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

MERCY HEALTH PARTNERS

Respondent,

-and- Case No. 7-CA-52693

SEIU HEALTHCARE MICHIGAN

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

BARNES & THORNBURG, LLP
Attorneys for Respondent
Michael A. Snapper (P24135)
Keith J. Brodie (P51636)
171 Monroe Ave., N.W., Suite 1000
Grand Rapids, Michigan 49503

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A. Procedural Statement of the Case

On October 4, 2010, the Administrative Law Judge George Carson II (the "ALJ") issued his recommended decision (the "Decision") in the above referenced matter. The ALJ concluded that Mercy Health Partners ("MHP" or the "Respondent") did not violate Section 8(a)(5) of the National Labor Relations Act ("NLRA" or the "Act") as alleged in Counsel for Acting General Counsel's ("General Counsel" or "GC") Second Amended Complaint and issued a recommended Order dismissing the Compliant in its entirety.

In so deciding, the ALJ made the following determinations:

- Consistent with the analysis prescribed in *Dubuque Packing Co.*, 303 NLRB 386 (1991), I find that the General Counsel presented a prima facie case that the relocation of the preregistration work was a mandatory subject of bargaining but that the Respondent has established that labor costs were not a factor and that no concession by the Union would or could have affected its decision. Thus, I shall recommend that the allegation that the Respondent violated the Act by eliminating the unit work of registration/admit assistants and insurance verification clerks engaged in preregistration duties at Hackley by assigning that work to nonunion positions at the Mercy Campus without notice to and bargaining with the Union be dismissed. (Decision p. 7 lines 22-29.)

- The request that the affected employees advise whether they wanted to accept the nonunit positions did not undercut the Union and did not constitute direct dealing. I shall recommend that the allegation of direct dealing be dismissed. (Decision p. 8 lines 48-51.)

Additionally, because he found that MHP's decision to relocate pre-registration work from the hospital at its Hackley Campus location to a non-hospital office building at its Mercy Campus location was not a mandatory subject of bargaining, the ALJ did not address General Counsel's argument that the Union was presented with a fait accompli and MHP's argument that the Union waived its right to bargain over the decision.

B. Factual Statement of the Case

Respondent, a subsidiary of Trinity Health ("Trinity") is one of nineteen Ministry Organizations ("MOs") owned by Trinity. Trinity, across its nineteen MOs, employs more than 47,000 employees in the United States (Tr. p. 104). Each of these MOs operates one or more hospitals, in many cases several hospitals, as well as related medical facilities (Tr. pp. 100-01). As one of those MOs, Respondent operates two hospitals and related medical care facilities in Muskegon, Michigan. These facilities are known as the Hackley Campus and the Mercy Campus. (Tr. pp. 46, 72-73, 91-92, 104, 184.)

This dispute was precipitated by Respondent's decision to cease performing certain "pre-registration" and related duties at Respondent's Hackley hospital facility, and to consolidate such work with the pre-registration work for Respondent's other facilities at a different non-hospital location. As noted by the ALJ, Respondent's decision "was part and parcel of the URO adopted by Trinity in 2008" (Decision p.7 line 4).

The URO, or Unified Revenue Organization, that Trinity adopted encompasses all of the following functional areas for the entire Trinity organization, including all of the hospitals run by Respondent and the eighteen other MOs: patient financial services, health information management, revenue and reimbursement, revenue integrity and reimbursement, managed care payers and strategy contracting (Tr. p. 107).

Prior to Trinity's adoption of the URO, all of these areas of operation had been conducted autonomously by each of Trinity's nineteen MOs. In other words, each MO, including Respondent, maintained an organizational structure and facility to conduct these significant business and financial activities. Upon implementation of the URO, however, all of these

functions have been or will be removed from the MO structures and placed within the newly created URO organization within Trinity. (Tr. p. 107; Res-2.)

Trinity's capital investment simply in creating the URO will be approximately $90 million over a period of five to seven years (Tr. p. 137).

