

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AMERICAN HOSPITAL ASSOCIATION, Petitioner
v. NATIONAL LABOR RELATIONS BOARD, ET AL.

CASE NO: 90-97

PLACE: Washington, D.C.

DATE: February 25, 1991

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 90-97, American Hospital
5 Association v. National Labor Relations Board.

6 Mr. Holzhauer.

7 ORAL ARGUMENT OF JAMES D. HOLZHAUER

8 ON BEHALF OF THE PETITIONER

9 MR. HOLZHAUER: Mr. Chief Justice, and may it
10 please the Court:

11 This case presents the narrow statutory question
12 of whether the National Labor Relations Act permits the
13 Board to establish a rule determining that eight specific
14 bargaining units, and only those units, are appropriate
15 for every acute care hospital in the United States. We
16 believe that the language and legislative history of
17 Section 9(b) of the act, as well as the contemporaneous
18 interpretation of the act by the Board, make it clear that
19 the rule is not permitted.

20 Section 9(b) requires that the Board determine
21 the appropriate unit in each case. The Board and the
22 unions argue that those words refer solely to the
23 proceeding in which the Board is to issue unit
24 determinations. In their view, as long as the Board goes
25 through the formality of the hearing the requirements of

1 the statute are met, even if that formality is an empty
2 one leading in every case to the same preordained result.

3 Of course Section 9(c) already requires hearings
4 in contested representation cases, so in the Board's view
5 the "in each case" language, which was added deliberately
6 by amendment to the Wagner bill, adds nothing to the
7 statute. Well, those words do mean something, and their
8 meaning is demonstrated not only by the words themselves,
9 but by both the legislative history of Section 9(b) and
10 the Board's contemporaneous and longstanding
11 interpretation of that section.

12 The statutory language and its history were
13 clear enough in 1980 and again in 1982 for the Board
14 itself to hold that the adoption of a rule that a unit of
15 registered nurses would be appropriate in every case would
16 be, quote, "inconsistent" with the Board's Section 9(b)
17 responsibility to decide in each case whether the
18 requested unit is appropriate.

19 QUESTION: Mr. Holzhauer, we have to determine
20 what the meaning of the "in each case" language is in this
21 context, and it occurs to me that this Court, for example,
22 has an obligation to consider each case on its plenary
23 docket, and yet we search for rules of general
24 applicability to be applied to these cases.

25 MR. HOLZHAUER: That's right.

1 QUESTION: Now, isn't the Board doing
2 essentially a similar thing in searching for some kind of
3 rule of general applicability for most cases, leaving, of
4 course, its extraordinary circumstances out if necessary?

5 MR. HOLZHAUER: Sure. Well, the Board is making
6 that argument. They're arguing that the extraordinary
7 circumstances exception allows it to consider in each case
8 whether there are exceptions allowing a different result
9 from the rule. But the extraordinary circumstances
10 exception, which the Board did not say in its rulemaking
11 allowed case-by-case determination of the -- of each case,
12 in fact it did not rely on the extraordinary circumstances
13 exception for the purpose now asserted by the Board, that
14 exception is so narrow as to be illusory. The Board has
15 made it clear in the rulemaking that it will no longer
16 consider the individual facts and circumstances of each
17 hospital, and it will disregard all of the factors it
18 regards as critical in every other industry, and that it
19 always regarded as critical in this industry.

20 QUESTION: Counsel, suppose the Board -- is
21 this, what, is this the second rule that the NLRB has ever
22 adopted? It's not much more than the second, anyway.

23 MR. HOLZHAUER: I believe that this is the first
24 substantive rule they have adopted.

25 QUESTION: The first substantive one. I think

1 they have --

2 MR. HOLZHAUER: Right. It's not the procedural
3 rules.

4 QUESTION: Now, but there's a lot of law that
5 the NLRB has made.

6 MR. HOLZHAUER: That's right.

7 QUESTION: I mean, all sorts of rules about what
8 constitutes an unfair labor practice, and so forth.

9 MR. HOLZHAUER: That's right.

10 QUESTION: Now, I assume they have been adopted
11 on a case-by-case basis in adjudication.

12 MR. HOLZHAUER: That's correct.

13 QUESTION: And you have no problem with that?

14 MR. HOLZHAUER: I have no problem with that
15 because --

16 QUESTION: So the NLRB could say in its next
17 adjudication it seems to us these eight units are
18 appropriate bargaining units with respect to hospitals,
19 and if it said that in adjudication it would be all right.
20 Is that all you're arguing?

21 MR. HOLZHAUER: No. There are two distinctions
22 that we're making here. First of all, we're not arguing
23 that the Board erred by engaging in rulemaking rather than
24 adjudication. In fact we think the rule would suffer from
25 exactly the same defect and we would be making exactly the

1 same arguments if it had been announced in adjudication.

2 QUESTION: Well, not exactly the same. You
3 might say it's arbitrary, you'd make the same arbitrary
4 and capricious argument that you make here, but you
5 couldn't say that they're ignoring the case by case --

6 MR. HOLZHAUER: I would make the same statutory
7 argument if they established a rule saying that these
8 eight units are appropriate in every case, and that we
9 will not consider the facts and circumstances of hospitals
10 in subsequent cases.

11 QUESTION: But why is that an inappropriate
12 rule, although it is appropriate to say what constitutes
13 an unfair labor practice, to say that every time you do
14 this, every time you do it it's an unfair labor practice.

15 MR. HOLZHAUER: Well, there are two differences.
16 First of all, the "in each case" language of Section 9(b)
17 does not apply to labor, to unfair labor practices.
18 Section 9(b) says, and only says, that the Board shall
19 determine the appropriate unit in each case. It doesn't
20 say that it shall determine unfair labor practices in each
21 case.

22 Now the Board has established bargaining unit
23 rules in adjudication, and the Board is now arguing that
24 the rule that it has established in this industry is much
25 the same as those rules. But that's not correct. In no

1 other industry has the Board established a rule that
2 particular units and only those units will be appropriate
3 in each and every case. And that's what violates the "in
4 each case" requirement.

5 QUESTION: I thought that your brief said that
6 the Board used to approve only four units because of a
7 test it used to apply, the disparity of interest test or
8 something of that sort.

9 MR. HOLZHAUER: No, the Board never said that
10 it, that it would approve or would not approve any
11 particular number of units. It has changed the test at
12 times. At times it followed the community of interest
13 tests that it follows in all other industries. At times
14 it switched to a disparity of interests test, but that
15 test did not result in a set number of units being
16 appropriate in each and every case. In each and every
17 case the Board applied that test, looked at the facts and
18 circumstances of each individual hospital, and decided
19 whether under those facts and circumstances the particular
20 unit that was before the Board was appropriate or not
21 appropriate.

22 QUESTION: But applying a general rule to all of
23 them.

24 MR. HOLZHAUER: That's right, a rule --

25 QUESTION: The disparity of interest test, or

1 whatever other test it --

2 MR. HOLZHAUER: That's right. And the Board
3 could establish a disparity of interest test and say we
4 will decide in each case whether under the disparities of
5 interest test this unit, the unit that's being sought in
6 this particular proceeding, is appropriate.

