

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

SPECIALTY HOSPITAL OF WASHINGTON –
HADLEY, LLC

and

Case 5-CA-33522

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

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

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COMES NOW Thomas J. Murphy and Sean R. Marshall, counsel for the General Counsel and respectfully files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.

I. STATEMENT OF THE CASE:

This proceeding was conducted before the Honorable Eric Fine on May 12 and 13, 2009. The Judge issued a Decision and Recommended Order on August 26, 2009. In his Decision and Order, the Judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to recognize and bargain with 1199 SEIU, United Healthcare Workers East, MD/DC Division (herein the Union). The Respondent has filed numerous exceptions to the above-cited findings. Based on the following, counsel for the General Counsel maintains that the Respondent's exceptions should be dismissed in their entirety.

II. STATEMENT OF THE FACTS:

On or about November 14, 2005, Doctors Community Healthcare Corporation (herein Hadley) recognized the Charging Party as the collective bargaining representative of the unit pled in paragraph 5 of the Amended Complaint (ALJD 2, lines 19-24; GCX 1-G). At the time, the unit consisted of 169 employees. The unit included 10 guards and 5 pharmacists (ALJD 6, fn.5; TR 213).

In early 2006, Rhonda Brady, Administrative Organizer for the Charging Party, contacted Janine Finck-Boyle, Hadley Hospital Administrator, to discuss bargaining (ALJD 6, lines 4-16; TR 51-52).¹ Brady testified that, on January 20, she faxed to Finck-Boyle a letter requesting

¹ Unless otherwise noted, all subsequent dates are 2006.

information pertinent to bargaining (TR 52-54; GCX 18). Brady also testified that on January 27, she received correspondence back from Finck-Boyle regarding her request stating what information Hadley would provide to Brady (ALJD 6, lines 4-16; TR 54-55; GCX 2). On or about February 1, Brady sent a fax to Finck-Boyle, telling Finck-Boyle when Brady would pick up the requested information (ALJD 6, line 11; TR 55-56; GCX 3). On or about February 22, Brady faxed a letter to Finck-Boyle, advising her who would be on the bargaining committee and that they needed to be released from work to participate in bargaining (ALJD 6, lines 14-16; TR 57; GCX 6).

On March 30, the Charging Party and Hadley held their first bargaining session (ALJD 6, lines 18-19; TR 58). This bargaining session occurred at Hadley's facility. Present for the Charging Party was Brady, Steve Godoff, the Charging Party's attorney, Bruce Lang, the Charging Party's representative, and bargaining committee members (TR 59). Present for Hadley was Finck-Boyle and Ron Davis, Chief Operating Officer (TR 59). At this bargaining session, the Charging Party presented its initial proposal to Hadley (ALJD 6, lines 18-26; TR 59-60; 79; GCX 8).

Brady testified that, in May, she picked up Hadley's response to the Charging Party's initial proposal (TR 61; GCX 10). On or about July 14, Brady faxed to Finck-Boyle a letter confirming the next bargaining session for July 17, and also alerting Finck-Boyle to allow the bargaining committee members to attend the session (ALJD 6, lines 34-36; TR 63; GCX 11).

On or about July 17, the Charging Party and Hadley representatives met again for bargaining. The same individuals attended this bargaining session as had attended the March 30 bargaining session, including the bargaining committee members (ALJD 6, lines 32-35; TR 61-

62; GCX 12). At this bargaining session, the parties agreed to union security, dues collection, and definition of part-time employees (ALJD 6, lines 38-41; TR 63-64).

On or about July 18, Brady sent an e-mail to Finck-Boyle regarding proposal editing and clerical errors (ALJD 6, lines 38-40; TR 65-66; GCX 14). That same day, Finck-Boyle responded to Brady's editing request (TR 65-66; GCX 14) and stated that she would get back to the Charging Party regarding additional bargaining dates (TR 66-68; GCX 15).

On or about July 27, Brady sent an e-mail to Finck-Boyle asking if dates for bargaining had been identified and also asking for additional information pertinent to bargaining. (ALJD 7, lines 1-3; TR 69-70; GCX 17). On or about August 4, Brady faxed a letter to Finck-Boyle requesting information pertinent to bargaining (TR 70-71; GCX 19). That same day, Brady also e-mailed Finck-Boyle with proposed bargaining dates (TR 71-72; GCX 20). Shortly after Brady sent her e-mail, Finck-Boyle responded and told Brady that no one would be able to meet until September and that Brady should drop off reworded proposals to Finck-Boyle (ALJD 7, lines 3-10; TR 71-72; GCX 20).

On or about September 12, Brady sent an e-mail to Finck-Boyle requesting that Hadley set up bargaining dates. In response to this e-mail, Finck-Boyle sent an e-mail to Brady stating that she was going on maternity leave and that Brady should contact Hadley's attorney, Cindy Sehr. Additionally, Finck-Boyle told Brady that the company was in the process of being sold (ALJD 7, lines 6-10; TR 72-73; GCX 21). Brady testified that, after receiving this e-mail, she contacted Godoff and the Charging Party's Executive Vice-President John Reid (TR 74).

