UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

ESSENTIA HEALTH **Employer** **and** **MINNESOTA NURSES ASSOCIATION** **Petitioner**	**Case 18-RC-330714**

DECISION AND DIRECTION OF ELECTION

Essentia Health (the Employer) operates a regional health system consisting of acute and non-acute care facilities located across Minnesota, Wisconsin, and North Dakota. The Employer is administratively divided into a West Market and East Market. On November 27, 2023, the Minnesota Nurses Association (Petitioner) filed a petition seeking to represent all full-time and regular part-time nurse practitioners, physician assistants,[1] certified nurse midwives and clinical nurse specialists employed in the Employer's East Market. The Employer's East Market employs approximately 400 petitioned-for employees in nine acute-care hospitals and approximately 51 clinics.[2] The Employer raises two main objections to the petitioned-for unit:

1) That the Board's Healthcare Rulemaking (Appropriate Bargaining Units in the Healthcare Industry) ("the Healthcare Rule"), 29 CFR § 103.30, 54 Fed. Reg. 16336–16348 (1989), must apply and renders the petitioned-for unit inappropriate; and
2) That the petitioned-for unit is inappropriate because the petitioned-for employees do not share a community of interest.

The Employer argues that application of the Board's Healthcare Rule should result in dismissal of the petition. The Employer further argues that should the

[1] While the Petition stated "Physician Assistants/Physician Associates" there is no reference to the classification "Physician Associate" in the transcript or in any of the parties' briefing. For this reason, I exclusively use the term "Physician Assistants" throughout this decision.
[2] The number of clinic locations is taken from Union Exhibit 70, which is based on data pulled from the Employer's medical billing system and was provided by the Employer pursuant to the Petitioner's subpoena.

Healthcare Rule be found not to apply, the petitioned-for East Market unit should be divided into thirteen separate units, primarily along geographic lines. The Employer does not propose adding any additional employee classifications or facilities to the petitioned-for unit.

Pursuant to the Rules and Regulations of the Board, a Notice of Representation Hearing issued, and a hearing officer of the Board held a hearing in this matter on February 5-9, February 12-13, February 23, and March 6, 2024. Both parties subsequently filed timely post-hearing briefs.

I find that the petitioned-for unit of nurse practitioners, physician assistants, certified nurse midwives and clinical nurse specialists, collectively referred to in this decision as "Advanced Practice Providers" (APPs), is appropriate. I reject the Employer's contention that the Board's Healthcare Rule must apply to its integrated health system. Instead, I find that the petitioned-for unit is appropriate in applying the traditional Board's community of interest factors under *American Steel Construction, Inc*. 372 NLRB No. 23 (2022). I further find that a multi-facility unit consisting of the APPs in the Employer's East Market is appropriate pursuant to the factors set forth in *Exemplar, Inc.,* 363 NLRB 1500 (2016) and *Stormont-Vail Healthcare,* 340 NLRB 1205 (2003).

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the record in this proceeding, I find:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]
2. The Employer is engaged in commerce within the meaning of the Act, and it would effectuate the purposes of the Act to assert jurisdiction herein.[4]
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[3] Petitioner argues in its post-hearing brief that I should make an adverse inference based on the Employer's failure to timely comply with the Union's subpoena for temporary transfer information. I decline to do so. An adverse inference is neither necessary nor appropriate based on the evidence presented in this preelection fact-finding proceeding.

[4] The parties stipulated that the Employer, Essentia Health, is a Minnesota corporation and healthcare institution that operates facilities across northern Minnesota and Wisconsin. During the most recent 12 months, a representative period, the Employer derived gross revenue from its business operations in excess of $250,000. During the same period, the Employer purchased and received at its Minnesota facilities goods and materials valued in excess of $50,000 directly from points located outside the State of Minnesota.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. There is no collective-bargaining agreement in effect covering any of the individuals in the petitioned-for unit and, therefore, no contract exists barring consideration of the instant petition.

This decision is organized as follows: (I) a summary of facts as it relates to the petitioned-for unit; (II) my analysis as to why the Healthcare Rule does not apply and my findings related to the appropriateness of the petitioned-for unit; and (III) the direction of the election, including why a mail ballot election is appropriate.

I. SUMMARY OF FACTS

A. Employer Operations

The Employer describes itself as an "integrated health system."[5] It operates facilities in Minnesota, Wisconsin, and North Dakota. Its operations include acute-care and non-acute care facilities. This includes hospitals, urgent care centers, primary care clinics, and specialty clinics. Its corporate headquarters is in Duluth, Minnesota.

The Employer administratively divides its system into a West Market and East Market. The East Market includes facilities located in northern Minnesota and northern Wisconsin. Within the East Market, there are nine acute-care hospitals and approximately 51 clinics. The East Market spans as far north as International Falls, Minnesota, as far south as Spooner, Wisconsin, as far east as Ashland, Wisconsin, and as far west as Baxter, Minnesota.

The Employer employs over 400 APPs in the East Market. The Employer maintains that the East Market is further divided into six regions.[6] The Employer's facilities and their respective regions are listed in the below table, along with the number of APPs at each facility.[7] As reflected below, the Employer's Duluth region alone contains most of the APPs in the East Market. The parties stipulated that any facility

[5] See Employer Exhibits 3, 15, 18, 23, 27, 28, and 31 which are the Employer's "Community Health Needs Assessment" reports.
[6] The Employer's "East Market Organizational Chart" does not identify six regions. There is no organizational chart or other document in the record which reflect an administrative division of the East Market into six regions, other than APP rosters which were prepared in anticipation for this hearing. Only the "Community Health Needs Assessment" reports suggest this type of grouping by region. However, even those reports do not align with there being a total of six regions.
[7] These numbers are intended only as an approximation and are taken exclusively from the Employer's list of employees in the petitioned-for unit which was submitted with its initial statement of position and included in the record as Board Exhibit 3.

noted below with an asterisk is an acute care hospital under the definition set forth in the Board's Healthcare Rule.

FACILITIES AND APPS IN THE EAST MARKET	
DULUTH REGION	
Building A – Duluth Clinic - 1st Street Clinic	51
Building B – St. Mary's Medical Center*	63
Building C – Duluth Clinic – 2nd street	8
Building D – Miller Dwan Medical Center - EH Duluth*	1
Building E – Essentia Health – Duluth	2
Building F – Duluth Clinic – 3rd Street	92
Hermantown Clinic	5
Lakeside Clinic	3
Lakewalk Clinic and Pharmacy	11
Proctor Clinic	3
West Duluth Clinic	7
Support Services Building	9
Amberwing	1
Miller Hill Health Plaza	2
Duluth Region Total	**258**
ARROWHEAD REGION	
Essentia Health – Northern Pines Medical Center* (a/k/a Aurora Hospital)	4
Northern Pines Clinic (a/k/a Aurora Clinic)	4
Essentia Health – Virginia*	6
Virginia Clinic	17
International Falls Clinic	2
Ely Clinic	2
Hibbing Clinic	3
Arrowhead Region Total	**38**
BRAINERD LAKES REGION[8]	
Essentia Health - St. Joseph's Medical Center (Brainerd)*	18
Brainerd Clinic (including Brainerd Orthopedic Clinic)	17
Pierz Clinic	1
Baxter Clinic	14
Pillager Clinic	2
Pequot Clinic	1

[8] Employer Exhibit 35 purports to be a listing of all APPs within the Brainerd Lakes Region, but it lists a total of 158 employees and appears to include non-petitioned for classifications. Most employees appearing on Employer Exhibit 35 do not appear anywhere else in the record.

Crosslake Clinic	1
Emily Clinic	1
Pine River Clinic	2
Hackensack Clinic	1
Brainerd Lakes Region Total	**58**
I-35W CORRIDOR	
Essentia Health Moose Lake Hospital*	0
Moose Lake Clinic	3
Essentia Health Sandstone Hospital*	4
Cloquet Clinic	4
I-35W Corridor Total	**11**
NORTHWEST WISCONSIN REGION	
Essentia Health St. Mary's Hospital- Superior*	1
Superior Clinic	15
Ashland Clinic	7
Hayward Clinic	4
Spooner Clinic	1
Total	**28**
ITASCA LAKES REGION	
Essentia Health - Deer River Hospital*	1
Deer River Clinic	3
Grand Rapids Clinic	7
Itasca Lakes Total	**11**

B. Overview of the Organizational Structure of the East Market

The Employer's East Market is overseen by a President, a Chief Medical Officer, and a Chief Operating Officer. Reporting to those East Market Leaders are the following groups: South Region Brainerd Lakes Operation, Facilities, Primary Care & Regional/Hospital Practices, East Market Nursing, Duluth Hospitals, Specialty & Surgery Practice, and East Market Operations.

