

Results of Interview

On March 16, 2012, William Cowen, Solicitor, provided the following information to David Berry, Inspector General.

Because of Mr. Flynn's attorney's argument that the material was not protected from disclosure and that Mr. Flynn was engaged in the appropriate activity of assisting people by providing information, Mr. Cowen was provided the opportunity to review several of the investigative exhibits.

Mr. Cowen stated that the Board does not release deliberative information to the public. The categories of information that are generally considered to be deliberative information include the Members assigned to a case, the counsel assigned to the case, the active status of a pending case, and the pre-decisional votes of any particular Member. Except for the final votes, the deliberative information remains privileged even after a decision is issued. Mr. Cowen stated that the communication between a Member and his or her counsel would also be deliberative.

Mr. Cowen also stated that certain communication between the General Counsel and the Board could be attorney-client communication or deliberative process. Such communication would occur when the General Counsel is acting in his capacity as the attorney for the Board. In such cases, the legal advice and analysis would be privileged. Mr. Cowen noted that whether the holder of the privilege was the Board or the Board and the General Counsel would depend on the particular circumstances of the case.

Mr. Cowen stated that he described the Board's protection of deliberative information in a response to a Congressional request. Mr. Cowen provided a copy of the response which is included as an attachment to this summary.



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14TH STREET NW, SUITE 11600
WASHINGTON DC 20570

May 25, 2011

The Honorable John Kline, Chairman
Committee on Education and the Workforce
House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

Re: *Specialty Healthcare and Rehabilitation Center of Mobile*
Case 15-RC-8773

Dear Chairman Kline:

I write in response to your May 11, 2011, letter concerning the Committee's request for documents and communications related to *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, Case 15-RC-8773.

The National Labor Relations Board (NLRB or Board) has previously supplied the Committee with all relevant public documents concerning this open representation case, now pending before the Members of the Board. The Committee's latest letter makes clear that the Committee is seeking non-public documents that would reveal, in great detail, the Board's on-going deliberations about the case, before a decision is issued. Such a request is highly unusual and intrusive. It is based entirely on the concern that the Board might, in the end, issue a decision in *Specialty Healthcare* that should have been made through the process of notice-and-comment rulemaking. That concern is speculative, because there has yet been no decision. Moreover, the Supreme Court has consistently upheld the Board's power to decide statutory issues, such as whether bargaining units are appropriate, on a case by case basis through adjudication. Finally, the question of when an administrative agency must act through rulemaking is a question of law turning on the effect of the agency's action. Internal, deliberative documents are in no way relevant to that question.

After careful consideration, a Board majority has concluded that disclosing the deliberative documents sought by the Committee would jeopardize the Board's ability to decide the case fairly and independently, as well as prejudicing the due process rights of the parties to the case. While the Board remains willing to work with the Committee to satisfy its legitimate oversight responsibilities, for the reasons explained more fully

below, the Board respectfully declines at this time to produce pre-decisional, deliberative communications and documents related to this pending case.¹

***Specialty Healthcare* Procedural History**

Specialty Healthcare is a case pending before the Board, under deliberation, and pending a decision. On December 18, 2008, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) filed a petition with Region 15 of the Board. That petition sought the certification of a bargaining unit comprised exclusively of 53 Certified Nursing Assistants (CNAs) employed by a nursing home (a non-acute care facility). At a hearing conducted on December 30, 2008, in Region 15, *Specialty Healthcare* and Rehabilitation Center of Mobile (Employer) contended that the only legally appropriate unit consisted of 86 employees including 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 Regional Director in Region 15 (RD) found that a unit comprised only of CNAs was appropriate.

On February 19, 2009, the Board granted the Employer's Request for Review of the decision of the RD. On December 22, 2010, the Board invited parties and amici to file briefs addressing the issues raised in the case.² The Board explained that its final rule regarding appropriate bargaining units in the health care industry, Rule 103.30(g), excluded nursing homes from coverage and instead provided that appropriate bargaining units in nursing homes would be determined "by adjudication." The current standard for making such determinations was adopted in an adjudicated case, *Park Manor Care Center*,³ which envisioned that over time the Board would be able to determine which units are "typically appropriate" in nursing homes.⁴ In inviting briefs in *Specialty Healthcare*, the Board observed:

[T]he Board continues to believe that it is its obligation under the [National Labor Relations] Act to continually evaluate whether its decisions and rules are serving their statutory purposes. This is particularly true of decisions such as *Park Manor*, where the Board adopted a new approach to determining whether units are appropriate in health care facilities not covered by its newly-promulgated rule, but extends as well to the procedures and standards for determining whether proposed units are appropriate

¹ Board Member Hayes did not agree with the position taken by his colleagues. However, he agrees that he is institutionally bound to adhere to this position.

