UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SPECIALTY HOSPITAL OF WASHINGTON
---HADLEY, L.L.C.

Respondent Case 5-CA-33522

and

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

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Sections 102.24 and 102.50 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, herein called the Board's Rules, counsel for the General Counsel opposes the Motion for Summary Judgment filed with the National Labor Relations Board, hereafter the Board, by Specialty Hospital of Washington --- Hadley, L.L.C., hereafter Respondent, and respectfully requests that the Board deny Respondent's Motion for Summary Judgment prior to issuing a Show Cause Order and remand this matter to the Regional Director for Region 5 for trial before an Administrative Law Judge as there are genuine disputes of material facts, factual issues exist which may moot the complex legal issues presented by Respondent's motion, and Respondent is not entitled to judgment as a matter of law.

I. OVERVIEW

On March 26, 2007, 1199 SEIU, United Healthcare Workers East, MD/DC Division, hereafter the Union, filed an unfair labor practice charge in Case 5-CA-33522 alleging that

Respondent was a successor employer under *NLRB v. Burns International Sec. Services*, 406 U.S. 272 (1972); that since on or about November 17, 2006, Respondent refused to recognize and bargain with the Union, the labor organization recognized by its predecessor as the representative of its predecessor's bargaining unit employees; and/or that Respondent recognized and then withdrew recognition of, and refused to bargain with, the Union. Subsequent to the filing of the charge, the Region conducted an investigation to make a determination on the merits of the allegations.

On June 29, 2007, the Regional Director issued a Complaint and Notice of Hearing alleging, *inter alia*, that Respondent was a successor under *Burns* to the predecessor employer that recognized the Union in or about November 2005 as the collective-bargaining representative of the predecessor's bargaining unit employees, and that on or about February 7, 2007, Respondent refused to recognize and bargain with the Union as the collective-bargaining representative of an appropriate unit. On July 13, 2007, Respondent filed its Answer to the Complaint. In its Answer, Respondent denied, *inter alia*, that it was a successor under *Burns*, that the unit set forth in the Complaint was appropriate, and that it had an obligation to bargain with the Union.[1]

II. SUMMARY OF FACTS

On November 14, 2005, Arbitrator Barry Shapiro issued a letter to the Union and to Hadley Memorial Hospital, the predecessor employer to Respondent here, certifying that a majority of the employees in the proposed unit signed cards authorizing the Union to represent

[1] By Order dated November 16, 2007, the Regional Director postponed indefinitely the hearing in this matter pending the Board's ruling on Respondent's Motion for summary Judgment.

them for collective-bargaining. Shapiro included a list of classifications and the number of employees in each classification.[2] The proposed unit included the following:

> 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. [emphasis added]

Of the 169 employees listed in those classifications, there were ten security guards and five pharmacists. There is no evidence concerning which employees signed authorization cards.

The Union and Hadley Memorial Hospital met for bargaining for the first time on or about March 30, 2006. The Union's initial proposal included a recognition clause which described the unit as set forth above, including the pharmacists and security guards. On May 12, 2006, Hadley Memorial Hospital provided the Union with its counter proposal for a contract. The Union and Hadley Memorial Hospital met again for bargaining on July 17, 2006. During bargaining, the parties tentatively agreed on some issues, but negotiations did not result in a collective-bargaining agreement. The parties did not go back to the table after the July 17 bargaining session largely because of scheduling problems on the part of Hadley Memorial Hospital, including the unavailability of its lead negotiator who was on maternity leave beginning September 2006. At no time did Hadley Memorial Hospital propose a different unit.

In September 2006, Hadley Memorial Hospital contacted the Union and informed them it needed to delay bargaining because a sale of the hospitals' stock was expected to close within two weeks. In late October and early November 2006, the employees attended meetings during which they were told that Respondent would be taking over the hospital and there would be very

[2] Shapiro incorrectly stated that there were 172 employees in the proposed unit. A review of the list attached by Shapiro to his letter indicates there were 169 employees in the proposed unit.

few changes. By letter dated November 6, 2006, Hadley Memorial Hospital informed the Union that Hadley Memorial Hospital sold its assets to Respondent and suggested the Union contact Respondent for further union discussions.

On November 9, 2006, Respondent's attorney telephoned the Union's attorney and explained that he was representing Respondent. Respondent's counsel replied he was looking forward to negotiating with Union counsel over a contract and that he would talk with his principals and provide dates for bargaining.

