Harmony in the Health Care Industry at Last?


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Harmony in the Health Care Industry at Last?

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I. INTRODUCTION

In *American Hospital Association v. NLRB*1 the United States Supreme Court reversed a lower court ruling which had enjoined the National Labor Relations Board2 from enforcing a substantive rule promulgated under the Administrative Procedure Act's3 rulemaking procedure. Generally, the rule defines appropriate bargaining units4 in private, acute care hospitals.5 The *American Hospital* decision confirmed the Board's authority to enforce the first substantive rule made

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2. Hereinafter "Board" or "NLRB".
4. Generally, a bargaining unit is a group of employees organized for the purposes of collective bargaining, provided that the group is appropriate for that purpose. Section 9(a) of the National Labor Relations Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit." National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a)(1988). The Board has determined that the unit need not be the only appropriate unit or the most appropriate unit, but only that it be an appropriate unit. *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950), enforced, 190 F.2d 576, 581 (7th Cir. 1951). However, the determination of "appropriateness" has remained elusive. The determination of appropriateness is guided only by the broad standard that the determination "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." National Labor Relations Act, § 9(b), 29 U.S.C. § 159(b)(1988). The Board has developed a number of tests which it has employed in the discretion given it by the Act to determine unit appropriateness. See 1 CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 413-21 (2d ed. 1983).
5. The Final Rule is:

Section 103.30 Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.
(2) All physicians.
(3) All professionals except for registered nurses and physicians.
through the rulemaking procedure. It is widely believed that the

(4) All technical employees.
(5) All skilled maintenance employees.
(6) All business office clerical employees.
(7) All guards.
(8) All nonprofessional employees except for technical employees,
    skilled maintenance employees, business office clerical employ-
    ees, and guards.

Provided That a unit of five or fewer employees shall constitute an ex-

traordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall deter-

mine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hos-

pitals, and a petition for additional units is filed pursuant to sec.
9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units
which comport, insofar as practicable, with the appropriate unit set forth
in paragraph (a) of this section.

(d) the Board will approve consent agreements providing for elec-
tions in accordance with paragraph (a) of this section, but nothing shall
preclude regional directors from approving stipulations not in accord-
ance with paragraph (a), as long as the stipulations are otherwise accept-
able.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) “Hospital” is defined in the same manner as defined in the Medi-
care Act, which definition is incorporated herein (currently set forth in
42 U.S.C. 1395x(3), as revised 1988);

(2) “Acute care hospital” is defined as: either a short term care hos-
pital in which the average length of patient stay is less than thirty days,
or a short term care hospital in which over 50% of all patients are admit-
ted to units where the average length of patient stay is less than thirty
days. Average length of stay shall be determined
by reference to the
most recent twelve month period preceding receipt of a representation
petition for which data is readily available. The term “acute care hospi-
tal” shall include those hospitals operating as acute care facilities even if
those hospitals provide such services as, for example, long term care,
outpatient care, psychiatric care, or rehabilitative care, but shall exclude
facilities that are primarily nursing homes, primarily psychiatric hospi-
tals, or primarily rehabilitative hospitals. Where, after issuance of a sub-
poena, an employer does not produce records sufficient for the Board to
determine the facts, the Board may presume the employer is an acute
care hospital.

(3) “Psychiatric hospital” is defined in the same manner as defined in
the Medicare Act, which definition is incorporated herein (currently set
forth in 42 U.S.C. 1395x(f)).

(4) The term “rehabilitation hospital” includes and is limited to all
hospitals accredited as such by either Joint Commission on Accreditation
of Healthcare Organizations or by Commission for Accreditation of Re-
habilitation Facilities.

(5) A non-conforming unit is defined as a unit other than those de-
scribed in paragraphs (a)(1) through (8) of this section or a combination
among those eight units.

(g) Appropriate units in all other health care facilities: The Board
will determine appropriate units in other health care facilities, as de-
defined in section 2(14) of the National Labor Relations Act, as amended,
by adjudication.

Board's use of the rulemaking procedure would be advantageous. However, the anti-union sentiments of the health care industry, which led to the promulgation of the rule, may obscure any advantages the rule was thought to provide.

This Note analyzes the significance the Supreme Court's decision will have on the seventeen-year dispute between organized labor and the health care industry over appropriate bargaining units in the health care industry. Part II notes the historical background which was the impetus for the promulgation of the rule. Part III analyzes the legal grounds on which the rule was opposed by the American Hospital Association ("Association"), and the reasoning of the Court in upholding the rule. Part III looks at the practical advantages and disadvantages of rulemaking. Further, Part III analyzes the resistance to the rule by the Association in the context of the seventeen-year dispute between the industry and organized labor over appropriate units in hospitals. Finally, Part IV concludes that, although rulemaking is widely considered to be advantageous, the resistance to unionization in the health care industry by the health care industry will not be deterred by the promulgation and enforcement of the rule.

II. BACKGROUND

A. The 1974 Amendments to the National Labor Relations Act

In 1974, the National Labor Relations Act6 ("Act") was amended to extend its protection to the employees of all private, nonprofit hospitals, which had previously been exempted from the coverage of the Act.7 Congress recognized that strikes and similar activities could produce problems in the health care industry by interrupting patient care.8 As a result, Congress included in the amendments provisions that lengthened the strike notice period and required federal mediation of disputes.9 The provisions were designed to ensure uninterrupted patient care.10 The amendments did not limit the number, size nor composition of bargaining units that would be allowed in acute care hospitals. Congress left intact the Board's discretionary power to determine appropriate bargaining units.11 However, the concern that

11. The 1974 amendments did not change section 9(b) of the Act. Section 9(b) reads: The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act,
an undue number of bargaining units in a hospital would lead to inter-
ruptions in patient care was incorporated into the legislative history
accompanying the 1974 amendments. Both the House and Senate
Committee Reports on the legislation contained this statement:

\[\text{EFFECT ON EXISTING LAW}\]