² *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, Case 15-RC-8773, Notice and Invitation to File Briefs, 356 NLRB No. 56* (December 22, 2010).

³ 305 NLRB 872 (1991).

⁴ *Id.* at 875.

in all industries – a critical and necessary prerequisite for resolving questions concerning representation.⁵

The Board further observed that it “strongly believe[d] that asking all interested parties to provide [the Board] with information and argument concerning the question of statutory construction raised in this case is the fairest and soundest method of deciding whether our rules should remain the same or be changed and, if the latter, what the new rules should be.”⁶

The Board also addressed the issue, raised by the dissent, of whether it was appropriate for the Board to proceed through adjudication, rather than rulemaking. It pointed out that with the sole exception of the health care rule, the Board – for more than 75 years and with the Supreme Court’s approval – has exclusively used adjudication to address a wide range of statutory issues, including what bargaining units are appropriate under the Act. The Board observed that adjudication is subject to judicial review and allows for broad participation by interested parties through the submission of amicus briefs. It nevertheless observed, “[I]f, at any time, we are convinced that rulemaking would be a fairer or otherwise more appropriate means to address the questions raised in this case, we shall initiate that process.”⁷

Specifically, the Board invited parties and amici to address the following questions: 1) What has been your experience applying the “pragmatic or empirical community of interests approach” of *Park Manor Care Center*, 305 NLRB 872 (1991) and subsequent cases; 2) What factual patterns have emerged in the various types of nonacute health care facilities that illustrate what units are typically appropriate; 3) In what way has the application of *Park Manor* hindered or encouraged employee free choice and collective bargaining in nonacute health care facilities; 4) How should the rules for appropriate units in acute health care facilities set forth in Section 103.30 be used in determining the appropriateness of proposed units in nonacute health care facilities; 5) Would the proposed unit of CNAs be appropriate under *Park Manor*; 6) If such a unit is not appropriate under *Park Manor*, should the Board reconsider the test set forth in *Park Manor*; 7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute healthcare facilities. Should such a unit be presumptively appropriate as a general matter; 8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are “readily identifiable as a group whose similarity of function and skills create a community of interest.”⁸

⁵ 356 NLRB No. 56, slip op. at 1.

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ *Id.* at 1-2.

The Board set February 22, 2011, as the deadline for parties and amici to submit briefs and later extended that deadline to March 8, 2011.⁹ On March 8, you and Congressman Issa, and three United States Senators filed and served on the parties to this case separate requests that the Board delay the deadline for filing briefs by 60 days. On March 17, 2011, the Board granted those requests in part and allowed those parties and amici who *previously* filed briefs by March 8, 2008, as well as you and Congressman Issa, to file briefs addressing information made public at your request by March 29, 2011.¹⁰

The deadline for filing all briefs has passed and this case is now under consideration by the Members of the Board and pending a decision.

History of the Committee's Oversight Requests

On March 7, 2011, you sent to the Board an oversight request regarding *Specialty Healthcare*.¹¹ First, the request asked the Board to make public on its website a list of all Certification of Representative cases (RC cases) filed from 2000 to 2011 identifying cases that involved certain issues and aspects of each of those cases, all hearing records from RC cases in which a hearing was held between 2000 and 2011 that involved certain issues, and all documents from all RC cases from 2000 to 2011 in which the petition was dismissed on the grounds that the "proposed unit was too narrow." Second, the request asked that the Board delay the deadline for filing amicus briefs in *Specialty Healthcare* by 60 days from the date the Board made public on its website the data requested.¹² Finally, the March 7 request sought "all documents and communications referring or relating to" *Specialty Healthcare*, "all documents and communications referring to or relating to" the Board's invitation to file briefs, and all "documents and communications referring or relating to estimates of the financial effects of any change to the determination of an appropriate bargaining unit under the National Labor Relations Act" no later than March 21, 2011.