Below each of those groups are various subdivisions. Those subdivisions directly related to clinical or medical services are headed by an operations manager and a separate "dyad partner," which is a clinician. For example, the Employer's "Heart and Vascular Division" falls under "East Market Operations." It has both an operations director and a division chair who is a physician.

Except for the Brainerd Lakes operations discussed further below, several of the Employer's East Market divisions are centralized to cover practice areas across the

East Market. For example, hospitalists, emergency medicine and urgent care departments are centrally managed from Duluth.

The "South Region Brainerd Lakes Operation" ("Brainerd Lakes") is the most recently incorporated into the East Market. It still maintains a reporting structure that is distinct from the other regions which are more centralized to Duluth. Brainerd Lakes had been considered the Employer's "Central Market" until the Employer combined it with the East Market in 2019. The facilities located within the I-35W Corridor also report up through Brainerd Lakes, except for I-35W's urgent care operations which at the time of the hearing reported to Duluth. However, according to its organizational chart, certain groups even within the Brainerd Lakes operations report directly to the broader East Market. These include the following divisions: Heart and Vascular, Oncology, Gastroenterology, Emergency Medicine, Endocrinology, Rheumatology, and Infectious Disease.

C. General Overview of the APPs at the Employer

1. APPs as an Identifiable Group

The petitioned-for unit includes the following classifications: Nurse Practitioners, Physician Assistants, Certified Nurse Midwives and Clinical Nurse Specialists. Collectively, these employees are referred to as "Advanced Practice Providers" by the Employer. Since the 1990s, there has been an Essentia APP Council which includes providers in these classifications.[9] Until 2018, the Council was specific to the East Market, but has since expanded to cover APPs Essentia-wide. The council meets monthly to discuss and advise on issues related to APPs.[10] The council addresses issues related to education, research, recruitment, mentoring, and quality. There is also a spring conference to acknowledge and celebrate APPs.

The East Market also has a designated "Director of Advanced Practice Nursing and Physician Assistant Services," which provides input to senior leadership on various issues related to APPs in the East Market. This includes issues related to training, credentialing, recruiting, and education. This Director also serves as a liaison between East Market APPs and the Employer's administration. The Director meets and serves as a resource to all newly hired APPs, answers questions regarding the scope of an employee's licensure, and advocates for legislative changes to optimize APP practice. This position reports directly to the East Market Chief Medical Officer.

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[9] This council also includes certified registered nurse anesthetists, but neither party asserts that they should be included in the unit. The record does not otherwise contain evidence that would compel a conclusion that they must be included in the unit.

[10] Petitioner asserts in its Brief that the APP council is a management-dominated labor organization. Whether this council is in violation of Section 8(a)(2) is not before me or relevant to my conclusion in this matter.

2. Nurse Practitioners

Nurse Practitioners must have a master's degree in nursing. As part of their education, nurse practitioners must complete clinical rotations in a wide variety of settings. While nurse practitioners may focus on a certain area during their education, they are trained as generalists and may change their specialties throughout their career. They are licensed through the Board of Nursing. According to the Employer's job description, nurse practitioners utilize advanced health assessment, knowledge, and decision-making skills to provide health care to individuals and families both independently and in collaboration with physicians and other health care professionals. Nurse practitioners assess patients, order labs or other diagnostic testing, and create or carry out a treatment plan, which may include prescribing medication or other forms of treatment. To work in certain specialty areas, additional certification requirements may be needed.

3. Physician Assistants

Physician assistants and nurse practitioners are functionally interchangeable at the Employer. Other than the licensure and educational requirements, the Employer's job description for physician assistants is identical to that of nurse practitioners. Unlike nurse practitioners, physician assistants do not need to have first become a registered nurse. According to the Employer's job postings, physician assistants must have a master's degree in physician assistant studies. They must also be licensed to practice as physician assistants by the state in which they practice. Physician assistants are licensed through the Board of Medical Practice. Like nurse practitioners, there may be additional certifications required to practice within certain specialties.

4. Certified Nurse Midwives

There are only five certified nurse midwives in the proposed unit. As far as the record reflects, all midwives in the petitioned-for unit are based in Duluth's Obstetrics and Gynecology practice group. The work of a midwife is the same as nurse practitioner or physician assistant within the practice group. They also share the same supervisor. A midwife must be a registered nurse and complete further education through an accredited nurse midwife program and be state-certified.

5. Clinical Nurse Specialists

There is very little record evidence related to the petitioned-for classification of clinical nurse specialists. The list of employees submitted with the Employer's statement of position reflects only six individuals holding that job classification, all of which are based in Duluth. The evidence suggests that non-managerial clinical nurse specialists work alongside nurse practitioners and physician assistants and provide the same patient care.

In its statement of position, the Employer argued that clinical nurse specialists should be excluded entirely from the unit because they are managerial employees and do not share a community of interest with the other APPs. However, the Employer presented no evidence related to the managerial status of these employees or any evidence suggesting that clinical nurse specialists do not share a community of interest with the other petitioned-for APPs. Instead, the parties agreed to the following stipulation related to clinical nurse specialists:

> Subject to the Employer's objection to the Union's petition, in the event the Regional Director defines an appropriate bargaining unit that includes advanced practice providers, clinical nurse specialists who provide patient care services shall be included in the unit as appropriate. Clinical nurse specialists with managerial duties shall not be included in any bargaining unit. (Tr. 1705:18-1706:14.)

The parties further stipulated and identified two clinical nurse specialists that should be included in any unit of APPs. One clinical nurse specialist works in the nephrology department in Duluth in the same capacity as a Nurse Practitioner or Physician Assistant within that department, including performing outreach to different dialysis centers, seeing patients at clinics and in the hemodialysis unit in St. Mary's Medical Center. The other clinical nursing specialist works in palliative care. That clinical nurse specialist's job is so identical to that of the nurse practitioner that the only witness that testified about that individual was uncertain whether the individual was a nurse practitioner or a clinical nursing specialist.

D. Commonalities Across All APPs

Employer witness testimony was consistent that APPs share a basic set of responsibilities throughout the Employer's system and constitute a distinct grouping of employees. Broadly, they are responsible for assessing patients, making diagnosis, and coordinating treatment of the patient. These basic functions are true regardless of the environment or specialty they work in, as reflected in the Employer's nearly identical job descriptions across practice areas.

APPs may transfer to different departments with training, orientation, education, or certification. The evidence reflects this is a relatively common occurrence among APPs throughout the course of their career. Of the eight APPs that testified during the hearing, only one had never worked outside of her current practice area.[11] The Employer maintains a "Transitions to Practice" program in its East Market for APPs where APPs are mentored and trained by other APPs within their specialty. The program is designed to assist APPs that have recently graduated or are new to a

[11]This is consistent with Union Exhibit 71 which is a listing of permanent APP transfers to different facilities or different departments. Since 2019, approximately 60 APPs have transferred departments.

practice area. Education through the "Transitions to Practice" program is centralized and includes biweekly educational sessions.

APPs must be credentialed at any facility in which they are providing patient care. Nearly all APPs are credentialed at more than one facility, even if they do not work at all the facilities for which they are credentialed. Additionally, APPs must have certain privileges which specify what care APPs may provide at a given facility. Certain "core privileges" apply to all APPs across any specialty. Both credentialing and privileging are centralized by the Employer through its "Medical Staff Services," a department under the chief medical officer which covers the Employer's East and West Markets.

East Market APPs share the same benefit package, including access to continuing medical education funds. All APPs that are considered a .6 full-time equivalency or higher are paid on a salary basis. Casual APPs or APPs that work less than a .6 full-time equivalency are paid on an hourly rate basis. Compensation for APPs is determined centrally by the Employer's "Physician and Provider Compensation Committee," which formulates a base salary structure for APPs in the East Market and determines the wage scale for each APP position, which varies depending on the specialty, type of work and on call-schedule, among other factors.[12] APP issues that are related to compensation, such as eligibility for overtime, are addressed centrally by the Employer's corporate offices. Any changes to an APP's full time equivalency status, which controls the APP's number of regularly scheduled hours, must be approved by the East Market President.