\textbf{Bargaining Units}

Due consideration should be given by the Board to preventing proliferation of
bargaining units in the health care industry. In this connection, the Commit-
tee notes with approval the recent Board decisions in \textit{Four Seasons Nursing
Center} and \textit{Woodland Park Hospital}, as well as the trend toward broader
units enunciated in \textit{Extendicare of West Virginia}.*

*By our reference to \textit{Extendicare}, we do not necessarily approve of all of the
holdings of that decision.\textsuperscript{12}

This congressional admonition to the Board to avoid undue prolifera-
tion of bargaining units in the health care industry was echoed by sev-
eral members of Congress, most notably by Senator Williams, a
cosponsor of the bill:

While the Board has, as a rule, tended to avoid unnecessary proliferation of
collective bargaining units, sometimes circumstances require that there be a
number of bargaining units among nonsupervisory employees, particularly
where there is such a history in the area or a notable disparity of interests
between employees in different job classifications.

While the committee clearly intends that the Board give due consideration
to its admonition to avoid an undue proliferation of units in the health care
industry, it did not within this framework intend to preclude the Board acting
in the public interest from exercising its specialized experience and expert

\[\text{the unit appropriate for the purposes of collective bargaining shall be the}
\text{employer unit, craft unit, plant unit, or subdivision thereof: \textit{Provided},}
\text{That the Board shall not (1) decide that any unit is appropriate for such}
\text{purposes if such unit includes both professional employees and employ-
\text{ees who are not professional employees unless a majority of such profes-
sional employees vote for inclusion in such unit; or (2) decide that any}
craft unit is inappropriate for such purposes on the ground that a differ-
ent unit has been established by a prior Board determination, unless a
majority of the employees in the proposed craft unit votes against sepa-
rate representation or (3) decide that any unit is appropriate for such}
purposes if it includes, together with other employees, any individual
employed as a guard to enforce against employees and other persons
rules to protect property of the employer or to protect the safety of per-
sons on the employer's premises; but no labor organization shall be certi-
fied as the representative of employees in a bargaining unit of guards if
such organization admits to membership, or is affiliated directly or indi-
rectly with an organization which admits to membership, employees
other than guards.}\]


\[\text{In fact, a bill introduced in 1973 which would have repealed the health care}
exemption to the Act and expressly limited the number of bargaining units to
five, was not passed. S. 2292, 93rd Cong., 1st Sess. (1973), reprinted in, 120 CONG.
REC. 12941-44 (1974).}\]

\[\text{12. S. REP. NO. 776, 93rd Cong., 2d Sess. 5 (1974); H.R. REP. NO. 1051, 93rd Cong., 2d
Sess. 6-7 (1974).}\]
knowledge in determining appropriate bargaining units.13

B. Judicial Response

Following the enactment of the 1974 amendments, the Board continued to apply its long-standing community of interests standard when making bargaining unit determinations in the health care industry. However, in *NLRB v. St. Francis Hospital of Lynwood,* the Ninth Circuit held that the Board improperly used the community of interests standard instead of a disparity of interests standard, gleaning the disparity of interests language from Senator Williams’ remarks regarding undue proliferation. Subsequently, the Board attempted to conform the community of interests test to address the court’s concern that the standard may lead to unit proliferation contrary to the congressional admonition.

The Board’s attempts were not widely accepted by the courts. The Board’s use of the community of interests standard, or some modification thereof, produced a split among the circuit courts of appeals. The Second, Third, Fourth, Sixth, Seventh and Eleventh

13. 120 CONG. REC. 22575 (1974)(citation omitted).
14. The community of interest standard was defined in *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962), as:

> [W]here . . . special separate interests [are] emphasized by the existence of substantial differences in . . . working conditions as distinguished from those of other employees, . . . [a separate bargaining unit is] warranted . . . .

> Factors which warranted consideration in determining the existence of substantial differences in interests and working conditions included: a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training, and skills; differences in job functions and amount of working time spent away from the employment or plant situs under State and Federal regulations; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

> *Id.* at 136-37.

17. *Id.* at 415. The Board has defined the disparity of interest standard to require that “the appropriateness of the petitioned-for units is judged in terms of [the community of interests test], but sharper than usual differences . . . between wages, hours, and working conditions, etc., . . . must be established to grant the unit.” *St. Francis Hosp., 271 N.L.R.B. 948, 953 (1984)(St. Francis II).*
18. See supra note 13 and accompanying text.
19. E.g., *NLRB v. HMO International,* 678 F.2d 806 (9th Cir. 1982); *NLRB v. Frederick Memorial Hosp.,* 691 F.2d 191 (4th Cir. 1982).
23. Bay Medical Center v. NLRB, 588 F.2d 1174, 1177-78 (6th Cir. 1978).
Circuits held that the community of interests test was permissible, but that it must be accompanied by a clear statement by the Board demonstrating that it was heeding the congressional admonition against undue proliferation. The Ninth and Tenth Circuits held that the disparity of interests test was mandated by the 1974 amendments and accompanying legislative history. The D.C. Circuit held that the admonition to avoid undue proliferation had no effect on the standard the Board used in determining bargaining units. Since section 9 was not amended, the Board was not required to change its unit determination standard under the 1974 amendments. However, the court noted that the Board could, in its discretion, switch to another standard of determination but that "the Board would have to explain its action adequately, particularly because the Board has always construed section 9 to embody community-of-interest criteria." 

