UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPECIALTY HOSPITAL OF WASHINGTON - HADLEY, LLC

Respondent

and **Case 5-CA-33522**

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

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE

On January 17, 2008, the Board issued an Order transferring this proceeding to the Board and a Notice to Show Cause, requesting the parties to address: "whether the Respondent has a successor obligation to bargain with the Union in a unit that has allegedly been 'perfected' by the Union's disclaimer of interest in representing the guards and professional employees previously included in the unit." The General Counsel files this Memorandum in response to that Notice to Show Cause and in further opposition to Respondent's pending Motion for Summary Judgment. The Respondent is a Burns successor and excusing the Respondent from its obligation under Burns to recognize and bargain with the Union solely because the unit has been revised to exclude guards and professional employees would

contravene longstanding Board law and the policy of promoting stable collective bargaining relationships that underlies that law.

INTRODUCTION

On June 29, 2007, the Regional Director issued the Complaint in this case alleging, *inter alia*, that Respondent is a Burns successor that failed and refused to recognize and bargain with the Union as the collective-bargaining representative of an appropriate unit. The Respondent filed its Answer on July 13, 2007, denying *inter alia*, that it is a Burns successor, that the unit alleged in the Complaint is appropriate, and that it has an obligation to bargain with the Union. On December 3, 2007, the Respondent moved for summary judgment; the Region filed its opposition to that motion on December 21, 2007.

The Respondent does not dispute that it hired all of its predecessors' employees or that there is substantial continuity between the two enterprises. Instead, after refusing to recognize the Union on the ground that the unit improperly included guards and professional employees, the Respondent now argues that it is relieved from its bargaining obligation because the Union disclaimed interest in representing those guards and professional employees. The Respondent's assertion that a minor reduction in the

unit removes the presumption of continuing majority support that survives a mere change in ownership is contrary to well-established Supreme Court and Board law.[1]

STATEMENT OF FACTS[2]

The facility involved in this proceeding is a hospital providing long-term acute care. The Charging Party, SEIU United Healthcare Workers East ("the Union"), and the predecessor employer, Hadley Memorial Hospital ("Hadley"), agreed to a card-check procedure to determine whether Hadley would voluntarily recognize the Union as the exclusive bargaining representative for an agreed-upon unit of approximately 170 employees that included five professional employees (pharmacists) and ten security guards. Specifically, that unit included employees in the following classifications:

> Baker, cashier, certified pharmacy tech, C.N.A., cook, dietary clerk, E.S., E.S. Aide, E.S. Floor Tech, Engineer III, food service worker, LPN, maintenance helper, maintenance mechanic, med lab tech, medical records clerk, medical records tech, painter, pharmacist, pharmacy tech, phlebotomist, P.T. care tech, rehab tech, security guard, senior medical records tech, stock clerk, stock room coordinator, trayline checker, unit secretary, and utility aid.

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[1] See NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972); Stewart Granite Enterprises, 255 NLRB 569, 573 (1981).

[2] The General Counsel provided a more detailed Statement of Facts in its Opposition to Respondent's Motion for Summary Judgment.

An Arbitrator's card check in November 2005 demonstrated that a majority of the employees had authorized the Union to represent them. Hadley voluntarily recognized the Union, and the parties engaged in contract negotiations in March, May, and July 2006. In September 2006, Hadley suspended negotiations because a sale was pending. On November 6, 2006, Hadley notified the Union that it had sold its assets to the Respondent.

The Respondent took over operation of the facility on November 13, 2006. The Respondent hired virtually all of the predecessor's employees, without requiring them to submit applications, and, at least initially, maintained their working conditions. At that time there were 177 employees in the bargaining unit, including twelve guards and four pharmacists. There was no hiatus in operations, and the Respondent continued to provide the same services at the same location for the same patients.

On November 17, 2006, the Respondent refused to recognize the Union because the unit included professional employees, who had not been afforded a self-determination vote under Section 9(b)(1), and security guards. On February 1, 2007, the Union disclaimed interest in representing the guards and the pharmacists. On February

8, 2007, the Respondent refused to recognize the Union in the modified bargaining unit.

ARGUMENT

RESPONDENT IS A BURNS SUCCESSOR THAT IS OBLIGATED TO RECOGNIZE AND BARGAIN WITH THE UNION IN THE REVISED UNIT, BECAUSE THE UNION IS ENTITLED TO A PRESUMPTION OF CONTINUING MAJORITY SUPPORT.