7 QUESTION: And even though it knows that the
8 outcome of that test will always be that there are eight
9 appropriate bargaining units, it must not say that?

10 MR. HOLZHAUER: I don't think it would ever know
11 that the outcome of that test would only be eight
12 appropriate units or four appropriate units. The test
13 would establish a standard, and each hospital would be
14 free to introduce the facts and circumstances of that
15 particular hospital to try to convince the Board that
16 under those facts and circumstances the particular unit
17 before it was inappropriate.

18 QUESTION: But suppose the agency does believe
19 that applying that test faithfully will always lead to
20 these eight. I mean, it has studied all the types of
21 employees at hospitals and it's confident that these eight
22 are -- that'll be the situation in every case?

23 MR. HOLZHAUER: If the Board believes that, I
24 think it's free to say we think that -- we will presume
25 that these eight units might, will be correct in each and

1 every case.

2 QUESTION: It can do that in adjudication, but
3 not in rulemaking?

4 MR. HOLZHAUER: No. It can't do it -- it can do
5 it in adjudication or in rulemaking, provided that it
6 allow each employer in each case to introduce the facts
7 and circumstances of that particular employer to convince
8 the Board that in that case that rule should not apply.
9 The "in each case" language requires case-by-case
10 evaluation of the appropriateness of the particular
11 bargaining unit. That's what we're arguing.

12 QUESTION: Without any general principles at
13 all?

14 MR. HOLZHAUER: Oh yes, it can establish general
15 principles. In fact it can establish the same kinds of
16 principles that it has established in other industries.

17 QUESTION: But it can't -- it can't establish a
18 rule that is conclusive, regardless of the facts of a
19 particular case?

20 MR. HOLZHAUER: That's right. That's right.
21 What the Board has done here is it has said that, first of
22 all it said in its rulemaking that all of the -- that as
23 to all of these factors it lists in its extraordinary
24 exceptions exception -- extraordinary circumstances
25 exception, hospitals don't vary in these respects. But to

1 the extent they do, we find that we're better off ignoring
2 those variations, because the value of having a uniform
3 rule outweighs the value of considering in each case
4 whether that bargaining unit is appropriate.

5 We don't think that's proper. We think the
6 Board has to look at the facts and circumstances of each
7 case to decide whether its rule is properly applied to
8 that case.

9 QUESTION: Does that mean simply that the Board
10 can't have a conclusive presumption in the interest of
11 administrative efficiency?

12 MR. HOLZHAUER: That's correct. It cannot have
13 a --

14 QUESTION: Does it mean anything more than that?

15 MR. HOLZHAUER: It can't have an exclusive
16 presumption, period, no matter what the interest is. The
17 Board has -- the Congress has determined by putting in
18 this "in each case" language, which otherwise would be
19 completely redundant and meaningless, that the Board must
20 consider the facts and circumstances of each case, as long
21 as they do that.

22 Now, the Board has, has argued or has written
23 over the years that that's exactly what, what this rule
24 requires. It said so in adjudications in 1980 and 1982,
25 and in 1935, when the act was first being considered,

1 Congress explained that the question of what bargaining
2 unit is appropriate is, quote, "obviously one for
3 determination in each individual case."

4 QUESTION: Is your argument helped, Counsel, by
5 the provision in the statute that a majority of
6 professional employees can vote to be included in another
7 unit?

8 MR. HOLZHAUER: Sure. And in each case you
9 would think that they would be allowed to make that
10 presumption -- to make that election.

11 QUESTION: So the language of the statute itself
12 helps you in that respect?

13 MR. HOLZHAUER: I think that's correct. It also
14 is helped by the fact that the extent of organization is
15 not supposed to be conclusive. In each case the Board is
16 supposed to consider the facts and circumstances of the
17 particular hospital to decide whether the unit at issue is
18 or is not an appropriate unit.

19 QUESTION: I -- as I recall, the regulations,
20 though, did acknowledge that there could be this cross-
21 over if a majority of the employees in the unit, in each
22 unit accept the cross-over. Is that the way it works?

23 MR. HOLZHAUER: Well, as far as professionals
24 go, yes. There would have to be -- the professional
25 employees would have to, would have to accept that.

1 There is one meaningful exception to this entire
2 rule. That exception provides that if unions request that
3 one or more of these units be combined, one or more of
4 these eight units be combined, that will ordinarily be
5 considered appropriate. But if an employer requests that,
6 that will be inappropriate in every case. So I would
7 assume that if a union came in and says we want a combined
8 professional and nonprofessional unit in this case, the
9 election procedures, the consent procedures would still
10 apply, and such a combined unit, if appropriate, would be
11 allowed. Of course, if an employer sought that it would
12 not be allowed in any case.

13 QUESTION: Why isn't that enough to establish
14 that they are considering it case by case? Given two
15 different hospitals, one hospital the employees want to
16 organize in a particular fashion that has less than --
17 less than all eight of these separate bargaining units,
18 and the other -- in the other, with respect to the other
19 employer they don't want to. They want to have only four
20 or five.

21 MR. HOLZHAUER: They are not considering on a
22 case-by-case basis.

23 QUESTION: Well, yes they are.

24 MR. HOLZHAUER: The only situation in which they
25 will consider that is when the unions come in and request

1 a combined unit.

2 QUESTION: That's all you need.

3 MR. HOLZHAUER: I don't think that's all you
4 need. I think 9(b), and what Congress --

5 QUESTION: Aren't those two cases treated
6 differently?

7 MR. HOLZHAUER: Excuse me?

8 QUESTION: Aren't those two cases treated
9 differently? You don't impose eight separate unions on
10 each of those two employers. You wait to see what the
11 unions want, or what the employees want.

12 MR. HOLZHAUER: Well, if the unions request an
13 addition, a combination of units, that can be allowed.
14 But I don't think that that comports with the "in each
15 case" requirement.

16 QUESTION: Why?

17 MR. HOLZHAUER: I think the "in each case"
18 requirement requires the Board, not the unions but the
19 Board, to look at the facts and circumstances of each
20 case, including the employer's argument that because of
21 the staffing patterns, supervision, contacts between
22 employees, and so forth, that this particular unit is
23 inappropriate or appropriate. And that can't be done
24 under this rule. The employer could never offer that
25 evidence.

1 QUESTION: If, if the Board in 50 separate cases
2 had heard employers' evidence to this effect, and in every
3 single case it had said well, this evidence just doesn't
4 change our minds, it couldn't at the end of those 50 cases
5 adopt some general principle?

6 MR. HOLZHAUER: It could adopt a general
7 principle saying that we might presume that all of these
8 units will be appropriate units, but the Board -- the
9 employer or other parties before the Board would still
10 have to have the opportunity in each case to convince the
11 Board that that unit is appropriate. And that's exactly
12 what the Board does in every other industry.