After the July 17 bargaining session, Brady continued to meet with employees to keep them updated, notifying employees of her meetings by fliers (ALJD 6, lines 41-42; TR 67-68; GCX 16). Brady held weekly meetings at Hadley's facility to discuss bargaining and notify of

them of bargaining issues, distributing notices to employees as well as posting them at the facility (ALJD 6-7, lines 42 and 1; TR 57-58; GCX 7). In November, while holding a meeting at Hadley's facility, Brady was asked by an unnamed hospital administrator to leave the premises (ALJD 7, lines 15-19; TR 75). After being asked to leave, Brady and other representatives of the Charging Party continued contact with the employees by distributing literature outside the facility during working hours (ALJD 7, lines 19-22; TR 75-76).

Godoff currently represents the Charging Party (TR 78), and he represented the Charging Party regarding bargaining with Hadley and attended bargaining sessions (TR 79). He testified that he contacted Sehr in September 2006 at the request of the Charging Party. Godoff spoke with Sehr and brought to her attention the difficulty in scheduling bargaining sessions (ALJD 7, lines 23-26; TR 80-81). According to Godoff, he told Sehr that the Charging Party needed firm dates for bargaining or the Charging Party would file unfair labor practice charges (ALJD 7, lines 26-29; TR 81). Godoff stated that Sehr asked for forbearance and that Hadley was having personnel issues and exploring sale possibilities. Sehr also told Godoff that the company had every intention to return to bargaining (ALJD 7, lines 29-34; TR 81).

On September 25, Hadley sent a letter to the Charging Party confirming that Finck-Boyle was on maternity leave, the company was for sale, and that the company intended to return to bargaining (TR 81-82, 92; GCX 23). On October 18, the Charging Party responded to Hadley's letter, indicating that it would take legal action if Hadley did not come back to the bargaining table (ALJD 7, lines 41-45; TR 83-84; GCX 24).

On or about November 6, the Charging Party received a letter from Hadley stating the company had been sold and that the Charging Party should contact Brian Wells, CEO of Respondent, regarding union discussions (ALJD 7-8, lines 45-52 and 1-2; TR 84, 92; GCX 25).

In or around October or early November, Respondent purchased the business of Hadley and has continued to operate the business of Hadley in basically an unchanged form, employing as a majority of its employees individuals who were previously employed by Hadley (GCX 1-G, GCX 1-K).

Respondent admitted at trial that job descriptions for employees in unit pled in paragraph 8(a) of the Amended Complaint (herein the perfected unit) did not change until April 2008 (TR 141-142; GCX 32, 33, 35, and 36). According to Shelita Domino-Stoddard, Respondent's Human Resources Coordinator, Respondent brought over Hadley's employees without making any additions to the hospital (ALJD 9, lines 12-14; TR 132-133). Respondent followed Hadley's employee handbook until the Respondent implemented its own in January 2008. (ALJD 9, lines 20-24; TR 149-150; GCX 43 and 44).

Godoff testified that, on or around November 9, Joseph D'Amato contacted him and identified himself as counsel for the Respondent. Godoff responded that the Charging Party was prepared to bargain with the new owners. D'Amato indicated that he was very much looking forward to bargaining another contract with Godoff, as they had bargained contracts in the past. D'Amato also told Godoff that he would provide Godoff with bargaining dates (ALJD 8, lines 4-9; TR 86).

As of November 13, there were 152 employees in the perfected unit. This unit did not include 12 guards, 5 pharmacists, 5 recreation technicians, and 33 respiratory technicians. All 152 of these employees were retained from the unit recognized by Hadley (JX 1, 2, and 3).

On or about November 17, D'Amato sent a letter to Godoff stating that Respondent was not prepared to recognize the Charging Party in a unit that included guards and professionals (ALJD 8, lines 10-18; TR 87-88; GCX 26). On February 1, 2007, Godoff sent a letter to

D'Amato, disclaiming interest in representing the guards and professionals and requesting recognition in the perfected unit (ALJD 8, lines 18-21; GCX 27).

As of February 1, 2007, there were 148 employees in the perfected unit. This unit did not include 11 guards, 4 pharmacists, 5 recreation technicians, and 27 respiratory therapists. Of these 148 employees, there were 142 employees who were retained from the unit recognized by Hadley (ALJD 8, lines 21-22; Joint Exhibit 1, 2, and 3).

On February 8, 2007, D'Amato sent a letter to Godoff stating that the Respondent would not recognize the Charging Party in the perfected unit (ALJD 3-4, fn. 4; TR 88-89; GCX 28).

On or about June 29, 2007, Respondent filed an RM petition with Region Five of the National Labor Relations Board, claiming a question concerning representation existed regarding the perfected unit (ALJD 3-4, fn.4; TR 230-231; GCX 46).² On July 10, 2007, the Regional Director for Region Five dismissed Respondent's RM petition (TR 230-231; GCX 47). On January 15, 2009, the National Labor Relations Board denied Respondent's Request for Review of the Regional Director's dismissal (ALJD 3-4, fn.4; TR 230-231; GCX 48).

As of April 30, 2009, there were 178 employees in the perfected unit, of whom 107 had been employed by Hadley (ALJD 30, lines 8-10).

