

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 ANSWERING BRIEF TO COUNSEL
FOR THE ACTING GENERAL COUNSEL'S 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

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND FACTS..... 1

III. THE SCOPE OF THE SECOND AMENDED COMPLAINT 4

IV. GENERAL COUNSEL’S EXCEPTIONS 4

V. ARGUMENT 5

 A. The ALJ Was Correct When He Rejected The Application Of *Fibreboard* And Its Progeny. 5

 B. There Was No Fait Accompli. 9

 C. The ALJ Correctly Found That MHP Did Not Engage In Direct Dealing. 12

 D. General Counsel’s Exception No. 5 Alleging The Union Had Representation Rights Regarding The Non-Unit Positions at Respondent’s Mercy Campus Is Specious. .. 15

 E. General Counsel’s Section 8(a)(5) Allegation that MHP Unlawfully Changed the Scope of the Unit is Misleading, Untimely, and Must be Rejected..... 16

VI. CONCLUSION..... 17

TABLE OF AUTHORITIES

CASES

<i>Champion International Corp.</i> , 339 NLRB 672, 673 (2003)	14
<i>Cherokee Culvert Co.</i> , 266 NLRB 290 (1983)	11
<i>Ciba-Geigy Pharmaceutical Division</i> , 264 NLRB 1013, 1017 (1982)	11
<i>Clarkwood Corp.</i> , 233 NLRB 1172 (1977)	11
<i>Desert Aggregates</i> , 340 NLRB 289, 293 (2003)	17
<i>Dubuque Packing Co.</i> , 303 NLRB 386 (1991).....	4, 9
<i>El Paso Electric Co.</i> , 355 NLRB No. 95 (2010)	13
<i>Fibreboard Products Corp. v. NLRB</i> , 379 U.S. 203 (1964)	passim
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981)	4
<i>Geiger Ready Mix Co.</i> , 315 NLRB 1021 (1994)	9
<i>Jim Walter Resources</i> , 289 NLRB 1441, 1442 (1988)	11
<i>McClain E-Z Pack, Inc.</i> , 342 NLRB 337 (2003)	11
<i>Medicenter, Mid-South Hospital</i> , 221 NLRB 670 (1975)	11
<i>Meisner Electric, Inc.</i> , 316 NLRB 597 (1995)	17
<i>NLRB v. Facet Enterprises, Inc.</i> , 290 NLRB 152 (1988)	14
<i>Paul Mueller Co.</i> , 332 NLRB 332 (2000)	14
<i>Pioneer Electric of Monroe Inc.</i> , 333 NLRB 1192 (2001)	14
<i>Southern California Stationers</i> , 162 N.L.R.B. 1317, 1543 (1967).....	10
<i>Spurlino Materials, LLC</i> , 355 NLRB No. 77 (2010)	12
<i>Torrington Industries</i> , 307 NLRB 809 (1992).....	passim
<i>Windstream Corp.</i> , 352 NLRB 44, 51 (2008), <i>remanded on other grounds by 2010 U.S. App. LEXIS 19051 (3d. Cir. July 1, 2010)</i>	12

STATUTES

NLRA Section 10(b)	17
NLRA Section 8(a)(5).....	4, 5, 16

OTHER AUTHORITIES

<i>Capital Ford Inc.</i> , 32-CA-18464-1, NLRB General Counsel Advice Memo (Jan. 30, 2002)	14
<i>See La Opinion</i> , 21-CA-36368, NLRB General Counsel Advice Memo (Nov. 8, 2004)	13

I. INTRODUCTION

Counsel for Acting General Counsel (“General Counsel” or “GC”) has filed eight Exceptions to the Administrative Law Judge’s (the “ALJ”) October 4, 2010 decision (the “Decision”) with the Board. As discussed in this Brief’s Argument section, these Exceptions lack merit and must be rejected because:

- The ALJ correctly rejected the application of the U.S. Supreme Court’s decision in *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203 (1964) and its progeny to Mercy Health Partners’ (“MHP” or “Respondent”) decision to relocate the work of certain employees who perform pre-registration functions from its Hackley Campus hospital location to a professional building at its Mercy Campus location.
- The Union was not presented with a *fait accompli*, and in fact waived its right to bargain over Respondent’s decision.¹
- General Counsel’s argument that Charging Party, SEIU Healthcare Michigan (“SEIU” or the “Union”), had representation rights to the relocated work at the Mercy Campus through the Hackley Campus Service and Maintenance Unit collective bargaining agreement contradicts the parties’ stipulation regarding the scope of the representation rights under the Union’s collective bargaining agreements.
- Exception No. 8 is not an Exception to any finding of the ALJ, but is instead a tardy attempt to assert a new allegation never previously raised, argued, or litigated.