13 QUESTION: Well, would the Board have standards
14 of relevancy that it could impose? It could say we're not
15 going to hear these kinds of evidence from the employer
16 because in these other 50 cases we have decided it didn't
17 make any difference.

18 MR. HOLZHAUER: Well, I think there would be
19 some problem if the Board were saying that this is just
20 the standard of relevance. I think it's important to
21 point out first that that's not what the Board has done
22 here. It didn't find that these factors are irrelevant.
23 It found instead that for the most part hospitals don't
24 vary in the various respects that the Board talked about,
25 and that to the extent they do vary, which they

1 acknowledged, the value of having a uniform rule
2 outweighed the value of considering those factors.

3 If the Board had determined that all of the
4 factors that it always considers in every other industry
5 were irrelevant and didn't change its mind, I don't think
6 that determination, frankly, could survive scrutiny.

7 These are the factors that the Board considers relevant in
8 every other industry, and that it has considered relevant
9 in hospital cases for the last 17 years. In case after
10 case applying these factors, the Board has found that one
11 or another of the units that are now before it and that
12 are now deemed to be appropriate in every case, were in
13 fact inappropriate, and have held that those units would
14 not be allowed.

15 Now, for them to suddenly, after making all
16 these decisions over the years under both the disparity of
17 interest standard and the community of interest standard,
18 for them to suddenly decide no, these are no longer
19 relevant, I don't think that could survive scrutiny.

20 But that's not what they have done in this case.
21 What they have done in this case is say they don't vary in
22 these respects, mostly, but to the extent they do vary in
23 these respects we're not going to consider that. We no
24 longer think that that variation is something we have to
25 think about. We think, instead, that the value of a

1 uniform rule outweighs that.

2 Well, that might be so, and I think that that
3 might be an interest that is recognized in most
4 rulemaking, but it's an interest that Congress foreclosed
5 by requiring the Board to decide in each case that the
6 particular bargaining unit is appropriate.

7 QUESTION: You're really saying that the rule
8 ends up in -- the Board just refuses to decide what an
9 appropriate unit is?

10 MR. HOLZHAUER: It does. Exactly. It refuses
11 to decide -- well, to consider the facts and circumstances
12 of a particular hospital in deciding whether one of the
13 eight units is appropriate.

14 QUESTION: Well, I know, but I suppose the Board
15 would say well, if we -- if we really didn't care about
16 administrative efficiency or saving time or a lot of
17 things like that we would decide this particular case
18 differently, but we value whatever it is we're valuing so
19 much that we will disregard that otherwise we would find
20 this unit to be inappropriate.

21 MR. HOLZHAUER: That's correct. That's correct.
22 The Board has decided that the value of uniformity, the
23 value, the efficiency that comes from uniformity, and
24 that's what it says in its rulemaking, outweighs the
25 desire to engage in case-by-case determination in those

1 cases.

2 QUESTION: Regardless of what -- of what they
3 would decide if they weren't so much interested in
4 uniformity.

5 MR. HOLZHAUER: That's right. Exactly. And in
6 fact, the extraordinary circumstances --

7 QUESTION: Why are they interested in
8 uniformity?

9 MR. HOLZHAUER: I think that they have found --

10 QUESTION: Just administrative efficiency?

11 MR. HOLZHAUER: I think it's administrative
12 efficiency. As we know, and we can understand the Board's
13 frustration in this case, over 13 years the Board lost
14 case after case in this area. The courts of appeals kept
15 refusing to enforce case after case involving unit
16 determinations.

17 QUESTION: Now you just want them to lose
18 another one, I guess.

19 MR. HOLZHAUER: That's right. I would hope so.

20 (Laughter.)

21 MR. HOLZHAUER: The Board in its extraordinary
22 exceptions rationale -- explanation includes a long list
23 of factors that it will no longer consider as appropriate,
24 and then it goes on to say not only are these factors
25 inappropriate, but everything we have ever seen in 13

1 years of adjudicating these cases are inappropriate, even
2 though in many of those adjudications the Board found that
3 a unit or more than one unit that it now designates as
4 appropriate was inappropriate. We won't even think about
5 these factors anymore.

6 QUESTION: Yeah, but not because they're not
7 really inappropriate. It's because they want to save some
8 time.

9 MR. HOLZHAUER: They want the value of a rule,
10 right. They want to save time. They want administrative
11 efficiency. And I'm not saying that administrative
12 efficiency might not be a suitable value. What I'm saying
13 is that administrative efficiency and that kind of
14 exercise of administrative efficiency is foreclosed by
15 Section 9(b) and by the requirement that the Board has
16 acknowledged over the years, that Congress has
17 acknowledged over the years, that Section 9(b) requires
18 case-by-case determinations.

19 QUESTION: Would you be here, would you be here
20 if the rule had said that we're going to treat every
21 hospital the same, namely we're going to have only one
22 unit in every hospital?

23 MR. HOLZHAUER: I suspect that if they made that
24 thing I would be here, but I would be on the other side of
25 the table.

1 (Laughter.)

2 MR. HOLZHAUER: I strongly suspect the AFL-CIO
3 would be here saying that this rule violates the "in each
4 case" requirement.

5 QUESTION: But you would say -- but you would be
6 supporting the rule.

7 MR. HOLZHAUER: Well, in that case certainly the
8 interests of --

9 QUESTION: (Inaudible) possibly do it.

10 MR. HOLZHAUER: -- the interests of the AHA
11 might favor such rule, but on the other hand I would have
12 to submit that the "in each case" language prohibits that
13 kind of uniform rule as well.

14 QUESTION: Exactly.

15 MR. HOLZHAUER: Even if it had one unit or two
16 units or the statutory minimum of three units,
17 professional, nonprofessional, and guard.

18 QUESTION: In labor cases generally other than
19 in the health care area, if employees agree upon a unit,
20 is that generally accepted by the Board?

21 MR. HOLZHAUER: The employees cannot agree upon
22 a unit, no. There is a procedure where if the employer
23 and the union seeking the unit agree, that the Board will
24 ordinarily agree to that unit, provided it's not clearly
25 inappropriate or violates the statute.

1 QUESTION: Suppose all of the employees make a
2 submission as to what they want the unit to be. Does the
3 Board accept that, or does it -- it just doesn't work that
4 way, is that what you're telling --

5 MR. HOLZHAUER: It generally doesn't work that
6 way, although if, if a union and an employer says we want
7 it, that would be one thing. Although still there are
8 some standards, like the professional/nonprofessional
9 standard, that the Board has to work from, and it has to
10 determine whether the unit is appropriate. If the
11 employer and the union, and the unions agree that this is
12 an appropriate union -- unit, we'll have an election, the
13 Board ordinarily will go ahead with that. But it can
14 determine that that's inappropriate.

15 QUESTION: Mr. Holzhauser, is it correct, as is
16 charged in respondents' brief, that the, your client, the
17 American Hospital Association once upon a time took just
18 the opposite position, that the -- it was necessary for
19 the NLRB to develop a, quote, "uniform national approach
20 to appropriate units in the health care industry"?