East Market APPs are subject to the same Employer policies. The Employer's human resources' function is centralized.[13] Additionally, certain human resources functions for APPs are handled by the system-wide "Physician and Provider Services Group." This group is involved with any behavioral or disciplinary issues for APPs or physicians. Standards for APP performance reviews are determined system-wide by the Employer.

Job posting for any APP positions appear on the Employer's central website. While local managers or department chairs may select the APP hires for their department, hiring is authorized at the corporate level. Once authorization for hiring is approved, it goes to the Employer's centralized recruitment team that puts together a list of candidates for the local management's consideration.

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[12] While pay practices are standardized, there are some legacy pay practices within the Brainerd Lakes region. However, even those legacy practices are being standardized, as reflected by the elimination of stipends when Brainerd Lakes merged with the East Market in 2019.

[13] While the Brainerd Lakes region has a designated human resources representative that is based locally, that representative reports to the director of human resources for the East Market.

In performance of their work, all APPs use Epic, the Employer's electronic medical record and billing system. They also use the Epic chat system to communicate about a patient across the Employer's system. APPs may also use "Med-Direct" which is used by APPs in both acute and non-acute settings to consult with a specialist. They also may use the East Market's centralized "Patient Flow Center" to transfer and admit patients to hospitals within the Employer's system.

Like the Employer's other employees, APPs use the same electronic platforms related to personnel matters. APPs use a platform called QGenda which contains their schedule, including any hospital rotations and visits to other Essentia facilities. APPs also use QGenda to make requests for time off. To enter their time worked each pay period, APPs use a platform called "API." APPs use "Workday" which is a centralized personnel file system and allows employees to request assistance from the Employer's central Human Resources department. APPs also use "Source" which is a website for Essentia's employees and contains various resources including links to Workday, API, Employer policies, continuing education, and a paging assistant.

E. Practice Areas of APPs in the Employer's East Market

Except for midwives, APPs are trained as generalists and work in different practice areas within the Employer's East Market. APPs may work in acute-care settings exclusively, non-acute care settings exclusively or a hybrid of both. APPs role within each practice care is described generally below.[14]

1. Primary Care Division

The primary care division includes the sections of Family Medicine, Pediatrics, Internal Medicine, and Urgent Care. The Employer has a centralized primary care division for its East Market, which also includes urgent care providers. That department supports all primary care clinics throughout the East Market, except for the Brainerd Lakes and I-35W regions. Those regions report to a separate primary care division, though that division ultimately reports up through the East Market.

a. Family Medicine, Pediatrics, and Internal Medicine

Primary care APPs practicing family medicine, internal medicine or pediatric medicine are clinic-based in their practice. APPs in this practice area do not see patients in a hospital setting. Their practice generally includes preventative medicine,

[14]The descriptions that follow are based on a composite of the record evidence. This includes testimony, organizational charts, employee rosters, medical billing records reflecting the work locations and department of APPs, and other exhibits. It is not intended to be comprehensive, but rather designed as a basic overview for purposes of this decision. Additionally, the number of APPs within each practice area noted are not intended to be exact, but an approximation.

wellness visits, and chronic disease management. There are approximately 95 APPs in the East Market within this practice area.

At least one APP in the Duluth region works as a "flex APP." A flex APP may be assigned to work at different clinics as needed and see patients virtually at other clinics, even if they do not physically report to those facilities. The records reflect the flex APP primarily works at facilities within the Duluth region.

Several East Market APPs within this practice group are routinely scheduled at different locations or work in other practice groups, like urgent care or gynecology. For example, about 20 percent of the Brainerd Lake APPs working in "Family Practice" regularly work at two different facilities or in different practice areas.

APP scheduling in this practice group is generally handled at the local clinic level, with local managers conducting the performance reviews of the APPs that work in a particular clinic. These local managers report up to a Regional Operations Director that oversees primary care in a particular region. That operations director is responsible for the scheduling and management of any float employees and reports to a Senior Operations Director for the Primary Care Division for the entirety of the East Market, excluding those primary care practices within the Brainerd Lakes or I-35W region.

b. Urgent Care

Urgent care treats patients with unplanned acute or short-term issues that does not rise to the level of emergency. It is considered non-acute care. There are currently eight urgent care centers in the East Market—Baxter, Cloquet, Duluth (Building F), Hermantown, Moose Lake, Sandstone, Superior, Virginia, and West Duluth.[15] There are approximately 25 urgent care APPs in the Employer's East Market, which excludes any APPs that pick up urgent care shifts.

Urgent care APPs see patients, perform assessments, and prescribe medication or other treatment. Urgent care hours are generally standardized throughout the East Market, with some variation on the weekends. Urgent care APPs typically work out of at least two urgent care sites, a practice referred to as "floating." For example, a Duluth-based urgent care APP worked at both the urgent care in West Duluth (Duluth Region) and Superior (Northwest Wisconsin Region). Another urgent care employee primarily based in Cloquet Clinic (I-35W Corridor), also worked at urgent care sites in Duluth (Duluth Region), Superior (Northwest Wisconsin Region), Moose Lake (I-35W Corridor), and Hermantown (Duluth Region) over the course of a year.

[15] Hermantown was never specifically identified as an urgent care in testimony but appears listed on one of the urgent care shift coverage solicitation emails sent to East Market APPs.

The APPs working at the Employer's urgent care centers in its East Market are centrally managed and scheduled, except for seven APPs at the urgent care in Baxter in the Brainerd Lakes region.[16] Except for Baxter, all urgent care APPs in the East Market receive their performance review from the same supervisor.[17] Other than Baxter, all APPs in the East Market are credentialed to all urgent care sites in the East Market to perform telehealth service at every site and to fill in as needed for the 24/7 virtual care team as described below.

Testimony and scheduling records reflect that it is common for APPs from a variety of practice areas in the East Market to pick up shifts in urgent care centers on a voluntary basis. This is reflected in solicitations for shift coverage at urgent care sites sent by management to all East Market APPs, including those APPs working in the Brainerd Lakes region.

There are five 24/7 virtual care APPs in the Employer's East Market. They work remotely from their homes and provide urgent-care services using telehealth services. The schedules reflect that these APPs also staff shifts at physical urgent care locations within the East Market. Several APPs on this team also appear to regularly work in in different specialty areas within the East Market.

2. Hospital-Based Practices

a. Hospitalist

The term "hospitalist" may refer to APPs or physicians that exclusively care for patients in a hospital setting. There are approximately 24 APP hospitalists in the East Market. APP hospitalists evaluate, assess, and manage the treatment of hospitalized patients. After admission of a patient, a hospitalist APP "rounds" on patients. To round, an APP meets with a patient, assesses the patient, and creates a plan of care specific to the patient. The hospitalist APP also works with the hospital care team to effectuate that care plan. In doing so, they interact with various other professionals such as social workers, pharmacists, or physical therapists. As part of a care plan, APPs may put in any orders that are needed to care for the patient. A hospitalist APP may also determine when a patient may be discharged and prepare discharge instructions. Unlike their clinic-based APP colleagues, APP hospitalists' schedules must account for hospitals being open 24 hours a day, seven days a week.

Currently, the Employer hires APPs as "East Market hospitalists." All East Market hospitalists are hired at a "domiciled site" with the expectation that they may be required

[16] However, Baxter's urgent care hours of operation are determined centrally and were changed when Brainerd Lakes became part of the East Market.
[17] The Employer anticipated having any urgent care APPs assigned to the I-35W region report up through the Brainerd Lakes region, but that transition had not yet occurred at the time of the hearing.

to work at any other hospital within the East Market as needed. This is referred to as “flexing.” Hospitalists may also be required to provide telehealth coverage and admissions for patients at other hospitals as part of their duties. APP hospitalist schedules reflect that at least 40 percent of hospitalists are scheduled to physically work at multiple hospitals within the East Market over the course of the year—including at hospitals outside their domiciled region.

