALTHCARE AND ITS PROGENY

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Ever since the composition of the National Labor Relations Board drastically changed following President Obama’s appointments during the Congressional recess for Easter in 2010, the Board has issued numerous decisions overruling settled law and setting forth new standards with far-reaching – and unquestionably negative – implications for employers. Chief among such actions is the Board’s decision last summer in Specialty Healthcare and Rehabilitation Center of Mobile.\(^1\) Since then, employers have been attempting to assess the impact of Specialty Healthcare and the scope of its applicability to organizing efforts beyond nonacute healthcare facilities.

I. **By Overruling *Park Manor*, the Board Upended 20 Years of Settled Law Regarding the Determination of Appropriate Bargaining Units.**

*Specialty Healthcare* dealt with an organizing effort at a nonacute care nursing home in Mobile, Alabama. The petitioned-for bargaining unit consisted exclusively of certified nursing assistants (CNAs). The employer challenged the composition of the proposed bargaining unit, asserting that, under *Park Manor Care Center, Inc.*,\(^2\) the smallest appropriate unit must include service and maintenance employees along with the CNAs. Decided in 1991, *Park Manor* set forth criteria for determining the composition of an appropriate bargaining unit specifically in the nonacute care healthcare facilities setting. In essence, *Park Manor* required an empirical community of interest test. Seeking to avoid units that are “neither too large nor too small,” *Park Manor* identified a host of factors to consider, including training and education, comparative salary, diversity of duties, and the degree of technical skill required for a position.

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\(^1\) 357 N.L.R.B. No. 83 (2011).
Applying a community-of-interest analysis, but rejecting the employer’s contention, theRegional Director found the CNA-only unit to be appropriate. Contending that the RegionalDirector had failed to properly apply Park Manor, the employer appealed to the Board. Notably,when the full Board agreed to hear the appeal, it sought briefing on whether Park Manor shouldbe overruled, not on whether the Regional Director had properly applied Park Manor (as theemployer contended). In dissenting from the Notice and Invitation to File Briefs, Member Hayesnoted that both the employer and the union had agreed that Park Manor was controlling in thiscase, and that the Board was raising sua sponte an issue that neither party had raised previously.3Based on the manner in which the issue came before the Board, and the general tenor of Boardaction over recent years, few observers were surprised when the final decision in SpecialtyHealthcare was issued on August 26, 2011, explicitly overruling Park Manor.

In setting forth the new standard to replace Park Manor, the majority in SpecialtyHealthcare determined that, “[b]ecause a proposed unit need only be an appropriate unit andneed not be the only or most appropriate unit, it follows inescapably that demonstrating thatanother unit containing the employees in the proposed unit is appropriate or even moreappropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.”4Therefore, the petitioned-for unit need only be an appropriate unit, a standard under which an employer is required to “demonstrate that employees in a more encompassing unitshare ‘an overwhelming community of interest’ such that there ‘is no legitimate basis uponwhich to exclude certain employees from it.’”5 This task now places a nearly impossible burdenon employers. As a procedural matter, when determining the appropriateness of a unit, theBoard will first examine the community of interests shared within the petitioned-for unit. If it

3 356 N.L.R.B. No. 56, slip op. at 4 (2010).
4 357 N.L.R.B. No. 83, slip op. at 10.
5 Id., slip op. at 11.
determines that members of the petitioned-for unit share a community of interests, the inquiry ends, even if a more appropriate unit may exist. Such a procedure has the practical effect of precluding any examination into whether an overwhelming community of interest exists among a broader group of employees. In an attempt to provide additional guidance regarding when there would be “no legitimate basis” to exclude certain employees from a petitioned-for unit, the *Specialty Healthcare* majority adopted language from the District of Columbia Circuit Court of Appeals, finding that “no legitimate basis” exists when the traditional community of interest factors “overlap almost completely.”

II. The Negative Reaction from the Chamber to Capitol Hill Has Been Loud and (Remarkably) Swift.

For the United States Chamber of Commerce, the National Federation of Independent Business, and other similar employer-advocacy organizations, *Specialty Healthcare* marks the Board’s latest assault on employers, allowing organizing efforts to target the most sympathetic subset of employees and leading to the proliferation of a fractured labor force.

