

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SPECIALTY HOSPITAL OF WASHINGTON
– HADLEY, LLC,

Respondent

Case 5-CA-33522

and

1199 SEIU, UNITED HEALTHCARE
WORKERS EAST, MD/DC DIVISION,

Charging Party/Union

**RESPONDENT’S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to the Board’s Rules and Regulations, Series 8, as amended, Respondent, Specialty Hospital of Washington – Hadley, LLC, excepts to the following findings of fact, failure to find certain facts, rulings, conclusions of law and recommended order of the Administrative Law Judge (“ALJ”) as set forth in, or omitted from, his decision dated August 26, 2009. In addition, Respondent requests oral argument.

Respondent’s exceptions are as follows:

1. Respondent excepts to the implication of the finding that “Respondent was willing to concede the appropriateness of the currently disputed unit when it suited its purposes to do so” (JD 4, l. 50-51)¹ as wholly speculative and improperly imputing the ALJ’s own perceptions and views to the Respondent.

2. Respondent excepts to the finding that Mr. Damato did not appear as counsel at the hearing (JD 5, l. 20-21) as unwarranted and irrelevant.

3. Respondent excepts to the implication of the finding in Paragraph 2 above that Mr. Damato did not appear as counsel at the hearing as improperly imputing the ALJ’s own perceptions and views to those of the Respondent.

¹ “JD __, l. __” refers to the pages and lines of the Administrative Law Judge’s Decision. “T __” refers to the pages of the hearing before the Administrative Law Judge. “GC __,” “R __,” and “CP __” refer respectively to the exhibits of the General Counsel, Respondents and Charging Parties.

4. Respondent excepts to the finding that it filed a “Motion for Reconsideration and Motion to Stay” dated December 3, 2008 for the reason that said finding is contrary to the evidence (JD 5, l. 1-2). Respondent filed its “Motion for Reconsideration and Motion to Stay” on December 19, 2008.

5. Respondent excepts to the finding that on November 6, 2006 Hadley Memorial’s COO Mounce wrote to Union Executive Vice President Reid that, “Although we previously advised you that the sale was to be a sale of stock, in the last several days of negotiations the form of the transaction was changed to an asset sale” as legally irrelevant, as the Board held in its Order Denying Motion For Summary Judgment that Respondent’s bargaining obligation to the Union must be determined as of February 1, 2007 (JD 7, l. 48-49).

6. Respondent excepts to the failure to find that there is no evidence in the record as to whether the Union had majority support in the 2/1/07 Unit (JD 8, l. 10-20).

7. Respondent excepts to the failure to find that there is no evidence in the record regarding the extent of the support for the Union in the predecessor unit (JD 6, l. 45-51).

8. Respondent excepts to the finding that “It was Respondent’s position at the hearing that the bargaining unit for which recognition was sought from February 1, 2007 is inappropriate because it excludes respiratory therapists (RTS) and recreation technicians,” to the extent this finding suggests that this was Respondent’s only argument advanced at hearing or that this argument was raised for the first time at the hearing (JD 9, l. 27-29).

9. Respondent excepts to the ALJ’s revocation of Respondent’s April 23, 2009 subpoena to the Union seeking, among other things, the authorization cards submitted to and/or reviewed by Arbitrator Barry Shapiro (T 18-20).

10. Respondent excepts to the failure to find that the Union acknowledged at the hearing that it has the authorization cards used for the November 14, 2005 card check (T 20).

11. Respondent excepts to the ALJ’s decision to grant the General Counsel’s Motion in Limine to preclude the production or use at hearing of the items sought by the Respondent’s subpoena to the Union (T 18-20).

12. Respondent excepts to the failure to find that the Union has never demonstrated majority support (both before and after the change in ownership) in an appropriate unit for the reason that the ALJ has not applied the proper legal standard.

13. Respondent excepts to the failure of the ALJ to apply the proper legal standard under NLRB v. Burns International Security Services, Inc. and its progeny requiring the General Counsel to demonstrate an appropriate unit both before and after a change in ownership (JD 9-11).

14. Respondent excepts to the ALJ’s reliance on the NLRB decisions cited on pages 9-12 of the ALJ’s decision as inappropriate and inapposite, as these cases involve units that were appropriate units both before and after a change in ownership (JD 9-12), facts which have not been established in the instant case.