² Counsel for the General Counsel maintains that the Judge correctly found that based on the record as a whole the Respondent was willing to concede the appropriateness of the disputed unit when it suited its purposes to do so (ALJD 4, lines 50-51).

III. ARGUMENT ON EXCEPTIONS

A. THE JUDGE CORRECTLY FOUND RESPONDENT WAS A BURNS SUCCESSOR AND OBLIGATED TO BARGAIN WITH THE UNION REGARDING THE PERFECTED UNIT.

An employer generally succeeds to the collective bargaining obligation of its predecessor employer if there is substantial continuity in both the workforce and the operation of the enterprise. See *Fall River Dyeing*, 482 U.S. 27 (1987); *Burns Security*, 406 U.S. 272 (1972). Continuity of the workforce requires that the former employees of the predecessor must comprise a majority of the new employer's complement within the same bargaining unit at the point when the new employer has achieved a substantial and representative complement of employees. *Fall River Dyeing*, 482 U.S. 27 (1987)

In this case, Respondent hired virtually all the employees³ in the perfected unit and took over the business previously operated by Hadley in an unchanged form without interruption. In fact, the only change in the business was in name only. This conclusion is supported by Respondent's admissions, record testimony, as well as record evidence showing that, as of February 1, 2007, Respondent had hired 148 employees in the perfected unit, of whom over 95% were retained from Hadley (ALJD 14, lines 10-14; TR 41-42; 45-46; GCX 1-G, 1-K; JX 1). Since the facts clearly show that Respondent satisfied the Board's continuity of operations test, the next question correctly considered and found by the Judge is whether the remaining perfected unit is appropriate for bargaining.

³ Contrary to Respondent's contentions, the Judge correctly found that the presumption of majority support existed in the 2/1/07 perfected unit. In making this finding, the Judge correctly revoked the Respondent's subpoena seeking authorization cards and correctly found that the card count establishing voluntary recognition carried forward under Board law. In making this ruling, the Judge also correctly granted counsel for the General Counsel's Motion In Limine in ruling that the Respondent could not contest the prior voluntary recognition entered into between Hadley and the Charging Party. See *Local Lodge No. 1424 v. NLRB Bryan Manufacturing*, 362 U.S. 411 (1960); See also *Southern Power Co.*, 353 NLRB No. 116, slip op. at 6 (2009); *Eye Weather*, 325 NLRB 973, 973 (1998), citing

For successorship status to attach, Board law requires that the employees acquired from a predecessor themselves must constitute an “appropriate unit”. See *Irwin Industries*, 304 NLRB 78 (1991). In determining the appropriateness of the unit, the Board does not require that the inherited unit be the most appropriate unit, but only that the unit be an appropriate one. See *Vincent M. Ippolito*, 313 NLRB 715, 717 (1994). Since the Judge correctly found that the unit pled in paragraph 8(a) of the Amended Complaint is an appropriate unit, the presumption follows that the Charging Party continues to have a majority status. See *University Medical Center*, 335 NLRB 1318, 1334 (2001). (See brief pages 12-16). In making this determination, the Judge correctly stated that Board law has held that changes in ownership should not uproot bargaining unless the unit no longer conforms “reasonably well” to the standards of appropriateness. See *Trident Seafoods*, 318 NLRB 738, 738 (1995).

The facts found by the Judge clearly show that Charging Party engaged in meaningful bargaining with Hadley for several months prior to the sale of the operation to Respondent (ALJD 6-8). The Charging Party and Hadley met, exchanged proposals, and corresponded, confirming the obligation to bargain. The Judge also found that Hadley planned to continue bargaining with the Charging Party even though it was involved in a sale transaction (ALJD 7, lines 39-45; TR 81, 92; GCX 23). The Judge further found that, but for the interruption caused by the sale of Hadley to Respondent, this bargaining relationship would have continued. These facts are exactly why the failure to accord significant weight to the bargaining history would disrupt the Section 7 rights of unit employees who, prior to the sale of Hadley to Respondent, chose the Charging Party as their collective bargaining representative. This is why the Judge correctly gave substantial weight to the bargaining history in the instant case. See *Children’s*

North Ford Bros., Inc., 220 NLRB 1021, 1021 (1975); *Kravis Center for the Performing Arts*, 351 NLRB 143, 144, fn. 8 (2007); *Hotel Coronado*, 345 NLRB 306, 306-307 (2005).

Hospital, 312 NLRB at 929. Further, as the judge correctly found, the mere fact that the Charging Party and Hadley did not agree on a collective bargaining agreement should not be used to justify disrupting the unit employees' selection of the Charging Party as their bargaining representative. See *Lockheed Engineering, Co.*, 271 NLRB 119 (1984).

B. THE JUDGE CORRECTLY FOUND THAT THE BOARD'S HEALTH CARE RULES DO NOT APPLY TO "EXISTING NON-CONFORMING UNITS", i.e., "THE PERFECTED UNIT":

Contrary to Respondent's contentions, counsel for the General Counsel maintains that the Judge correctly found that the Board's health care rules do not apply in determining the appropriateness of the perfected unit. The health care rules only apply to representation petitions involving new units of previously-unrepresented employees; they do not apply to an existing non-conforming unit. See *Pathology Institute*, 320 NLRB 1050, 1051 (1996); *Kaiser Foundation Hospitals*, 312 NLRB 933, 934-935 (1993); *Crittenton Hospital*, 328 NLRB 879, 890 (1999). Accordingly, the Judge correctly applied representation principles in determining the appropriateness of the perfected unit. See *Pathology Institute*, at 1051; *Kaiser Foundation Hospital*, at 934-935.