Except for the Brainerd Lakes region, which employs only two APP hospitalists, all hospitalists are managed by a centralized operations manager of the “Hospitalist Medicine Team.” The hospitalist medicine team operations manager schedules all East Market hospitalists, addresses performance issues in consultation with human resources, performs annual performance reviews, and participates in hiring of hospitalist APPs. For the Brainerd Lakes hospitalists, these responsibilities are handled by an operations senior director located in Brainerd Lakes.

Hospitalist department meetings include hospitalists from across the East Market, including Brainerd. Hospitalists that are domiciled outside of Duluth, including those domiciled to Brainerd, perform their initial training in Duluth, which can last weeks to years. APP hospitalists from outside of Duluth are encouraged to work shifts at the Duluth hospitals every quarter to keep up their skill set.

One hospitalist APP testified that when working at Sandstone hospital, she also performed consults in the emergency room. There is also evidence of some hospitalists maintaining clinical practices, in addition to their role as hospitalist.

In addition to hospitalists, three APPs at St. Mary’s Medical Center in Duluth are assigned to cover the intensive care unit, cardiac intensive care unit, and a trauma intensive care unit. They are referred to as “Critical Care APPs.”

b. Emergency Medicine

There are approximately 21 APPs that work inside hospital-based emergency rooms in the Employer’s East Market.

APPs in this division handle trauma like broken bones, lacerations, heart attacks, strokes, and any other medical issue that comes through the emergency department. Emergency department APPs undergo an emergency medicine boot camp and onboarding. Emergency department APPs also require additional certifications related to advanced life support and advanced cardiac life support. Like hospitalists, their schedules must account for the emergency department being open around the clock. Due to the nature of their work, emergency department APPs are compensated at a higher rate than other APPs within the East Market.

Except for Brainerd, all emergency departments within the Employer’s East Market are managed and scheduled centrally and receive their performance review and

schedules from the same manager. Duluth emergency department APPs may work shifts at multiple facilities. For example, at least three emergency medicine APPs regularly worked at Virgina Hospital (Arrowhead Region), St. Mary's Superior Hospital (Northwest Wisconsin Region), and St. Mary's Medical Center in Duluth (Duluth Region) over the course of a one-year period.

There are also neonatal APPs within the emergency division that admit, discharge, and help critical and stable neonates, attend deliveries, and handle medical transportation for newborns. These six APPs employees work only at St. Mary's Medical Center in Duluth.

3. Behavioral Health

The Employer has a central "East Market Behavioral Health" department which covers all behavioral health practices within the East Market, including Brainerd. APPs working in this division are scheduled and managed by the same operations manager irrespective of their physical location. There are two inpatient units within this department's oversight—an inpatient unit located in Miller-Dwan Hospital in Duluth and the Grace Unit located in St. Joseph's hospital in Brainerd. There are approximately 21 APPs within the behavioral health department. Many of the APPs within behavioral health have a hybrid function where they may perform psychiatric consultations in an emergency room, hospital, or inpatient psychiatric facility and see patients in a clinical setting. For example, the five Brainerd-based behavioral health APP team work on a rotating schedule covering outpatient and inpatient work at the Employer's Grace Unit. APPs may see patients in person or virtually using tele-outreach to other hospitals across East Market.

4. Heart & Vascular Division

The Employer's Heart & Vascular Division is centrally managed by the Employer on an East Market-wide basis, including its Brainerd operations. There are 38 APPs that work in the Employer's Heart and Vascular Division in the East Market. Many APPs in this division work at different clinics outside their assigned region. They may also see patients in other clinics virtually. Thirteen APPs in this division work in both an acute care and ambulatory care setting. APPs in these hybrid positions make rounds on patients that have undergone surgery and assist with post-operative care in a clinic setting. The remaining APPs in this division practice exclusively in either acute care or ambulatory care settings.

5. Cancer Division

The Employer has a Cancer Division in the East Market which employs approximately 10 APPs. APPs in this division are typically paired with a medical oncologist to provide cancer care to patients. Most are based in the Duluth region. APPs within this department may work in both a clinic and hospital setting. In a clinical

setting, APPs carry out a treatment plan assigned by a physician, including chemotherapy. They also assist in managing symptoms and side effects and participate in the follow-up care of the patient. They may also see patients in a hospital setting when providing consultative services. Some APPs within this division are primarily hospital-based where others are primarily clinic-based.

Some APPs within this division may regularly see patients outside of the Duluth region in person or through virtual appointments. At the time of the hearing, there was at least one APP that was domiciled to the Duluth area that was covering shifts in Brainerd. Performance reviews of employees within this section are handled by the section chair and operations manager for the Cancer Division, except for one APP in the Northwest Wisconsin region who reports to an operations manager for the Northwest Wisconsin Cancer Center. That operations manager reports up to a Senior Operations Director which oversees the entire cancer services division for the East Market.

6. Elder Care, Hospice, and Palliative Care Departments

Elder care, hospice, and palliative care all fall within a single centralized division for the East Market, except for the Brainerd Lakes region. Each are described briefly below. There are at least 25 APPs working in this division.

Elder care is focused on long-term care and primary care for residents in long-term care communities. Elder care APPs practice in nursing homes and assisted living facilities that are not owned by the Employer. Elder care APPs may be reassigned to different facilities periodically based on need. In Brainerd, there are two APPs listed as working in “Elder Care,” though one of the APPs mostly works in the podiatry department. These APPs report to a Brainerd section chair and round to long-term care facilities in Brainerd and Baxter.

Hospice and palliative care are separate departments but supervised as one. Palliative care treats patients in all stages of the disease process, not limited to end of life, and focuses on symptom management. Palliative care is inpatient-based. There are two APP palliative care employees that see inpatients exclusively at St. Mary’s Medical Center in Duluth. Hospice care is focused on those patients at the end of life. APPs may see patients at the patient’s home, a nursing home, in an assisted living facility or in the Solvay Hospice House in Duluth. There are five APPs working in hospice care in the East Market.

7. Medical Specialties Division

The Employer’s East Market medical specialties division supports the practice areas of nephrology, dermatology, allergy, rheumatology, sleep medicine, endocrinology in the diabetes center, infectious disease, and integrative health. APPs practicing in one of these areas may travel to other clinics within the East Market or

meet with patients from other locations remotely through the Employer's telehealth service. They may also be called upon to consult with other providers as needed. Some APPs working within these specialties may routinely work in a hospital setting, while others only see patients in a clinic setting. There are approximately 30 APPs in the East Market within these practice areas.[18] Each specialty reports to a manager specific to the specialty. Those specialty managers report up to the operations director of medical specialties of the East Market.

8. Musculoskeletal and Surgical Services Division

The Employer's Musculoskeletal and Surgical Services Division consists of the following practice areas that employ APPs: general surgery, orthopedic surgery, trauma, medical weight management, podiatry, and plastic surgery. Except for Brainerd Lakes, this division is centralized for all the East Market and is under the same operations senior director, though each practice area has its own management that would handle scheduling and supervision of the APPs in their respective departments. There are approximately 36 APPs working among the various specialties in this division. Except for those APPs based in Brainerd Lakes, all are based in Duluth.

The general surgery section contains various sub-specialties. APPs in this section are partnered with a surgeon in a subspecialty area. The APPs work in the operating room with the surgeon, visit patients in the two Duluth hospitals and St. Mary's Hospital in Superior and see patients in the clinic as scheduled. Of the eight APPs in this section, only two APPs exclusively work in a clinic.

Among the orthopedic surgery practice, there are multiple different specialties. Some APPs in this section work almost exclusively at St. Mary's Medical Center Hospital serving hospitalized patients with traumatic injuries. Some APPs in this section may also evaluate patients in the emergency room. Other APPs may see patients only in a clinic setting for follow-up visits after surgery. Some work in both a clinic and hospital setting. At least two APPs in this division work both in Duluth and in clinics outside of the Duluth region.

APPs working in trauma work out of St. Mary's Medical Center in an inpatient setting. They work with surgeons to manage critical care, trauma surgery, and patients in intensive care settings. They also see patients in the emergency department. A small percentage of their time may be in a clinic setting where they are performing post-discharge follow up.