21 MR. HOLZHAUER: I believe that was correct. In
22 fact most, much of that explanation occurred during the
23 rulemaking proceeding when the Board was, when the
24 American Hospital Association, once the Board decided to
25 engage in rulemaking, decided it was going to get the best

1 rule it possibly could. But the fact of the matter is --

2 QUESTION: No, this was before the rulemaking, I
3 think. This was much earlier when the Board was still
4 proceeding case by case. You were knocking down these
5 cases in the courts of appeals because you were saying
6 it's necessary to have a uniform national approach. So
7 they now go through a rulemaking and adopt a uniform
8 national approach, and you change the tune.

9 MR. HOLZHAUER: Well, let me respond in two
10 different ways. First of all, the "in each case"
11 requirement requires case-by-case consideration of
12 bargaining units, and if the American Hospital Association
13 took a contrary position and made an argument that is
14 contrary to what the statute means, the American Hospital
15 Association was wrong.

16 Secondly, a uniform rule or a uniform -- that's
17 right, a uniform rule or a uniform policy does not have to
18 be a conclusive presumption. It doesn't have to say we
19 will regard these units as appropriate in each and every
20 case, regardless of the facts and circumstances of each
21 case. A uniform rule can allow for meaningful exceptions,
22 which is not what this rule does.

23 In fact a uniform rule can be like the rules
24 that the Board has established in other industries. In no
25 other industry has the Board established a rule that

1 particular units and only those particular units will be
2 appropriate in every case. In those few industries where
3 the Board has established presumptions, employers are
4 given the full opportunity to rebut those presumptions and
5 to show that the facts and circumstances of a particular
6 workplace warrant a different result.

7 QUESTION: Has any other industry litigated as
8 assiduously as yours?

9 MR. HOLZHAUER: I don't know. I don't know
10 that. I assume that there has been litigation in some
11 industries, but there has never been a rulemaking like
12 this. And also, our industry had a much different history
13 than other industries. Our industry was not covered by
14 and large by the National Labor Relations Act, at least
15 the dominant nonproprietary sector was not covered by the
16 National Labor Relations Act until 1974, at least between
17 1947 and 1974. And the announcement that it would
18 suddenly cover did give rise to an increased amount of
19 litigation. There is no question about that. But other
20 industries have litigation over units and appropriate
21 units over the years.

22 But in all those other cases the employer is
23 allowed to offer evidence to rebut the presumption and to
24 show that the facts and circumstances of the particular
25 workplace warrant a different result. There is no such

1 possibility under the Board's rule, and the Board
2 emphasized in its rulemaking that it was not merely
3 establishing rebuttable presumptions that the eight units
4 were correct.

5 I think it's important to realize that
6 acceptance of our argument would not mean that those other
7 vastly different rules would be invalid. When those other
8 rules are applied, the Board continues to give case-by-
9 case consideration to the facts and circumstances of each
10 employer and to comply with the "in each case"
11 requirement.

12 We're not engaging in any broad attack on
13 presumptions or upon the Board's rulemaking authority.
14 We're merely making the argument that in this one area,
15 where the statute requires case-by-case consideration, the
16 Board must take into account the circumstances of each
17 employer and cannot adopt rules that eliminate that
18 consideration.

19 Now, our argument, in addition to the original
20 language and history of the National Labor Relations Act
21 --

22 QUESTION: If the Board had just made it a
23 rebuttable presumption, how often do you think you would
24 ever win a case?

25 MR. HOLZHAUER: Well, in other industries the

1 cases are won quite often, and I think we would win cases
2 quite often if the facts and circumstances showed that a
3 different unit was appropriate --

4 QUESTION: I know, but you would have to
5 convince the Board that the facts or circumstances really
6 showed it though.

7 MR. HOLZHAUER: That's right. That's right.
8 And I think we would be able to that. And I think we
9 would be able to do that in numerous cases. Now I'm not
10 sure whether it makes sense to say that in those
11 circumstances the Board --

12 QUESTION: More often than you would by showing
13 -- what do they call it under this rule -- exceptional
14 circumstances?

15 MR. HOLZHAUER: Extraordinary circumstances.
16 Yes. Extraordinary circumstances is an empty exception.
17 Here the Board says that all of the factors --

18 QUESTION: How do you know it is?

19 MR. HOLZHAUER: Because the Board says it is.

20 QUESTION: What, it's empty? We've got it in
21 there, but it means nothing.

22 MR. HOLZHAUER: Well, the Board has said, the
23 Board, first of all, has not said at any time in its
24 rulemaking proceeding that the extraordinary circumstances
25 exception is designed to allow case-by-case determination

1 of bargaining units. It basically said that it was an
2 escape valve --

3 QUESTION: Well, it says in any case, and in any
4 case there may be extraordinary exceptions.

5 MR. HOLZHAUER: But those extraordinary
6 circumstances that could exist exclude all of the factors,
7 all of the facts and circumstances that are most relevant
8 in every other industry.

9 QUESTION: Is that what the rule says?

10 MR. HOLZHAUER: That's what the rule says.
11 That's what the Board has explained the rule as saying in
12 its notice of proposed rulemaking.

13 QUESTION: Does extraordinary circumstance mean
14 something other than a bargaining unit that would have
15 five or less members?

16 MR. HOLZHAUER: It's hard to believe, under the
17 circumstances that the Board has said, that it could
18 possibly mean anything more than that. The extraordinary
19 circumstances exception says that every kind of issue,
20 every kind of factor that we have seen in the past 13
21 years of adjudicating hospital cases and all of these
22 other factors that we have seen in other cases cannot be
23 considered extraordinary circumstances. Things like the
24 size of the institution, the services provided, functional
25 integration of employees, which is a critical factor in

1 every other industry, contact among employees, different
2 kinds of concepts that are important in the hospital
3 industry, multi-competent workers, people who are cross-
4 trained, team care, none of these things can be considered
5 --

6 QUESTION: Maybe it thinks these factors never
7 -- that's why it had the rulemaking. Maybe it found that
8 these factors never exist, that there isn't any functional
9 integration between -- between nurses and doctors, or
10 between nurses and guards, or between nurses and
11 maintenance workers. Maybe it has found that as a result
12 of its rulemaking. It hasn't conducted rulemakings for
13 other industries.

14 MR. HOLZHAUER: Well, what has happened, what
15 has happened in this rulemaking is two things. First of
16 all, it said that we don't think these differences exist
17 in significant extent in this industry. I think that's
18 arbitrary and capricious, and we have made that argument.

19 Secondly though, it says that to the extent it
20 does exist, and they acknowledge these variations do exist
21 to a certain extent, we will disregard them because we
22 think the value of a uniform rule exceeds the value of
23 going through this case-by-case consideration. Well, I
24 think that's a determination that Congress said the Board
25 can't engage in.

