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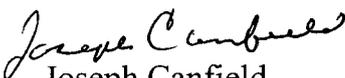
Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St., NW
Washington, DC 20005-3419

Re: Mercy Health Partners
Case 7-CA-52693

Dear Sir:

Enclosed is Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision As indicated on the last page of the document, copies have been served on all parties of record.

Very truly yours,


Joseph Canfield

Counsel for the Acting General Counsel

Enclosures

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

MERCY HEALTH PARTNERS, INC.

Respondent

and

Case GR-7-CA-52693

SEIU HEALTH CARE MICHIGAN

Charging Union

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Counsel for the Acting General Counsel Joseph Canfield respectfully submits this Brief in support of Exceptions to the Administrative Law Judge's Decision in this matter.

Counsel for the Acting General Counsel contends that Respondent violated Section 8(a)(5) of the Act on November 23, 2009¹ when it bypassed the Charging Union and dealt directly with its employees. Respondent also violated Section 8(a)(5) of the Act by eliminating the Unit work of registration/admit assistants and insurance verification clerks engaged in pre-registration duties at its Hackley Campus facility by assigning said work to non-Unit positions at its Mercy Campus. Finally, Respondent violated Section 8(a)(5) of the Act in that its elimination of the unit work at Hackley Hospital unilaterally changed the scope of the bargaining unit.

THE FACTS

Respondent operates acute care hospitals in Muskegon Michigan, including one on the Hackley Campus and another on the Mercy Campus. Respondent has a collective bargaining agreement with the Charging Union covering CERTAIN employees at its Hackley Hospital, including the classifications registration/admit assistants and insurance verification clerks. (GC Ex. 2, Tr.17) There were 16 employees working in this classification, (GC Ex. 10) including six employees who performed pre-registration work. (GC Ex. 12) Employees in these classifications at the Mercy Campus are not represented by any labor organization. (GC Ex. 11)

¹ Unless otherwise specified, all dates herein re 2009.

On November 23, Respondent's Human Resources Director Robin Belcourt, along with supervisors/managers Linda Churchill, Connie Hassenback, Julie Champayne and Deana Richter, met with five of the six registration/admit clerks and insurance verification clerks engaged in pre-registration duties at the Hackley Campus. (Tr. 21, 22, 177, 179. 180) The employees who attended this meeting were pre-registration clerks Anna Winters, Mary Erickson, Amber Grainer, and Jodi Pallos, and insurance verification clerk Barb Hoffman. (Tr. 22) Insurance verification clerk Tanna Lock was absent because she was on a medical leave. (Tr. 24, 161) During this meeting, Belcourt informed the employees that their positions at Hackley were eliminated and the positions were being moved to Respondent's Mercy Campus, to non-union positions. (Tr. 22, 15-59, 175-76)

Winters testified that the employees were told they had three options: to attempt to bump into positions in the Hackley unit, to take a layoff, or to move to the Mercy Campus.(Tr. 23) The employees were told that if they moved to the Mercy Campus, that except for the manner in which vacation would accrue, all of the wages and benefits would remain the same. (Tr. 22) They were told they had 72 hours to decide.

The ALJ found that Belcourt told the employees that the position at Mercy was nonunion, but that the employees' pay and benefits would remain the same, that they would not lose any benefits. (ALJD p. 4, L 12-13) But contrary to the ALJ, employee Anna Winters' presented un rebutted testimony that Belcourt also told the employees the manner in which their vacations accrued would change. (Tr. 22)

During the meeting, four of the five employees elected to follow their jobs by moving to the Mercy Campus (GC Exs. 5(b), 6(b), 7(b), and 8(b)) On November 27 Winters also elected to follow her work to the Mercy Campus. (GC Ex. 4(b), Tr. 26) On December 12, Tanna Lock, who was absent from the meeting, met with Belcourt. She was given the same options as the other pre-registration clerks, but she chose to accept the layoff. (GC Ex. 12(b), Tr. 178)

Immediately after the November 23 meeting, Anna Winters, who was the only steward representing the registration department employees at Hackley, (Tr.16) called the Charging Union's Member Representative Loretta Briggs and informed her that they had just been informed that their jobs were being moved to the Mercy Campus. (Tr.86)