Trinity's reasons for its decisions include significant projected revenue enhancement – approximately $500 million over the first five years – as well as improving patient and physician experience in communications and ensuring full compliance with legal regulation (Tr. p.109; Res-8, p. 5). This restructuring and consolidation of operations, involving the elimination of the autonomous authority of the nineteen separate MOs and the creation of a single new corporate entity, the URO, was described at the hearing as converting Trinity, in these functional areas, from a "holding company" to an "operating company" (Tr. pp. 116-17).[1]

The relocation of pre-registration work from Respondent's Hackley facility to a non-hospital office location at its Mercy Campus affected six employees.[2] Each of those employees was offered employment at a new position within the URO. For the most part, the offers were accepted and there is no evidence of any loss of pay or benefits.[3]

The record is clear, and the ALJ found, that labor costs were not a factor in Respondent's decision to relocate the work (Decision p. 4 line 1). The record is devoid of any evidence that any other terms or conditions of the employment of the affected employees, or of the Charging

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[1] Additionally, the URO is only one of several "shared services" organizations, also referred to as Unified Service Organizations ("USO"), that have been formed or are being formed by Trinity. (Tr. pp. 107, 117.) Another example of a Trinity USOs is the Trinity Information Systems ("TIS") which provides computer systems for all of Trinity Health's MOs (Tr. p. 117). Similar USOs exist or are being implemented for legal services, tax/accounting, and the Unified Accounts Payable Organization (Tr. pp. 117-118).

[2] The work of four MHP Pre-Registration, Registration/Admit Assistants and two Insurance Certification Clerks at Hackley's hospital facility was moved.

[3] Five of the affected employees elected to take a layoff under the parties' collective bargaining agreement and followed their work to the new location. One employee was on medical leave at the time of the relocation announcement and subsequently voluntarily accepted a layoff but did not move to the new location. (Tr. pp. 22-24; 160-61.)

Party's bargaining unit, was a factor, motivating or otherwise, in Respondent's decision. Respondent's decision to consolidate the pre-registration work of the two Muskegon, Michigan MOs was, as the ALJ found, "part and parcel of the URO" (Decision p. 7 line 4).

II. QUESTIONS INVOLVED TO BE ARGUED

(1) Was Respondent's decision to relocate the pre-registration work from its Hackley Campus location to its Mercy Campus location, pursuant to the implementation of the URO, accompanied by a basic change in the nature of Respondent's operations and a change in the scope and direction of the enterprise under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) and *Dubuque Packing Co.*, 303 NLRB 386 (1991)? Respondent answers Yes.

- Respondent's Exceptions Nos. 1, 2, 3, and 5 relate to this Question Involved.

(2) Did the failure of the Union to request bargaining over MHP's decision to move the pre-registration work, which was not to be implemented until two weeks after the formal announcement to the employees on November 23, 2009, constitute a waiver?[4] Respondent answers Yes.

- Respondent's Exception No. 4 relates to this Question Involved.

III. ARGUMENT

A. The Decision to Relocate the Pre-Registration Work Was Not a Mandatory Subject of Bargaining Under *First National Maintenance.*

Respondent's Exceptions Nos. 1, 2, 3, and 5 all relate to Respondent's contention that its decision at issue was not a mandatory subject for bargaining under the Act.

The ALJ found "that the General Counsel presented a prima facie case that the relocation of the preregistration work was a mandatory subject of bargaining" (Decision p. 7 lines 22-24). The ALJ apparently based his finding on his conclusions that the "basic nature of the

[4] This Question Involved is closely related to General Counsel's argument in General Counsel's Exception No. 7 that the Union was presented with a fait accompli, which Respondent separately addresses in its Answering Brief.

Respondent's operations remains the same" (Decision p. 6 line 29) and on his conclusion that there was no change in the scope and direction of the enterprise because "the basic nature of the Respondent's operations remains the same," namely "providing healthcare" (Decision p. 6 line 41).

In this analysis, the ALJ did not correctly apply the Board's standards as set out in *Dubuque Packing Co.*, 303 NLRB 386 (1991), and the Supreme Court's standards in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

In *Dubuque Packing*, the Board provided the following structure to its analysis of a decision to relocate unit work:

> In harmonizing the different results reached in the two cases [*First National Maintenance* and *Fibreboard*], there are at least three important points to consider.
>
> First, in *First National Maintenance*, the employer "had no intention to replace the discharged employees or to move that operation elsewhere." 452 U.S. at 687. In contrast, *Fibreboard* involved the "replace[ment] [of] existing employees with those of an independent contractor." 379 U.S. at 213.
>
> Second, in *First National Maintenance*, the Court was confronted with a decision changing the scope and direction of the enterprise "akin to the decision whether to be in business at all." 452 U.S. at 677. In *Fibreboard*, the employer's decision "did not alter the Company's basic operation." 379 U.S. at 213.
>
> Third, in *First National Maintenance*, the employer's decision was based "solely [on] the size of the management fee [the nursing home] was willing to pay." 452 U.S. at 687. In *Fibreboard*, "a desire to reduce labor costs . . . was at the base of the employer's decision to subcontract." *First National Maintenance*, 452 U.S. at 680.
>
> *Dubuque Packing Co.*, 303 NLRB at 390-91.