On March 17, 2011, Lester A. Heltzer, Executive Secretary for the Board, responded in part to the March 7, 2011 oversight request.¹³ Mr. Heltzer stated that on March 15, 2011, the Board had made available on its website data derived from its database that is responsive to the request. On March 17, Mr. Heltzer also provided, as

⁹ February 7, 2011, Order Granting Extension of Time to file Briefs.

¹⁰ Order Modifying Briefing schedule and Granting Extension of Time to File Supplemental Briefs, issued March 17, 2011.

¹¹ Letter from John Kline and Darrell Issa, U.S. Congressmen, to Wilma Liebman, Chairman National Labor Relations Board (Kline and Issa Letter to Liebman) (March 8, 2011).

¹² On March 8, 2011, the deadline for filing amicus briefs in the case at the time, the oversight request was filed as a motion requesting an extension of time and served on the parties in the case.

¹³ Letter from Lester A. Heltzer, Executive Secretary National Labor Relations Board, to John Kline and Darrell Issa, U.S. Congressmen (March 17, 2011).

a courtesy, a CD containing the responsive data. With respect to the request for hearing records, Mr. Heltzer stated that "the physical records for the RC cases since 2000 are voluminous and are stored around the United States in our 51 field offices, headquarters and the records center at the Washington Navy Yard."¹⁴

On March 21, 2011, the Board responded to the requests outstanding from the March 7 oversight letter.¹⁵ First, we indicated that the Board had granted in part the request for an extension of time by order dated March 15, 2011. Second, we provided a CD of public and nonpublic documents referring or relating to *Specialty Healthcare* and the notice and invitation to file briefs. Third, we noted that section 4(a) of the National Labor Relations Act specifically prohibited the agency from "appointing individuals...for economic analysis."

Finally, we noted that the request was broadly worded and could be interpreted as seeking documents and communications "relating to the internal deliberations of the Board in an active case." We registered our concerns about the separation of powers, the potential chilling effect on Board Members and their legal staffs, and the risk of injury to the due process rights of the parties to the proceeding implicated by that broad reading of the request. In light of those concerns, we stated that we were not interpreting the request as seeking documents and communications "relating to the internal deliberations of the Board in an active case."

On April 18, 2011, agency staff met with your staff to discuss the *Specialty Healthcare* oversight request. On May 11, 2011, we received an oversight request reiterating the request for documents and communications related to that case.

The Basis of the Committee's May 11 Request

The May 11 request relies heavily on the dissent of Member Brian Hayes from the Board's Notice and Invitation to File Briefs. The request argues that the Board's eventual decision in *Specialty Healthcare* could constitute an abuse of discretion if that decision "departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation...and where the new standard is very broad and general in scope and prospective in application."¹⁶ There are no allegations of fraud, waste, abuse, or other similar misconduct in connection with the Board's consideration of the *Specialty Healthcare*

¹⁴ Despite the challenges faced regarding the accessibility of the hearing records sought, Mr. Heltzer offered to help coordinate the Board's efforts to locate and provide any specific records the Committee might seek after reviewing the publically available responsive data.

¹⁵ Letter from William B. Cowen, Solicitor National Labor Relations Board, to John Kline and Darrell Issa, U.S. Congressmen (March 21, 2011).

¹⁶ Letter from John Kline, U.S. Congressman, to Wilma Liebman, Chairman National Labor Relations Board (Kline Letter to Liebman) (May 11, 2011).

case. Instead, the request's only stated concern is that that the Board's eventual decision *may* violate judicial standards for agency adjudication.

At this point in the proceeding, it is highly speculative to suggest that the Board will make any wide ranging decision, much less one that would constitute an abuse of discretion. Before issuing a decision in this case, the Board has several preliminary decisions to make. First, it must decide whether to affirm or reverse the decision of the Regional Director that the unit of 53 CNAs was appropriate. Second, it must decide whether to modify or adhere to existing precedent. Finally, the Board must decide, if it is going to modify existing precedent, how and through what process it will do that. All of those are decisions for the Board to make, and no final decision has been made.