On Capitol Hill, the reaction from Republicans to the *Specialty Healthcare* decision was swift. On October 5, 2012, Representative John Kline (R-MN) introduced H.R. 3094, the Workforce Democracy and Fairness Act – legislation that would effectively overrule *Specialty Healthcare* by codifying eight separate factors that the Board would be required to apply in making unit determinations. The U.S. Chamber of Commerce actively lobbied for the passage of H.R. 3094 and the NFIB designated the House vote on the legislation as a “key vote” for the

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6 Id., slip op. at 8.
7 Id., slip op. at 11, quoting Blue Man Vegas, LLC v. NLRB, 529 F.3d 417, 421-22 (D.C. Cir. 2008).
112th Congress.9 As a result, less than two months after it was introduced (lightning speed for congressional action), the Republican-controlled House passed the legislation on November 30, 2011, largely along party lines. Meanwhile, on November 10, 2011, Senator John Isakson introduced S. 1843, the Representation Fairness Restoration Act, legislation containing factors substantially similar to H.R. 3094 that the Board must consider in making unit determinations. However, given the Democratic majority in the Senate, it is not surprising that S. 1843 remains languishing in the Senate Committee on Health, Education, Labor and Pensions.

III. Despite Ambivalent Language in the Majority Opinion, Specialty Healthcare Appears to Apply Beyond Nonacute Healthcare Facilities.

While Specialty Healthcare clearly established a new standard for determining the appropriateness of a unit in nonacute care healthcare facilities, its applicability outside such a setting was, at least initially, unclear. The Board’s holding in Specialty Healthcare explicitly overruled Park Manor and required that the traditional community of interest test be used as the starting point for unit determinations in all cases not governed by the Board’s Healthcare Rule.10 However, to the extent that Park Manor had initially been decided in the narrow context of nonacute healthcare facilities and the Board claimed it was adhering to the traditional community of interest test, the effect of Specialty Healthcare in other industries remained an open question.11 Indeed, the majority opinion itself contained somewhat contradictory language as to its broader applicability. On the one hand, the decision asserted that the National Labor Relations Act “provides no basis for defining appropriate units in the health care industry than are applied in other industries.” On the other hand, the majority stated that the holding “is not

10 The Board’s Healthcare Rule lists specific criteria for appropriate bargaining units in the context of acute care hospitals only. 29 C.F.R. § 103.30.
11 357 N.L.R.B. No. 83, slip op. at 14.
intended to disturb any rules applicable only in specific industries other than the rule announced in *Park Manor*.”

In the six months since the decision was issued, the Board has given broad applicability to *Specialty Healthcare*, relying on it in at least three substantive decisions outside the nonacute care healthcare facilities industry – specifically, the rental car industry, the shipbuilding industry, and the food manufacturing industry. Additionally, the Board has cited *Specialty Healthcare* as the basis for denial of review in one case and remand in two cases – all also outside the nonacute care healthcare facilities industry.

In *DTG Operations*, the Board was confronted with a union’s appeal of a Regional Director’s decision issued prior to *Specialty Healthcare*. *DTG Operations* involved a determination of an appropriate bargaining unit at a rental car facility at the Denver International Airport. The petitioned-for unit included only rental service agents (RSAs) and lead rental service agents (LRSAs). Both positions had primary responsibility for interacting with customers in the execution of rental contracts. The Regional Director found that the smallest appropriate unit contained all hourly employees at the facility including lot agents, exit booth agents, return agents, fleet agents, shuttlers, and all mechanics and courtesy bus drivers – a much broader unit than the union sought or desired. Despite the arguably limiting language in *Specialty Healthcare*, the Board explicitly relied on that decision to determine if the much

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12 *Id.*, slip op. at 5, 13, n. 29  
16 See *Oliver C. Joseph, Inc.*, 2011 WL 3946951 (N.L.R.B.) (denying review of Regional Director’s decision on the basis of *Specialty Healthcare* in organizing effort of International Association of Machinists and Aerospace Workers); *Grace Industries, LLC*, 2011 WL 6122778 (N.L.R.B.) (remanding to Regional Director for reconsideration in light of *Specialty Healthcare*, in organizing effort of Highway, Road & Street Construction Laborers Local 1010); *Performance of Brentwood LP*, 2011 WL 5288439 (N.L.R.B.) (remanding to Regional Director for reconsideration in light of *Specialty Healthcare*, in organizing effort of International Association of Machinists & Aerospace Workers).  
17 357 N.L.R.B. No. 175, slip op. at 1.
narrower, petitioned-for unit was “an” appropriate one. Finding that the employees in the petitioned-for unit shared a community of interest, the Board concluded that the Regional Director had incorrectly determined that additional employees shared an overwhelming community of interest with the petitioned-for unit. On remand to the Region, the union was permitted to proceed with its petition to represent the narrow unit of employees initially sought.