To borrow the Board's words in *Dubuque*, "measured by these three considerations" Respondent's decision in the instant case to relocate the pre-registration unit work is closely

analogous to the partial closing decision found non-mandatory in *First National Maintenance*, and clearly is not analogous to the subcontracting decision found mandatory in *Fibreboard*. Below, we will apply each of the "three important points" identified by the Board, as follows:

First, in this case Respondent did not intend "to replace the discharged employees." Although, the pre-registration work was consolidated in a new location some distance from Hackley's hospital facility, the employees were not displaced but instead were, in fact, all offered positions at the new location. In his oft-cited concurrence in *Fibreboard*, Justice Stewart described the employer's decision as "the substitution of one group of workers for another to perform the same task." 379 U.S. at 224. By sharp contrast, in this case Respondent has not substituted new employees for any of the Hackley Campus employees who were affected by the consolidation of work.

The second "important point" considered by the Board was whether the employer's decision was simply a relocation without an alteration of the employer's operations, or, by contrast, whether the decision was "akin to the decision whether to be in business at all." In this case, the removal of the MO from management control of patient revenue, and the creation of an entirely new corporate organizational structure, the URO, certainly has kinship to a decision to stop doing business in one form, and to carry forward those activities, in a very different manner, in an entirely different form. Granted, this decision is not tantamount to the closing of a business, but it clearly is not simply a relocation of workers doing the same work in the same corporate structure for the same purposes. The ALJ's determination that this question was answered simply because Respondent continued in the business of providing healthcare is incorrect.

The Board's previous decisions support Respondent's argument. In *Holly Farms Corp.*, 311 NLRB 273 (1993), the Board determined that there was no duty to bargain when the employer consolidated two previously separate entities, even though the Respondent continued in the same business, namely that of being a poultry producer. Similarly, in *AG Communication Systems Corp.*, 350 NLRB 168 (2007), the Board decided that there was no duty to bargain even though, in the wake of an acquisition, the new employer continued to carry on in the same line of business performed previously, namely that of being a telephone equipment company. So, the fact that Respondent has continued in the healthcare business does not resolve the issue.

In this case, Respondent decided to fully integrate all of its patient revenue functions by removing those functions from the nineteen separate MOs and consolidating them into a new organizational structure. Similarly, in *Holly Farms*, the employer made a decision to integrate the previously separate transportation divisions of two companies into a single transportation division and in *AG Communication Systems Corp.,* the employer, after purchasing another entity, made the decision to combine the two entities' collective bargaining units and completely integrate the two into one. *Holly Farms*, 311 NLRB at 275; *AG Comm. Systems Corp.*, 350 NLRB at 168. These decisions confirm that the integration of previously separate business operations into a single operating unit can constitute a core entrepreneurial management decision that is exempt from bargaining under *First National Maintenance*. The fact that the entity has continued in the same basic line of business does not alter this conclusion.

The Board's decisions in *Holly Farms* and *AG Communication* bear additional similarity to Respondent's situation. Both of those cases, like that of Respondent, had in their recent history an acquisition or merger of separate entities. In *Holly Farms*, the Board concluded that "requiring bargaining over the integration decision would place a significant burden on the

Respondents because ... the integration process involved structural and operational changes" and the "implementation of the integration decision required the expenditure of capital." 311 NLRB at 278. In the instant case, integration of all patient revenue function into a single consolidated URO involves the creation of an entirely new corporate structure within Trinity and substantially changed Trinity's operations by removing authority in those areas from the nineteen separate MOs into the new URO. Furthermore, development of the URO reflects a capital commitment by Trinity of approximately $90 million (Tr. p. 137). Similarly, in *AG Communication* the Board determined that requiring bargaining over the integration decision was inappropriate because "the integration process involved large-scale organizational restructuring conducted by joint teams of [the two merging entities]." 350 NLRB at 172. Likewise in the instant case, the restructuring that produced the URO was organization-wide within Trinity and was conducted by joint teams of not only Trinity management but significant outside consultant resources as well (Tr. pp. 128-29).