The request concedes that the Board has "broad discretion to make rules through the adjudicatory process...."¹⁷ Indeed, the Supreme Court has made clear that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."¹⁸ Although the Supreme Court acknowledged in *Bell Aerospace* that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion...."¹⁹ the court noted in that case that those concerns were "largely speculative" because the Board had yet to make a final determination in the case.²⁰

The law is clear: unless and until the Board has issued a decision, there can be no basis for alleging that the Board has acted contrary to law.²¹ Ultimately, Article III courts would be the proper forum for a challenge to the Board's action under the Administrative Procedure Act and the judicially constructed standard that the request asserts is the appropriate test. As to that standard, it is important to note that the issue in *Specialty Healthcare* is simply the appropriateness of the proposed bargaining unit. Thus, "this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements."²² And with respect to the Board's notice and invitation to file briefs, the Supreme Court has affirmed that "the Board has discretion to decide that adjudicative procedures... may also produce the relevant information necessary to mature and fair consideration of the issues."²³ Ultimately, the question of whether whatever decision the Board reaches in this pending case should have been made through notice and comment rulemaking will turn on the substance of the decision itself and the express scope of its application, and nothing potentially in the Board's

¹⁷ *Id.*

¹⁸ *NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267, 294 (1974).

¹⁹ *Id.*

²⁰ *Id.* at 295.

²¹ *Id.*

²² *Id.* (ruling that the decision as to which employees properly fell within a bargaining unit did not impose new liability nor involve fines or damages).

²³ *Id.*

deliberative documents will be relevant to that question. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

For all these reasons, we believe that this highly unusual and intrusive request for documents and communications reflecting the internal communications of Board members and their staffs in a pending matter is premature, at best. In this regard, we reiterate that the Board is presently considering the submissions of the parties and their amici, no Board decision on the merits has yet been made, and when such a decision is made the validity of that decision is fully reviewable by the courts in accordance with the review provisions that Congress has specified in the statute.

The NLRB's interests

Based on the April 18 staff meeting and the May 11 oversight request, the Board now understands the request to be seeking deliberative, pre-decisional documents and communications related to a case currently pending before the Board. Deliberative, pre-decisional documents and communications typically in possession of the Board in connection with a pending case include:

- legal memoranda from staff attorneys (and/or more senior attorneys) to one or more Board members analyzing the case (or some aspect of the case) and recommending a particular decision on an issue or the case as a whole;
- communications related to the drafting, dissemination, or discussion of such legal memoranda;
- research memoranda related to the factual or legal issues in the case, prepared by a staff attorney or more senior attorney, for use by one or more Board members, including communications related to the drafting, dissemination, or discussion of such research memoranda;
- communications between and among an individual Board member and staff attorneys (or more senior attorneys) conveying or discussing a prospective decision in the case, including the views of other Board members and/or their staffs (these may range in formality from an e-mail to a written memorandum);
- draft decisions (in whole or in part) prepared by a Board member or staff attorney for review and approval by more senior attorneys or by one or more Board members;
- successive revisions of the draft prepared and reviewed at various levels of a Board member's staff (staff attorney, supervisor, deputy chief counsel, chief counsel), and related communications, culminating in a final approved decision;

- draft dissents (in whole or in part) prepared by a Board member or staff attorney for review and approval by more senior attorneys or by one or more Board members;
- successive revisions of the draft dissent prepared and reviewed at various levels of a Board member's staff (staff attorney, supervisor, deputy chief counsel, chief counsel), and related communications, culminating in a final approved dissent; and
- communications between Board members discussing a draft decision or dissent and prospective action on the draft, and similar communications between the staffs of the individual Board members.

At the Board, deliberative, pre-decisional documents and communications are treated with the highest level of confidentiality. Many draft documents are known only to their authors and immediate supervisors. Documents that are ultimately presented to an individual Board Member are rarely shared with other staff members not directly involved in the consideration of the case. Similarly, communications between Board Members generally are not shared beyond those involved in the immediate distribution of that communication, and it is very rare for any deliberative, pre-decisional communication to be distributed more broadly than those persons directly involved in the consideration of the case. Moreover, our information technology systems are built with security controls that protect the confidentiality of deliberative, pre-decisional materials. In short, at the Board, nothing is more confidential than these materials.

Over the 75 year history of this Agency, the Board has carefully protected the confidentiality of its deliberative, pre-decisional materials. While Board Members may, from time to time, speak about the deliberative process generally, it is a long-standing tradition that they do not publically reveal the deliberations on any particular case. Whether Republican, Democrat, or Independent, Board Members have adhered to these principles because they recognize that the Board can function effectively only in an environment where the free flow of ideas is not compromised by the fear of public disclosure of private communications.