It is clear that a change in ownership does not affect the presumption of continuing majority status afforded to existing collective bargaining representatives where there is substantial continuity in operations and a majority of the successor's employees worked for the predecessor.[3] In Fall River, the Supreme Court explained that when there is a "transition between employers," the union is in "a particularly vulnerable position" and therefore "needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor."[4]

Respondent argues that this well-established doctrine should be set aside in this case because the unit in which the Union requested recognition has been slightly modified -- in fact, modified to meet the Respondent's own

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[3] NLRB v. Burns International Security Services, Inc., 406 U.S. at 278-81; Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 41-43 (1987).

[4] 482 U.S. at 39.

objections. The Respondent, however, has not proffered any convincing reason why the Board should not apply traditional Burns principles in this case.

A. The Successor's Duty To Bargain Is Not Defeated By A Reduction Of The Predecessor Bargaining Unit.

The Respondent's insistence that the Burns successorship duty to bargain only attaches when the bargaining unit remains unchanged is belied by thirty years of contrary Board precedent.[5] Thus, a successor employer's obligation to bargain with the union that represented its predecessor's employees is not defeated by the fact that only a portion of the union-represented operation was transferred, so long as the employees in the transferred portion constitute a separate appropriate unit.[6]

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[5] See Respondent's Motion for Summary Judgment at 6.

[6] See, e.g., Van Lear Equipment, Inc., 336 NLRB 1059, 1064 (2001) (successor took over only a portion of the predecessor's "heterogeneous bargaining unit," bus drivers but not custodians, maintenance workers, or secretaries); Bronx Health Plan, 326 NLRB 810, 812 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999) (successor hired predecessor clerical employees, who had formerly "been a separate part of a large and diverse unit"); Louis Pappas' Restaurant, 275 NLRB 1519, 1519-20 (1985) (successor took over predecessor's restaurant but not its hotels, attraction park, or bait store where 60 of the 216 unit employees had worked); Stewart Granite Enterprises, 255 NLRB at 573 (predecessor sold gravestone manufacturing plant but retained stone quarries); Mondovi Foods Corp., 235 NLRB 1080, 1082 (1978) (successor purchased whey drying operations but not the milk processing operation which was

In Northern Montana Health Care, in addressing the precise issue before the Board here, the Administrative Law Judge determined that there was "no significant difference" between a situation "where the new bargaining unit arises as a result of a partial assumption of the predecessor's operation" and a situation where "the appropriate unit simply excludes some of the employees previously included in the predecessor unit."[7] In that case, the parties had treated licensed practical nurses ("LPNs") as nonsupervisors and included them in a series of collective-bargaining agreements. The Administrative Law Judge determined that the LPNs were supervisory employees. Thus, like here, the successor had acquired all of the predecessor's operations but some of the predecessor's employees had been inappropriately included in the pre-existing unit. The Judge revised the unit to exclude the LPNs and then concluded that there nevertheless was continuity in the unit, the revised unit was appropriate

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also covered by the predecessor's collective bargaining agreement with the union).

[7] Northern Montana Health Care, 324 NLRB 752, 765 (1997), enfd. 178 F.3d 1089 (9th Cir. 1999).

and, accordingly, the union was entitled to a rebuttable presumption of majority status in that unit.[8]

The very same analysis should apply here, where the bargaining unit has been revised to exclude twelve guards and four professional employees, consistent with Section 9(b)(1) and (3) of the Act *and at the Respondent's insistence*. For the remaining approximately 161 unit employees, there is continuity in the unit and, therefore, the Union should enjoy the rebuttable presumption of continued majority status provided by Burns.

This result is consistent with the Board's treatment of changes in unit composition resulting from employee turnover. The Board has long presumed that new employees support the incumbent union in the same proportion as the employees they replace, absent strong evidence to the contrary.[9] Likewise, the Board should presume here that the

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[8] Id. at 768. The Board reversed the Judge's finding that the LPNs were supervisory employees who did not belong in the unit. Consequently, the Board did not reach the question of whether the successor was obligated to recognize and bargain in the revised unit. Id. at 752-54.

[9] See NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 779 (1990) (discussing this longstanding presumption); Kentucky Fried Chicken, 341 NLRB 69, 81, 83 (2004) (high turnover alone does not support good faith doubt of majority status, even though only one current employee in a unit of 41 was employed at the time of the election); Spillman Co., 311 NLRB 95, 95, n.2 (1993), enfd. mem. 41 F.3d 1507 (6th Cir. 1994) (only seven of the seventeen

remaining employees support the incumbent union in the same proportion as the employees in the predecessor unit, despite the "turnover" in the unit resulting from the exclusion of guards and pharmacists.