1 I would like to reserve the remainder of my
2 time.

3 QUESTION: Very well, Mr. Holzhauer.
4 Mr. Shapiro.

5 ORAL ARGUMENT OF DAVID L. SHAPIRO
6 ON BEHALF OF THE RESPONDENTS

7 MR. SHAPIRO: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 After 13 years of extensive controversy,
10 uncertainty, delay, and expense, the Labor Board decided
11 to initiate a rulemaking proceeding on the vexing question
12 of unit determinations in the health care industry. After
13 some 2 years, which included two very extensive notices of
14 proposed rulemaking, a number of significant modifications
15 in the proposed rule, consideration of some 3,500 pages of
16 testimony from over 140 witnesses, and 1,800 written
17 submissions, the Board formulated its final rule,
18 specifying the types of bargaining units that in the
19 absence of extraordinary circumstances would be considered
20 appropriate on the filing of a proper petition for most
21 acute care hospitals.

22 I sure doubt, parenthetically, as Mr. Holzhauer
23 has mentioned, that the rule specifically contemplates the
24 possibility of a union petition for a combination of
25 units, and in that sense the regulation is significant in

1 imposing a ceiling rather than a floor.

2 This regulation is fully consistent with the
3 Board's authority under the Labor -- under the Labor laws,
4 it is firmly rooted in an exhaustive investigation and
5 analysis of the record --

6 QUESTION: Mr. Shapiro, would you say the rule
7 would be valid even if there were no extraordinary
8 circumstances --

9 MR. SHAPIRO: I believe that it would, Your
10 Honor.

11 QUESTION: -- exception?

12 MR. SHAPIRO: Yes, I believe that it would. I
13 think the Board was very wise in including an
14 extraordinary circumstances exception in the record -- in
15 the rule, but I do not believe that anything in the act or
16 the legislative history of the 1974 act requires such an
17 exception, or indeed analogous precedents of this Court in
18 other areas. The rule is in fact, we submit, a model of
19 how the administrative process should work.

20 Now it has been challenged by the petitioner --

21 QUESTION: Even though it's the first time in
22 history they have ever tried to do it?

23 MR. SHAPIRO: It's unfortunate that it has taken
24 so long, Your Honor.

25 QUESTION: They did pretty well on the first

1 try, is that it?

2 (Laughter.)

3 MR. SHAPIRO: I think they did magnificently,
4 because they knew how important this process was.

5 QUESTION: A lot of courts and commentators have
6 criticized the Labor Board in the past, haven't they --

7 MR. SHAPIRO: Yes, indeed.

8 QUESTION: -- for not conducting rulemaking?

9 MR. SHAPIRO: Yes, indeed, and I think the Board
10 has been responsive to those criticisms in an area where
11 there was a singular need for that kind of response.

12 QUESTION: 13 years of litigation, though.

13 MR. SHAPIRO: Well, it -- that was a factor, no
14 question about it.

15 (Laughter.)

16 QUESTION: Your comment that this is a ceiling
17 on the number of groups, because there can be fewer groups
18 if the employees so elect, that excludes any participation
19 by the employer in that determination, and that, I take
20 it, and I take it also that that is inconsistent with the
21 Board's rule in all other areas, where the employer has a
22 voice.

23 MR. SHAPIRO: Well, the employer -- I think it's
24 important to establish at the outset that the employer's
25 role in the petitioning process is a very limited one. It

1 is the union as the representative of the employees that
2 chooses the bargaining unit to be sought through petition.
3 The only time that an employer is authorized to petition
4 under the act is when confronted with a union demand for
5 recognition. And if the employer files a petition, my
6 understanding is that by withdrawing the demand the union
7 can effectively boot that petition. The petition route is
8 a route that allows the union, as the representative of
9 the employees, to seem an appropriate unit.

10 Now, when a petition is filed it is not open to
11 the employer to argue that another unit is also
12 appropriate or even much more appropriate. The employer's
13 burden would be to show that this unit is not appropriate.
14 And of course the whole purpose of this regulation was to
15 establish rules under which we acknowledge indeed we are
16 very --

17 QUESTION: Well, that's just, that's what
18 exactly the employer wants to do in this case, is to show
19 that it's inappropriate.

20 MR. SHAPIRO: Well, the employer --

21 QUESTION: And the Board won't let him.

22 MR. SHAPIRO: You mean in this rulemaking
23 proceeding? They want to attack the rule as arbitrary and
24 capricious because they, they claim that this rule cannot
25 properly establish appropriate units in the industry.

1 In a particular proceeding, of course, the
2 operation of the rule would effectively preclude the
3 employer from trying to show that a given unit within the
4 rule is not appropriate unless in the very limited case,
5 and we acknowledge it is very limited, extraordinary
6 circumstances --

7 QUESTION: Did the employers participate -- did
8 the association participate in this rulemaking and oppose
9 this rule?

10 MR. SHAPIRO: Yes they did, Your Honor. There
11 was suggestion from the industry --

12 QUESTION: And they had their full say in the
13 hearing?

14 MR. SHAPIRO: Oh, yes.

15 QUESTION: Too much?

16 (Laughter.)

17 MR. SHAPIRO: At least enough.

18 (Laughter.)

19 MR. SHAPIRO: The rule is challenged here by
20 petitioner on three grounds, although Mr. Holzhauer really
21 concentrated only on one of them in his oral argument.
22 First, that the rule is inconsistent with the language of
23 Section 9(b) and particularly the "in each case" language.
24 Second, that the rule is inconsistent with an admonition
25 that appears in certain committee reports accompanying the

1 1974 amendment to the act which removed the exemption for
2 nonprofit hospitals. And finally, that the rule is
3 arbitrary and capricious.

4 The court of appeals, we submit, properly
5 rejected each of those three grounds. It properly
6 rejected the reliance on Section 9(b) because the "in each
7 case" requirement does not preclude the Board from
8 formulating rules of decision that govern in each case,
9 that effectively supply rules of relevance, and that help
10 to assure that like cases will be treated alike.

11 QUESTION: What do the "in each case"
12 requirement, what obligation does that impose on the
13 Board, Mr. Shapiro?

14 MR. SHAPIRO: Your Honor, we think the
15 obligation of the "in each case" requirement is an
16 obligation to apply whatever standards and rules may exist
17 in the context of a particular proceeding to determine the
18 appropriate unit.

19 If you go back to the history of the 1935
20 legislation, the "in each case" language was one of a
21 number of amendments proposed by Secretary of Labor
22 Bergens as she described it for the sake of clarity. That
23 clarification may not have been essential, but it was
24 helpful because the very specific petition requirement of
25 Section 9(c), which the Board later developed and which

1 now appears in Section 9(c), was not a part of the
2 original act. The original Section 9(c) was a good deal
3 vaguer about how the process worked, and in that context
4 we believe the "in each case" provision was a useful one.

5 We do not believe that that clarifying language
6 should be given the radical and very destructive
7 definition that petitioner would give it here. It does
8 not preclude the Board from formulating rules of decision
9 that facilitate a determination that in a particular case
10 there is no genuine issue of material fact. It does not
11 require the Board to -- to reinvent the wheel in each
12 case.