II. BACKGROUND FACTS

Prior to April 2008, there were two competing non-profit acute care hospitals in Muskegon, Michigan: Hackley Hospital located at 1700 Clinton Street and Mercy General-Health Partners (“MGHP”) located at 1500 Sherman Boulevard (Tr. pp. 154-55). Hackley Hospital and MGHP both had multiple bargaining units represented by the Union. MGHP was owned by its parent corporation, Trinity Health (“Trinity”).

¹ Respondent has filed an Exception to the ALJ’s failure to find a waiver. See Exception No. 4 and Section III.B of Respondent’s Brief in Support of its Exceptions.

On April 2, 2008, MGHP and Hackley Hospital merged to form MHP. Since the merger, MHP has continued to operate two separate acute care hospital facilities in Muskegon, Michigan: the Hackley Campus and the Mercy Campus. (Tr. pp. 46, 72-73, 91-92, 104, 184.) The merger did not alter the separate collective bargaining agreements MGHP and Hackley Hospital each had with SEIU. At the hearing, the parties, including General Counsel, stipulated that the representational rights of each of these collective bargaining agreements are restricted to either the Mercy Campus or the Hackley Campus hospitals (Tr. pp. 91-92, 152).²

Trinity is the parent corporation of the merged entity MHP. Trinity is the fourth largest Catholic healthcare system in the United States. In addition to MHP, Trinity owns eighteen other Ministry Organizations (“MOs”) across the United States. Like MHP, most operate more than one acute care hospital facility, i.e., campus. (Tr. pp. 100-01.) Some of Trinity’s other MOs are located in Michigan (e.g., St. Joseph Mercy); others are located in California, Idaho, Indiana, Iowa, Maryland, Nebraska, Ohio and Oregon (Tr. p. 103; Res-2). Trinity and its MOs employ about 47,000 employees across the United States (Tr. p. 104).

In 2007, Trinity began to research the business case for establishing what became known as the Unified Revenue Organization (“URO”). The URO is one of a number of shared service organizations, also referred to as Unified Service Organizations (“USO”), that have been formed or are being formed by Trinity (Tr. pp. 107, 117).

On December 7, 2009, as part of its implementation of the URO, Trinity moved the work of four MHP pre-registration, Registration/Admit Assistants and two Insurance Clerks from the Hackley acute care hospital/Hackley Campus location to a non-hospital office building location, the West Shore Building at the Mercy Campus (Tr. pp. 57-58, 111, 175, 185). These employees

² The only limited exception is if an employee is temporarily assigned to a different campus, a situation not applicable here (Tr. p. 152).

were covered by the Hackley Campus Service and Maintenance Unit collective bargaining agreement (the “CBA”), effective July 21, 2009 through July 31, 2011 (GC-2). The impacted work in each category as performed by the Hackley Campus employees was as follows:

Pre-Registration, Registration/Admit Assistants

- Jodi Pallas
- Amber Greiner
- Anna Winters
- Mary Erickson (GC-9A).

Pre-Registration, Insurance Certification Clerks

- Barbara Hoffman
- Tanna Lock (GC-9B).

The relocated work was consolidated with “Pre-Arrival Clerk” work, which was its equivalent at the Mercy Campus (GC-10). Prior to December 7, 2009, there were approximately thirteen Pre-Arrival Clerks performing pre-registration work at the Mercy Campus. (*Compare* GC-9A and 9B *with* GC-10.) The Mercy Campus pre-registration work has been and remains unrepresented work (Tr. pp. 87-88, 170-71; Res-30).

The announcement to the Hackley Campus employees that their work was being moved occurred on November 23, 2009.³ This announcement, and the relocation of the pre-registration Hackley Campus work from the Hackley Campus hospital location to the business office West Shore Building at the Mercy Campus, is central to the issues actually litigated by the parties during this unfair labor practice litigation.

³ Except for Tanna Lock, who was on a medical leave (Tr. pp. 23-24).