The Board was required to perform a more nuanced application in Northrop Grumman, where a petitioned-for unit contained certain technicians who worked in the radiological control department of a shipbuilding facility. The employer argued that, despite Specialty Healthcare, specific and alternative rules applied to unit determination involving technical employees and, under those rules, the only appropriate unit included all technical employees at the facility. The Board conceded that it had arguably developed a different standard of unit determination for technical employees. However, despite such a concession, the Board found that the technical employees in the petitioned-for unit shared a community of interest distinct from the shipyard’s other technical employees. Therefore, under both the technical employee line of cases and Specialty Healthcare, the petitioned-for bargaining unit was appropriate.

One bright spot for employers was the Board’s Odwalla, Inc. decision, where the Board found that the petitioned-for unit was inappropriate – even under the Specialty Healthcare standard – in an organizing effort at a company that manufactures and sells juice drinks and fruit

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18 As Member Hayes pointed out in his dissent, although the Regional Director had issued his ruling prior to Specialty Healthcare, he used the phrase “overwhelming community of interest” – the precise phrase that the Board later adopted in Specialty Healthcare. Nonetheless, the Board still reversed the Regional Director’s finding. 357 N.L.R.B. No. 175, slip op. at 8.
19 Under the “technical employee” cases, the Board previously held that “[w]hen technical employees work in similar jobs and have similar working conditions and benefits, the only appropriate unit for a group of technicals must include all such employees similarly employees.” T.W.R. Carr Division, 266 N.L.R.B. 326, 326 (1983).
20 357 N.L.R.B. No. 163, slip op. at 4.
21 Id, slip op. at 8.
bars. In *Odwalla, Inc.*, an election was held that among a group of employees that included all route sales drivers including relief drivers, warehouse associates, and cooler technicians. The union and employer were unable to agree on whether product merchandisers – who had primary responsibility for visiting customer sites and rotating products – should be included in the proposed unit. Ultimately, the merchandisers were included subject to protest. When the organizing effort was defeated by one vote, the union challenged the inclusion of the merchandisers in the unit. Rejecting the union’s challenge, the Board found that the union-supported unit did not track any lines drawn by the employer, including classification, department, function, lines of supervision, compensation, or functional location. Ultimately, the Board found that the merchandisers shared an overwhelming community of interest with the employees in the original petitioned-for unit and, therefore, were properly included.

**IV. Final Thoughts**

For the time being, *Specialty Healthcare* appears to have set the standard for virtually all unit determinations. With a partisan split in Congress, and a hotly contested election season on the horizon, legislation overruling the decision is unlikely to make it to see final enactment, at least during this term. Decisions like *Odwalla, Inc.* are likely to remain far and few between, since its holding is just as instructive to organizers on what *not* to do when organizing a smaller unit. That decision may also be distinguishable since the merchandisers at issue were actually permitted to vote, subject to protest, in an election held before *Specialty Healthcare* was decided. Under *Specialty Healthcare*, it is far more likely that the additional employees an employer wants to add to a petitioned-for unit will *not* be permitted to vote, even under challenge. The

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22 357 N.L.R.B. No. 132, slip op. at 7.
presumption now clearly favors the petitioned-for bargaining unit, whatever classifications of employees it may include and whatever its size may be.

Employers should continue to engage in meaningful dialogue with their workforce at large as well as employees who are influential among their co-workers, to ensure that employers are aware of employee concerns and are being responsive to them. However, challenging the proposed composition of a bargaining unit is now a substantially less effective tool in defeating a representation petition once it has been filed. Specialty Healthcare now shifts the power to the petitioning union to select the narrowest group of employees among whom it believes it can prevail in an election, leading to the proliferation of a fractured workforce.