Respondent argues that *Park Manor Care Center, Inc.*, 305 NLRB 872 (1991), is controlling precedent. Respondent's reliance on *Park Manor* is misplaced, as it involved markedly different facts. Specifically, *Park Manor*, unlike the instant case, involved an initial petition, not a successor employer which took over the business of a predecessor employer which had voluntarily recognized a union and had engaged in meaningful bargaining. Additionally *Park Manor* did not involve a pre-existing non-conforming unit, such as the unit in the present case. Respondent's attempt to bootstrap the rationale of *Park Manor* to the facts of the instant

case fails. The Judge correctly found that the Board’s health care rules do not apply to “pre-existing” non-conforming units, such as the perfected unit.

C. THE JUDGE CORRECTLY FOUND THAT THE PERFECTED UNIT WAS AN APPROPRIATE UNIT.

1. BURDEN:

Respondent contends that the General Counsel had the burden of proving that the perfected unit was appropriate. The Respondent cites *Fort Smith Outerwear*, 205 NLRB 592, 594 (1973) and *Rice Food Markets, Inc.*, 255 NLRB 884, 887 (1981) in support of its argument that the General Counsel bears the burden of showing that the “perfected unit” is appropriate. Contrary to Respondent’s contention, its reliance on these cases is another misplaced attempt to bootstrap an inapplicable analysis. *Fort Smith* involved the burden of establishing card verification in a *Gissel* bargaining order context, not a successorship case where the predecessor employer had voluntarily recognized and engaged in meaningful bargaining with the union. As for *Rice Food Markets, Inc.*, that case dealt with the issue of whether whether an employer could remove a certain classification from union representation under accretion principles; in its analysis, the Board noted that the employer had the burden to show that the disputed classification was sufficiently dissimilar from the remainder of the unit warranting the removal of the classification. *Rice Food Markets*, 255 NLRB at 887. In relying on these cases, the Respondent disregards years’ worth of successorship cases which support the Judge’s findings and conclusions.

Contrary to Respondent’s contention, the Board has long held, in successorship cases, that the party challenging the historical bargaining unit bears the burden of showing the inappropriateness of the unit, and that the burden is a heavy one. See *Indianapolis Mack Sales & Service*, 288 NLRB 1123, 1123 fn.5 (1988); *American Geri-Care, Inc.*, 288 NLRB 1123, 1123, fn. 5 (1988); *Trident Seafoods, Inc.*, 318 NLRB 738, 738 (1995); *Cadillac Asphalt, Co.*, 349

NLRB 6, 9 fn. 15 (2007). In *University Medical Center*, 335 NLRB 1318, 1335 (2001), the Board held that the General Counsel had no burden to prove the appropriateness of a historical unit.⁴ In order to meet the burden, the Board has held that “compelling” circumstances are required to overcome a collective-bargaining history. See *Canal Carting, Inc.*, 339 NLRB 969, 969-970 (2003); *Trident Seafoods*, at 738. In this case, Respondent, as the party challenging the historical unit, had the burden of proving its inappropriateness. Respondent utterly failed to meet this burden, and the record does not come close to establishing the “compelling circumstances” necessary to uproot the established bargaining representative. Accordingly, counsel for the General Counsel maintains that the Judge correctly found that, under *Burns* and its progeny, the “perfected unit” is appropriate.

2. THE PERFECTED UNIT IS APPROPRIATE WITHOUT INCLUSION OF RESPIRATORY THERAPISTS AND RECREATION TECHNICIANS:

Respondent contends that exclusion of two classifications (Respiratory Therapists and Recreation Technicians) makes the “perfected unit” inappropriate. Counsel for the General Counsel maintains that the Judge correctly dismissed this argument and found that the exclusion of these classifications did not make the “perfected unit” inappropriate. Rather, the Judge correctly found that the Respiratory Therapists had a separate and distinct community of interest from the “perfected unit” (ALJD 26, lines 10-12). This finding is supported by record evidence showing that Respiratory Therapists are a different category of employees from any classification included in the “perfected unit.” Specifically, these employees constitute a homogeneous, separately-identifiable group with internal cohesiveness. The record evidence reveals, among other things, that the Respiratory Therapists were separately supervised (ALJD

⁴ Webster’s II defines historical as “of, pertaining to, or otherwise the character of history.” Thus, “historical” refers