III. THE SCOPE OF THE SECOND AMENDED COMPLAINT

General Counsel's Second Amended Complaint (the "Complaint"), dated July 20, 2010, alleges that MHP committed the following unfair labor practices under the National Labor Relations Act ("NLRA" or the "Act"):

- MHP failed to afford the Union a meaningful opportunity to bargain over its decision and the effects of its decision, thereby violating Section 8(a)(1) and (5) of the Act. (Complaint ¶¶ 14, 15.)⁴
- MHP bypassed the Union and dealt directly with the aforementioned employees when it announced its decision, thereby violating Section 8(a)(1) and 8(a)(5) of the Act. (Complaint ¶¶ 14, 15.)

The Complaint does not allege a violation of the CBA. General Counsel's Brief also concedes that the Complaint does not allege MHP violated Section 8(a)(5) by unlawfully changing the scope of the CBA's unit (GC Brief p. 20).

IV. GENERAL COUNSEL'S EXCEPTIONS

General Counsel has filed eight Exceptions to the ALJ's Decision. These Exceptions can be categorized by the legal theories to which they apply.

Exceptions Nos. 2, 3, and 4 relate to the fundamental issue litigated between the parties – whether MHP's decision to move the pre-registration work was a mandatory subject of bargaining. Respondent disagrees with General Counsel's contention that *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), *Torrington Industries*, 307 NLRB 809 (1992), and their progeny are applicable to Respondent's decision.⁵

General Counsel's Exception No. 7 involves an issue related to the bargaining issue – whether MHP's announcement regarding the movement of work presented the Union with a fait

⁴ At the close of the hearing, General Counsel withdrew the alleged violations in Complaint, ¶ 12 relating to "Pet Scans and Patient Education work" (Tr. p. 204).

⁵ Respondent's Exceptions Nos. 1, 2, 3, and 5 also except to parts of the ALJ's analysis of this issue under *Dubuque Packing Co.*, 303 NLRB 386 (1991), and the ALJ's failure to apply *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

accompli. Respondent disagrees there was a fait accompli and contends the Union waived its right to bargain over Respondent's decision.⁶ Regardless, because Respondent's decision was not a mandatory subject of bargaining these arguments are moot.

General Counsel's Exceptions Nos. 1 and 6 relate to the ALJ's determination that Respondent did not engage in direct dealing.

Finally, General Counsel has asserted two extraneous theories under his Exceptions. Exception No. 5 states that the ALJ erred when he found that "the Union had no representation rights regarding the non-unit positions at Respondent's Mercy Campus." Exception No. 8 contends that MHP unilaterally changed the scope of the bargaining unit and, therefore, violated Section 8(a)(5). It is important to note that Exception No. 8 does not except to any finding made by the ALJ. Rather, it asserts an entirely new legal theory not previously addressed by the parties nor ruled on by the ALJ.

Respondent addresses each of these legal theories associated with General Counsel's Exceptions in its Argument below.

V. ARGUMENT

A. The ALJ Was Correct When He Rejected The Application Of *Fibreboard And Its Progeny*.

General Counsel's Exceptions Nos. 2 and 3 except to the ALJ's refusal to apply *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *Torrington Industries*, 307 NLRB 809 (1992), to determine whether MHP's relocation decision was a mandatory subject of bargaining. General Counsel's Exception No. 3 concedes that there was a "*relocation* of work from Hackley Hospital to the Mercy Campus" (emphasis supplied). However, General Counsel

⁶ Respondent's Exception No. 4, discussed in its Brief in Support of its Exceptions, also is relevant to a full analysis of this issue.

also argues the Board should apply *Fibreboard*, et al. to determine whether Respondent's relocation decision was a mandatory subject of bargaining. Respondent disagrees.⁷

General Counsel's argument that the ALJ should have applied *Fibreboard* and *Torrington* fails to account for the very limited scope of both decisions.

Regarding General Counsel's Exception No. 3, the ALJ correctly cited and applied the limited holding in *Fibreboard*. The Supreme Court in *Fibreboard* specifically hemmed in the scope of its decision:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that *the type of "contracting out" involved in this case – the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment – is a statutory subject of collective bargaining under § 8 (d)*. Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy. *Fibreboard*, 379 U.S. at 215 (emphasis added).

Justice Stewart's concurrence confirmed the limited reach of the majority's holding:

The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "*the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,*" is subject to the duty to bargain collectively. *Id.* at 218 (Stewart, J., concurring) (emphasis added).

Justice Stewart explained further:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. *Id.* at 223.