[18] Only three Brainerd APPs practice in any of these listed areas. On the Brainerd Organizational Chart entered as Employer Exhibit 30, it notes that Endocrinology, Rheumatology, and Infectious Disease are groups that report "through east or formal service line structure." Those departments report directly to the East Market divisions rather than through local Brainerd divisions.

There is only one APP in plastic surgery that conducts post-surgery visits with the patients in a clinic setting.

APPs in medical weight management work in an outpatient setting. Two of the three APPs in medical weight management see patients at more than one clinic location.

The podiatry APP splits her work between multiple locations locations—at the podiatry clinic in Duluth, the wound center located inside Essentia Health Duluth, and rounding in the two Duluth hospitals on patients with foot problems.

9. Surgical and Procedural Specialties

Surgical and Procedural Specialties includes the practices of gastroenterology, obstetrics and gynecology, urology, ear nose and throat, and pulmonary disease. All of these specialties are primarily based out of clinics in Duluth. Each section has its own manager which performs essentially the same function of managing the day-to-day operations of the practice team, including scheduling. The numbers below are only those APPs based in Duluth that practice within the specified specialty areas.[19]

There are nine gastroenterology APPs. Four of these APPs are on an acute care team and work both in the St. Mary's Medical Center in Duluth and in a clinic. The other five APPs in this section work in the clinic. Some APPs in the clinical setting occasionally see patients at other clinics either in person or virtually.

In Duluth, there are nine APPs, including five midwives, that work in the Obstetrics and Gynecology section. Most of these APPs split their time between St. Mary's Medical Center in Duluth and their clinical practice. In the Brainerd Lakes region, there are four APPs in this practice area that report up through a different supervisor than their Duluth-based colleagues.

Three urology APPs in Duluth work in both a clinical and hospital setting, rotating inpatient responsibilities.

There are two APPs that work in the ear nose and throat section which is clinic-based.

Finally, there is a single pulmonary disease APP who is entirely hospital-based at St. Mary's Medical Center hospital.

[19] There is evidence of some APPs outside of Duluth that may also practice within these areas, though their reporting structure and interaction with APPs within their same specialty is not clear from the record.

10. Brainerd Lakes Clinical and Practice Groups

Brainerd Lakes has three clinical service practice groupings: primary care, surgery clinical services, and medical specialties.

Like other clinics in the East Market, its primary care clinics employ most of the APPs in the Brainerd Region who practice in a clinic setting. Brainerd Lakes surgery clinical services include the following specialties: orthopedics, podiatry, spine care, urology, general surgery, and obstetrics/gynecology. Again, like the rest of the East Market, some APPs in these practice areas may attend to patients in a hospital setting and a clinical setting.

The medical specialties clinics in Brainerd Lakes practice in the following areas: endocrinology/diabetes, gastroenterology, weight management, allergy, elder care, palliative care, pulmonology, rheumatology, and sleep. Depending on the specialty, some APPs in these practice areas may see patients in acute-care settings while others may be entirely clinic based.

There is a freestanding orthopedic clinic in Brainerd that sees only orthopedic patients and includes an orthopedic urgent care. There are six APPs assigned to this unit. APPs in this unit see patients in an outpatient setting and work shifts in the orthopedic urgent care center. Some APPs also assist physicians in the operating room. The APPs in this unit are scheduled and managed by their local operations manager and section chair. At least one APP in this section sees patients at other clinics within the Brainerd Lakes region.

II. LEGAL ANALYSIS

A. The Board's Healthcare Rule and Broad System-Wide Bargaining Units.

The Employer argues that the Board's Healthcare Rule (the Rule) must be applied and should result in the petition's dismissal. The Employer argues that the Rule prohibits the combination of employees working in acute-care settings with employees that work in non-acute care settings. It further suggests that the Rule prohibits combining employees from different acute-care hospitals and that the petition must be dismissed because the unit sought does not include all other professional classifications at each hospital. For the reasons described below, I reject the Employer's arguments and find that the Rule does not apply. I further find that Board law supports that a unit of combined acute-care and non-acute care employees may be appropriate. This section is organized as follows: (1) an overview of the Rule and my analysis as to why the Employer does not meet the Rule's definition of an "acute care hospital"; (2) a review of Board cases which support my conclusion that the Rule does not apply; and (3) the Board's endorsement of units which combine acute-care and non-acute care employees, supporting that such units can be found appropriate.

1. The Board's Healthcare Rule does not apply because the Employer does not fit the definition of "acute care hospital."

In 1989, the Board issued a final rule relating to units in acute-care hospitals. The Board's Health Care Rule (the Rule) proscribes eight appropriate units applicable to "acute care hospitals," absent "extraordinary circumstances or existing non-conforming units." Those units are:

> (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. 29 C.F.R. § 103.30(a)-(c), 54 Fed. Reg. at 16336-48 (1989)

The Rule defines an "acute care hospital" as either a short-term care hospital in which the average length of patient stay is less than 30 days, or a short-term care hospital in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days. The Rule further specifies that an "acute care hospital" (used in the singular) is to include "those hospitals operating as acute care facilities even if *those hospitals* provide such services as, for example, long term care, outpatient care, psychiatric care or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitative hospitals." (emphasis added). In its comments, the Board acknowledged that hospitals may have "other types of units" including outpatient clinics and nursing care, but that the Rule was not intended to exclude "such hospitals from coverage of the rule unless any one of the excluded ancillary services predominated."

I do not find that the Employer fits within the Board's definition of an "acute care hospital." By its own description, the Employer is an integrated health system, not a free-standing "hospital." It operates nine acute-care hospitals among approximately 50 ambulatory care service locations. Most of the petitioned-for employees work predominantly in ambulatory settings. At most, 32 percent of patient services billed by APPs occurred within the walls of a hospital.[20] The Rule gives no indication that the term "an acute care hospital" should be read so broadly as to apply to the Employer under these circumstances. Accordingly, I do not find that the Employer's healthcare system falls within the Board's definition of an "acute care hospital," rendering the Rule inapplicable in this case. This finding is consistent with Board cases which have found system-wide healthcare units appropriate, as discussed immediately below.

[20] This number is taken from the Employer's electronic medical record system for the East Market-based Advanced Practice Providers for a one-year period.

2. Board law supports that the Rule should not apply to the petitioned-for unit.

a. The Board has twice declined to apply the Rule to system-wide units in healthcare systems like the Employer.

Since the Board's adoption of the Rule in 1989, the integration of stand-alone hospitals into healthcare systems has proliferated.[21] Yet, the Board has never applied the Rule to a healthcare system where the petitioned-for unit includes employees from across an employer's health system. In the two instances in which the Board has been faced with the question of the Rule's application to a broader healthcare system unit, it declined to apply the Rule and relied on other grounds for its decision.

i. Stormont-Vail Healthcare

In *Stormont-Vail Healthcare,* 340 NLRB 1205 (2003), the Board opted not to pass on the Director's conclusion that the Rule did not apply to an integrated health system. In that case, the employer operated a regional "integrated health system" which included: a hospital complex (including clinics located inside the hospital); seven detached buildings providing for non-acute care services on the hospital campus; an inpatient acute care psychiatric department two miles from the main campus; 17 outpatient clinics as far as 60 miles away from the main campus; two community nursing centers; and helicopter ambulance services.

The Union initially sought only those registered nurses employed within the hospital complex (which was stipulated to be a single facility). The parties then stipulated to inclusion of the helicopter ambulance services which were 10 to 70 miles away from the hospital complex and for inclusion of RNs employed at an Educational Center which was a facility connected by walkway to the hospital complex. The employer argued that the only appropriate unit must be employer-wide and include the psychiatric facility, outlying clinics, and the community nursing centers. The Board agreed with the employer, reversing the Director. While it could have done so, the Board did not pass on the Director's finding that the Rule did not apply to the "hospital complex" which was "more extensive and inclusive than a single acute care hospital." Id. at 1210.