Respondent took over operations shortly before November 13, 2006, and continued operating throughout the transition. There was no shutdown. There has been no changes in the business operation noticeable to the employees. The patients of Hadley Memorial Hospital remained as patients of Respondent; Respondent continued to operate the facility as a nursing home for patients in need of long-term care in a hospital setting as did Hadley Memorial Hospital. In addition, Respondent hired virtually all of the employees who had worked for Hadley Memorial Hospital. Employees did not have to apply for a job with Respondent. Initially, Respondent did not change employees' terms and conditions of employment when it took over the hospital. However, within five months of taking over the hospital Respondent offered improved medical, dental and vision benefits, and an increase in wages for the pharmacists.

By letter dated November 17, 2006, Respondent advised the Union it was refusing to recognize the Union as the representative of the employees in the unit because the unit included guards and because the unit included professional employees who had not been afforded their Section 9(b)(1) right to decide on inclusion in the unit.

By letter dated February 1, 2007, the Union replied to Respondent's November 17, 2006 letter, informing Respondent the Union disclaimed interest in representing the security guards, and the Union disclaimed interest in representing the pharmacists and was willing to afford the pharmacists a right to vote for or against bargaining unit inclusion, thus perfecting the bargaining unit and making a valid demand for recognition.

Respondent responded to the Union, by letter dated February 8, 2007, and informed the Union it was not prepared to recognize the Union for the perfected bargaining unit (the predecessor's bargaining unit without the guards and the pharmacists). The instant unfair labor practice charge followed.

III. ARGUMENT

Respondent is not entitled to summary judgment because there are genuine issues of material fact in dispute, and thus Respondent is not entitled to judgment as a matter of law. The issues of material fact in dispute between the parties include the appropriateness of the perfected unit and the presumption of majority support in the perfected unit, as the General Counsel contends that Respondent is a clear *Burns* successor; the perfected unit is an appropriate unit; and any challenge to the November 2005 card check at this time is untimely. Respondent's Motion for Summary Judgment should also be denied as the legal issue presented by Respondent's is an issue of first impression for the Board that should properly be decided only after the matter has been fully litigated and briefed by the parties, and the matter has been given full consideration by an administrative law judge.[3]

[3] Assuming the Board disagrees that there are material facts in dispute sufficient to remand the matter to the Regional Director for a hearing before an administrative law judge, the General Counsel requests the opportunity to file a brief to the Board fully briefing the legal issues to the Board prior to the Board making its determination on the merits.

A. The Appropriateness of the Perfected Unit

The General Counsel contends Respondent is a clear *Burns* successor. Respondent's status as a *Burns* successor turns upon the appropriateness of the perfected unit sought by the Union on February 1, 2007, as Respondent has admitted in its Answer that upon purchasing the assets of the predecessor, there was continuity in the business operations and in the workforce. All of the reasons cited by Respondent in support of its argument that it is not a *Burns* successor turns upon the appropriateness of the perfected unit. The appropriateness of the perfected unit is a mixed question of law and fact and is in dispute between the parties.

By letter dated February 1, 2007, the Union demanded recognition in a perfected unit, the original unit but excluding the security guards and the pharmacists. At that time, the Union demanded recognition in an appropriate unit consisting of non-guard, non-professional employees. At that time, Respondent had an obligation to recognize the Union as the collective-bargaining representative for the perfected unit which is an appropriate unit. While Respondent may believe the perfected unit it is neither the most appropriate unit nor its preferred unit, neither argument is a basis upon which Respondent may lawfully withhold recognition. See, for example, *Hotel Del Coronado,* 345 NLRB No. 24 (2005).

Respondent asserts that the perfected unit is inappropriate because the perfected unit includes twenty-one LPNs and six secretaries whose status it alleges to be undetermined and in issue;[4] and excludes twenty-six certified respiratory therapists Respondent alleges to be technical employees while allowing for the inclusion of other technical employees. Respondent's assertion is unavailing for several reasons and is illustrative of material facts in dispute. First, the status of the LPN's, the secretaries, and the certified respiratory therapists are mixed

[4] See Respondent's Motion at p. 4: "There was no determination as to any employee's supervisory or managerial status (*e.g.*, the 21 LPNs), whether any employees were confidential employees under the NLRA (*e.g.*, the 6 unit secretaries) . . . ."

questions of law and fact. Clearly the status of these three classifications are factually material to the resolution of the matter at bar and the status of the classifications is in dispute between the parties. Second, the Board's Rules for Collective-Bargaining Units in the Health Care Industry, 29 CFR § 103.30(a) are not so inflexible as to preclude the perfected unit. In this regard, it must be considered that the Board's Rules for Collective-Bargaining Units in the Health Care Industry apply only to initial petitions for recognition under Section 9(c) of the Act. 29 C.F.R. § 103.30(a). See also *Kaiser Foundation Hospitals*, 312 NLRB 933, 934 (1993) and *Pathology Institute*, 320 NLRB 1050 (1996) enfd. 116 F.3d 482 (9th Cir. 1997). Third, the Board's Rules for Collective-Bargaining Units in the Health Care Industry specifically envision the continued appropriateness of existing non-conforming units. 29 C.F.R. § 103.30(a). The determination of whether the perfected unit is an existing non-conforming unit is a penultimate, factual issue in dispute. If this issue of fact and law is decided against the General Counsel's position under existing principles based on the evidence obtained in hearing before the ALJ, there would be no need for the Board to determine the remaining complex legal issues presented by this matter. If this issue of fact and law is decided in favor of the General Counsel, the Board would reap the benefit of a complete administrative record and full consideration by an ALJ of the merits in making its determination.