C. St. Francis Hospital

In St. Francis Hospital, the Board adopted a new two-tiered community of interests standard in an effort to alleviate the concerns raised by several circuits. Under the two-tiered community of interests test, the Board first determined whether the petitioned-for unit fell into one of seven groupings of employees that the Board had previously determined could constitute an appropriate bargaining unit. The seven groupings were: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees, and skilled maintenance employees. If the petitioned-for unit fit one of the groupings then the Board proceeded to the second tier. In the second tier of the community of interests test, the Board determined whether the specific employees involved did, in fact, display a separate community of interests to warrant a separate bargaining unit.

In a subsequent refusal-to-recognize proceeding, the Board in St.

24. Mary Thompson Hosp. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980).
25. NLRB v. Walker County Medical Center, 722 F.2d 1535, 1538-39 (11th Cir. 1984).
27. Southwest Community Health Services v. NLRB, 726 F.2d 611, 613 (10th Cir. 1984).
29. Id.
30. Id. at 712, n.65 (citations omitted)(emphasis in original).
32. A representation proceeding is a challenge brought by either the employer or the union to the determination of an appropriate unit by a regional director of the National Labor Relations Board.
34. Id.
Francis II rejected its own two-tiered community of interests standard and adopted the disparity of interests standard stating, "After careful and thorough consideration we are persuaded that the majority approach in St. Francis I is contrary to the intent of Congress and that the adoption of a disparity of interests test can best effectuate our statutory obligations in health care unit determinations." Board Members Dennis and Zimmerman, in separately written dissents, urged the Board to promulgate rules defining the appropriate bargaining units in the health care industry.

The decision of the Board in St. Francis II was appealed to the District of Columbia Circuit Court of Appeals. The court held that the Board had erroneously determined that the disparity of interests test was mandated by the 1974 amendments and accompanying legislative admonition. The court reasoned that the 1974 amendments did not modify section 9(b) of the Act to require a specific test to be used in health care unit determinations. The court did not preclude the Board from using the disparity of interests test nor the community of interests test. Rather, the court stated that the Board's reasoning for adopting the disparity of interests test was clearly an erroneous interpretation of the Act. The case was remanded to the Board.

In St. Francis III, the Board explained that it did not find that the disparity of interests test was mandated by the amendments and congressional admonition, but that the test more closely approximated the legislative intent of the amendments as expressed in the congressional admonition to avoid undue unit proliferation. The Board then announced that it would engage in rulemaking with regard to bargaining units in the health care industry, and that the disparity of interests test would be used until such rules became effective.

D. Rulemaking

The Board published the Notice of Proposed Rulemaking in accordance with the Administrative Procedure Act and invited comments at several hearings located throughout the country. The comment period was extended three times by the Board due to the overwhelming response from hospitals, hospital associations, employees, and unions. Finally, in April 1989, the Board published its Final

36. Id. at 950.
37. Id. at 954-55, 958.
40. Id. at 1305-06.
41. Id. at 1305.
Rule establishing eight bargaining units in the health care industry: all registered nurses, all physicians, all professionals except for registered nurses and physicians, all technical employees, all skilled maintenance employees, all business office clerical employees, all guards, and all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees and guards.

The rule further provided that "[w]here extraordinary circumstances exist, the Board shall determine appropriate units by adjudication," and that any "unit of five or fewer employees shall constitute an extraordinary circumstance." In addition, the rule did not disturb existing units nor did it preclude consent agreements in accordance with the prescribed units or any other configuration that a Regional Director of the Board might approve. Finally, the rule limited its coverage to acute care hospitals and specifically excluded psychiatric hospitals, rehabilitation hospitals, and nursing homes. The rule states that the Board will determine by adjudication bargaining units in health care institutions not covered by the rule.

E. The Lawsuit

The American Hospital Association filed suit in the Federal District Court for the Northern District of Illinois seeking to permanently enjoin the Board from enforcing the rule. The Association asserted that the rule was invalid on three grounds: (1) the rule contravenes section 9(b) of the Act which provides that bargaining unit determinations must be made "in each case," (2) the rule contravenes the 1974 amendments which mandate that the Board avoid undue proliferation of bargaining units in the health care industry, and (3) the rule is arbitrary and capricious. The district court issued an injunction, finding that the rule violated the congressional admonition to avoid undue proliferation of bargaining units in the health care industry. The court did not specifically rule on the other grounds asserted by the Association. On appeal, the Seventh Circuit Court of Appeals reversed. The Seventh Circuit held that the rulemaking

47. Id. at § 103.30(a),(b)(1991).
48. Id. at § 103.30(c),(d).
49. Id. at § 103.30(a).
50. Id. at § 103.30(g).
52. Id. at 705.
53. Id. at 716.
54. Id.
55. American Hosp. Ass'n v. NLRB, 899 F.2d 651 (7th Cir. 1990).
powers of the Board conferred by section 6 of the Act are broad and explicit, and that rulemaking with regard to bargaining units is not contrary to the "in each case" language. The court found that "case" in this context could mean an individual dispute; an industry or a subset or submarket of an industry; a proceeding; or that the Board is required to apply its rules, no matter how achieved, on a case-by-case basis. The Seventh Circuit further held that the rule did not improperly fragment the health care industry contrary to the congressional admonition. Finally, the court rejected the contention that the rule was arbitrary and capricious.

On review, the United States Supreme Court affirmed the Seventh Circuit's decision in a unanimous opinion written by Justice Stevens, thus making the rule enforceable by the Board. The Court determined that the arguments raised by the Association were without merit. However, the Court "deliberately avoided any extended comment on the wisdom of the rule, the propriety of the specific unit determinations, or the importance of avoiding work stoppages in acute care hospitals."

III. ANALYSIS

The rule promulgated by the Board defining bargaining units in the health care industry has been declared valid by the Supreme Court. Although the Court did not address the propriety of the rule, others have argued that rulemaking by the Board would be advantageous in many respects. Few have disagreed with that contention. However, given the long-standing anti-union animus of the health care industry, it can reasonably be asserted that the rule will either fail to display the advantages it was hoped it would achieve, or the presence of the rule will shift the focus of the industry's anti-union efforts to areas not covered by the rule, effectively destroying the advantages the rule creates.