⁷ Respondent's Exceptions contend the relocation decision was not a mandatory subject of bargaining under *First National Maintenance*, and also under the test devised specifically for relocation decisions by the Board in *Dubuque*. The ALJ applied *Dubuque*. Under the application of the *Dubuque* analysis, General Counsel has failed to except to the ALJ's finding that labor costs were not a factor (Decision p. 7 lines 1-2) and that the Union could offer no concessions to alter MHP's implementation of the URO (Decision p.7 lines 13-15).

Justice Stewart also recognized that the Court's decision does not extend to circumstances where the work of the employees is moved or relocated to another location. *See id.* at 224 ("On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task *in the same plant* under the ultimate control of the same employer." (emphasis added)). As discussed below, Respondent's decision clearly involved a relocation of work. Therefore, the ALJ was correct to apply *Dubuque* and reject *Fibreboard's* application.

The ALJ's Decision correctly determined MHP operates two separate acute care hospital locations, the Hackley Campus and the Mercy Campus (Decision p. 12). This is consistent with the fact that MGHP and Hackley Hospital each operated as distinct healthcare facilities prior to 2008 (Tr. pp. 91-92, 152, 154-55). The ALJ correctly determined the work at issue moved/was relocated from the Hackley Campus to the West Shore Building at the Mercy Campus (Decision p. 5). This management decision is distinct from the subcontracting recognized as amenable to bargaining in *Fibreboard* – the replacement of employees at a plant/location with those of an independent contractor. Unlike in *Fibreboard*, the employees who decided to move with their work to the Mercy campus were not replaced at the Hackley Campus. *See, e.g., Fibreboard*, 379 U.S. at 218-19 ("Fibreboard had performed its maintenance work at its Emeryville manufacturing plant through its own employees ... [and after the subcontracting] [m]aintenance work continued to be performed within the plant.")

General Counsel's argument also relies on the Board's decision in *Torrington Industries*. Again, there is no account for the fact that the Board's decision in *Torrington* specifically limits its application to the kind of subcontracting detailed in *Fibreboard* – "the replacement of

employees in the existing bargaining unit with those of an independent contractor to do the same work.” *Torrington*, 307 NLRB at 810 (quoting *Fibreboard*, 379 U.S. at 215).

More critically, General Counsel’s Brief mischaracterizes *Torrington*’s facts when it argues that the employer there: “moved the work performed by two truck drivers represented by a union to another non-union facility and laid off the two drivers” (GC Brief p. 16). Those are not *Torrington*’s facts. In *Torrington*, bargaining unit work was *not* moved to another non-union facility. A 10-wheel dump truck was moved from the employer’s Oneida facility resulting in the layoff of an employee named William Marshall who had hauled sand, stone, and cement powder to/at the Oneida facility. *Torrington*, 307 NLRB at 809, 816. But as the ALJ and Board decisions in *Torrington* make clear, “[t]hereafter, the Respondent transferred a nonunit employee, ... from one of Respondent’s other plants to haul sand” at the employer’s Oneida facility where Mr. Marshall had been driving prior to his layoff. *Id.* Similarly, another represented driver at the Oneida facility, Alton Blair, was ultimately laid off and the employer then “made arrangements with a number of outside contractors” to haul sand and stone to/at the Oneida facility. *Id.* at 809, 817. As can be seen from a careful reading of the Board’s decision, General Counsel’s representation of *Torrington*’s facts and attempt to apply them to this case is wrong.

Both *Fibreboard* and *Torrington* involved a particular type of subcontracting – the replacement of employees at an employer’s facility with independent contractor employees. Neither case involved the relocation of work from one employer facility to another employer facility. The ALJ was correct when he rejected the application of *Fibreboard* and *Torrington* to MHP’s decision to relocate the Hackley Campus pre-registration work. In fact, the Board’s decision in *Torrington* supports, rather than defeats, the ALJ’s application of the Board’s

analysis in *Dubuque Packing* to this case. In *Torrington*, the Board was clear that the test in *Dubuque Packing* was “devised for determining the nature of relocation decisions.” *Torrington*, 307 NLRB at 810. The Board explicitly contrasted *relocation* decisions with those where there was a “*reallocation* of work” to non-unit employees or independent contractors. *Id.* (emphasis added). In other words, in *Torrington*, the Board explicitly found there was no relocation decision and that is why the Board did not apply *Dubuque*.