13 Now, this argument, we believe, has two very
14 strong supports. One is that very similar arguments have
15 over the past 35 years been rejected by this Court in a
16 series of decisions beginning with Storer Broadcasting
17 back in the 1950's. The argument has been repeatedly made
18 that particular regulations cannot survive challenge, not
19 because they clash with some substantive provision of law,
20 but because they are at odds with the statutory
21 requirement of an opportunity for a hearing or a statutory
22 requirement of a individualized determination. This Court
23 has repeatedly rejected those challenges on the grounds
24 they do not undermine the fundamental administrative
25 authority to formulate rules of decision. It did so in

1 the Storer case in the 1950's, in the Texaco case in the
2 1960's --

3 QUESTION: Was there similar language in the
4 Communications Act to the "in each case" language in the
5 Labor Act?

6 MR. SHAPIRO: In a way it seems to me, Your
7 Honor, that there was stronger language, because in the
8 Communications Act the statute said that if the agency
9 cannot decide that a particular application, a particular
10 license, would be in the public interest, then it was
11 required to set the case for hearing.

12 Now what the communications decision --
13 commission did was to say that if a station owner already
14 owned five stations, he could not get a sixth. That was a
15 flat rule. There was a waiver procedure provided, but the
16 rule in a sense facilitated, permitted summary judgment.
17 If a station owner already had five stations, there was no
18 genuine issue of material fact that required a hearing.

19 This language, "in each case," says nothing
20 about a requirement of a hearing, and does not address the
21 sources of law to be applied in each case.

22 Now the, the precedent of the Storer case has
23 been repeatedly applied by this Court, in Texaco in the
24 1960's, more recently in WNCN, in Heckler and Campbell,
25 and just last month in the Mobile case. So not only is

1 there a long line of precedent in this Court, there is
2 also, we believe, a consistent view of the Labor Board
3 that squares with its position in this proceeding.

4 QUESTION: What were the circumstances, or what
5 was the reason that the Board undertook this rulemaking
6 and arrived at this result, rather than doing what it did
7 for 13 years?

8 MR. SHAPIRO: Well, I think there were a number
9 of reasons, Your Honor. I think one was that the Board
10 had had a good deal of difficulty both understanding the
11 industry, acquiring enough information, and in persuading
12 the courts of appeals that it was acting consistently with
13 its legal obligations.

14 The courts of appeals were widely divided on
15 what those obligations were, very widely divided, but they
16 all did seem to agree on one thing, and that is that the
17 Board had to address the problem as a distinctive problem
18 in a distinctive way. And I think the Board was both
19 responding to that and to its very acute need for more
20 information by undertaking this proceeding.

21 I also believe that part of what the Board was
22 doing was an echo of what it tried to do in the first St.
23 Francis case, that is the Board was mindful of the
24 admonition in the 1974 committee reports that there should
25 not be too many bargaining units, and one thing it tried

1 to do in its first St. Francis case was to set a ceiling
2 on the number of bargaining units that would be authorized
3 in the industry to prevent the kind of balkanization that
4 had occurred in the construction industry, which is an
5 industry that had a very large number of different skills
6 and crafts, very much like a hospital industry.

7 And so one of the objectives of this rule, we
8 believe, and a very significant one, was to establish a
9 cap on the number of units which would apply in each case.

10 QUESTION: You don't think they had any reason
11 just to administrative efficiency or just some abstract
12 value of uniformity --

13 MR. SHAPIRO: I think administrative --

14 QUESTION: -- without which they might have
15 found some of these units to be inappropriate?

16 MR. SHAPIRO: I think administrative efficiency
17 was a factor. I think it has been vastly overrated in the
18 argument that Mr. Holzhauer just made. I think that what
19 was motivating the Board -- the Board here, and what it
20 made very clear in its lengthy opinions, was a desire to
21 determine whether despite the variations among hospitals
22 they had enough in common so that as a matter of law they
23 should be treated alike. That their goal ultimately was
24 to focus on the issue whether a certain class of acute
25 care hospitals had enough in common to warrant this kind

1 of treatment.

2 They recognize that no two hospitals are alike,
3 just as no two fingerprints are alike, no two people are
4 alike. The question remains whether a valid legal
5 generalization can be made about fingerprints, people, or
6 hospitals. The Board concluded that it could.

7 Now, I think it's probably true, Your Honor,
8 that as a result of the rule individual cases might be
9 decided differently. Indeed, if that were not so there
10 seems to be little point in having the rule. And the
11 Board has made a conscious and we believe wise decision
12 that the tradeoff is worth it. Indeed, there is some
13 indications that deciding of accordance with the rule --

14 QUESTION: There's a tradeoff, and what's traded
15 off against what?

16 MR. SHAPIRO: What is traded off is perhaps
17 certain marginal cases where a particular proceeding might
18 be decided differently in the sense that a given unit was
19 inappropriate, and yet it doesn't qualify for the
20 extraordinary circumstances exception and is governed by
21 the rule.

22 QUESTION: Well, in that kind of a case is the
23 Board really acting consistent with the direction to
24 decide in that particular case what unit is appropriate?

25 MR. SHAPIRO: Yes, I believe it is, Your Honor,

1 because I -- I believe that the "in each case" requirement
2 does not stand in the way of the Board's articulating
3 rules that are to be applied in each case.

4 QUESTION: But you just said that except for
5 this general rule that they have now made, that they would
6 decide the case differently. If they really got down to
7 brass tacks and decided, and looked at the case, they --
8 you just said they would -- might decide it differently.

9 MR. SHAPIRO: Well, yes, they might decide it
10 differently for a wide variety of reasons. One might turn
11 simply on --

12 QUESTION: One of them is that the hospitals are
13 different.

14 MR. SHAPIRO: Hospitals are different. The
15 question is are they so different that the Board is
16 precluded from this kind of generalization about when
17 units are appropriate. There are problems involved in
18 leaving decision to the discretion of the adjudicator
19 every time, and in our view 9(b) does not require that.
20 Those problems include the possibility that the result may
21 turn on the particular three-member panel that is sitting
22 -- out of the five members of the Board in that case --
23 might turn on the particular skills of the adversaries.
24 One of the great virtues of the administrative rulemaking
25 process is to allow agencies to narrow their discretion,

1 not just to avoid costly and expensive litigation,
2 although of course --

3 QUESTION: But it has been done only in the area
4 of hospitals by the Board, has it not?

5 MR. SHAPIRO: Your Honor, this kind of
6 regulation is novel. But I think --

7 QUESTION: I didn't quite get your --

8 MR. SHAPIRO: This regulation is novel. There
9 is no other industry that has a comparable regulation.
10 But the Board has in fact in the past formulated rules of
11 decision that are not simply presumptions, as petitioner
12 would suggest. The Board has in the past formulated
13 conclusive presumptions in the area of unit determination.