A. American Hospital

Analysis of the Supreme Court's decision in American Hospital

56. Section 6 reads: "The Board shall have the authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." National Labor Relations Act, § 6, 29 U.S.C. § 156 (1988).
57. American Hosp. Ass'n v. NLRB, 899 F.2d 651, 656 (7th Cir. 1990).
58. Id.
59. Id.
60. Id. at 660.
62. Id. at 1547.
reaps little reward. However, a quick analysis of each of the arguments advanced by the Association is needed.

1. Association's "in each case" Argument

First, the Association claimed that the rule contravened section 9(b)'s mandate that the Board determine appropriate units "in each case." The Supreme Court found that the language "in each case," given the context of section 9(b) and its legislative history, was synonymous with "whenever necessary" or "in any case in which there is a dispute." Thus, that language did not preclude the Board from using rules to determine an appropriate unit "in any case in which there is a dispute." The Court rejected the Association's argument that rules delineating the appropriate unit for an entire industry were qualitatively different than rules the Board had relied upon to guide the required case-by-case determination. The Court refused to acknowledge that such a distinction could be drawn from the words "in each case."

2. Association's Undue Proliferation Argument

The Supreme Court affirmed the Seventh Circuit decision and held that the rule did not contravene the admonition against undue proliferation. The Supreme Court found that the admonition did not evince Congress' intent that bargaining units be decided "in each case" by adjudication. The Court further noted that even if the admonition did instruct the Board to determine units "in each case" by adjudication, the rule does not contravene the "in each case" language of section 9(b). The Court further found that the admonition does not carry the force of law and does not require any specific action by the Board. The Court determined that if the admonition was viewed as a "post-enactment legislative history" and thus indicated Congress' intent as to section 9(b) when it amended the Act in 1974, then the admonition should be read "as an expression by the Committees of their desire that the Board give 'due consideration' to the special problems that 'proliferation' might create in acute care hospitals." However, the Court found that the admonition is "best understood as a form of notice to the Board that if it did not give appropriate consideration to the problem of proliferation in this industry, Congress might respond with a legislative remedy." The Court did not address whether eight

63. Id. at 1542-44.
64. Id. at 1543.
65. Id. at 1545.
66. See supra notes 63-64 and accompanying text.
68. Id.
units constituted undue proliferation because the Association failed to raise the argument.

3. Association's Arbitrary and Capricious Argument

Finally, the Supreme Court held that the rule was not arbitrary and capricious. The Court found that the Board had ample evidence to consider the issue of differences in the industry and that the Board had adequately found that the differences were not significant enough to warrant different treatment.

4. Extra-legal Arguments

The Supreme Court specifically refused to consider the propriety of the rule. The Court stated, "[W]e have deliberately avoided any extended comment on the wisdom of the rule, the propriety of the specific unit determinations, or the importance of avoiding work stoppages in acute care hospitals."70

B. Advantages and Disadvantages of Rulemaking

The advantages of rulemaking by administrative agencies under the Administrative Procedure Act have been touted by many. More particularly, scholars, courts, and legislators have espoused the use of that procedure by the Board. The Board had remained reluctant to employ that method of rulemaking for substantive matters until the present rule was adopted. The Board, instead, relied on adjudicative rulemaking, pointing to the flexibility of rulemaking through adjudication. Few others share the Board's view towards adjudicative rulemaking.

1. Advantages of Rulemaking
   a. Scholars

The advantages of rulemaking by administrative agencies, and by the Board in particular, have received extensive treatment in literature. Perhaps the most comprehensive treatment is that of Charles

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69. Id. at 1547.
70. Id.
J. Morris in his article, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, Morris lists eleven reasons that the Board should engage in rulemaking.

First, Morris argues that the Act is written in broad and general language with the duty of defining legal detail in accordance with legislative policy left to the Board. Rulemaking, then, is an ideal vehicle for fulfilling that duty. Second, rulemaking allows the Board to accumulate data beyond that which is possible in adjudication. Accumulated empirical data allow the Board to formulate rules of general applicability premised on extensive analysis of all data. Third, rulemaking emphasizes broad legislative policy rather than the specific facts of a specific case. Thus, in rulemaking, the Board can focus on the facts pertinent to the rule while ignoring minor details on which a specific case may turn. Fourth, rulemaking reduces litigation by providing stability and uniformity. Adjudication, on the other hand, begets litigation by allowing the parties to test the boundaries of an adjudicative rule through further adjudication. Fifth, rulemaking uses agency resources more efficiently. The Board may use rules to determine the outcome of cases which arise time and time again, thereby avoiding the need to provide reasoning in each case. Sixth, rulemaking should provide the Board with more deference in appellate review. The rulemaking process would evidence agency expertise to which the appellate courts would be more likely to defer, and appellate review would tend to focus on agency policy and legislative interpretation rather than the specific facts of the individual case.

Seventh, rulemaking allows the Board to be “pro-active” when problem areas appear rather than reactive after a problem appears and reaches the Board in adjudication. Thus, the Board can emphasize the prevention of unfair labor practices rather than merely remedy violations. Eighth, rulemaking allows the Board to fully articulate the reasoning behind the rules, including policy reasoning. Adjudication restrains the Board to the reasoning behind a specific decision. Ninth, rulemaking assists Congress in its oversight responsibility. Rules provide Congress with an explicit outline of the Board’s sub-

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*Joshua L. Schwarz, Unit Determination Standards - The NLRB Tries Rulemaking, 14 EMP. REL. L.J. 75 (1988).*


73. *Id.* at 29.

74. *Id.* at 29-30.

75. *Id.* at 30-33.

76. *Id.* at 34.

77. *Id.*

78. *Id.* at 34-35.