This result is also consistent with principles that govern the Board's representation proceedings. Thus, the Board will process a unit clarification petition to "perfect" a bargaining unit and exclude particular job classifications where, as here, inclusion of those classifications would violate the "basic principles" of the Act.[10] In such circumstances, the Board modifies the unit without requiring a new election, despite the fact that employees initially had selected representation in a unit that included the challenged positions.[11]

Moreover, the Board has expressly and repeatedly rejected the Respondent's argument that a new election must be held in a unit modified in response to election

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employees on the payroll when the Employer withdrew recognition were employed when the Board certified the union).

[10] See Goddard Riverside Community Center, 351 NLRB No. 84, slip op. at 3 (2007) (excluding team leaders as supervisory employees); Washington Post Co., 254 NLRB 168, 169 (1981) (excluding various classifications as supervisory, managerial, and confidential employees).

[11] Id.

challenges because the remaining employees who chose union representation might have felt differently had they known the unit would be revised.[12] Respondent relies upon a line of Circuit Court cases that denied enforcement of bargaining orders in units that were revised after representation elections had been held.[13] In those cases, the Courts of Appeals held that the Board's vote-under-challenge procedure denied employees their right to make an informed choice, because the certified unit differed from the unit described in the official notice of election.[14]

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[12] See, e.g., Northeast Iowa Telephone Co., 341 NLRB 670, 670-71 (2004) (rejecting argument that allowing alleged supervisors to vote under challenge compromised employee free choice because voting employees did not know "the contours of the unit"); Morgan Manor Nursing & Rehabilitation Center, 319 NLRB 552, 553 (1995) (reversing Regional Director's revocation of certification and direction of new election where parties stipulated to the exclusion of LPNs after the election had been held). Sunrise, Inc., 282 NLRB 252 (1986) (rerun election ordered where the election had improperly been held in a stipulated unit that violated Section 9(b)(1)), is not to the contrary. Unlike Northeast Iowa Telephone Co. and Morgan Manor Nursing & Rehabilitation Center, the parties in Sunrise had misused the Board's processes for a purpose contrary to the Act.

[13] Respondent's Motion for Summary Judgment at 8-9, citing NLRB v. Parsons School of Design, 793 F.2d 503 (2d Cir. 1986); Hamilton Test Systems v. NLRB, 743 F.2d 136 (2d Cir. 1984); NLRB v. Lorimar Productions, Inc., 771 F.2d 1294 (9th Cir. 1985); NLRB v. Beverly Health & Rehabilitation Services, Inc., 1997 U.S. App. LEXIS 21257 (4th Cir. 1997).

[14] Parsons School of Design, 793 F.2d at 506-08; Hamilton Test Systems, 743 F.2d at 140-42; Lorimar Productions, 771

However, the Board has distinguished those Circuit Court cases and applied the holdings only to situations where the unit in the election notice is different "in some significant way" from the unit eventually certified.[15] Where there is no significant change in unit size or in the scope and character of the unit, the Board will not hold a rerun election.[16] The approach advocated by Respondent would in essence require the Board to discard its "tried-and-true 'vote under challenge procedure'" -- something the Board clearly is unwilling to do.[17]

Here, the exclusion of sixteen employees from a unit of 177 did not significantly alter the size of the unit; the exclusion of the guards and pharmacists also did not

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F.2d at 1301-02; Beverly Health & Rehabilitation Services, 1997 U.S. App. LEXIS 12157 at **10-11.

[15] Northeast Iowa Telephone Co., 341 NLRB at 671, distinguishing NLRB v. Parsons School of Design, 793 F.2d 503 (2d Cir. 1986) (postelection unit excluded all full-time faculty leaving only part-time faculty); Hamilton Test Systems v. NLRB, 743 F.2d 136 (2d Cir. 1984) (postelection unit reduced by 50%); NLRB v. Lorimar Productions, Inc., 771 F.2d 1294 (9th Cir. 1985) (postelection unit reduced by nearly 40%).

[16] See, e.g., Morgan Manor Nursing & Rehabilitation Center, 319 NLRB at 553 (exclusion of LPNs resulting in 20% reduction in unit size did not necessitate new vote to determine if remaining service and maintenance employees still desired representation).