14 For example, in the tenth annual report which
15 petitioner relies on where the Board said that under 9(b)
16 they are required to make a decision on the facts of each
17 case, the Board articulated a number of rules that it had
18 developed.

19 Some of those rules were conclusive rules. For
20 example, this was before Taft-Hartley, the Board had a
21 conclusive rule that supervisors would never be put into
22 the unit with the people they supervise unless there was a
23 long history of bargaining in that very unit. The Board
24 had a conclusive rule that confidential employees would
25 not be put in any unit. The Board had a conclusive rule

1 that people who monitor other people would not be put in a
2 unit with the people they monitor.

3 In the postal industry, after the enactment of
4 the Postal Reform Act, the Board announced what was
5 essentially a conclusive rule that a petition would be
6 dismissed unless it sought to represent all the employees
7 in a region or section unless it submitted on a nationwide
8 basis. These were -- had it been crafted --

9 QUESTION: That was a rule established by
10 adjudication.

11 MR. SHAPIRO: Yes, Your Honor, but it was
12 conclusive in character.

13 QUESTION: But it was a very -- with a result
14 very similar to this rule that has been adopted.

15 MR. SHAPIRO: Yes. Yes, Your Honor. The Board
16 in a wide variety of areas has done its job well in
17 adjudication in establishing a range of rules that vary
18 from mild preferences to very strong presumptions. For
19 example, in the single facility area the Board has said
20 that units will be restricted to a single facility unless
21 a very strong showing that more than one facility operates
22 on an integrated basis can be made, to rules that are
23 truly conclusive. We submit it is not a defect of this
24 rule that it increases certainty and predictability. It's
25 a virtue.

1 I would like, if I may, to address the
2 admonition in the 1974 reports, because it has been such a
3 large part of the litigation over the years, and because
4 petitioner places so much emphasis on that in its brief.

5 The Board's view, as articulated in its decision
6 in this case, is that the admonition in those committee
7 reports, which neither accompanies nor explains any
8 relevant statutory language, it does not have any binding
9 legal effect. The admonition is a request to the
10 committee, to the Board by the relevant committees. We
11 submit that it is a matter essentially between the Board
12 and the committees of Congress that wrote those
13 admonitions.

14 Now, we also contend that even if the
15 admonitions were incorporated in the statute itself that
16 the Board has fully complied with their letter and their
17 spirit. The admonition, to begin with, does not, despite
18 petitioner's heroic efforts, does not speak at all to the
19 choice between rulemaking and adjudication. And indeed
20 there is nothing in the legislative history of this
21 legislative history that suggests that the admonition is
22 concerned with the choice between rulemaking and
23 adjudication. The Board -- the admonition asks the Board
24 to give due consideration to preventing proliferation.

25 The Board has done that in this rule in two very

1 significant ways. First of all, it has paid very close
2 attention to the problem of the number of units. It has
3 determined on the basis of the record and its experience
4 that there is no domino effect in the hospital industry,
5 that the authorization of a particular unit, and most of
6 the units that have been authorized look like the units
7 that are specified in this regulation, that the
8 authorization of a particular unit --

9 QUESTION: Are you suggesting that over all
10 these years of litigation about hospitals, that their
11 case-by-case adjudication sort of pointed towards eight
12 units?

13 MR. SHAPIRO: By and large, Your Honor, yes.
14 And the units that are specified are the units that in
15 general have been traditionally recognized.

16 Now, physicians rarely seek units. Guards
17 rarely seek units. But the history shows, most of the
18 time by consent and sometimes by litigation, that when
19 registered nurses seek a unit a registered nurses' unit
20 will be authorized. In fact the two main controversies
21 that have led to litigation are rather limited ones. One
22 involves registered nurses and whether they should be
23 combined with other professionals, and the other involves
24 separate maintenance workers.

25 But a report by the Federal Mediation and

1 Conciliation Service shows that of all hospitals that have
2 bargaining units today, 55 percent have only one
3 bargaining unit, 80 percent have two or less, and 90
4 percent have three or less. And the Board was conscious
5 of that. The Board also, as I have suggested, was very
6 conscious of the need to put a cap on the number of units
7 to prevent the kind of balkanization that occurred in the
8 construction industry.

9 So the Board has ruled that all other
10 professionals are confined to one unit, that all technical
11 workers, despite the very substantial difference in their
12 skills and their functions, are combined in one unit, that
13 all skilled maintenance workers, despite the balkanization
14 od -- of workers in other industries, are confined to one
15 unit. So the Board has been concerned about the numbers
16 problem.

17 The Board has also investigated exhaustively the
18 question whether the evils thought to come with
19 proliferation are associated with these bargaining units,
20 and the Board has determined that they are not. The
21 statistics indicate that the strike rate in the hospital
22 industry is quite low, lower than in other industries, and
23 indeed there is empirical evidence to suggest that the
24 size of units, or -- I'm sorry, the number of units is
25 inversely related to the likelihood of a strike. Beyond

1 that there is evidence, and indeed it doesn't take a lot
2 of evidence to know that the larger the bargaining unit,
3 the more disruptive a strike is like to be, especially in
4 the absence of a sympathy strike.

5 QUESTION: Mr. Shapiro, to what extent -- this
6 is to show my ignorance about this area, but to what
7 extent is there room under the regulation for there to be
8 debate and divergence over whether a particular employee
9 is, for example, a professional or a technical employee?

10 MR. SHAPIRO: That question is effectively left
11 open in most areas.

12 QUESTION: That has to be resolved in each case,
13 does it?

14 MR. SHAPIRO: There are many questions that have
15 to be resolved in each case. Some questions go to unit
16 determination itself, for example single facility or
17 multi-facility, and many questions go to closely related
18 issues, employee placement, for example, the question that
19 you raise, dual-capacity employees, a wide variety. In
20 fact, the, in our brief, I think it was at note 14, we
21 indicated a whole raft of questions that remains for
22 determination in each case.

23 QUESTION: Mr. Shapiro, did I understand you to
24 say that it's very likely that an awful lot of hospitals
25 will, as a matter of fact will not have the eight

1 bargaining units?

2 MR. SHAPIRO: That's correct, Your Honor.

3 That's correct. That's correct.

4 QUESTION: How many -- what percentage?

5 MR. SHAPIRO: Oh, I can't give you a percentage,
6 except that I don't think there are many hospitals out
7 there that have been operating under the 1974 act that
8 have anywhere approximating those -- that number of units.

9 QUESTION: So this -- you're saying this is just
10 a ceiling?

11 MR. SHAPIRO: This is a -- for all practical
12 purposes --

13 QUESTION: Just a ceiling, and -- so in each
14 case it's going to have to be decided which of the eight
15 units are going to be --

16 MR. SHAPIRO: Depending on what is sought. Now,
17 we acknowledge --

18 QUESTION: Depending on what?

19 MR. SHAPIRO: On what is sought.

20 QUESTION: So it -- and, I take it that the
21 Board just isn't automatically going to agree with --
22 every time with what is sought?