79. *Id.* at 35.

80. *Id.* at 35-36.
stantive actions. If Congress disagrees with an action, the rule can be identified with precision and changed by specific legislative amendment. The potential to amend rules without amending the statute is beneficial as well.\textsuperscript{81} Tenth, Morris argues that the General Counsel factor is an advantage to rulemaking. Rules would allow the General Counsel, a separate entity from the Board, to know the Board's stance on a variety of issues and would allow it to proceed accordingly.\textsuperscript{82} Finally, rules provide necessary information to the people who need to know them, \textit{e.g.}, labor negotiators, union officials, and management-side lawyers.\textsuperscript{83}

Morris also argues that substantive rulemaking is important for national labor policy.\textsuperscript{84} He contends that the Board's record of enforcing the mandates of the Act is poor, and that rulemaking is a viable solution to that problem.\textsuperscript{85} Further, only when the Board fulfills its statutory duties can the prescribed national labor policy be advanced. Hence, rulemaking can be valuable in the advancement of the national labor policy.

\textbf{b. National Labor Relations Board}

In outlining the reasons that prompted the Board to engage in rulemaking, the Board also noted advantages it hoped to achieve through the process. The Board listed three reasons for engaging in rulemaking. First, the Board pointed to thirteen years of unsuccessful attempts to create a judicially-accepted doctrinal formula for unit determinations.\textsuperscript{86} The advantage of rulemaking, then, would be greater deference on appellate review. Second, the Board listed the need for more empirical data in their unit determinations, \textit{i.e.}, data beyond the scope of the particular case being decided.\textsuperscript{87} The advantage gained is the unfettered evidence gathering procedures of the rulemaking procedure. Third, the Board listed the need for reduced litigation, partic-

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} at 36.
\item \textsuperscript{82} \textit{Id.} at 36-38.
\item \textsuperscript{83} \textit{Id.} at 38-42.
\item \textsuperscript{84} A statement of the national labor policy is found in section 1 of the Act:
\begin{quote}
It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating \ldots or other mutual aid or protection.
\end{quote}
\item \textsuperscript{86} Notice of Proposed Rulemaking, 52 Fed. Reg. 25142, 25143 (1987).
\item \textsuperscript{87} \textit{Id.}
\end{itemize}
ularly where the Board was being asked to decide similar cases time and time again. The advantages the Board hoped to achieve by rulemaking are the same or similar to several of the advantages that Morris and others have indicated flow from rulemaking.

c. Judiciary

The courts, on occasion, have pointed to rulemaking as an option that would be beneficial for the Board to choose. The Supreme Court, in *NLRB v. Wyman-Gordon Co.*, urged the Board to engage in rulemaking under the Administrative Procedure Act. While not reaching the specific question of whether the Board had promulgated substantive rules in adjudication in violation of the Administrative Procedure Act, the Court suggested that if the Board desired to make binding rules based on policy, the better vehicle for doing so would be the rulemaking procedure. In *NLRB v. Metropolitan Life Insurance Co.*, the Supreme Court suggested that the Board could make the required disclosure of the basis of its adjudicatory decisions by reference to rules, rather than explaining the basis fully in each case. Thus, the Supreme Court has recognized at least two of the advantages that rulemaking can provide: increased emphasis on agency policy and increased agency efficiency.

The Seventh Circuit also urged the Board to engage in rulemaking in *NLRB v. Res-Care, Inc.* The court, in that case, was determining the standard of judicial review in a section 2(11) case. The court noted that "while the Board is entitled to some judicial deference in interpreting its organic statute as well as in finding facts, it would be entitled to even more if it had awakened its dormant rulemaking powers . . . ."

88. Id. at 25143-25144.
90. Id.
91. Id. at 764-66.
93. Id. at 442-43, 443 n.6.
94. NLRB v. Res-Care, Inc., 705 F.2d 1461 (7th Cir. 1983).
95. Section 2(11) of the Act reads:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.


Thus, a section 2(11) case is a case involving the determination of whether an employee, or class of employees, falls within this definition of a supervisor.
96. NLRB v. Res-Care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983).
d. Legislators

In 1978, the Senate considered the Labor Law Reform Act of 1978, or Senate bill 2467. If passed, the act would have required the Board to engage in rulemaking with regard to bargaining units. The Senate report commenting on the proposed bill stated:

In the 42 years since [the] grant of power [to determine units] was made, the Board has run thousands of elections and counted millions of votes. The time has come for it to codify its accumulated learnings and experience so as to simplify the law, better guide the parties, and permit prompt handling of petitions for representation elections.

The Senate report cited several scholars and court opinions in support of the proposition. The bill ultimately was not passed. However, the bill does indicate that this country's legislators have considered rulemaking by the Board to be advantageous.

e. Conclusion

The Board's use of rulemaking under the Administrative Procedure Act is widely considered to be advantageous. The Supreme Court, scholars, legislators, and the Board itself have listed several advantages which would be gained by all people involved in the labor relations field if the Board would engage in rulemaking. Further, there does not appear to be any widespread resistance to the notion that rulemaking is advantageous and appropriate for the Board. Few have argued that rulemaking is inappropriate for the Board or disadvantageous.