Within fifteen minutes after the meeting, Belcourt sent Briggs an e-mail informing her that on December 7 the pre-registration work would be moved to non-union positions at the Mercy Campus. (GC Ex. 11, Tr. 86,161) Other than the call Briggs received from Winters, this was the first time the Union was informed of the move. (Tr. 87, 151,173)

Later the same day, the Charging Union's attorney, Brenda Robinson, sent Respondent an e-mail asking to meet to bargain on the effects of the move. (R Ex. 27) Briggs testified that the e-mail did not ask Respondent to bargain over the decision because the decision had already been made. (Tr.90)

On December 4, all of the equipment, including computers, keyboards and chairs, used by the employees who were to move to the Mercy Campus was moved from the Hackley Campus to the Mercy Campus, a distance of two miles. (Tr. 14-15, 32, 34)

On December 7, the five employees who elected to move with their work started working at a location on the Mercy Campus,² separate from the acute care hospital on that campus. (Tr. 32, 135-36)

The parties met on December 7. The Union asked Respondent to move the employees back to Hackley Hospital, but Respondent refused to do that. (Tr. 89) It also asked Respondent to apply the contract to the employees at Mercy, but Respondent also refused that request.³(Tr. 90, 165, 177) Finally, the Union asked if Respondent would recognize the Union as the bargaining agent for these employees based on a card check. But again, Respondent refused that request. (Tr. 90)

Anna Winters presented un rebutted testimony that the day after Belcourt told the employees about the move, Linda Churchill told Winters that she could not tell her about the move because Winters was the Union steward. (Tr.41) A couple of weeks before this, Churchill had relayed the same message to employees Mary Erickson and employee Amber Grainer; telling them that they were moving to Mercy Campus, but they were not to tell a lot of people, especially Anna Winters because she was a Union steward. (Tr. 76-77, ALJD p. 3, L. 43-45)

After the move, the former Hackley employees continued to perform the same work they had performed at Hackley Hospital, contacting patients scheduled for tests at

² Respondent's Director of Human Resources Robin Belcourt testified that in layoff situations, stewards are not placed on the layoff list because of superseniority. (Tr. 178) Accordingly, moving Winters arguably violated the super seniority clause in the contract. (Tr. 37, GC Ex. 4(c), GC Ex. 2, Sec. 1.6)

³ By the terms of the contract, Respondent recognized the Charging Union as the bargaining agent of the employees in various departments including "insurance verification clerks, Registration/Admit Assistant." There is nothing in the contract which restricts recognition to the Hackley Campus. Therefore, Respondent also breached the contract by refusing to recognize the Union as the bargaining agent for the employees who were moved.

the Hackley Hospital or at the Lakes Campus, another former Hackley Hospital. (Tr. 32) They do not contact any patients treated at the Mercy Campus. (Tr.35) They do their work in the same manner, using the same equipment. (Tr. 32) They continue to be supervised by Linda Churchill, who supervised them when they were at Hackley Hospital. (Tr. 34) While the pre-registration employees are not now covered by the collective bargaining agreement, other than a change in how their leave is accrued, there was no change to their wages or benefits. (Tr. 40) They continue to have contact with admitting clerks who remained on the Hackley Campus, and who occasionally assist the employees who moved by performing pre-registration work at Hackley. (Tr. 35, 44)

The employees who perform registration work for patients being treated at the Mercy Campus are located in a room adjacent to the room which houses the former Hackley employees. (Tr. 33, 34) The employees who moved from Hackley to the Mercy Campus have only cursory contact with Mercy employees. They do not take common breaks; at most they nod when they pass each other in the halls. (Tr. 34, 45, 55, 64-65)

Trinity Health (Trinity) is a national healthcare system “primarily responsible for acute health care facilities across the United States.” (Tr. 100) Trinity has 19 “ministry organizations,” including the one which includes the Mercy and Hackley Campuses in Muskegon. (Tr. 104) In the summer of 2007, Trinity began a business case study that ultimately resulted in the development of a Uniform Revenue Organization (URO). Respondent’s Vice President of Patient Financial Services, Linda Schaeffer, described the URO as a “shared services organization.” (Tr.107, see also R Ex. 8, p. 4) It is a program adopted by Trinity in part to standardize and make the process more efficient. (Tr. 112)