Similarly, General Counsel cites to *Geiger Ready Mix Co.*, 315 NLRB 1021 (1994), as being applicable to the current case. Again, a careful reading of the Board’s decision demonstrates that in fact the Respondent in that case “did not ... relocat[e] its operations to other locations.” *Id.* at 1022. Instead, the Respondent closed its facility temporarily and then after a hiatus reopened its operations *at the same facility* with non-unit employees. As such, the Board determined that what was really involved was the “reassignment of unit work, rather than a plant relocation.” *Id.* at 1023. That is why the Board applied *Fibreboard* and *Torrington*.

As the ALJ found and General Counsel’s framing of his Exceptions concedes, this case involves a relocation decision. Therefore, under the Board’s decisions outlined above, the bargaining issue was properly analyzed under *Dubuque Packing*, and the ALJ was correct to reject the use of *Fibreboard* and its progeny.

B. There Was No Fait Accompli.

General Counsel’s Exception No. 7 argues that the Union was presented with a fait accompli. This argument is without merit. The Union had adequate notice of MHP’s decision to relocate the work. Rather, by requesting bargaining only over the effects of the move, the Union waived its right to bargain over the relocation decision.⁸

⁸ See Exception No. 4 and Section III.B of Respondent’s Brief in Support of its Exceptions.

On November 23, 2009, at 2:54 p.m., almost immediately after Robin Belcourt, MHP's Director of Labor Relations, informed the Hackley Campus employees that their work was moving to the business office location at the Mercy Campus, Ms. Belcourt sent an email to the Union notifying it that the work would move on December 7, 2009. This notice was consistent with the parties' practice since the merger.⁹ Twenty-seven minutes later, at 3:21 p.m., Union attorney, Brenda Robinson, responded to Ms. Belcourt requesting bargaining only over "effects" (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). The law, however, is clear. An employer can present its decision as a fully developed plan or as a decision already made and not violate the Act. *See, e.g. Southern California Stationers*, 162 N.L.R.B. 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). It was still incumbent on the Union to countermand its earlier communications and demand bargaining over Respondent's decision.

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). The Union had adequate notice under the law. The Board has found as little as a two days notice to a union adequate and has frequently found notice ranging from four to eight days sufficient. *See Jim*

⁹ In September/October of 2008, the Centralized Scheduling Clerks at the Hackley Campus, who were represented by Charging Party under a CBA (GC-2), were consolidated with non-union Centralized Scheduling Clerks at the Mercy Campus as part of the implementation of the URO (Res-32; Tr. pp. 157, 172). During that URO-related relocation of work, which impacted four to six Central Scheduling Clerks, Ms. Belcourt informed the Union by calling Marge Faville, SEIU's President, after meeting with employees and announcing the impending move (Tr. p. 162). The Union did not object.

Walter Resources, 289 NLRB 1441, 1442 (1988) (citing *Cherokee Culvert Co.*, 266 NLRB 290 (1983); *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975)); see also *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2003) (notice was adequate when the employer contacted the union representative on Nov. 6 prior to a Nov. 15 layoff). As explained by the Board in its decisions, the key element is whether the union was given a reasonable opportunity to bargain. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982). The facts demonstrate the Union was.

First, the fact of the move was not a secret. Union Steward Winters knew about it weeks before the November 23, 2009, meeting.¹⁰ Additionally, the Union ultimately had fourteen days advance notice prior to bargaining. In her email, Ms. Robinson requested bargain over the effects “as soon as possible” (Res-27). Ms. Belcourt had offered December 4, but the Union did not accept this date. Instead, the Union settled on December 7, the date of the move (Res-28). The Union did not press for any meetings sooner than December 7.

The Union discussed very few options/issues with MHP as part of its requested “effects” bargaining. Its proposal that the Hackley Campus CBA follow the movement of work was contrary to the parties’ established practice that the parties’ collective bargaining agreements were restricted to the campus where the recognized units were located. The Union did not make any further proposals which called for additional “effects” bargaining. Under these circumstances, the fourteen days advance notice (November 23 through December 7)

¹⁰ Despite Union Steward Anna Winters’ insistence that she did not know about the meeting or Respondent’s decision before November 23, 2009 (Tr. p. 32), as determined by the ALJ, her credibility on the point was severely undermined by the testimony of her co-worker, Mary Erickson. Ms. Erickson testified that a “couple weeks” before the November 23, 2009 meeting, she and co-worker Amber Griener learned of the move to the Mercy Campus (Tr. p. 75). Ms. Erickson immediately confirmed this information with her supervisor, Linda Churchill, “like the next day or something,” and then she and Ms. Griener told Union Steward Winters (Tr. pp. 76-77).