[21]See, Landscape of Health Systems in the United States - PMC (nih.gov), published online on January 23, 2019. The percentage of U.S. hospitals in a health system rose from 53 percent in 2001 to 60 percent in 2011. As of 2016, 70 percent of nonfederal general acute care hospitals in the United States were system affiliated with a health system.

ii. *Virtua Health*

In *Virtua Health, Inc.,* 344 NLRB 604 (2005), the Board again declined to apply the Rule to a healthcare system. In *Virtua Health,* the union petitioned for a unit of approximately 150 paramedics employed by a comprehensive regional medical system including several acute-care and non-acute care facilities. The employer argued that pursuant to the Rule, the unit must include all technical employees. The Regional Director found that the Rule did not apply to the employer's health care system, which was broader than a stand-alone hospital building. The Board reversed the Director on other grounds, finding that "it is unnecessary to reach [the Rule] issue because we conclude that, even under the broader standard set forth in *Park Manor*, a unit limited to the Employer's paramedics is inappropriate." Id. at 605-606. Member Leibman dissented, adding that she would have adopted the Regional Director's "well-reasoned and comprehensive decision finding that a systemwide unit of the Employer's paramedics is appropriate." Regardless, the Board again declined to apply to the Rule to a healthcare system even when presented with an opportunity to do so.

b. The Board has refused to apply the Rule where the facility is not a "typical free-standing acute care hospital."

The Board has declined to apply the Rule to facilities which do not resemble a typical free-standing acute-care hospital, even when they include an acute-care hospital. In *Child's Hospital,* the Board specifically declined to apply the Rule to a combined acute-care hospital and nursing home facility. 307 NLRB 90 (1992). The employer was made up of three different entities constituting a single employer: The Child's Hospital (the hospital); The Child's Nursing Home (the nursing home); and Samaritan Service Corporation (Samaritan), which provided shared services to both the nursing home and the hospital. The hospital, nursing home and support services were physically connected and part of a single contiguous structure. While inpatient services made up a relatively small portion of the hospital's medical services compared to its outpatient services, the Board found that *both* the hospital and nursing home were "substantial" components of the overall facility. Petitioner sought to represent a unit of registered nurses at the hospital.

The Board declined to apply the Rule. The Board noted that the Rule was "designed to cover the more typical free-standing acute care hospital." It held that application of the Rule to the employer would lead to an "anomalous or impractical result" and that it "would not be feasible or sensible to automatically apply the Rule." Id. at 92. Since it found that the Rule did not apply, it remanded the case to the Director to determine the appropriateness of the unit under *Park Manor Care Center,* 305 NLRB 872 (1991).

Here, the Employer's health system bears even less resemblance to a "typical free-standing acute care hospital." Rather than a single building as in *Child's Hospital,* the Employer's healthcare system in the East Market consists of over 50 locations and

nine acute-care hospitals. Application of the Rule to the Employer would likewise create an "anomalous or impractical result." Many APPs work in both acute and non-acute care settings. Should the Rule apply, APPs that are primarily based in a hospital setting that seek to be represented would have to join a unit with numerous classifications of hospital-based professionals with whom they have very little in common. Those same APPs would be denied the ability to share representation with APPs within their own specialty and division and with whom they share the most in common. Such a result is simply not sensible or in line with the purposes of the Act.

3. Board law is clear that a combined unit of acute-care and non-acute care employees can be appropriate.

Board law establishes that a combined unit of acute-care and non-acute care employees may be an appropriate unit under the Act. For example, in *Stormont-Vail Healthcare,* 340 NLRB 1205 (2003), the Board broadened the unit to combine non-acute care nurses with hospital-based nurses. In *Virtua Health, Inc.,* 344 NLRB 604, 605 (2005), the Board never objected to the combination of acute-care and non-acute care employees into a single unit. Rather, the Board found that the combined unit should be expanded to include additional technical employees across both acute and non-acute care settings in the employer's system. Id. These cases specifically undermine the Employer's argument that acute-care and non-acute care employees cannot be combined into a single unit.

4. Conclusion

In cases presenting a similar issue, the Board has declined to apply the Rule and has instead endorsed system-wide units which combine acute-care and non-acute care facilities. Nor would the Rule's application be appropriate in this case. The Employer has approximately 60 facilities in the East Market. Most of the patient services provided by the petitioned-for unit are provided outside of a hospital setting. Numerous petitioned-for employees have hybrid roles in both hospital and clinic settings. As the Board held in *Child's Hospital,* I find that application of the Rule in these extraordinary circumstances is "not feasible or sensible."[22]

B. The Petitioned-for Unit of APPs is Appropriate

Because I have found that the Rule does not apply for the reasons stated above, I must next determine whether the petitioned-for unit is appropriate. The Employer argues that East Market APPs do not share a community of interest primarily in terms of geographical scope under the multi-facility unit analysis. The Employer argues that if the Rule is determined not to apply to the petition, the petitioned-for unit must be divided

[22] Because I find the Rule does not apply, the Employer's argument about the exclusion of other professionals at each hospital being contrary to the Rule is not relevant and will not be addressed.

into thirteen smaller separate units of "all full-time and regular part-time nurse practitioners, physician assistants, and certified nurse midwives" and clinical nurse specialists[23] in each of the following groupings: (1) the Arrowhead Region; (2) the Itasca Lakes Region; (3) the Northwest Wisconsin Region; (4) the I-35 Corridor; (5) the Brainerd Lakes Region; (6) EHD; (7) St. Mary's Medica Center; (8) Duluth 1st Street Clinic; (9) Duluth 2nd Street Clinic; (10) Duluth 3rd Street Clinic; (11) Duluth neighborhood clinics; (12) Urgent Care-Duluth; (13) Urgent Care–Brainerd Lakes/I-35 Corridor.[24]

This portion of the decision is organized as follows: (1) an overview of applicable principles in determining whether a unit is appropriate; (2) the appropriateness of the petitioned-for unit which seeks to combine nurse practitioners, physician assistants, certified nurse midwives and clinical nurse specialists pursuant to *American Steel Construction, Inc.*; and (3) the appropriateness of a multi-facility unit consisting of all APPs employed in the Employer's East Market.

1. General Principles

It is well-established that a petitioner is not required to seek a bargaining unit that is the only appropriate unit or even the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 417-418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). The Act merely requires that the unit sought by a petitioner be *an* appropriate unit. *Wheeling Island Gaming, Inc.*, 355 NLRB 637, fn. 2 (2010), citing *Overnite Transp. Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). Further, in deciding whether a petitioned-for unit is "appropriate" under Section 9(b), "[t]he Board's discretion in this area is broad, reflecting Congress' recognition 'of the need for flexibility in shaping the [bargaining] unit to the particular case.'" *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944)).

In addition, "a petitioner's desires as to the unit is always a relevant consideration.'" *Marks Oxygen Co. of Alabama*, 147 NLRB 228, 230 (1964). "In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate." *Overnite*, above at 724. When deciding whether the unit sought in a petition is appropriate, the Board focuses on whether the employees share a community of interest. *NLRB v. Action Automotive,* 469 U.S. 490, 494 (1985). A party contesting the appropriateness of the unit must prove that the petitioned-for unit is "truly arbitrary on community-of-interest grounds, not just that some other unit configuration is also, or

[23] The Employer later stipulated to the inclusion of any non-managerial clinical nurse specialists.

[24] Apart from the urgent care units, the Employer's proposed unit descriptions in its amended statement of position are inherently contradictory. It lists as included those APPs "whose primary work site" is an acute-care facility, but then excludes "employees who are domiciled at an acute-care facility." This appears to be an error.

even more, appropriate." *American Steel Construction, Inc.* 372 NLRB No. 23, slip op. at 6 (2022).

2. A unit of consisting of nurse practitioners, physician assistants, certified nurse midwives, and clinical nurse specialists is an appropriate unit.

In *American Steel Construction, Inc*. 372 NLRB No. 23 (2022), the Board overruled *PCC Structurals, Inc*., 365 NLRB No. 160 (2017) and reinstated *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) as the standard for determining whether a petitioned-for unit is appropriate. In *American Steel Construction,* the Board stated it will approve a petitioned-for "subdivision" of employee classifications if the petitioned-for unit: (1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct. Generally, employees in a petitioned-for group are readily identifiable when they share job classifications, departments, functions, work locations, skills, or similar factors. *American Steel Construction, Inc.*, above, slip op. at 13. The Board further held that "the Board need not address each element in every case: if a particular element is not disputed, it need not be adjudicated."