The third "important point" established by the Board in *Dubuque* concerns the Respondent's motivation for its decision. In *Dubuque*, the Board contrasted the employer motivation in *First National Maintenance* – concern about the size of a management fee – with the employer's desire in *Fibreboard* to "reduce labor costs." *Dubuque Packing Co.*, 303 NLRB at 391. In fact, it is fair to observe that in virtually all of the Board's decisions applying *Dubuque* in which a duty to bargain has been found, labor costs in one form or another were found to be a primary, or at least a proven, motivation for the employer decision maker. *See, e.g., Owens-Brockway Plastic Products*, 311 NLRB 519 (1993).

By contrast, in those decisions in which the employer's decision was found not to constitute a mandatory subject for bargaining, the employer has always demonstrated a clear

business reason or reasons for its decision. In *First National Maintenance*, the employer's motivation was profitability and most specifically avoiding an unacceptable management fee. 452 U.S. at 687. In *Holly Farms*, the employer decision maker was motivated by the desire to reduce costs and improve operating efficiencies. 311 NLRB at 277-78. In *AG Communication*, "the Respondent's decision had as its focus the Respondent's economic profitability; to streamline operations and eliminate redundancies." 350 NLRB at 172. In the instant case, Respondent was motivated by a desire to improve revenues (approximately $500 million over five years) and improve patient and physician relations and regulatory compliance (Tr. p. 109; Res-8, p.5).

And, as has been made abundantly clear by the ALJ and the record, labor costs had nothing whatsoever to do with Respondent's decision in the instant case to establish the URO and accordingly relocate and centralize various functions (Tr. p. 119). Based on these facts, the following conclusion of the Board in *AG Communication* should apply at least as clearly on the facts of this case:

> Accordingly, we find that the burden on the conduct of the Respondent's business outweighs any benefit that might be gained from bargaining ... over its decision to integrate. ... The Respondent's integration decision is not suitable for resolution through collective bargaining because it lies at the core of the Respondent's entrepreneurial control and decision making. ... We thus find that the integration was a management decision exempt from bargaining under *First National Maintenance*. 350 NLRB at 172 (citations omitted).

Respondent recognizes that the ALJ gave great weight to the absence of labor costs in the context of constituting an affirmative defense proven by Respondent in this case. However, on the facts presented, Respondent submits that it is very clear that the absence of labor costs also has a determinative weight in the more fundamental decision of whether the decision here was amenable to collective bargaining. When compared to the clear entrepreneurial business

motivations on the part of Respondent, and the complete lack of not only labor costs but any other subject amenable to collective bargaining, the conclusion is inescapable: Respondent's decision did not constitute a mandatory subject for bargaining.

B. The Union Waived Bargaining over MHP's Decision

Even if Respondent's decision to move the pre-registration work were determined to be a mandatory subject of bargaining, the Union waived its right to bargain over the decision.

On November 23, 2009, at 2:54 p.m., almost immediately after Robin Belcourt, MHP's Director of Labor Relations, met with the Hackley Campus employees to inform them their work was being moved to the business office location at the Mercy Campus, Ms. Belcourt sent an email to the Union notifying it of the impending movement of work on December 7, 2009. Twenty-seven minutes later, at 3:21 p.m., Union attorney, Brenda Robinson, responded to Ms. Belcourt. Ms. Robinson's email to Ms. Belcourt was unequivocal. She only requested bargaining over "effects."

> As exclusive bargaining representative for the Registration Clerks at the Hackley Campus of Mercy Health Partners, please consider this SEIU Healthcare Michigan's formal demand to bargain the effects of the employer's anticipated December 7, 2009, move of these members to the Sherman Campus. Please notify myself and Loretta Briggs of your available dates for bargaining these effects as soon as possible. (Res-27.)

Loretta Briggs, SEIU's Chief of Staff, admitted neither she nor Ms. Robinson specifically asked to bargain about Respondent's decision (Tr. p. 90). Ms. Briggs' rationale was that Respondent's decision had already been made (Tr. p. 90). However, neither the facts nor the law support Ms. Briggs' asserted rationale.