Respondent gave the Union sufficient and adequate notice and not a fait accompli. General Counsel's Exception No. 7 is without merit and should be rejected.

C. The ALJ Correctly Found That MHP Did Not Engage In Direct Dealing.

General Counsel's Exceptions Nos. 1 and 6 relate to General Counsel's argument that Respondent engaged in direct dealing when it announced its decision to layoff the employees at the Hackley Campus and move their work to the Mercy Campus. There is no merit to either Exception.

Ms. Belcourt merely announced a unilateral change. She did not bargain with the impacted pre-registration employees. Simply notifying employees of a unilateral decision does not constitute direct dealing. "Merely informing employees of a predetermined course of action does not amount to direct dealing," but direct dealing may be found where the employer "invite[s] the employees to bypass their representative and negotiate with the [employer] over any term or condition of employment" or "undermine[s] the Unions' role as the employees' exclusive bargaining representative by requiring the employees to agree, in advance, to future unilateral changes." *Windstream Corp.*, 352 NLRB 44, 51 (2008), *remanded on other grounds* by 2010 U.S. App. LEXIS 19051 (3d. Cir. July 1, 2010); *see also Spurlino Materials, LLC*, 355 NLRB No. 77 (2010).

Ms. Winters' confirmed that Ms. Belcourt did not negotiate with the employees over terms and conditions of employment:

Robin said she had packets to give us because our jobs had been eliminated and they were going to be placed over at the Mercy Campus, and that we were going to have 72 hours to decide on whether we want to bump or take a layoff or take the position at Mercy. The Mercy position was going to be non-union, but that we would not lose any of our benefits. Everything would be the same, other than our vacation which would accrue a little bit differently. (Tr. p. 22.)

Ms. Erickson agreed this was the extent of the conversation (Tr. pp. 74-75).

The ALJ correctly determined there was no direct dealing by Ms. Belcourt.

First, Ms. Belcourt's announcement of the layoff and bumping rights and her letter(s) to the impacted employees (GC-4A) merely summarized their layoff rights under Section 10.2 of the applicable CBA (GC-2 p. 15). The time frame for response set forth in the letter(s), 3 days/72 hours, comes directly from CBA Section 10.2 F (GC-2 p. 15). This communication does not constitute direct dealing. The CBA governs these rights. *See La Opinion*, 21-CA-36368, NLRB General Counsel Advice Memo (Nov. 8, 2004) (no direct dealing where "[e]mployer announced and explained a predetermined course of action which it was privileged to take unilaterally under the parties' contract").

Second, there is no evidence Ms. Belcourt intended to bypass the Union. She notified the Union consistent with the prior practice between the parties, a practice the Union had acquiesced in. *See n.9 supra*. In addition, her November 23, 2009, letter to impacted employees specifically states that employees were "encourage[d]" "to consult with... your union representative," about any questions and she told the impacted employees this as well (GC-4(a); Tr. p. 160).

Third, the wage and benefit status of the employees, if they chose to follow their work, was not "negotiated" with the employees. As found by the ALJ, Ms. Belcourt announced the changes. She did not solicit comments from the employees about what they wanted or their preferences. There was no quid pro quo offered to the employees.

Given such facts, General Counsel's citation to *El Paso Electric Co.*, 355 NLRB No. 95 (2010), does not support Exceptions Nos. 1 and 6. In *El Paso Electric* the Board confronted a situation where the employer's representative stated to the employees that he was "there to find out what [their] concerns were, to find out what it is [they] wanted." *Id.* at 1. The Board found this type of communication constituted direct dealing because "[w]hat matters is that [the

employer's representative] invited unit employees' comments about what they wanted and responded to [an employee's] suggestions for modification of a proposal that the Union had already rejected at the bargaining table." *Id.* at 2. It was this back and forth solicitation of the employees' preferences by the employer which served to "undercut" the Union's status. *Id.*¹¹