[17] Northeast Iowa Telephone Co., 341 NLRB at 671.

significantly alter the scope and character of the large, heterogeneous predecessor unit that still includes 28 other classifications. In such circumstances, the remaining 161 unit employees should not be deprived of Union representation because of an insignificant modification of the unit in which they chose such representation.[18]

B. The Revised Unit Is An Appropriate Unit.

Respondent contends that the revised unit here is not appropriate because it does not comply with the Board's

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[18] The Respondent also challenges the application of the Burns presumption of continuing majority support because the predecessor employer voluntarily recognized the Union based upon authorization cards rather than a Board certification. Respondent's Motion for Summary Judgment at 2, 6. But the Board has long rejected such a distinction and held successors obligated to recognize and bargain with a Union voluntarily recognized by the predecessor employer. See, e.g., JMM Operational Services, 316 NLRB 6, 12-14 (1995) (private contractor was Burns successor to public employer that voluntarily recognized the union based on a card check). The Board's recent decision in Dana Corp., 351 NLRB No. 28 (2007), does not require a change in this policy. Dana Corp. involved the issue of whether a voluntary recognition should bar a decertification petition filed by employees or a representation petition filed by another union. That issue is not implicated here, because no decertification petition or rival union representation petition has been filed. Further, the Board made clear in Dana Corp. that it does "not question the legality of voluntary recognition agreements based on a union's showing of majority support. Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it." 351 NLRB No. 28, slip op. at 3 (citation omitted).

health care industry Rule[19] or with its traditional health care representation principles.[20] Once again, Respondent would have the Board disregard well-established doctrines designed to promote stability in labor relations.

First, the health care industry Rule only applies to representation petitions involving a new unit of previously unrepresented employees and does not apply to an "existing non-conforming unit."[21] The Board is not faced here with an initial representation petition.

Second, the Respondent also challenges the unit in which bargaining has been requested on the grounds that it allegedly does not include all technical employees.[22] But, in the interest of promoting stable bargaining relationships, a successor that challenges the appropriateness of a previously recognized unit has the burden of proving the unit is no longer appropriate and that burden is a heavy one.[23] Further, the Board will

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[19] Board's Rules and Regulations, 29 CFR § 103.30.

[20] Respondent's Motion for Summary Judgment at 18–21.

[21] Pathology Institute, 320 NLRB 1050, 1050 (1996), enfd. 116 F.3d 482 (9th Cir. 1997), cert. denied, 552 U.S. 1028 (1997); Kaiser Foundation Hospitals, 312 NLRB 933, 934 (1993); 29 CFR § 103.30(a).

[22] Respondent's Motion for Summary Judgment at 19.

[23] Cadillac Asphalt Paving Co., 349 NLRB No. 5, slip op. at 4 (2007) (successor's operational changes did not render

uphold a unit recognized by the predecessor employer, even if the unit would not be appropriate under Board law if it were being organized for the first time.[24] The Respondent does not present any operational changes that make the historical bargaining unit inappropriate; instead, the Respondent raises objections that would only be relevant if the unit were being organized for the first time.[25]

The Respondent would have the Board disregard these precedents on the grounds that "there is no collective bargaining relationship to stabilize."[26] But the facts

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separate drivers bargaining unit inappropriate); Ready Mix USA, Inc., 340 NLRB 946, 947 (2003) (successor failed to demonstrate that combined unit of employees from ready-mix batch plant and concrete block plant was no longer appropriate); Trident Seafoods, Inc., 318 NLRB 738, 738 (1995), enfd. in pert. part 101 F.3d 111 (D.C. Cir. 1996) (respondent failed to show any significant post-purchase changes to render the three existing bargaining units inappropriate).

[24] Trident Seafoods, Inc., 318 NLRB at 740 (Administrative Law Judge improperly focused on factors relevant only to whether a previously unrepresented unit would be appropriate); Ready Mix USA, Inc., 340 NLRB at 947 (question is not whether differences in block plant and batch plant operations would have made unit inappropriate if it were being organized for the first time).

[25] See Ready Mix USA, Inc., 340 NLRB at 947 (differences in block plant and batch plant operations existed under predecessor employer). To the extent that the Respondent's arguments regarding the exclusion of respiratory therapists are relevant, those issues should be resolved through a hearing before an Administrative Law Judge.

[26] Respondent's Motion for Summary Judgment at 7-8, 20.

demonstrate otherwise: Hadley voluntarily recognized the Union; the parties bargained for several months; proposals and counter-proposals were exchanged; and there is no reason to assume that a collective-bargaining agreement would not have been reached if the facility had not been sold. The notion that the Board should determine when its rules promoting labor stability should be applied based on a subjective analysis of the strength of the prior bargaining relationship is impractical and contravenes decades of successorship law.

CONCLUSION

For all these reasons, as well as the reasons stated in our previously submitted Opposition to Respondent's pending Motion, Counsel for the General Counsel respectfully requests that the Board deny the Respondent's Motion for Summary Judgment.

Respectfully submitted this 28th day of February, 2008.

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CERTIFICATE OF SERVICE

This is to certify that on this 28th date of February 2008, copies of Counsel for the General Counsel's Response to the Board's Notice to Show Cause were served by Federal Express next business day delivery on Respondent's and Charging Party's Counsel at the addresses below. Both parties were notified telephonically of this filing.

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