15. Respondent excepts to the ALJ's reliance on Fall River Dyeing & Finishing v. NLRB (JD 10, l. 4-5) as inapposite to the instant case because Fall River, and the Burns decision upon which it relies, involved a certified unit unlike the instant case.

16. Respondent excepts to the ALJ's conclusion that Respondent is a successor employer analogous to the employer in Fall River Dyeing & Finishing v. NLRB and its progeny (JD 10-13), because in the instant case the unit was not certified, could not have been certified and cannot be certified now because there has been no showing of majority support.

17. Respondent excepts to the ALJ's reliance on Northern Montana Health Care and Concord Associates for the proposition that the Union could retain representational status after it unilaterally altered the bargaining unit, for the reason that this reliance is inappropriate and inapposite because there was no question in those cases, as there is in the instant case, as to the union's majority status (JD 12, l. 48-51; JD 13, l. 27-30, 45-50).

18. Respondent excepts to the failure to find that the General Counsel has the burden of proving that the 2/1/07 Unit was appropriate, as it is contrary to law.

19. Respondent excepts to the ALJ's finding that "The Board has also not used concerns that the employees may not have initially selected Union, if they had known at the time that the bargaining unit would have been smaller than initially recognized in successorship cases" (JD 14, l. 21-23), as misrepresenting Respondent's argument and, in addition, as being contrary to law.

20. Respondent excepts to the finding that the Union did not unilaterally alter the predecessor's unit (JD 14, l. 39-40) as being both contrary to fact, and contrary to the Board's finding in its ruling on Respondent's Motion For Summary Judgment (at page 7) that the Union demanded "bargaining in a unit that the Union unilaterally created."

21. Respondent excepts to the ALJ's finding that NLRB v. Beverly Health and Rehab. Servs., Inc., NLRB v. Parsons School of Design, NLRB v. Lorimar Productions, Inc., and Hamilton Test Systems, N.Y., Inc. v. NLRB do not apply to the instant case as being contrary to the law and fact (JD 14, l. 35-38, 47-51).

22. Respondent excepts to the ALJ's reliance on Local Lodge No. 1424 v. NLRB, Bryan Manufacturing as the basis for revoking Respondent's subpoena seeking the Union authorization cards, for the reason that this reliance is inapposite and contrary to law (JD 15, l. 47-49).

23. Respondent excepts to the ALJ's reliance on Local Lodge No. 1424 v. NLRB, Bryan Manufacturing for the proposition that the General Counsel does not need to establish majority status in this case, as inapposite and contrary to law (JD 15, l. 50-51).

24. Respondent excepts to the ALJ's finding that Libby-Owens-Ford Glass Company, a unit clarification case, is applicable to the instant case (JD 15, l. 6-7) for the reason that said finding is contrary to law and unsupported by the evidence.

25. Respondent excepts to the ALJ's finding that Briggs Manufacturing Company, a decertification case, is applicable to the instant case (JD 15, l. 24-25) for the reason that said finding is contrary to law and unsupported by the evidence.

26. Respondent excepts to the ALJ's finding that Russelton Medical Group is distinguishable from the instant case for the reason that it is contrary to law and unsupported by the evidence (JD 16, l. 5).

27. Respondent excepts to the ALJ's failure to apply Field Bridge Associates to the instant case for the reason that it is contrary to law.

28. Respondent excepts to the finding that "[i]t is clear in the circumstances here that from the employees perspective they would have assumed their jobs 'as essentially unaltered' when Respondent began operating the facility" (JD 16, l. 22-24), as speculative, contrary to law, and unsupported by the evidence.

29. Respondent excepts to the ALJ's statement that "Section 9(b)(1) of the Act appears to be written to protect the interests of professional employees, not for successor employers to escape their bargaining obligations with a historically recognized unit" (JD 16, l. 34-36), as wholly speculative, unsupported by the evidence, and improperly imputing the ALJ's own perceptions and views to the Respondent.

30. Respondent excepts to the ALJ's finding no difference between the Union "voluntarily drop[ping] some positions from a predecessor's unit based on statutory exclusions" with an employer acquiring only a portion of the predecessor's bargaining unit and thereby diminishing the bargaining unit's size (JD 13, l. 27-30), as contrary to law.

31. Respondent excepts to the ALJ's finding, premised on Burns, that Respondent's awareness of the Union's presence when it acquired the hospital is a basis for finding a bargaining obligation (JD 17, l. 33-37), for the reason that it is contrary to law.