The Employer does not propose expanding the unit to include other classifications or facilities. Indeed, the Employer does not appear to contest that the petitioned-for classifications of APPs are a readily identifiable group and sufficiently distinct from other employees. The record strongly supports that the grouping is easily identifiable and distinct. The Employer has an "APP Council"—which includes APPs working in both acute and non-acute care settings across both East and West markets. The APP council sends out its minutes to an email list entitled "Advance Practitioner – NP/PA/CNS/CNM/CRNA – East," indicative of their shared grouping and identity. That same email grouping is used to solicit APPs to cover shifts at urgent care throughout the East market. The Employer also has a designated "Director APRN/PA Services East and Transition to Practice Program Director."

The evidence also establishes that the petitioned-for classifications share an internal community of interest. This well-established test considers whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *American Steel Constructions*, 372 NLRB No. 23, slip op. at 2. (2022).

APPs share distinct skills and training. All APPs in the petitioned-for unit must have some type of advanced degree. They must all complete a "Transition-to-Practice" program in their practice area. Their job function is not the same as any other

classification of employee. While there may be overlap between their work and the work of a physician, they are not completely interchangeable as reflected by the Employer's job postings. For example, physician assistants can only practice pursuant to a collaborative agreement with a physician. As in nearly every healthcare setting, APPs are functionally integrated with other healthcare staff. They interact with a variety of professional and non-professional employees in providing patient care. They may even share some of the same supervision with those classifications within their work unit. However, there is no evidence that APPs interchange with those other classifications. APPs have distinct terms and conditions of employment as reflected by the Employer's pay matrix specific to APPs. They share the same benefit package. APPs are on a paid time off plan, whereas physicians are not. Finally, while APPs are not organized into a particular department, this factor is not determinative. See *DPI Secuprint, Inc.,* 362 NLRB 1407, 1410 at fn.10 (2015) (finding unit of employees is appropriate despite being drawn from several departments if they are readily identifiable as a group and share a community of interest).

Overall, for the reasons described above, I find the evidence substantially supports that the petitioned-for classifications have an internal community of interest, are readily identifiable as a group and are sufficiently distinct from other classifications.

3. An East Market multi-facility unit is appropriate.

The Employer argues that a multi-facility unit consisting of the petitioned-for APPs across the Employer's East Market is inappropriate, claiming that because the employees are geographically dispersed, they do not share a community of interest. The Employer argues that if the Rule is determined not to apply to the petition (as I have concluded), the petitioned-for unit must be divided into thirteen separate units as already set forth above. The Employer does not argue that additional facilities must be included to make the unit appropriate.

In determining whether a multi-facility unit is appropriate, the Board evaluates the following factors: similarity in employees' skills, duties and working conditions; centralized control of management and supervision; functional integration of business operations, including employee interchange; geographic proximity; bargaining history; and extent of union organization and employee choice. *Exemplar, Inc.* 363 NLRB 1500, 1501 (2016) (internal citations omitted); *Stormont-Vail Healthcare,* 340 NLRB 1205 (2003) (internal citations omitted). The Board also considers whether the petitioned-for unit corresponds to an administrative grouping or division of the employer. *Exemplar,* above at 1503. See also *FreshPoint Southern California, Inc.*, 28-RC-252613 at fn. 3 (June 18, 2020) (unpublished) (citing *Exemplar*, above, at 1503, 1506).

a. Skills, duties and working conditions

The similarity or dissimilarity of work skills has some bearing, along with the nature of any work performed, in deciding on the appropriateness of a multifacility unit.

Exemplar, 363 NLRB 1500, 1503-1504 (2016); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998); *Cheney Bigelow Wire Works, Inc*., 197 NLRB 1279, 1280 (1972). All petitioned-for APPs have advanced educational requirements which exceed those of a registered nurse. Except for midwives, all APPs are trained as generalists, though certain specialties may require some additional certifications. However, an APP's certifications may not align with their practice area as they may move to different specialties throughout their career.

The nature of APP work may vary depending on their specialty and assignment within that specialty. For example, an APP in orthopedic surgery may assist a physician in an operating room and see patients at a clinic. That work is different than an APP assigned to behavioral health who sees approximately 65 percent of patients through a virtual platform and has no surgery-related responsibilities. Regardless, the duties of APPs in any setting or facility are the same in broad sense: they use their advanced health assessment, knowledge, and decision-making skills to care for the patients.

Moreover, differences in the work performed by APPs are not based on geographic location, but their practice area. For example, APPs in primary care perform the same essential work regardless of their worksite. The same is true across any specialty area. An APP working in Cardiology in Duluth has more skills and duties in common with a Cardiology APP in Brainerd Lakes than they would with a Duluth-based Gynecology/Oncology APP, even though they may share the same building.

APPs throughout the East Market share many of the same working conditions. They are subject to the same Employer policies. They use the same electronic platforms to record their time, communicate with Human Resources, or consult with other providers at the Employer. They all use the same medical record system in their work. Any APP that is new to practice or new to a practice area is trained and mentored through the Employer's "Transition to Practice" program. APPs in the East Market share the same benefit package. APP compensation is determined centrally by the Employer's "Physician and Provider Compensation Committee," which creates a matrix for APP pay in the East Market. Supplemental pay practices are becoming standardized throughout the East Market, though some regional legacy pay practices remain.

Depending on their division, an APP may be scheduled by a local scheduler or manager. However, any East Market APP request to change their full-time equivalency, which dictates the number of regularly scheduled hours, must be approved by the East Market President. Hiring of APPs is authorized centrally.

Overall, given the numerous commonalities discussed above, I find this factor supports the appropriateness of the petitioned-for unit.

b. Centralized control of management and supervision

The Board has cited to the application of identical personnel and labor relations policies, particularly when determined at the employer's principal office, in support of a multifacility determination. *Exemplar*, 363 NLRB No. 1500, 1503 (2016); *Budget Rent-A-Car Systems*, 337 NLRB 884, 885 (2002). Similarly, administrative integration of the employer's operations under unified control and centralized control of labor relations are factors given significant weight in favor of a multifacility unit. *Universal Metal Products Corp*., 128 NLRB 442, 444–445 (1960). Additionally, whether employees at different facilities share common supervision is a consideration where more than one facility is involved. *Exemplar*, above; *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000). The Board also considers whether supervision retains significant local autonomy over daily personnel and operational decisions; local autonomy of operations militates toward a separate unit. *Bashas', Inc.*, 337 NLRB 710, 712 (202); *Hilander Foods*, 348 NLRB 1200, 1202–1205 (2006).

As discussed above, several divisions within the Employer are managed and supervised on an exclusively East Market-wide basis. While many Brainerd Lakes facilities still maintain a local reporting structure, those local managers ultimately report up through the East Market. Even though some APP schedules and performance reviews may be handled at the local clinic level, there was no evidence of local autonomy over operational decisions. The Employer's "Physician and Provider Services Group" handles human resources' functions for APPs and physicians throughout the East Market with respect to behavioral or disciplinary issues. The Employer has a centralized human resources department. Hiring is authorized centrally at the East Market level. The number of hours an APP is scheduled to work (their percentage FTE), is ultimately the decision of the East Market president. Payroll is operated on an Employer-wide basis and issues related APP pay are handled at the corporate level. The Employer maintains a single set of personnel policies and procedures for employees across all facilities. See *Virtua Health*, 344 NLRB at 605 (all employees subject to the same HR policies); *Stormont-Vail Healthcare*, 340 NLRB at 1206 (HR department issues one set of policies applicable to all employees). Overall, I find that this factor supports the appropriateness of the petitioned-for unit.

c. Functional integration of business operations, including employee interchange.

The functional integration of two or more facilities in substantial respects may weigh heavily in favor of a more comprehensive unit, but it is not a conclusive factor. Conversely, a lack of functional integration between two or more petitioned-for locations may be offset by other factors favoring a single unit of employees encompassing both locations. *Audio Visual Services Group, LLC*, 370 NLRB No. 39, slip op. at 3 (2020) (citing *Panera Bread*, 361 NLRB 1236, 1236 fn. 1 (2014); *Verizon Wireless*, 341 NLRB 483, 485, 490 (2004); *Bashas'*, 337 NLRB at 711; *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000).