Respondent also asserts that the perfected unit is inappropriate because the prior unit included guards, non-guards, professional employees, and non-professional employees, and the Union's demand to exclude the guards and the professionals did not cure or perfect the unit. There is no dispute between the parties that the predecessor employer recognized the Union as the representative of a unit that included guards, non-guards, professional employees, and non-professional employees, and that Respondent had no obligation to recognize and bargain with the

Union regarding that unit. The original unit was not an appropriate unit that the Board would certify or approve.

Field Bridge Associates, 306 NLRB 322 (1992), relied upon by Respondent is inapposite to the instant matter. In that case, the Board determined a successor employer is only obligated to bargain with an appropriate unit, and the successor employer in that case was not required to continue to recognize or bargain with the union as the collective-bargaining representative for an inappropriate unit. In the instant case, Respondent did not have an obligation to bargain with the Union at the time of its initial request for recognition for the original unit that included guards and non-guards, professionals and non-professionals. The Region specifically determined Respondent's refusal to recognize the Union on November 17, 2006 was lawful. The Union's later action, requesting recognition in the perfected unit that did not include guards or professional employees, distinguishes this case from *Field Bridge*.[5]

Respondent also relies upon *Russelton Medical Group, Inc.*, 302 NLRB 718 (1991). *Russelton Medical Group* is also inapposite to the instant matter as the union there never perfected the unit or its demand for recognition by excluding the professionals in a unit that combined professional employees and non-professional employees. The ALJ found that Russelton Medical Group was not a successor employer because there was no continuity of operations between Russelton Medical Group and the predecessor employer, and dismissed the complaint. *Id.* at 725. The Board upheld the ALJ's dismissal of the complaint because the unit

[5] As a corollary, Respondent also argued that it is not a Burns successor because the Board would not have certified a mixed guard unit as such a unit is contrary to Section 8(a)(5) and 9(a) of the Act. The Board's authority to order bargaining in a mixed guard unit as a remedy for an unfair labor practice, however, is an open question of law. See *SEIU Local 73, v. NLRB (Temple Security, Inc.)*, 230 F.3d 909 (7th Cir. 2000), denying enf. of 328 NLRB 663 (1999), on remand and aff'g the Board's position in 328 NLRB 663, *Temple Security, Inc.*, 337 NLRB 372 (2001).

sought by the union was inappropriate because it included professionals and non-professionals. *Id.* at 718.

Respondent further argues that the two primary interests of the successorship doctrine under *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987), stabilization of collective-bargaining relationship based on presumption of majority support and the fulfillment of employee expectations that the Union is still their majority, are not served in this matter as the predecessor employer and the Union never reached a collective-bargaining agreement. However, the Board has held that the absence of a collective-bargaining agreement between a union and a predecessor employer does not preclude the successor employer's obligation to recognize and bargain with the union on request. See *Lockheed Engineering Co.*, 271 NLRB 119 (1984).

B. The Presumption of Majority Support

The General Counsel contends that there is the presumption of majority support in the perfected unit. Ultimately, in this matter, the presumption of majority support in the perfected unit is also a mixed question of fact and law. The Board has held that minor changes to a unit will not adversely affect the union's presumption of majority status, and a successor will be required to recognize and bargain with the union in that changed unit. See, for example, *Springfield Retirement Residence*, 235 NLRB 884, 888-889 (1978). Respondent sets forth a three-part test for determining whether an employee's right to make a fully informed representation decision has been compromised by later modification of the bargaining unit: difference in the size of the two units; the character and scope of the two units; and the closeness of election results. Respondent concedes the analysis of the bargaining unit changes must be considered from the employees' perspective and the totality of the circumstances. In order to

determine the totality of the circumstances, an administrative hearing must be held and an administrative record fully developed that the facts may be brought out and established for the Board's consideration and review before it makes a determination on the merits.