32. Respondent excepts to the ALJ improperly equating the Union's more than two month delay in seeking recognition in the new unit with a hiatus in operations caused by a change in ownership, such that he concluded that the delay did not have a "significant impact on the bargaining unit employees, or as to the bonafides of the Union's representation status" (JD 18, l. 3-10), as contrary to law.

33. Respondent excepts to the ALJ's finding that "the sole reason Respondent gave at the time for its refusal to recognize the Union was that Hadley Memorial unit included guards and pharmacists" (JD 18, l. 50-51), as contrary to the evidence (GC 26) and irrelevant, as the Board found in its Order Denying Motion for Summary Judgment that the Respondent's bargaining obligation to the Union must be determined as of February 1, 2007.

34. Respondent excepts to the finding that its operation is similar in nature to the operation in Child's Hospital for the reason that it is contrary to the evidence (JD 20, l. 48-49; T 93-100).

35. Respondent excepts to the finding that the Board's bargaining unit rules for acute care institutions would not be applicable to Respondent for the reason that it is contrary to the law and to the evidence (JD 20, l. 49-51; JD 21, l. 6-8; T 95-98).

36. Respondent excepts to the finding that the bargaining unit sought by the Union would be an "existing non-conforming unit" (JD 21, l. 10), for the reason that this finding is contrary to law. The new unit was unilaterally created by the Union after the sale of the hospital. Said another way, it was not an "existing" bargaining unit under the existing non-conforming bargaining unit exception to the Healthcare Rule.

37. Respondent excepts to the ALJ's failure to apply Park Manor Care Center, Inc., 305 N.L.R.B. 872 (1991), to his appropriate bargaining unit analysis once he concluded that Respondent was not an acute care hospital under the Healthcare Rule, as this is contrary to the law.

38. Respondent excepts to the finding that registered respiratory therapists generally make higher wages than certified respiratory therapists, as it is unsupported by the evidence (JD 23, l. 16; Jt. Ex. 3).

39. Respondent excepts to the ALJ's failure to find that respiratory therapists work is done pursuant to physicians' orders, as it is contrary to the evidence (T 245-46, 266-67, 273, 277).

40. Respondent excepts to the ALJ's failure to find that respiratory therapists work is done pursuant to daily assignments, as it is contrary to the evidence (T 244).

41. Respondent excepts to the ALJ's failure to decide the status of respiratory therapists (JD 26, l. 4) as technical employees, as the evidence and law establishes that they are technical employees (T 243-44, 245-46, 266-67, 268, 273-76, 277, 290-92).

42. Respondent excepts to the ALJ's finding that Respondent's predecessor "sought the exclusion of [respiratory therapists] from the unit it agreed to with the Union" (JD 26, l. 7-8), for the reason that it is legally irrelevant because the Board held in its Order Denying Motion for Summary Judgment that Respondent's bargaining obligation to the Union must be determined as of February 1, 2007.

43. Respondent excepts to the ALJ's finding that respiratory therapists have a separate and distinct community of interest from the bargaining unit employees (JD 26, l. 9-10), because this finding is contrary to the evidence (T 155-56, 162-63, 254-56, 257) and the law.

44. Respondent excepts to the ALJ's finding that the nature of the contact of the respiratory therapists with unit classifications is not sufficient to override both the historical nature of the unit, as well as the unique status and separate community of interest of the highly skilled and specialized respiratory therapists whether they are labeled technical or professional employees (JD 26, l. 19-22), because this finding is contrary to the evidence (T 155-56, 162-63, 243-44, 245-46, 254-57, 266-67, 268, 273-76, 277, 290-92) and the law.

45. Respondent excepts to the ALJ's finding that the requested unit is appropriate without the inclusion of recreation technicians (JD 26, l. 37-38), because this finding is contrary to the evidence (T 154-55, 158, 160, 162, 170-73) and the law.

46. Respondent excepts to the finding that Respondent's predecessor employer proposed to exclude recreation technicians from the bargaining unit (JD 29, l. 1-2), for the reason that it is legally irrelevant and the Board held in its Order Denying Motion for Summary Judgment that Respondent's bargaining obligation to the Union must be determined as of February 1, 2007.