26, lines 10-13; TR 240); require certification and/or registered status for employment (ALJD 26, lines 14; TR 246-247; GCX 33); were highly educated and members of professional associations (ALJD 26, lines 15-16; TR 240-241, 307; GCX 33, 37, 38); were the primary operators of unique equipment (ALJD 26, lines 16-17; TR 274-279, 299), made recommendations to doctors that were followed (ALJD 24, lines 20-25; TR 268, 300, 311); had no temporary or permanent interchange with other perfected unit employees (ALJD 26, 18-19; TR 281), received higher wages than the perfected unit (ALJD 26, lines 12-13; JX 3); are administratively grouped in only one department (GCX 33; JX 3); have distinct job functions (GCX 33); and use independent judgment in deciding and implementing treatment procedures (ALJD 25, lines 27-28; TR 290-292). Further, their level of functional integration and contact with other employees is not so substantial as to negate their separate and distinct community of interest. See *Hartford Hospital*, 318 NLRB 183 (1995), enfd. 101 F.3d 108 (2d Cir. 1996); *Pontiac Osteopathic Hospital*, 227 NLRB 1706 (1977) (LPN's were excluded from a unit of all technical employees based on separate bargaining history); *New Orleans Public Services*, 215 NLRB 834 (1974) (less-than-all technical department unit found appropriate where functions were sufficiently distinct); *Ochsner Clinic*, 192 NLRB 1059 (1971) (radiological technologists found to constitute a separate appropriate unit apart from other technicals)..

As for the Recreation Technicians, the Judge correctly found that the exclusion of four employees from a unit of 148 employees did not make the perfected unit inappropriate (ALJD 29, lines 11-15). In a successorship case, the unit merely needs to be an appropriate unit, not the most appropriate unit. See *Vincent M. Ippolito*, 313 NLRB 715, 717 (1994) enfd., 54 F.3d 769 (3rd Cir. 1995). In this case, the exclusion of the four Recreation Technicians does not make the

to anything in the past.

perfected unit inappropriate for bargaining. Furthermore, the classification can be petitioned-for and found appropriate under Section 103.30 (8) of the health care rules.

Respondent's argument ignores years of Board policy articulated in successorship cases. As stated in *Montauk Bus Co.*, 324 NLRB 1128, 1135 (1997), the Board, in successorship cases, recognizes a strong presumption favoring the "maintenance" of the "historically" recognized bargaining unit. The Board is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy, or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. See *Trident Seafoods v. NLRB*, 101 F.3d 111, 114 (D.C. Cir. 1996). In the instant case, Respondent failed to show that the perfected unit was repugnant to the Act or in any way hampered employee rights guaranteed under the Act by the exclusion of the Respiratory Therapists.⁵

Furthermore, the Board has held that a non-conforming pre-existing unit does not have to be enlarged to be found appropriate. See *Crittenton Hospital*, 328 NLRB 879, 880-881 (1999). Although the classifications cited by Respondent could have been included, their exclusion does not make the perfected unit inappropriate. In *St. Mary's Duluth*, 332 NLRB 1419, 1420 (2000), the Board found that a residual unit of technical employees who were not included in a pre-existing non-conforming unit represented by an incumbent union which included technical employees could be petitioned-for and found appropriate under the health care rules. In light of *St. Mary's Duluth* and *Crittenton Hospital*, counsel for the General Counsel maintains that it

⁵ A variance between a bargaining unit demand, the unit alleged in the General Counsel's complaint, and the unit found appropriate is fatal not unit appropriateness and does not relieve the employer's duty to bargain with a union. See *Northern Montana Health Care*, 324 NLRB 752, 767 (1997).

would be inconsistent with Board law to find that, under these facts and circumstances, the perfected pre-existing unit is anything other than appropriate.⁶

Lastly, in voluntary recognition cases such as this, the Board has stated that agreement on the scope of the unit must be given substantial consideration, in line with the Board's long-established policy of promoting stability in labor relations. See *Alpha Associates*, 344 NLRB 782, 784 (2005). Although Respondent contends that it did not agree on the unit with the Charging Party and that community of interest factors and the Board's health care rules warrant dismantling the unit, the Judge correctly found that the Board has long held that the successor stands in the shoes of the predecessor (ALJD 11-12, lines 41-52, 1-5). *Proxy Communications*, 290 NLRB 540, 542, fn.16 (1988). As stated by the Board in *Southern Power*, 353 NLRB No. 116, slip op. 1 (2009), and cited by the Judge "[b]oth the Board and the courts have long recognized not only that the traditional [community of interest] factors which tend to support the finding of a larger or single unit as being appropriate, are of lesser cogency where a history of meaningful bargaining has developed, but also that this fact alone suggests the appropriateness of a separate bargaining unit and that compelling circumstances are required to overcome the significance of bargaining history" (ALJD 12, lines 6-16).

Based on the foregoing, counsel for the General Counsel maintains that the Judge correctly found that Board precedent, the historical nature of the unit, and the Respiratory Therapists' unique community of interest status did not warrant the uprooting of the perfected unit and creating instability in labor policy and relations regarding the "perfected unit".

⁶ See also *Pontiac Osteopathic Hospital*, 227 NLRB 1706, 1706 (1977) (Licensed Practical Nurses excluded from all technical unit based on their separate bargaining history); *Lancaster Osteopathic Hospital Assn.*, 246 NLRB 600, 601 (1979) (same).