In addition to these confidentiality interests, the courts have recognized that independent agencies conducting adjudications have a constitutional and statutory obligation to resist Congressional influence in order to protect the due process rights of the litigants.²⁴ Congressional intervention into an ongoing administrative proceeding

²⁴ See, e.g., *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) (ruling the court would not enforce an administrative subpoena if the agency did nothing to prevent the abuse of its process by congressional influence); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (administrative decision can only be compromised by congressional intervention if "extraneous factors intruded into the calculus of consideration of the individual decisionmaker"); *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set

can violate the due process rights of the litigants in that proceeding if it casts doubt upon the "appearance of impartiality" of the proceeding.²⁵ The courts have observed that it is appropriate to view the totality of Congressional intervention when considering whether that intervention violated the due process rights of litigants.²⁶

The Committee's request to examine all of the pre-decisional, deliberative documents of the Board in a pending proceeding seriously jeopardizes the due process rights of the parties. Federal courts have made it clear that Congressional intervention into the deliberations of an independent federal agency that "focuses directly and substantially upon the mental decisional process"²⁷ of the decisionmakers in a case pending before them raises grave concerns for the rights of private litigants to a fair administrative process. "To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him,"²⁸ threatens the appearance of impartiality of the decisionmaker at the expense of the due process rights of the litigant.

The request risks harm to due process rights in another way as well. The Supreme Court has recognized that "those who expect public dissemination of their remarks may well temper candor with a concern for appearance and their own interests to the detriment of the decisionmaking process."²⁹ The request seeks legal memoranda, drafts, and communications about those documents that lie at the heart of the deliberative process. Releasing the requested internal deliberative documents will not simply prejudice the rights of the parties to this case, but will also have a chilling effect on the operation of the Board that will prejudice the rights of the parties in all pending and future cases.

The request indicates that you intend to receive our pre-decisional, deliberative documents in executive session, in order to "ensure the integrity of the adjudicatory process." With respect, we do not see how the proposed procedure in any way neutralizes the harm that flows from a legislative intrusion into agency decisionmaking in a pending case. For one thing, even if this suggested procedure did ensure that the internal deliberations of the Board were not more broadly disseminated, the cases we have discussed above stand for the proposition that it is the act of congressional intervention in an ongoing administrative proceeding (and the possibility of political

aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention); *Gulf Oil Corporation v. FPC*, 563 F.2d 588 (3d Cir. 1977) (court found that Congressional intervention into the administrative process did not influence the agency because the agency did not accede to Congressional requests).

²⁵ See *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966).

²⁶ See, e.g., *ATX, Inc.*, 41 F.3d at 1525.

²⁷ *Pillsbury*, 354 F.2d at 964.

²⁸ *Id.*

²⁹ *United States v. Nixon*, 418 U.S. 683, 705 (1974).

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influence that results) that raises due process concerns.³⁰ Those concerns are not diminished in any way by reviewing the documents only in an executive session. Furthermore, under the rules of the House of Representatives, any document produced by our agency to the Committee is a "committee record."³¹ As such, each Member of the House of Representatives has a right of access to those documents.³² For all practical purposes, the Board's deliberative processes in an ongoing administrative proceeding would therefore be exposed to all 435 Members of the House of Representatives. No assurances have been given that all Members with access to these documents will refrain from commenting publicly about his or her conclusions based on the Board's internal deliberations in an ongoing case. Such comments, under judicial precedent, may be sufficient to violate the due process rights of our litigants.³³

For the reasons outlined above, we must respectfully decline to produce such materials at this time. If there are other documents that might be helpful to you, we would be happy to work with you to accommodate your legitimate needs without compromising the integrity of the Board's ongoing deliberative process.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.

Sincerely,



William B. Cowen
Solicitor

cc: The Honorable Darrell Issa, Chairman
House Committee on Oversight and Government Reform
The Honorable George Miller, Ranking Member,
House Committee on Education and the Workforce
The Honorable Elijah Cummings, Ranking Member,
House Committee on Oversight and Government Reform

³⁰ See *Pillsbury*, 354 F.2d at 964.

³¹ Rules of the House of Representatives, Rule XI, clause 2, § 794(e)(2)(A).

³² *Id.*

³³ See *Pillsbury*, 354 F.2d at 964 (holding that examining how and why a decisionmaker reached a decision and then criticizing him for making the "wrong decision" sacrifices the appearance of impartiality of the decisionmaker and intrudes on the due process rights of the litigants to that case).