47. Respondent excepts to the finding that the Union sought additional bargaining sessions from Respondent's predecessor, but was put off with a variety of excuses (JD 29, l. 20-21), as legally irrelevant, because the Board held in its Order Denying Motion for Summary Judgment that Respondent's bargaining obligation to the Union must be determined as of February 1, 2007.

48. Respondent excepts to the finding that towards the end of the predecessor's ownership of the hospital, the Union was given assurances that bargaining would continue as before, as legally irrelevant, because the Board held in its Order Denying Motion for Summary Judgment that Respondent's bargaining obligation to the Union must be determined as of February 1, 2007.

49. Respondent excepts to the finding that the predecessor employer changed the sale of the hospital from a stock sale to an asset sale for the reason that it is legally irrelevant, because the Board held in its Order Denying Motion For Summary Judgment that Respondent's bargaining obligation must be determined as of February 1, 2007 (JD 29, l. 24-25).

50. Respondent excepts to the finding that "it is likely that one of the reasons for the delay [in negotiations], although it was not mentioned, was that [the predecessor] was attempting to sell the hospital, and did not want to encumber the new owner with a Union contract" (JD 29, l. 27-29). Respondent excepts to this finding as wholly speculative and improperly imputing the ALJ's own perceptions and views to the Respondent. In addition, Respondent excepts to this finding as legally irrelevant, because the Board held in its Order Denying Motion for Summary Judgment that Respondent's bargaining obligation to the Union must be determined as of February 1, 2007.

51. Respondent excepts to the finding that it filed motions and requests for postponement seeking to delay these proceedings as inappropriate, unwarranted, wholly speculative, and not supported by the evidence (JD 29, l. 47-48).

52. Respondent excepts to the failure to find that the delay caused by the NLRB and the Union in these proceedings, including the eleven months it took the Board to rule on Respondent's Motion for Summary Judgment, the delay caused by the General Counsel's Motion for Extension of Time to Respond to the Notice to Show Cause, and the delay caused by the NLRB's Order Postponing Hearing Indefinitely, outweighed any delay caused by Respondent-initiated motions.

53. Respondent excepts to the finding that it advanced an argument at trial that employee turnover establishes the Union no longer has majority support (JD 29, l. 48-49), for the reason that it is contrary to the evidence, as Respondent raised this argument in its Motion for Summary Judgment.

54. Respondent excepts to the ALJ's finding that it filed a RM petition with the intent to delay these proceedings in the hope that time would strengthen its argument as to employee turnover (JD 30, l. 3-4), for the reason that this finding is wholly speculative, unsupported by the evidence and improperly imputes the ALJ's own perceptions and views to Respondent. The RM litigation proceeded concurrently with the ULP litigation, and thus there was no delay in the ULP litigation.

55. Respondent excepts to the ALJ's finding that, "as viewed by a reasonable employee, Respondent's refusal to honor its predecessor's recognition of the Union could only be viewed as subjecting their rights to union representation based on the whims of ownership of the facility" (JD 30, l. 20-23), because this finding is speculative, contrary to the Board's finding in its ruling on Respondent's Motion For Summary Judgment (at page 7) that the Union demanded "bargaining in a unit that the Union unilaterally created," unsupported by the evidence and contrary to the law.

56. Respondent excepts to the finding that it violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union in the unit requested on February 1, 2007 (JD 30, l. 23-25) since it is contrary to the evidence and the law.

57. Respondent excepts to the proposed remedy which is premised on inappropriate findings of violations of Sections 8(a)(5) and (1) of the Act for the reasons set forth in the exceptions above (JD 30, l. 48-51).

58. Respondent excepts to those portions of the recommended Order, including the Appendix, that in any way conflict with the above-noted exceptions (JD 31-32, Appendix).

Respectfully submitted,

SPECIALTY HOSPITAL OF WASHINGTON –
HADLEY, LLC

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November 13, 2009

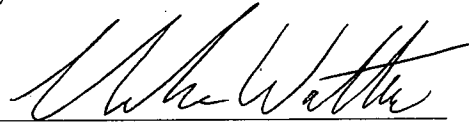
Attorneys for Respondent

CERTIFICATE OF SERVICE

This is to certify that a true copy of Respondent's Exceptions to the Decision of the Administrative Law Judge was served via email and Federal Express overnight delivery this 13th day of November, 2009, upon:

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A handwritten signature in cursive script, appearing to read "Charles F. Walters", written over a horizontal line.

Charles F. Walters