There is significant evidence that the Employer's East Market facilities are functionally integrated. According to the Employer's organizational chart for the East Market, the East Market shares the following centralized services: Finance, Information Technology, Facilities, Human Resources, Patient Satisfaction, Quality, and Nursing. The Employer uses the same electronic platforms to address personnel matters throughout the East Market, including scheduling. It utilizes a centralized electronic personnel file system. Job openings are posted on the Employer's central website. It operates a "Med-Direct" which facilitates consults with specialists within the Employer's system. The Employer maintains a "Medical Staff Services" group which handles employee credentialing and privileges for all facilities within its East Market.

There is also considerable evidence of employee interchange across the different regions within the East Market. Coverage in urgent care centers is solicited throughout the East Market and is not limited to only those APPs working in a particular region. There is evidence of APPs working in urgent care centers in different regions throughout the year. Other APPs may perform regular outreach to clinics both inside and outside their region. East Market APP hospitalists may be mandated to work in any of the hospitals in the East Market, irrespective of the region. Behavioral health employees see patients in person or virtually in facilities across the East Market. Emergency medicine APPs may work in different emergency rooms across regional lines.

Overall, the evidence of functional integration and employee interchange supports the appropriateness of the petitioned-for unit. See *Presbyterian/St. Luke's Med. Ctr.*, 289 NLRB at 250 (employees "float" among facilities and may cover for one another on the same job at another facility) and *Stormont-Vail Healthcare*, 340 NLRB at 1206 (employer maintained a central float pool for licensed practical nurses and patient-care technicians).

d. Geographic proximity

Geographically dispersed facilities may be found appropriate when other factors weigh in favor of the multifacility unit having its own distinct community of interest. See, for example, *Macy's West, Inc*., 327 NLRB 1222, 1223 (1999) (finding multifacility unit covering three states appropriate despite 579 miles between farthest facilities due to similar skills, duties, and working conditions, common supervision, monthly interchange, and the area conforming to an administrative division of the employer). Also see *Capital Coors Co*., 309 NLRB 322, 325 (1992) (distance of 90 miles between facilities did not preclude finding a community of interest).

The Employer's East Market covers a large geographic and predominantly rural area. There is significant geographic separation between many of the clinics in the Employer's East Market. The average distance between any one clinic and the corporate headquarters in Duluth is approximately 63 miles and between any two facilities, the distance may be up to hundreds of miles. However, I do not find that this factor should be given significant weight based on the other factors I identify which

weigh in favor of finding the unit appropriate, particularly the administrative division of the Employer as I describe below. The Employer's own proposed units do not support its argument that geographic separation should be a paramount consideration as its proposed alternative units include groupings of geographically remote facilities. For example, the International Falls Clinic is anywhere from 98 to 120 miles from other facilities within its own region.

e. Bargaining history

There is no collective-bargaining history among APPs at the Employer. There are collective-bargaining agreements covering other classifications of employees at several of the Employer's hospitals, though it appears many of those agreements may have pre-dated the incorporation of these facilities into the Employer's health system. Overall, I find this factor to be neutral.

f. Extent of union organization and employee choice

Petitioner has opted to organize all APPs in the East Market. However, this factor cannot be given controlling weight. See *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441–442 fn. 4 (1965). While this factor would support finding the unit appropriate, I do not rely on it because several other factors carry more significant weight.

g. Administrative grouping

The Board has repeatedly emphasized that multi-facility units should correspond to employers' administrative groupings. See, e.g., *Exemplar, Inc.*, 363 NLRB 1500, 1503 (2016).[25] See *Stormont-Vail Healthcare, Inc.,* 340 NLRB 1205, 1208 (2003). The East Market was not invented by the Petitioner. Rather, it is an administrative grouping implemented and controlled by the Employer. I find that this factor strongly supports the appropriateness of the petitioned-for unit.

h. Summary of Findings

I find that the petitioned-for East Market unit is appropriate based on the following factors: similarity in employees' skills, duties and working conditions; centralized control

[25] Cf. *Odwalla, Inc.*, 357 NLRB 1608, 1612–1613 (2011) (Board found that the petitioned-for unit was a "fractured unit," in part because it did not track any lines drawn by the employer, such as a department, function, or classification, and was not structured along lines of supervision or in accordance with the method of compensation); *Alamo Rent-A-Car*, 330 NLRB at 898 (The Board found the petitioned-for unit of two of the employer's four facilities in the San Francisco area not to be appropriate where, inter alia, "[t]he proposed unit [did] not conform to any administrative function or grouping of the Employer's operations." Instead, the Board found the unit of four San Francisco facilities to be appropriate.).

of management and supervision; functional integration of business operations and the conformity of the unit with the Employer's own administrative grouping. I also note that none of the above factors suggest that the East Market grouping is arbitrary or that APPs within the East Market do not share a community of interest.[26]

III. CONCLUSION

For reasons described above and upon consideration of the entire record, I conclude that the Healthcare Rule does not apply to the petitioned-for unit and that a unit of East Market APPs is appropriate. I conclude that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **Included:** All full-time and regular part-time nurse practitioners, physician assistants, certified nurse midwives and clinical nurse specialists employed within the Employer's East Market.
>
> **Excluded:** All other employees, managerial employees, confidential employees, guards, and supervisors defined by the National Labor Relations Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether they wish to be represented for purposes of collective bargaining by the Minnesota Nurses Association.

A. Method of Election

The Board has delegated discretion to the regional directors in determining whether an election should be conducted by manual balloting or mail ballot. See *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958). While the Board has a strong preference for conducting manual elections,

[26] It is not necessary for me to make any findings related to the Employer's proposed alternative units because I have found the petitioned-for unit to be appropriate. Regardless, I note that the Employer's proposed thirteen units, primarily based on geographic lines, do not account for several core features of the East Market. First, many of the East Market APPs are supervised centrally, irrespective of employees' regional location. Second, many APPs routinely perform work outside of their primary region—either because that is part of their job or because they volunteer to do so. Finally, all the Employer's 13 individual proposed units do not have a one-to-one correspondence with the Employer's administrative subgroupings, while the petitioned-for unit directly corresponds to an established comprehensive administrative division.

the Board has also recognized that there are instances where a regional director may reasonably conclude that conducting the election by mail ballot would enhance the opportunities for all to vote. *San Diego Gas and Elec*., 325 NLRB 1143, 1145 (1998). In *San Diego Gas and Elec.,* 325 NLRB at 1145, the Board found that a mail-ballot election may be appropriate:

> (1) when eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the regional director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern.

The Employer argues that a manual election is appropriate, while the Union argues for a mail-ballot election. The bargaining unit in this case covers approximately 400 employees working at approximately 60 different worksites over a large geographic area as already described above. Additionally, the evidence reflects that some employees are regularly scheduled to work at different facilities on any given day. Some APPs do not regularly report to an Employer worksite because they are teleworking or seeing patients in facilities not operated by the Employer. I find that given this scattering of employees, a mail-ballot election is appropriate under the *San Diego Gas* factors above. I also note that these employees are highly educated professionals that will be able to read and understand the mail ballots they receive. While their work may involve occasional travel, there is no evidence to suggest that the availability of employee mailing addresses will be an obstacle to conducting a mail-ballot election. Finally, given the number of facilities, geographic distance, and the varying work sites of employees, a manual election would require significant resources to conduct, likely involving multiple days, numerous voter lists, longer polling periods, and multiple board agents.

For the above reasons, I have concluded a mail-ballot election is appropriate and will be conducted in this case.

B. Election Details

As directed above, the election will be conducted by mail ballot.

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 18, on June 24, 2024, at 3:30 PM. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 18 office by close of business at 4:30 PM on July 22, 2024. The mail ballots will be counted at the Region 18 office located at Paul D. Wellstone Federal Building, 212 Third Avenue South, Suite

200, Minneapolis, MN 55401-2657 at 10:00 AM on July 23, 2024, or, at the Regional Director's discretion, by videoconference at a date and time to be determined by the Regional Director in consultation with the parties.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be void.

If any eligible voter does not receive a mail ballot by July 1, 2024, or otherwise requires a duplicate mail ballot kit, he or she should immediately contact the Region 18 office to arrange for another mail ballot kit to be sent to that employee.

If the election and/or count is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

C. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **June 2, 2024,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

D. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **June 13, 2024.** The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

E. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day the ballots are mailed to employees and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 11, 2024

Jennifer A. Hadsall
Regional Director
National Labor Relations Board
Region 18
Paul D. Wellstone Federal Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401-2657

Attachments