For example, Respondent has provided in its Motion for Summary Judgment no evidence concerning the total number of employees in the perfected unit and the number of security guards and pharmacists in the unit at the time of the Union's February 1, 2007 request. Respondent merely baldly asserts that at the time it took over the operations, there were 177 employees in the unit including twelve guards and four pharmacists. The evidence obtained by the Region during the investigation indicates the predecessor employer's bargaining unit consisted of 169 employees, including ten security guards and five pharmacists. When the Union made its demand by letter dated February 1, 2007, it indicated willingness to disclaim interest in representing the security guards and the pharmacists, and/or to afford the pharmacists a right to decide for or against inclusion in the bargaining unit. The number of employees in the unit and the number of guards and pharmacists are material facts at issue between the parties.

Similarly, regarding the character and scope of the two units, Respondent argues that the smaller, modified unit significantly alters the unit's character and scope making it weaker and less appealing to the employees. This, too, is a mixed question of fact and law. See e.g., *Hamilton Test Systems,* 743 F.2d 136, 139-140 (2d Cir. 1984) Respondent has presented no evidence that the classifications remaining in the unit are "lower tier" in terms of pay or advancement opportunities than the classifications of guards and pharmacists. Cf. *Parsons School of Design,* 743 F.2d 136 (2d Cir. 1984). Likewise, Respondent's conclusion that the six pharmacy technicians would not want to be at odds with the pharmacists is speculative at best. Again, these questions of fact can be dealt with dispositively in an unfair labor practice hearing.

Finally, the appropriateness of this analysis and precedent to a successorship situation, other than as an election objection, is, to the Region's knowledge, a question of first impression and would benefit from full consideration by an administrative law judge.

Respondent also asserts there is no basis to conclude that on February 1, 2007, the Union enjoyed majority support in the perfected unit because there is no evidence with respect to the initial card check conducted in November 2005 as to how many employees signed cards and what classifications those employees were in when they signed cards. Respondent does not provide evidence that the Union did not enjoy majority support on February 1, 2007; instead, Respondent attempts to challenge now, more than two years since the predecessor employer recognized the Union, the arbitrator's card check. Such a challenge is untimely. See *Local Lodge No. 1424 v. NLRB*, 362 US 411 (1960). Such a challenge also contravenes Respondent's admission in its Answer that it hired as a majority of its workforce the employees who were in the predecessor employer's bargaining unit and represented by the Union.

C. The Matter at Bar Presents an Issue of First Impression

Lastly, the Board has never considered the specific issue presented by the matter at bar: whether Respondent as a successor employer was required to recognize the Union when it made a demand for recognition in an appropriate unit by excluding the guards and professional employees. While the legal precedents relied upon by the Region for issuance of complaint are persuasive and instructive, they are by no means dispositive because this matter is a matter of first impression before the Board.[6] Because this matter presents a novel issue for the Board it is

[6] An issue remarkably similar to the matter at bar was addressed in an unfair labor practice hearing in *Concord Associates, L.P.*, JD-157-99 (White Plains, NY). In that case, the union had been certified in an appropriate unit, but over time the union and the predecessor employer agreed to include guards and supervisors in the unit. The parties had a collective-bargaining agreement, which covered the mixed unit. The successor employer refused to recognize the union because the unit inappropriately included guards and supervisors. The union then demanded recognition again, but this time in a unit that excluded the guards. Administrative Law Judge Margaret M. Kern issued her

all the more reason why the Board should deny Respondent's Motion for Summary Judgment and allow the matter to be fully developed factually on in an administrative record where the parties may call, examine, and cross-examine witnesses, and fully brief the issues to an administrative law judge so that the Board can have the benefit of all of the facts and the parties' legal positions as well as the full consideration of the administrative law judge when the Board makes its determination on the merits.

IV. CONCLUSION

For all of the foregoing reasons, Respondent's Motion for Summary Judgment should be denied as there are genuine issues of material facts in dispute and Respondent is not entitled to judgment as a matter of law. Accordingly, the Board should remand the matter back to the Regional Director for trial before an Administrative Law Judge.

Dated at Baltimore, Maryland, this 21st day of December 2007.

/s/ James C. Panousos

James C. Panousos
Counsel for the General Counsel

decision on December 3, 1999 and found the employer had an obligation to bargain with the union in the unit that excluded guards but failed to recognize and bargain with the union as the collective-bargaining representative of that unit. Region 3 then filed for and was granted injunctive relief pursuant to Section 10(j) of the Act. On March 15, 2000, United States District Court Judge Colleen McMahon issued an Order Granting Preliminary Injunction in *Sandra Dunbar v. Concord Associates, L.P.*, 99 Civ. 9576 (CM) (SDNY). The matter thereafter settled, and did not reach the Board for decision.

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of December 2007, a copy of Counsel for the General Counsel's Opposition to Respondent's Motion for Summary Judgment was served by Federal Express next business day delivery on Respondent and Charging Party's Counsel at the addresses below. Both parties were notified telephonically of this filing.

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