2. Disadvantages of Rulemaking

a. National Labor Relations Board

The group most resistant to rulemaking by the Board has been the Board itself. "The Board has criticized rule making as a 'cumbersome process of amending substantive rules that necessarily impedes the law's ability to respond quickly and accurately to changing industrial practices." Indeed, the Board's stance on rulemaking may have been informed by the Supreme Court and Congress itself. Congress, in enacting the original Wagner Act, provided the Board with broad

98. Id. at 19.
100. Wagner Act, ch. 372, 49 Stat. 449 (1935). The Wagner Act is the original version of the National Labor Relations Act. This original act was never repealed, but was
discretion in determining appropriate units. 101 When the National Labor Relations Act was amended in 1947, 102 virtually the same language as found in the Wagner Act was incorporated into the amended act. 103 Thus, the Board retained broad discretion in areas outside the limited restrictions imposed by the 1947 amendments. Section 9(b) has not been amended since 1947. It has been suggested that Congress' broad grant of discretion to the Board was due to Congress' recognition that broad differences in industry and a changing society made it virtually impossible for Congress to enact strict rules determining bargaining units. 104

The Supreme Court has echoed that view. In NLRB v. Hearst Publications, Inc., 105 a case arising under the Wagner Act, the Court noted

[w]ide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter. 106

b. Scholars

At least one scholar has applauded the Board's use of adjudication. 107 Henry J. Friendly lists several examples of the Board's adjudication where the Board interprets the broad language of the Act and, then, outlines specific guides of behavior. 108 Friendly does not enter


101. The pertinent section of the Wagner Act read:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.


103. The Taft-Hartley Act retained the language of the Wagner Act unchanged, see supra note 101, but added the following proviso:

[The] Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination . . . or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard . . .


106. Id. at 134 (footnote omitted).


108. Id.
the debate as to whether rulemaking or adjudication is more appropriate in the field of labor relations. He does, however, suggest that the Board has been uniquely successful in formulating broad agency policy and in providing guides for behavior through the use of adjudication. Friendly recognizes that rulemaking through adjudication may at times appear to violate the Administrative Procedure Act, but suggests that administrative agencies, in fact, function in that manner, and the courts have upheld agency decisions which have functioned in that manner. In summary, Friendly suggests that adjudication has served well as a means to translate the broad language of the Act, enunciate broad agency policy, and outline specific guides of behavior.

c. Board Member Johansen

During the rulemaking proceeding, Board Member Johansen filed a strong dissent, arguing against the particular rule and against rulemaking generally. In arguing against rulemaking generally, he claimed that the rule would produce units that would continue to be criticized by courts that deem the Board's determinations too rigid, and that the rule would not reduce litigation in the area of unit determinations. Further, he argued that the rule would destroy needed flexibility and could not withstand the complexities of the industry and its rapid changes.

d. Legislators

During a Senate hearing in 1968, it was suggested that adjudication could provide many of the same advantages that rulemaking could provide. For example, it was argued that the Board had ample opportunity to obtain information during an adjudicative proceeding through the use of amicus curiae briefs. Also, adjudication brings clarity to the law through the gradual development of doctrinal formulas developed in specific cases arising in actual industrial practice. It was also argued at the Hearing that it was not altogether clear how rulemaking would contribute to the clarity of the law and to
the parties understanding of the law.\textsuperscript{118} Finally, the argument was raised again that rulemaking would make the law too rigid, and would lead to litigation.\textsuperscript{119}

e. Health Care Industry

The health care industry opposed the rule on a large scale. During the last comment period 1,465 comments in opposition to the rule were received by the Board from the industry, while only thirty-five were received supporting the rule. Only two of the thirty-five supporting comments were from the industry.\textsuperscript{120} The Board compiled nineteen reasons for the health care industry's opposition to the rule.\textsuperscript{121} While most of the reasons were specifically oriented towards provisions in the rule, many opposed rulemaking by the Board in general. For example, the industry argued that the promulgation of the rule would lead to loss of flexibility,\textsuperscript{122} increased litigation,\textsuperscript{123} and unequal treat-
ment of individual institutions due to differences in the industry.\textsuperscript{124}

C. Rulemaking: Is There a Good Argument Against It?

Most arguments against rulemaking focus on the rigidity of rules. Indeed, it is the flexibility of adjudication that proponents of that process point to when opposing rulemaking. One argument against the alleged need for flexibility is that adjudication cannot keep pace with changes in the industry any better than rulemaking. Professor Bernstein has argued that enduring solutions simply are not to be had in a society as dynamic as ours. The problems, or at least their manifestations, change too fast for the case-by-case process to keep pace. Rather the method may institutionalize a state of permanent indecision. Usually we must determine policy on what we know at the time a decision is required; even if that knowledge is incomplete, it ought to be as full as systematic inquiry can make it.\textsuperscript{125}

The argument proceeds, then, that rulemaking is the Board's best way to articulate broad agency policy to be used in subsequent adjudication.\textsuperscript{126}

Another argument against the alleged need for flexibility is advanced by the Board itself. During the rulemaking procedure, the Board listed as a reason to engage in rulemaking that the industry has remained substantially the same since 1974 and looks to remain substantially the same into the future. The Board stated that the same proposed units have been determined appropriate in hundreds of cases.\textsuperscript{127} Thus, the Board disputes its own reasoning for avoiding rulemaking. It would seem that the argument that industry changes too quickly to accommodate strict rules is not borne out by empirical evidence, at least in the case of the health care industry.

Finally, the Administrative Procedure Act allows rules to be repealed or amended.\textsuperscript{128} Although this process may be lengthy, the pronouncement of adjudicative rules can be an equally lengthy process. For example, \textit{St. Francis Hospital} took nearly five years to decide, and it was at that time that the Board pronounced the disparity of interests test as the standard for bargaining unit determinations in the health care industry.\textsuperscript{129} By contrast, the rulemaking proceeding

\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{126} Id. at 590.
\textsuperscript{129} \textit{St. Francis I} was decided on December 12, 1982 and \textit{St. Francis III} was finally decided on November 30, 1987. As a further note, the original Decision and Direction of Election in this case was issued on November 5, 1979, meaning that this dispute lasted over eight years.
lasted less than two years, and the rule became enforceable following
the Supreme Court decision less than four years after the Notice of
Proposed Rulemaking was published.130

In summary, it appears that rulemaking would bestow upon all in
the health care industry substantial benefits. The reasons advanced
for opposing rulemaking or favoring adjudication over rulemaking are
not supported by actual practices of the Board or a realistic analysis of
the rulemaking procedures.