The law is clear. An employer can present its decision as a fully developed plan or a decision already made and not violate the Act. *See, e.g., Southern California Stationers*, 162 NLRB 1317, 1543 (1967) (holding employer did not breach its duty to bargain when its

spokesman presented changes in terms and conditions of employment as a decision already made; decision was still executory and no steps had been taken to implement it). As of November 23, 2009, the date of notice to the Union by Ms. Belcourt, the employees were still working at the Hackley Campus. They remained working there until December 7, 2009. Ms. Belcourt's email notifying the Union stated the move would not be "effective" until December 7, fourteen days after the November 23, 2009, announcement (GC-11). Ms. Robinson did not request to bargain over the decision on November 23, 2009, (Res-27), and Ms. Briggs testified the Union did not otherwise specifically request bargaining over the decision (Tr. p. 90).

By failing to request bargaining over Respondent's decision, even if Respondent's decision was a mandatory subject of bargaining, the Union waived its right to bargain over that decision. *See Kentron of Hawaii*, 214 NLRB 834, 835 (1974) ("When an employer notifies a union of proposed changes in terms and conditions of employment it is incumbent upon the union to act with due diligence in requesting bargaining."). Merely objecting to the changes does not fulfill the Union's responsibility to request bargaining or preserve bargaining rights. *See Medicenter, Mid-South Hospital*, 221 NLRB 670, 678-679 (1975); *American Buslines*, 164 NLRB, 1055-86 (1967). Furthermore, the filing of the unfair labor practice charge did not preserve the Union's right to bargain over the decision. *Boeing Co.*, 337 NLRB 758, 763 (2002) ("A union does not preserve its statutory bargaining right by ... assert[ing] a bargaining right by protesting the employer's conduct or by filing an unfair labor practice charge.").

IV. CONCLUSION

Respondent's decision to consolidate its pre-registration functions was not a mandatory subject of bargaining. Respondent's Exceptions 1, 2, 3, and 5 should all be upheld. *First National Maintenance* should apply to Respondent's decision and General Counsel failed to prove a *prima facie* case under *Dubuque*.

In *Holly Farms* the Board gave significant weight to the fact that "the integration process involved structural and operational changes ... [and] implementation of the integration decision required the expenditure of capital." 311 NLRB at 278. The same is strikingly true in Respondent's case, where Respondent created an entirely new corporate entity with several vice presidents (Res-2), made fundamental operational changes by removing management authority over the affected areas from the MOs to the new URO, and has and will invest approximately $90 million of capital in establishing the URO.

And in *AG Communication*, the Board relied upon the fact that "the integration process involved large-scale organizational restructuring conducted by joint teams of [the two merging entities]." 350 NLRB at 172. In this case, Respondent has shown that the development and implementation of the URO involved an extended period with management's team, outside consultants, and internal training and education, all of which is supported by the $90 million capital investment. (Tr. pp. 128, 129, 137; Res-6; Res-7; Res-8.)

In addition, the record makes clear that even if Charging Party had a right to bargain over Respondent's decision, which it did not, it waived that right.

Based on the foregoing, and its Answering Brief filed in conjunction with its Exceptions and this Brief, Respondent requests that the Board uphold its Exceptions and otherwise affirm the ALJ's Decision.

Respectfully submitted,

BARNES & THORNBURG LLP

Dated: December 30, 2010

By: _____

Michael A. Snapper (P24135)
Keith J. Brodie (P51636)
Business Address:
171 Monroe Ave., NW, Suite 1000
Grand Rapids, Michigan 49503
Telephone: (616) 742-3930
Facsimile: (616) 742-3999
Email: msnapper@btlaw.com
keith.brodie@btlaw.com

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Charging Party.

CERTIFICATE OF SERVICE

Document Served: ***Respondent's Exceptions To The Administrative Law Judge's Decision, Brief In Support Of Its Exceptions To The Administrative Law Judge's Decision and Respondent's Answering Brief To Counsel For The Acting General Counsel's Exceptions To The Administrative Law Judge's Decision***

Person served:

Brenda D. Robinson, Esq
SEIU Healthcare Michigan
brenda.robinson@seiuhealthcaremi.org

Joseph Canfield, Esq.
National Labor Relations Board
joseph.canfield@nlrb.gov

Stephen M. Glasser
National Labor Relations Board
stephen.glasser@nlrb.gov

The undersigned certifies that a copy of the documents listed above was electronically transmitted upon the parties listed above on December 30, 2010.

Dated: December 30, 2010

Respectfully submitted,

BARNES & THORNBURG LLP

By: _____
Keith J. Brodie (P51636)

Business Address:
171 Monroe Ave., NW, Suite 1000
Grand Rapids, Michigan 49503
Telephone: (616) 742-3936
Facsimile: (616) 742-3999
Email: kbrodie@btlaw.com