D. THE JUDGE CORRECTLY FOUND THAT RESPONDENT WAS OBLIGATED TO BARGAIN WITH THE UNION IN THE PERFECTED UNIT:

Respondent contends that the Charging Party's successorship status is called into question by the original unit inclusion, and now exclusion, of guards and pharmacists. Contrary to Respondent's contention, the Judge correctly found that the mere diminution of the size of the unit by the exclusion of the guards and pharmacists did not support a finding that the unit employees no longer desired union representation (ALJD 12-14). In fact, there are many cases where a successor employer has been required to bargain in good faith with a unit that was different from the one recognized by its predecessor. See *Tree-Free Fiber, Co.*, 328 NLRB 389, 390 (1999); *Bronx Health Plan*, 326 NLRB 810, 812 (1988); *M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001). Successorship obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute an appropriate unit and comprise a majority of the unit. See *Irwin Industries*, at 79, fn.4. The Board also recently held in *Southern Power Co.*, 353 NLRB No. 116, slip op. 1 (2009), citing the D.C. Circuit decision in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1085 (2003) that there is no authority supporting a successor employer's argument that the presumptive appropriateness of a unit of historically represented employees does not apply to a subset of the unit of the predecessor's recognized unit.

Counsel for the General Counsel maintains that the Board will uphold a historical unit recognized by a predecessor employer, even if the unit would not be found appropriate under Board law if it was being organized for the first time. See *Met Electrical Testing Co., Inc.*, 331 NLRB 872, 875-876 (2000), *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003). In this case, the

Judge correctly found that “perfected unit” was historical and appropriate for bargaining. Evidence showed that, at the time of the Charging Party’s request for recognition on February 1, 2007, the Respondent employed a representative complement and hired a majority of the employees in the perfected unit who were employed by Hadley, the predecessor employer (JX-1). Additionally, Respondent failed to present any operational changes of “compelling” circumstances that would make the historical bargaining unit inappropriate. Instead, the Respondent raised meritless objections that would only be relevant if the unit were being organized for the first time.

The Judge correctly considered *Northern Montana Healthcare*, 324 NLRB 752, 765 (1997), enfd, 178 F.3d 1089 (9th Cir. 1999), where 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.” In that case, the parties had treated Licensed Practical Nurses (herein LPN’s) as non-supervisors and included them in a series of collective-bargaining agreements. The Administrative Law Judge determined that the LPN’s 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 LPN’s and then concluded that there nevertheless was continuity in the unit, the revised unit was appropriate and, accordingly, the union was entitled to a rebuttable presumption of majority status in the unit.⁷

⁷ Id at 768. The Board reversed the judge’s finding that the LPN’s 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 752-754.

The also correctly considered *Concord Associates*,⁸ 1999 WL 33454743, where the union had been certified in an appropriate unit, which, over time, grew by agreement of the union and the predecessor employer to include guards and supervisors. After taking over the predecessor's operations, the successor employer refused to recognize the union because the unit inappropriately included guards and supervisors. The union then demanded recognition again, but in a unit that excluded the guards. The Administrative Law Judge found that the employer had an obligation to bargain with the union in the unit that excluded guards.

Counsel for the General Counsel maintains that the Judge correctly found that the exclusion of the guards and the professionals from the "perfected unit" was consistent with the Board's treatment of unit composition. The Judge also correctly found that, by disclaiming the guards and professionals at Respondent's insistence, the remaining unit employees still enjoyed continuity in the unit (ALJD 9-17; 12, lines 46-49; 14, lines 39-41; TR 87-88; GCX 26, 27; JX 1). Thus, the Charging Party should enjoy the rebuttable presumption of continued majority status. In *Burns Security*, 406 U.S. 272, 278-279 (1972), the Supreme Court stressed that the mere change in ownership, without an essential change in working conditions, would not be likely to change employee attitudes toward representation. The Board echoed this principle in *Derby Refining Co.*, 292 NLRB 1015, 1015 (1989), indicating that when a successor employer hires as a majority of its employees that were employed by the predecessor, a presumption arises that a majority of the successor's employees also support the union. This presumption is required so that corporate transformation, such as in the instant case, cannot be used to avoid the union. See *Fall River Dyeing*, at 29. It is for this reason why the Board presumes that an existing unit continues to be appropriate through a mere change in ownership. See *Trident Seafoods*, 318 NLRB 738, 738 (1995). Accordingly, the judge correctly found that this result is

⁸ *Concord Associates* was never appealed to the Board.

consistent with Board principles that govern representation proceedings. *Goddard Riverside Community Center*, 351 NLRB 1234, 1235 (2007); *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 979 (2007); *Washington Post Co.*, 254 NLRB 168, 168-169 (1981); *Peerless Publications, Inc.*, 190 NLRB 658, 659 (1971); *Libbey-Owens-Ford Glass Company*, 169 NLRB 126, 127, fn. 14; *Briggs Manufacturing, Co.*, 101 NLRB 74, 76, fn.4; *Brotherhood of Locomotive Firemen & Engineers (Ind.)*, 145 NLRB 1521, 1523-1524; See also *Atlanta Hilton & Towers*, 278 NLRB 474, 474, fn.1 (1986); *Control Services, Inc.*, 303 NLRB 481, 482, fn. 8 (1991).