D. Analysis of Rulemaking in the Context of the Health Care Industry

Given that the rule in this case has withstood judicial review, and
that rulemaking appears to be advantageous in general, the question
arises: Why has there been so much resistance to the rulemaking of
the Board in this case? The answer appears to be that the health care
industry has waged a concerted battle to limit or prohibit unionization
in the industry. The industry has suggested that unionization ulti-
mately increases the potential for interrupted patient care. However,
the evidence before the Board during the rulemaking proceeding does
not support that conclusion. Instead, it is reasonable to conclude that
the industry's efforts are motivated merely by an anti-union animus.

1. Industry Anti-union Animus

The admonition responsible for much of the dispute of the last sev-
enteen years can reasonably be viewed as an effort of the health care
industry to include in the 1974 amendments a persuasive statement
that would limit unionization, but which failed to be included in the
amendments. The Seventh Circuit expressed that view when it re-
viewed American Hospital. In deciding the weight to be given the ad-
monition, the court explained that the admonition must be understood
as an effort of the health care industry which was opposed to the
amendments that would extend the Act to cover their employees.131
By including the admonition warning the Board to avoid undue
proliferation, Congress indirectly limited the number of units which
would be allowed in a hospital. Thus, the admonition had the effect of
eliciting fewer, but larger, units in the industry. It is commonly
known that larger units are more difficult for unions to organize and
are more likely to lose a representation election. On the other hand,
smaller units are easier to organize and lead to more extensive admin-

130. The Notice of proposed Rulemaking was published on July 2, 1987, and the Final
Rule was published on April 21, 1989. The Supreme Court decided American
Hospital on April 23, 1991, less than four years after the Notice of Proposed
Rulemaking.

istrative costs for the employer. Thus, even if larger units do provide more security against interrupted patient care, the larger units are also less likely to be organized. Thus, it appears that the industry has had an effective weapon in Congress. By arguing for larger units, society receives uninterrupted patient care and the industry gets fewer unionization efforts which are easier to defeat. Hence, the history of the admonition is best seen as an effort of the industry to limit or prohibit unionization.

The rulemaking record indicates that the industry was still attempting to limit or prohibit unionization seventeen years later. The rule was widely believed by the industry to present an opportunity for unions to increase their organizational efforts. Further, by providing specific guides for unit determinations, the industry would have less opportunity to challenge a determination in an adjudicative proceeding. Thus, the rule would strip the industry of a delay tactic used to defeat union elections. The limits which the admonition indirectly imposed on unionization would be lost, if the rule were to become effective. Hence, by opposing the rule the health care industry would be attempting to limit unionization at least to the degree that the admonition imposed limits, and preserve one of its most powerful delay tactics. During the final comment period, the industry submitted approximately 1,465 comments opposing the rule. Of those comments, more than 670 were form letters created by one hospital and sent under the name of another (or in the case of one form letter, sent with no name filled in at all). Obviously, the industry was waging a large campaign to defeat the rule, and retain the limitations which the admonition provided, and the benefits which adjudication provided.

In sum, although many arguments were raised by the industry during the rulemaking proceeding that the rule would have disadvantageous societal impacts, it is reasonable to view the industry's opposition to the rule as an effort to limit unionization in the industry and to retain the benefits which adjudication provides.

136. Id.
2. Social Policy Reasons for Limiting Unionization in Health Care Industry

Even if the industry's efforts may reasonably be viewed as an effort to limit unionization in the industry, it is still necessary to ascertain whether the arguments which focus on the negative societal impacts of the rule are meritorious. The industry has argued that multiple units in hospitals, especially multiple units mandated by the rule, will lead to proliferation of units, strikes, jurisdictional disputes, and wage "whipsawing" and "leapfrogging". These problems will in turn lead to increased potential for interrupted patient care.


The rulemaking record and unionization trends in the health care industry do not seem to support the industry's reasons for limiting unionization in the industry. Evidence received by the Board in the rulemaking procedure indicates that seventy-four to ninety percent of all hospitals have three or fewer bargaining units, and that a successful organizing effort of one unit in a hospital do not lead to further organizing efforts. Logically, the potential for eight units under the new rule does not lead to the conclusion that eight units will be organized. The evidence also indicated that strikes in the health care industry have a lower incidence than in other industries. The data available to the Board indicated that only 3.3 percent of all contract negotiations in the health care industry lead to strikes. The Board further found that there was no correlation between the number of units in a hospital and the frequency of strikes.

The Board found that there is a low frequency of jurisdictional disputes in the health care industry and that there is no correlation between the occurrence of disputes and the number of units. Finally, the data available to the Board indicated that due to separate markets

137. A jurisdictional dispute is a dispute between competing or conflicting unions representing different employees in one company. The dispute arises when an employer makes a work assignment which each feels entitled to receive. CHARLES J. MORRIS, 2 THE DEVELOPING LABOR LAW 1245-74 (2d ed. 1983).

138. It is not within the scope of this Note to challenge or validate the evidence which the Board relied upon in the rulemaking process. The evidence the Board reported in the published notices is taken as representative of the true state of affairs. It should be noted, however, that studies and conclusions used by the Board were prepared by interested parties, and may not be statistically accurate.


141. Id.

142. Id.

143. Id. at 33909.

144. Id.
for the different categories of employees in the health care industry, the occurrence of wage whipsawing and leapfrogging is virtually nonexistent.\textsuperscript{145}

In conclusion, the data before the Board during the rulemaking procedure do not support the industry's conclusion that the rule will ultimately lead to interrupted patient care. The evidence regarding strikes, unit proliferation, jurisdictional disputes, wage whipsawing and wage leapfrogging does not indicate that the rule will lead to these problems. Thus, the industry's arguments in support of the conclusion that the rule will lead to interrupted patient care do not appear to be meritorious.