The URO called for consolidating some positions in what it refers to as shared space. The decision to implement the URO, including consolidating functions, was made in January 2008. The URO plan was approved by Respondent's CEO in May 2008. (Tr. 139, 140, 141) Schaeffer confirms that the approval of the URO by the CEO, in effect, made it a done deal. (Tr.140) That is, the decision to move the pre-registration employees was irrevocable. Respondent's Human Resources Director Robin Belcourt confirms this view. (Tr. 175)

Schaeffer explained the reasons for relocating the pre-registration work from Hackley Hospital to the Mercy Campus. The URO required standardization of processes within the patient financial services arena. This included consolidation of certain functions, including pre-registration, (Tr. 110, 118) in part to provide the pre-registration services throughout the system in a uniform, standardized, more efficient manner. (Tr. 112, 113, 115) The reason for consolidating services, which included consolidating the pre-registration work, was to free up space in the acute care hospital for work directly connected with acute care. Since the pre-registration work does not involve face-to-face contact with patients, the decision was made to move this work out of the acute care hospitals. Schaeffer described the hospital as prime real estate, space which had to be reserved for physicians, and patients, and care delivery. Accordingly, it was necessary to move the employees involved in pre-registration from the acute care hospital to get them away from the prime real estate. (Tr. 109, 110, 118, 136, 137) Schaeffer also mentioned the Genesis computer system, indicating everyone would have to know that system which

was not used at Hackley Hospital but was in place and used on the Mercy Campus. (TR. 120-21)

Julie Champayne, Trinity's URO Regional Manager for Patient Access and Patient Services for the West Michigan Shared Services Center, confirmed that the pre-registration employees were moved because of the URO's requirement for standardization, (Tr. 191-92) and in order to comply with the URO procedure to free up space in the acute care hospitals, stating that the pre-registration employees did not have face-to-face contact with patients. (Tr.184-85) Champayne also said it was necessary to move the employees in order to train them on the Genesis system, which is scheduled to be implemented on February 25, 2011. (Tr. 186-87) Champayne confirmed that the computers the employees use will remain, that only the system will change. (Tr. 188) She said that if the employees had been trained on the Genesis system at Hackley, there would have been access problems and imaging problems, (TR. 192) that it would have cost thousands and thousands of dollars to train the employees for Genesis at Hackley, a potential cost which the budget could not accommodate.⁴ (Tr. 192) In effect, Champayne testified that it was more convenient and somewhat less costly to train the pre-registration employees at Mercy.

Champayne, who was charged with deciding where the pre-registration employees would be moved, (Tr. 197) testified that Respondent considered several options to consolidate the pre-registration work including a location close to the Hackley Campus,

⁴ Champayne did not otherwise elucidate on the cost factors, but thousands and thousands of dollars could just as well mean as little as \$4,000 as some higher figure.

but the neighborhood was not very safe and there would have been a cost to upgrade the plumbing and electrical systems. (Tr. 198, 199)

For a year or two prior to the move, there were rumors that their jobs might be moved, but the employees were never given any specifics as to who was to move, where they would move, or when. (Tr. 60) In 2008, Respondent distributed a brochure to employees which indicates “Some pre-registration and financial clearance functions will also migrate to shared services center over 3-4 years.” (R Ex. 6, Tr. 124, 150-51)

Around March, Trinity’s Regional Director Western Region, Michael Grant, distributed a brochure to Hackley employees and also gave a power point presentation to the employees based on the contents of the brochure. (R Ex. 8) The presentation represented “there will be URO shared services centers including pre-registration in Western Michigan in 2/29/09.” (R Ex 8, p. 10) But it also represented that at a later date the shared services model would be evaluated. (R Ex 8, p 11) The presentation indicated the move would take place in February, 2009, which date preceded the power point presentation. As found by the ALJ, the power point presentation twice noted that “some pre-registration and financial clearance functions will also migrate to shared services center over three to four years.” (ALJD p. 3, L. 31-33)