23 MR. SHAPIRO: Well, I think the Board has
24 indicated, Your Honor, that if a -- let's take a
25 hypothetical. If a union seeks a unit of registered

1 nurses -- that's one of the most controversial areas --
2 and the employer comes back and says I want an opportunity
3 to show that in this hospital a unit of registered nurses
4 is appropriate, let's say because we operate in teams here
5 --

6 QUESTION: Will they listen to that?

7 MR. SHAPIRO: Not if that's all that the
8 employer says, unless there is some, as the Board has
9 said, very extraordinary circumstance. The Board has in
10 fact not only dealt with these cases over many years, but
11 has dealt very exhaustively in the rulemaking proceeding
12 with that kind of argument.

13 QUESTION: Wouldn't it be the case that
14 sometimes there will be more than one union involved in
15 the case?

16 MR. SHAPIRO: Well, if they're, if they're
17 competing unions which are seeking different formulations,
18 I must say one important question I'm not sure of the
19 answer of, if you have one union that comes into --

20 QUESTION: Well, at least in each case they're
21 going to have to decide, aren't they?

22 MR. SHAPIRO: Cases involving rival claims where
23 one union wants a broader unit than another union, my
24 reaction to that is that would be a case that the Board
25 would necessarily have to resolve. The regulation may be

1 helpful, but I don't quite see how the regulation could
2 determine it if one union were seeking a unit that
3 included what another union was seeking. But it is true
4 that in the main --

5 QUESTION: Why wouldn't it? I thought the rule
6 was that if any of these sub-units is sought, it is
7 granted.

8 MR. SHAPIRO: That may be. I'm trying to work
9 this through because I just hadn't thought of it. If one
10 unit of a union seeks a unit of skilled maintenance
11 workers, and another unit of the union wants a
12 combination, I guess that's right, that the union that
13 seeks the unit of skilled maintenance workers would
14 prevail.

15 QUESTION: Wouldn't it be pretty unlikely that
16 they would both have a majority --

17 MR. SHAPIRO: It's not inconceivable,
18 particularly if the skilled maintenance workers are a very
19 small number of the larger unit.

20 QUESTION: I see.

21 MR. SHAPIRO: But in cases, of course, where
22 combined units are sought, the Board would determine
23 whether that was appropriate in that case.

24 I would like, if I may, just --

25 QUESTION: But the Board would take a union's

1 suggestion that, that all technical employees, all skilled
2 maintenance employees, and all business office clerical
3 employees should be included in one unit?

4 MR. SHAPIRO: If the union sought that?

5 QUESTION: Um.

6 MR. SHAPIRO: That would -- that would be
7 consistent with the regulation. The Board might not
8 necessarily approve it. The Board would have to find that
9 that was an appropriate unit.

10 QUESTION: Yes.

11 MR. SHAPIRO: But the regulation would not
12 preclude that finding.

13 QUESTION: It would not what?

14 MR. SHAPIRO: Preclude that finding, because the
15 regulation allows a union to seek a combination.

16 QUESTION: So that in each case there might be
17 different units than what is, are specified in the eight,
18 in the list of eight?

19 MR. SHAPIRO: If the union sought it, yes, Your
20 Honor.

21 Thank you. My time is up. Thank you.

22 QUESTION: Thank you, Mr. Shapiro.

23 Mr. Holzhauer, do you have rebuttal? You have 3
24 minutes.

25 REBUTTAL ARGUMENT OF JAMES D. HOLZHAUER

1 ON BEHALF OF THE RESPONDENT

2 MR. HOLZHAUER: Yes. Thank you. It's
3 interesting that the Board refers here to the first St.
4 Francis case, and says that it is basically trying to
5 reestablish the first St. Francis approach. In that first
6 St. Francis case the Board held that the in each case
7 language of Section 9(b) precludes the kind of presumption
8 that it had in the past that a nurses unit, an R.N. unit,
9 would be appropriate in each and every case.

10 What this rule does is it says if a union comes
11 and asks for any one of these eight units, that unit is
12 appropriate. Period. The employer cannot offer facts and
13 circumstances of a particular employer, or a particular
14 workplace, or a grouping of employees to rebut that
15 presumption.

16 QUESTION: Will the Board inevitably accept the
17 union's choice?

18 MR. HOLZHAUER: The Board will accept the
19 union's choice. Yes.

20 QUESTION: Inevitably?

21 MR. HOLZHAUER: The only time when the Board
22 will not accept the union's choice is if it's inconsistent
23 with these eight units.

24 Frankly, I think that's as wrong --

25 QUESTION: What if they -- what if the union --

1 what about the question I just asked Mr. Shapiro? The
2 union comes in and says we want a unit made up of numbers
3 4, 5, and 6?

4 MR. HOLZHAUER: The second notice of proposed
5 rulemaking, and the second rule said that we will assume
6 that these are always appropriate. Now it says in the
7 final rule that no, we're going to look at it because we
8 don't want to have inappropriate groupings together, such
9 as perhaps a physicians and guards unit. But ordinarily
10 the Board will consider those to be appropriate. But it
11 will look --

12 QUESTION: Even though they group these, what
13 would otherwise be separate units?

14 MR. HOLZHAUER: Right. Combined units will be
15 regarded as ordinarily appropriate, but not always
16 appropriate, when requested by the union. They will never
17 be regarded as appropriate when the employer makes that
18 kind of request.

19 QUESTION: So at least to this extent it has to
20 be case-by-case adjudication?

21 MR. HOLZHAUER: That one issue, where they
22 decide to combine units, yes. But when, let's say,
23 there's a petition for a unit of registered nurses and the
24 employer goes up, as it can in every other industry and as
25 it has always done in this industry, and says this unit is

1 inappropriate because of the way we staff, or where they
2 say we're going to have a service and technical unit that
3 is separate, as it said for example in the Vicksburg
4 Hospital case, the Jewish Hospital Association case, and
5 all three cases mentioned in the admonition, we're going
6 to say that these units are not appropriate. The Board is
7 going to say we will not listen to that argument. We will
8 not consider the facts and circumstances of this employer
9 if the union is asking for one of the eight units that's
10 in the rule.

11 The argument here from the Board is basically
12 that the 9(b) language adds nothing to the statute.
13 Section 9(c) requires a hearing in each case. All the
14 factors that the Board is still going to consider, the
15 issues that they are going to consider, don't go really to
16 which units are appropriate, but go to the kinds of things
17 that are appropriate under Section 9(c) and that have to
18 be decided. 9(b), where it says the Board shall determine
19 the appropriate unit in each case, will be completely
20 ignored.

21 I think it's useful to look at page 186 and 187
22 of the Joint Appendix where the Board describes the
23 extraordinary circumstances exception, and where it sets
24 out all of the things it will no longer consider, and I
25 think to compare that with other cases.

1 Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

3 Holzhauer.

4 The case is submitted.

5 (Whereupon, at 11:03 a.m., the case in the
6 above-entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
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American Hospital Association, Petitioner -v- National Labor
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BY *Robert H. Harte*
(REPORTER)

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