E. Union Organization in the Health Care Industry After \textit{American Hospital}

The Supreme Court decision in \textit{American Hospital} seemingly puts to rest the industry's efforts to limit unionization in the health care industry. The industry failed to convince the Board that the rule was disadvantageous to society and failed to convince the Supreme Court that the rule was invalid. However, there are still several avenues for the industry to continue in its efforts to limit unionization in the industry.

1. \textit{Adjudication Within the Rule}

The rule has left open several avenues for adjudication proceedings. One such area is the appropriateness of the single facility unit when an employer owns a number of facilities.\textsuperscript{146} Another major area that has been left to adjudication is the placement of specific job categories in the appropriate unit. Specifically, the Board indicated it would decide by adjudication the placement of certain job categories in the technical unit,\textsuperscript{147} the business office clerical unit,\textsuperscript{148} and the skilled maintenance unit.\textsuperscript{149} The rule itself also specifically creates areas which must be determined by adjudication. First, a union may request a unit that is a combination of the pre-determined units.\textsuperscript{150} The Board then must make a determination of whether the unit is appropriate. The employer could, of course, challenge that determination.

Second, the rule states, "Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication."\textsuperscript{151} The

\begin{itemize}
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.} at 33903.
  \item \textsuperscript{147} \textit{Id.} at 33920.
  \item \textsuperscript{148} \textit{Id.} at 33924.
  \item \textsuperscript{149} \textit{Id.} at 33926.
  \item \textsuperscript{150} 29 C.F.R. § 103.30(a)(1991).
  \item \textsuperscript{151} 29 C.F.R. § 103.30(b)(1991).
\end{itemize}
Board has said that it intends to narrowly construe the “extraordinary circumstances” exception. Moreover, in order to satisfy the requirement of the exception, a party would have to bear the “heavy burden” to demonstrate that “its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding.” Finally, the rule exempts from its coverage psychiatric hospitals, rehabilitation hospitals, and acute care hospitals that do not fall within the definition adopted in the rule. It might also be noted that the rule does not provide a standard by which units will be determined in these excluded institutions. Therefore, even if the Supreme Court did decide the weight to be given the congressional admonition, it is not altogether clear which test—the community of interests test or disparity of interests test—the Board will adopt when making unit determinations in these institutions.

The Board has said that it does not consider those avenues to be of any significance. However, given the history of the industry’s efforts, it is reasonable to predict that efforts will be made to reduce the scope of the rule through these adjudications. Evidence indicates that sixty-seven percent of all hospital union elections are stipulated; that is, the employer and the union agree to the proposed unit. Therefore, at most, three of ten union organization efforts reach adjudication. It has been suggested that the rule will provide guides to the parties involved, leading to more stipulated elections. However, it is also reasonable to suggest that employers will find reason to challenge a proposed unit in three of ten elections after the rule becomes effective. Further, it is not clear that if, after the rule becomes effective, eighty or eighty-five percent of union elections are stipulated, the advantages which the Board hoped to achieve would actually appear.

2. Petition to Amend or Repeal the Rule

The Administrative Procedure Act allows any interested party to petition to amend or repeal a rule. Thus, it is possible that the health care industry will make an attempt to amend or repeal the rule at some time.

3. Congressional Efforts

The American Hospital Association has said that it will not make any immediate efforts to get Congressional action regarding unioniza-

155. Id.
tion in the industry or the rule.\textsuperscript{157} However, that option is certainly open. Further, the Supreme Court’s decision in \textit{American Hospital} has provided the industry with a poignant argument for Congress. By pointing to the Court’s language indicating that the matter of undue proliferation is between the Board and Congress, the industry may argue that it is necessary for Congress to take affirmative steps to indicate to the Board how the Board should proceed in unit determinations in the industry.

4. **Summary**

The health care industry has several avenues left open to continue in its efforts to limit or prohibit union organization. The most important of these likely are the issues left open to adjudication by the rule itself. Placement of specific job classifications might prove most troublesome for the Board. Prior to the 1974 amendments there was a potential for fifteen to twenty units in each institution.\textsuperscript{158} Within each potential unit, there were numerous job categories. In the late 1980’s, a typical hospital had over 200 job classifications in its budget, and it is suggested that the aforementioned number may be a conservative measure of the actual number of job classifications in a hospital.\textsuperscript{159} Thus, the Board must determine not only which units fall within each of the units prescribed by the rule, but also which job categories fall within the prescribed units. Efforts to amend or repeal the rule, or to influence Congressional action on the rule may not be forthcoming in the near future, but present opportunities for the industry to upset the workings of the rule.

\textbf{IV. CONCLUSION}

The rule promulgated by the Board defining bargaining units in the health care industry will not display the advantages which were predicted. The anti-union animus in the health care industry, which arguably led to the promulgation of the rule, will continue to show itself in areas not covered by the rule, in efforts to repeal or amend the rule, and in efforts aimed at Congress. However, the industry’s immediate response has been to teach institutions how to keep employees satisfied in order to forestall unionization efforts.\textsuperscript{160} That has been the response of the Association also.\textsuperscript{161} The rule has served a valuable

\textsuperscript{157} Burda, \textit{supra} note 133, at 6.


\textsuperscript{161} Burda, \textit{supra} note 133, at 6.
function in this regard as it has taken the unionization question out of
the courts and placed it in the hospital. John Sweeney, president of
the Service Employees International Union, recently stated, "'For the
first time ever, the playing field is level for union organizing in hospi-
tals.'"\textsuperscript{162} So far, John. So far.

\textit{Darin Mackender '93}

\textsuperscript{162} David Burda, \textit{Hospital Industry Regroups After Supreme Court Upholds NLRB