Respondent claims it previously moved four to six scheduling clerks from the Hackley Hospital in October, 2008 without objection from the Union. However, the Union had no advanced notice that the scheduling clerks’ work was going to be moved. Rather, Respondent merely announced to the Union that the move had occurred, (Tr. 173)

just as the Union was not given notice that the pre-admission clerks were going to be moved. (Tr. 173)

Respondent Changed the Scope of the Unit

Respondent also changed the scope of the Unit by eliminating the work at Hackley Hospital. Prior to the moving of the pre-registration work to the Mercy Campus, these six employees had been a part of the registration/admit assistant classification in the bargaining unit. Insurance verification clerks were also part of the unit. Prior to the move, this classification consisted of 16 employees. The unilateral move of the pre-registration work to the Mercy Campus left only 10 employees in these classifications in the Unit.

ARGUMENT

1. The Direct Dealing

The ALJ found Respondent did not engage in direct dealing in its meeting with the employees when it presented them with the Hobson's choice of attempting to bump into the Unit, accepting a layoff, or moving with their work to a non-Unit position. The ALJ found there was no bargaining, so there was no direct dealing. Rather, the ALJ agreed with Respondent's assertion that "the announcement of a predetermined decision without seeking employee input negates any basis for finding an unlawful instance of direct dealing.

As noted by the ALJ, the first two options offered the employees, to bump into the unit or take a layoff, are mandated by the contract. But the third option, to move with the work, is not subsumed in the contract. However, the ALJ found that presenting the

employees with this third option was not direct dealing because the offer referred to non-unit positions, and the Union had no representation rights regarding these non-unit positions. (ALJD p. 8, L. 44-45)

Contrary to the ALJ, the question is not whether the Union had bargaining rights as to the employees working at the Mercy Campus, but whether the Union had bargaining rights as to the unit employees at Hackley Hospital. As the bargaining representative for the unit at Hackley Hospital, the Union had a right to preserve work there, and to attempt to deter Respondent from moving unit work to non-unit positions at the Mercy Campus. Accordingly, Respondent had an obligation to bargain with the Union concerning the relocation of the unit work. But instead, Respondent dealt with the employees regarding the move.

The established criteria for finding direct dealing are: (1) that the employer was communicating directly with union-represented employees; (2) that the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB No 95 (August 18, 2010).

Respondent's action in meeting with the Unit employees satisfies each of these criteria. Respondent communicated directly with the Unit employees when it met with them on November 23. It communicated directly with the employees. The discussion was for the purpose of presenting the employees with different terms and conditions of employment, that is the conditions under which they would be employed if they accepted

the third option and moved with their work. Not only was the Union excluded from the meeting, but it was not informed of the decision to move the work until after the meeting concluded. By meeting with the employees under these circumstances, Respondent undercut the Union's role in bargaining by not only excluding the Union from the meeting, but also by then both depleting and altering the unit.

It is clear that Respondent was presenting the employees with terms and conditions of employment at the Mercy Hospital which were different than the terms and conditions of employment in effect at Hackley Hospital. Although not referred to in the ALJD, Winters established that Belcourt told the employees their vacation benefits at the Mercy Campus would accrue differently. Further, the positions at the Mercy Hospital were nonunion. Accordingly, the employees were presented with positions which were not covered by the collective bargaining agreement. In effect, by moving with their work, the employees would lose much, if not all, of the protection guaranteed under the contract, including seniority rights, (GC Ex 2, Art. 10.1 and 10.5) access to the grievance-arbitration procedure, (GC Ex 2, Art 6.2 and 6.3) and they would not have the protection provided by the contract against discriminatory treatment. (GC Ex. 2, Art 5.1)

Thus, it is clear Respondent engaged in direct dealing with these employees under the standards explicated in *El Paso Electric Co.* Moreover, informing Unit employees they were being laid off, and offering them a job at another non-Unit location with different terms and conditions of employment and without being covered by their collective bargaining agreement, amounts to direct dealing. *Pioneer Electric of Monroe, Inc.*, 333 NLRB 1192, 1197 (2001)

2. The Waiver Issue

Respondent moved the work from the Hackley Hospital to the Mercy Campus without bargaining with the Union about the decision to move the work.