E. THE JUDGE CORRECTLY FOUND THAT THE PRESUMPTION OF MAJORITY SUPPORT EXISTS IN THE “PERFECTED UNIT” AND NO QUESTION CONCERNING REPRESENTATION EXISTS:

Respondent has repeatedly argued that the above-described presumption is inapplicable and a new election must be held in the perfected unit (GCX 1-P, 1-V). 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. See *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). In these 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 the election. 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. See *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 50%); *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294 (9th Cir. 1985) (postelection unit reduced by nearly 40%). 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. See *Morgan Manor Nursing & Rehabilitation Center*, 319 NLRB 552, 553 (1995) (exclusion of LPN's resulting in 20% reduction in unit size did not necessitate new vote to determine if remaining service and maintenance employees still desired representation). 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. See *Northeast Iowa Telephone Co.*, 341 NLRB at 671.

Respondent cites *Sunrise, A Community for the Retarded*, 282 NLRB 252, 252 (1986) in support of its contention that the unit cannot be perfected (GCX 1-P, 1-V).⁹ Contrary to Respondent's argument, *Sunrise* is clearly distinguishable. *Sunrise* was an election case involving a post-election modification, unlike the instant successorship case, which involves the perfecting of a previously-recognized unit at the insistence of the Respondent.

Looking at the facts at hand, the exclusion of 15 from the unit of 148 (142 of whom were retained from Hadley) did not significantly alter the size of the unit. The exclusion of the guards

⁹ Respondent also states in its brief that the Judge ignored *Mental Health Center of Boulder*, 222 NLRB 901 (1976), in finding no question concerning representation existed. Counsel for the General Counsel maintains that Respondent's reliance on this case is misplaced. In *Mental Health Center of Boulder*, the Board was faced with an election which involved a unit which included professional and non-professional employees. Thus, *Mental Health Center of Boulder* is factually distinguishable from the instant case, which does not involve an election but rather is a successorship case where recognition evolved from voluntary recognition. The cases are also distinguishable because, in the present case, the unit was "perfected" at Respondent's request. Nonetheless, Respondent, contrary to Board law, continues to try to attack the validity of the original voluntary recognition. See Footnote 2 of brief. Its untimely and legally incorrect attempt fails. Lastly, counsel for the General Counsel maintains that, contrary to Respondent's contention, the Judge correctly dismissed Respondent's argument regarding the unit recognized by Hadley (ALJD 16, footnote 12).

and pharmacists also did not significantly alter the scope and character of the large, historically-recognized, heterogeneous predecessor unit that still includes 25 other classifications. In such circumstances, the remaining 148 unit employees should not be deprived of union representation because of an insignificant modification of the unit in which they chose representation.

Respondent also contends that the unit is inappropriate because it does not include all technical employees. In support of this contention, Respondent relies on *Barnert Memorial Hospital Center*, 217 NLRB 775 (1975). Contrary to Respondent's contention, this case is distinguishable from the facts of the instant case. In *Barnert*, the issue was whether all technical employees shared a separate community of interest from those shared by service and maintenance employees. Further, *Barnert* involved an initial petition, which the Board held that all technicals needed to be included even though the parties agreed to exclude Licensed Practical Nurses. In contrast, the instant case is a successorship situation in which a predecessor employer agreed to a unit including some, but not all, technical employees. *Barnert* is not controlling given that the Board was not faced with a prior bargaining history, which the Board must consider in determining the appropriateness of the unit. See *Bay Medical Center, Inc.*, 218 NLRB 620, 621 (1975); cf. *St. Joseph Hospital and Medical Center*, 219 NLRB 892, 893 (1975). Further, the viability of *Barnert* is questionable given recent decisions by the Board that allowed for separate units of technical employees. See *Crittenton Hospital*, at 880-881; *St. Mary's Duluth*, at 1420; and *Kaiser Foundation Hospitals*, at 934, fn. 12.

Respondent asserts that the perfected unit is inappropriate because the prior unit included guards, non-guards, professional employees, and non-professional employees, and the Charging Party's disclaimer of interest in representing the the guards and the professionals could not cure or perfect the unit. Respondent relies on *Field Bridge Associates*, 306 NLRB 322 (1992) and

Russelton Medical Group, Inc., 302 NLRB 718 (1991) in support of its contentions (GCX 1-P). Counsel for the General Counsel maintains neither case demands the result that Respondent seeks.

In *Field Bridge Associates*, the Board determined a successor employer was only obligated to bargain with an appropriate unit, and the successor employer 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 was not required to bargain with the Charging Party at the time of its initial request for recognition for the original unit (which included guards and non-guards, professionals, and non-professionals). However, the Charging Party's later action of disclaiming interest in the guards and pharmacists—prompted by Respondent—and requesting recognition in the perfected unit that did not include guards or professional employees distinguishes this case from *Field Bridge Associates*.

In *Russelton Medical Group*, the administrative law judge found that the employer was not a *Burns* successor employer because there was continuity of operations between the employer and its predecessor; the judge thus dismissed the complaint. The Board upheld the dismissal because the unit sought by the union was inappropriate, as it included professionals and non-professionals. However, the union in *Russelton Medical Group* never demanded for recognition in a perfected unit, as the Charging Party has done in the instant case.