There is no dispute about this. Rather, Respondent contends that there was no obligation to bargain about this decision because the decision was not a mandatory subject of bargaining and because the Union waived the right to bargain about the decision by its inaction, by failing to request bargaining once the decision to move the pre-registration work was announced on November 23, and by failing to request bargaining on the relocation of scheduling employees which occurred in October, 2008. The ALJ did not decide the waiver issue because he found Respondent did not have an obligation to bargain on the decision to move the work. (ALJD p. 7, L. 16-20)

Respondent claims the Union waived the right to bargain about this move because it failed to request bargaining on the move of the scheduling clerks in October, 2008. However, the Union did not receive notice of this move until after it was made.

Bohemian Club, 351 NLRB 1065, 1066-1067 (2007)

Respondent claims the employees were given notice of the intent to move the pre-registration work when they were shown the power point presentation in March 2009. But, at best, the information conveyed in the meeting was too vague to give meaningful notice that a move would take place. Grant told the employees that some pre-registration functions would migrate to shared services over three to four years. But he never mentioned which pre-registration functions would migrate, or where they would migrate

to, and he indicated it would take place three or four years in the future, sometime between 2013 and 2014, whereas the move was actually made in December 2009. The employees were never told any specifics regarding the move, including what work would be moved, who would be moved, the specific timetable relative to the move, or where the work would be moved. In effect, the employees were given no meaningful notice that pre-registration work would be moved from Hackley Hospital to the Mercy Campus.

United Parcel Service, 323 NLRB 593 (1997), *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993) But the fact that Respondent did not provide the Union with clear and unambiguous notice of the move comes as no surprise, given Linda Churchill's message to Winters, Erickson and Grainer that Respondent did not want the Union to learn of the move.

The ALJ found that Union Steward Winters was given some notice of the move when Erickson told her that Churchill said they would be moving to the Mercy Campus. However, this information was also woefully lacking in details, including which specific work would be moved, or when the move would take place.

On November 23, Respondent did, finally, give the Union notice of the move. But the language of the e-mail clearly stated that the decision to move the work had already been made. Accordingly, the November 23 e-mail failed to present the Union with an opportunity to bargain about the move. *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001) But more importantly, it is clear that any notice which may have been received by the Union was meaningless given the fact that when the URO was approved by the CEO in May, 2008, long before anyone from the Union learned of the move, the decision to

move the pre-registration work was irrevocable. Accordingly, when Belcourt sent the Union the e-mail on November 23 informing the Union of the intent to move the work, sent only after Respondent informed the employees of the move, Respondent presented the Union with a *fait accompli*.

The Board has consistently found that a union is not required to request bargaining when presented with a *fait accompli* because such request would be futile. *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004), *United Parcel Service*, supra, *Ciba-Geigy Pharmaceuticals, Inc.*, 264 NLRB 1013, 1017-1018 (1982) Accordingly, the Union did not waive its right to bargain regarding the movement of the work not only because prior notice was too vague and ambiguous to be meaningful, but because it was presented with a *fait accompli*.

3. The Decision to Eliminate the Work and Relocate the Jobs

Respondent contends that the decision to move the work was at the core of entrepreneurial control, and was therefore not a mandatory subject of bargaining. Alternatively, Respondent contends that pursuant to *Dubuque Packing Co*, 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994), there was no obligation to bargain over the decision to move the work because the decision was not based on labor costs, and, further, the Union could not offer Respondent any concession that would cause Respondent to change its decision.

Under Respondent's view of the law, an employer could decimate a unit with impunity by simply moving groups of unit employees to another nearby location. Taken

to an extreme, if the Board allowed an employer to engage in this type of activities, it would give carte blanche to an employer to rid itself of a union by moving its unit employees to a non-union site. In any event, Counsel for the Acting General Counsel contends that the move of the pre-registration work from Hackley to Mercy was not a change in the direction or scope of Respondent's business and was therefore a mandatory subject of bargaining. Further, although there was a movement of work, it was not the kind of move which would fall under the dictates of *Dubuque*. Rather, since the work was being performed in the same manner, using the same equipment, by essentially the same employees, it was more like subcontracting the work, which required an analysis under *Torrington Industries*, 307 NLRB 809 (1992) and *Fibreboard Corp v. NLRB*, 379 U.S. 203 (1964) rather than *Dubuque*.

The ALJ found the move was not a change in the direction or scope of Respondent's business, (ALJD p. 6, L 40-45) but applied *Dubuque* rather than *Torrington* and *Fibreboard* because, according to the ALJ, "There was no subcontracting. Unlike *Fibreboard*, there was no replacement of employees in the existing unit with those of an independent contractor." (ALJD p.5 L. 52, p. 6. L 1-2)

In applying *Dubuque*, the ALJ found the decision to move the work was not based on labor costs, and also found that the Union could not have offered any concessions which would cause Respondent to change its decision. Accordingly, the ALJ found that there was no obligation to bargain over the decision to move the work.

The ALJ was in error in applying *Dubuque* rather than *Torrington* and *Fibreboard*. The movement of the work was much closer to the moves found in *Torrington* and its progeny than the movement which took place in *Dubuque*.

Unlike *Dubuque*, the relocation of the six pre-registration jobs is not a move of an entire business operation across state lines. It was a relocation of a few jobs across town. Unlike *Dubuque*, there was no permanent closing of a facility. Hackley continues to operate, and continues to conduct registration work in that building with the remaining registration clerks. Unlike *Dubuque*, there was no substantial capital investment. Unlike *First National Maintenance*, Respondent did not permanently close a discrete portion of its business with no intention of reopening it, and except for Lock who was laid off, there was no termination of employees. In essence, all that was involved here was a reassignment of six jobs a distance of two miles, where essentially the same employees perform the same work, in the same manner, under the same terms and conditions of employment, under the same supervision as they worked prior to the move.

The ALJ's conclusion that *Torrington* should not apply in this case because the work was not subcontracted is also in error. In *Torrington* the employer moved the work performed by two truck drivers represented by a union to another non-union facility and laid off the two drivers. Non-union drivers and independent contractors then performed the work previously performed by the laid-off drivers.

The Board found that every relocation of work does not affect the direction and scope of a business, and it distinguished the movement of work in *Torrington* from the

holding in *Dubuque*. The Board found that the drivers were merely replaced, which the Board termed a form of “*Fibreboard* subcontracting.” *Id.* at 810

Using a *Fibreboard* analysis, the Board noted that all that was involved in laying off the employees and moving this work was the substitution of one group of workers for another to perform the same work at another plant under the ultimate control of the same employer. The Board found that moving work performed by two truck drivers to another facility, resulting in the layoff of the drivers, was a mandatory subject of bargaining.

The Board further found that there was not a change to the scope and direction of the business, and the decision was therefore not a core entrepreneurial decision which was beyond the scope of the bargaining obligation. The Board concluded that since there was no change to the direction or scope of the business, it did not have to address the issue as to whether labor costs were a factor in the employer's decision. *Id.* at 810

The movement of the work in the instant case is strikingly similar to the work moved in *Torrington*. In *Torrington*, Respondent moved unit work to its non-union facility and laid off the employees who performed the work. In the instant case, Respondent also moved work from a union facility to a non-union facility. Respondent then gave the employees a choice of bumping into the unit, or being laid off, or moving with their work. One employee chose a layoff. Five others moved with their work. Respondent then had the work which it moved performed by the same employees who performed the work at Hackley Hospital, except after the move they were non-union employees. In effect, Respondent substituted the former unit employees with themselves. Given the fact that in *Torrington* the Board found a movement of work of this nature to be a form of

Fibreboard subcontracting, the ALJ was in error in applying *Dubuque* to the movement of the work from Hackley Hospital to the Mercy Campus on the basis that there was no subcontracting. Similarly, and for the same reasons, the ALJ was in error in applying *Dubuque* because there was no replacement of employees in the existing unit with those of an independent contractor.