Finally, Respondent argues that an affirmative bargaining order is not an appropriate remedy due to the lapse of time since its unlawful action and turnover in the perfected unit. Respondent cites several cases in support of its argument, each of which is distinguishable and

inapplicable to the present case.¹⁰ These cases involved *Gissel* bargaining orders and initial recognition.¹¹ The case at hand is markedly different—it is a successorship situation involving a union which had already obtained recognition from the predecessor employer and was entitled to recognition from Respondent as of February 1, 2007. In such cases, the Board has recognized a distinction between affirmative bargaining orders—which merely restores the incumbent union to the position it would have been in absent the unlawful refusal to bargain—and a *Gissel* bargaining order, which provides an additional remedy to a non-incumbent union because a fair election cannot be held. *See Williams Enterprises, Inc.*, 312 NLRB 937, 940-942 (1993)(drawing distinction between bargaining orders in successorship cases versus *Gissel* bargaining orders), *enfd.* 50 F.3d 1280, 1289-1290 (4th Cir. 1995)(recognizing distinction). *But see Lee Lumber and Building Material Corp.*, 117 F.3d 1454 (D.C. Cir. 1997)(indicating that the D.C. Circuit requires detailed findings as to why an affirmative bargaining order is appropriate in cases involving incumbent unions).

The Respondent argues that an affirmative bargaining order is inappropriate because it forces the incumbent union—and a decertification bar—on a workforce that is substantially changed, thereby upsetting the Section 7 rights of those employees. The Respondent cites *Sullivan Industries v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992), *remand* 322 NLRB 925 (1997), in support of its case. Although *Sullivan Industries* involved an incumbent union and not a *Gissel* situation, it is distinguishable in that it involved employee petitions indicating disaffection from the incumbent union. In contrast, Respondent produced no evidence of any disaffection. Rather, Respondent appears to argue merely that the fact that there has been some employee turnover

¹⁰ Respondent cites the following cases in support of its position: *Sullivan Industries v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980); and *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996).

¹¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

demands that an affirmative bargaining order is an inappropriate remedy. However, Respondent's argument ignores its own employment history. More than two years since the violation occurred on February 1, 2007, more than half of the employees in the perfected unit were retained from the predecessor (of the 178 employees in the perfected unit, 108 were retained from the predecessor). *Cf. Cogburn Health Center*, 437 F.3d at 1274 (44% retention). More than 60% of Respondent's employees in the perfected unit—even significantly after the violation—had unquestionably enjoyed representation by the Charging Party, and Respondent produced no evidence that *any* of these employees—retained or newly hired—did not want the Union to continue to represent them. Rather than weighing against the issuance of an affirmative bargaining order, Respondent's evidence of employee turnover supports a finding that the Board's traditional, appropriate remedy for a successor's unlawful refusal to recognize an incumbent union—an affirmative bargaining order—would be the remedy that best protects the employees' Section 7 right.

IV. CONCLUSION:

In this case, Respondent would have Board precedent disregarded on the grounds that there is no collective bargaining relationship to stabilize. But the law and facts mandate otherwise: Hadley voluntarily recognized the Union; the parties bargained for several months; proposals and counter-proposals were made; 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 Respondent hired a majority of Hadley's employees and operated the facility in an unchanged manner. Employees perceived that nothing had change except for the ownership of the business. The Union requested recognition in the perfected unit after disclaiming the guards and the pharmacists in response to Respondent's refusal to recognize and bargain in a unit including

these jobs classifications. Respondent failed to show compelling circumstances warranting the uprooting of the unit. Its contentions that exclusion of the respiratory therapists and recreation technicians make the unit inappropriate fall short of its burden and do not amount to compelling circumstances, given that the employees can be represented through self determination election or separate election in a unit cited in the Board's health care rules. Lastly, by perfecting the unit, the modification resulted in a 10% reduction in the unit requested on February 1, 2007. Counsel for the General Counsel maintains that the change did not significantly alter the scope and character of the unit and was inconsequential. See *Northern Montana Health Care*, 324 NLRB 752 (1997), citing *Fosdal Electric*, 367 F.2d 784, 787 (7th Cir. 1966), enfg. 153 NLRB 85 (19650 (demand for unit of 7, unit of 10 found appropriate an increase of 40%); citing *United Butchers Abattoir, Inc.*, 123 NLRB 946, 956 (1959) (demand for unit of 28, unit of 25 found appropriate, a decrease of over 10%).

Accordingly, counsel for the General Counsel maintains that the evidence and legal argument support the Judge's finding and conclusions that the perfected unit is appropriate,¹² and that by refusing to recognize the Charging Party as the representative of the perfected unit, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act.

¹² Thus, since the Judge correctly found that the 'perfected unit' pled in paragraph 8(a) of the Amended Complaint is appropriate for bargaining, counsel for the General Counsel maintains that the presumption follows that the Union continues to have a majority status in the "perfected unit" (ALJD 26, lines 35-38, 29, lines 17-18) See *University Medical Center*, 335 NLRB 1318, 1334 (2001), enfd. in part, 335 F.3d 1079 (D.C. Cir. 2003).

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CERTIFICATE OF SERVICE

This is to certify that on this 8th day of January, 2010 a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision in the above-captioned matter was filed electronically and, on that same day, copies were electronically served on the following individuals by e-mail.

Thomas J. Murphy /s/

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