The Board consistently applied its holding in *Torrington* when it found that when the only thing that changed was the identity of the employees performing the work. For example, in *Geiger Ready Mix Co. of Kansas City, Inc.*, 315 NLRB 1021 (1994), enfd. in relevant part, 87 F.3d 1363 (D.C. Cir. 1996), the employer closed a plant, laid off the employees who had been working there, and moved the work to its other facilities. The Board found that the employer's actions did not constitute an entrepreneurial decision, and applied *Torrington* because in *Geiger* there was a reassignment of unit work rather than a plant relocation. The Board noted that in *Torrington* it found that in cases factually similar to *Fibreboard*, when virtually the only circumstance the employer changed was the identity of the employees doing the work, there was no need to apply the multilayered test of *Dubuque* to determine whether the decision is subject to the statutory duty to bargain because *Fibreboard* had already held that such decisions are mandatory subjects of bargaining. *ID* at 1023

In fact, the instant case is stronger than *Geiger* in that here, essentially the same employees are performing the work, albeit without the benefit of union representation. See also *Westinghouse Electric Corp.*, 313 NLRB 452 (1993), enfd. sub nom. 46 F.3d 1126 (4th Cir. 1995) cert denied 514 U.S. 1037 (the employer laid off unit employees

working in one of its laboratories and transferred their work to employees working in a more modern, efficient laboratory).

The above cited cases did not involve subcontracting. Rather, each involved moving work to another location and substituting one group of employees with another. Accordingly, the Board applied *Fibreboard* and *Torrington* rather than *Dubuque*. In the instant case, Respondent simply converted the Union-represented workers at Hackley into non-union workers at Mercy. Respondent's actions are much closer to the employers' actions found in *Fibreboard* and *Torrington* and their progeny rather than to the move of an entire operation across state lines found in *Dubuque*.

Since relocating the six pre-registration jobs from the Hackley Campus to the Mercy Campus did not affect the direction or scope of the business, and since the move here is closer to the subcontracting of the work found in *Fibreboard* than to a movement of the work found in *Dubuque*, as made clear in *Torrington*, Respondent had an obligation to bargain over the decision to relocate this work, regardless of whether the decision was based on labor costs.

4. Respondent Unilaterally Changed the Scope of the Unit

Respondent also violated Section 8(a)(5) in that the elimination of the work at Hackley Hospital also unlawfully changed the scope of the unit. By moving the six jobs from Hackley Hospital to the Mercy campus, Respondent reduced the registration unit from 16 employees to 10 employees, and eliminated the sub-classification pre-registration assistants.

When an employer moves an entire job classification, or in this case a sub-classification, out of a bargaining unit, or transfers employees out of the unit to do the same work they had been doing as unit employees without the Union's consent, it unlawfully alters the scope of the unit. See *McDonnell Douglass*, 312 NLRB 373, 377 (1993, reconsideration denied 313 NLRB 868 (1994), reversed on other grounds, 59 F.3d 230 (D.C. Cir. 1995) (employer unlawfully removed employees from the unit when it changed their assignment from one of the employer's component company to another component company); *Illinois-American Water Co.*, 296 F.2d 715, 719 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991)(employer unlawfully moved employees out of the unit when it created a new high-tech computer center when it moved clericals there to perform the same basic functions); *Bozutto's Inc.*, 277 NLRB 977 (1985) (employer removed all part-time employees out of the unit). Also see *Newport News Shipbuilding & Dry Dock Co. v NLRB*, 602 F.2d at 77-78 (upholding Board's determination that a proposal to change the description of unit positions and work was a permissive subject of bargaining because it could easily exclude some employees from the bargaining unit...). While this allegation was not specifically alleged in the Complaint which issued in this matter; it is closely related to the Second Amended Complaint allegation and was fully litigated in the underlying hearing. See *Earthgrains, Inc.*, 351 NLRB 286, 289 (2007); *Meisner Electric*, 316 NLRB 597 (1995)

CONCLUSION

Based upon the entire record in this matter and upon the foregoing arguments and citations of authority, it is respectfully submitted that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union about the relocation of the six pre-registration jobs from Hackley Hospital to the Mercy Campus, and thereafter relocating five of the six pre-registration employees to non-Unit positions at the Mercy Campus, and laying off the other, by engaging in direct dealing with the pre-registration employees, and by unilaterally changing the scope of the unit. It is therefore respectfully requested that the Board find that Respondent violated Section 8(a)(5) and (1) of the Act as set forth herein, above.

Dated at Detroit, Michigan, this 1st day of December, 2010



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CERTIFICATE OF SERVICE

I certify that on the 1st day of December, 2010, I electronically transmitted The Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision to the following parties of record:

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