Finally, for there to be a direct dealing violation, the employer must have dealt with the employees regarding a mandatory subject of bargaining. *Champion International Corp.*, 339 NLRB 672, 673 (2003) holds direct dealing "involves dealing with employees (bypassing the Union) about a mandatory subject of bargaining." *See also Paul Mueller Co.*, 332 NLRB 332 (2000) (affirming the ALJ's finding of direct dealing only after concluding the matter was a mandatory subject of bargaining); *Capital Ford Inc.*, 32-CA-18464-1, NLRB General Counsel Advice Memo (Jan. 30, 2002) ("This conduct is unlawful direct dealing and an unlawful unilateral change if the agreements are a mandatory subject of bargaining."). The offer of a position outside the bargaining unit is *per se* not a mandatory subject of bargaining. It is axiomatic that the Act's reference to "wages, hours and other terms and conditions," NLRA § 8(d), refers to such topics for represented positions. Employment at another location in an unrepresented position outside the unit is not a mandatory subject. *See, e.g., Facet Enterprises, Inc.*, 290 NLRB 152 (1988) (holding where the employer attempted to bargain with the Union about placing a unit classification outside of the existing bargaining unit, the topic was "a permissive subject of bargaining").

¹¹ The other case cited by General Counsel in support of Exceptions Nos. 1 and 6 is *Pioneer Electric of Monroe Inc.*, 333 NLRB 1192 (2001). This case is of no precedential value. Footnote 1 of the decision indicates that Respondent "does not except to any of the violations found by the judge Rather, the Respondent only excepts to the judge's recommended remedy." *Id.* at 1192 n.1. The Board does not analyze the direct dealing allegation in its ruling nor does it lend its imprimatur to the ALJ's finding, since none of the substantive allegations, including the direct dealing allegation, were excepted to by the Respondent.

For all of the reasons set forth above, General Counsel's argument that Respondent engaged in direct dealing has no merit and Exceptions Nos. 1 and 6 should be rejected.

D. General Counsel's Exception No. 5 Alleging The Union Had Representation Rights Regarding The Non-Unit Positions at Respondent's Mercy Campus Is Specious.

General Counsel's Exception No. 5 is specious. The ALJ was correct in finding that "[t]he Union had no representational rights regarding the nonunit positions" at the Mercy Campus. General Counsel's attempt to argue otherwise is directly contrary to the record. It is undisputed that there were already pre-registration Registration/Admit Assistants (i.e. "Pre-Arrival Clerks") working at the West Shore Building at the Mercy Campus location and that these employees were unrepresented by any union (GC-10; Tr. p. 69; Decision p. 2, line 35).

General Counsel's Exception also directly contradicts the testimony of Loretta Briggs, the Union's Chief of Staff, who testified that the Hackley Campus collective bargaining agreements do not apply to the Mercy Campus location:

Q: And there is a separation of bargaining units of the workers among those facilities over either seven or eight bargaining units that SEIU has?

A: Yes. (Tr. pp. 91-92.)

Furthermore, Exception No. 5 contradicts a stipulation General Counsel agreed to as follows:

The respective contracts for each unit applies to the specific unit described in the contract, at the campus, i.e., the location applicable to that unit; that, when employees would permanently move from one position at one campus to another campus, the old contract would not follow or apply. (Tr. p. 152.)

General Counsel's Exception No. 5 is obviously without merit and the Board should reject it.

E. General Counsel's Section 8(a)(5) Allegation that MHP Unlawfully Changed the Scope of the Unit is Misleading, Untimely, and Must be Rejected.

General Counsel's "Exception" No. 8 is not an Exception. It is an entirely new allegation never before interposed in this litigation. There is no finding referred to by General Counsel upon which purported "Exception" No. 8 relies. General Counsel's Brief admits that this allegation was not specifically alleged in the Complaint (GC Brief p. 20). It also was never mentioned or alluded to by General Counsel in his Opening Statement, nor was it argued anywhere in General Counsel's post-hearing brief to the ALJ. In fact, General Counsel solicited contrary testimony from his witnesses, and the theory set forth by "Exception" No. 8 conflicts with the record.

General Counsel's Brief states that MHP violated the Section 8(a)(5) by "eliminating the sub-classification pre-registration assistants" (GC Brief p. 19). First, there is no "sub-classification" of "pre-registration assistants" in the CBA recognition clause. The CBA's recognition clause recognize a classification of "Registration/Admit Assistants" (GC-2 p. 6). The record conclusively demonstrates employees within the Registration/Admit Assistants classification remain represented at the Hackley Campus (GC-9; Tr. pp. 13, 54-55). Second, General Counsel's witnesses testified that employees within this classification were still performing pre-registration work at the Hackely Campus location (Tr. pp. 54-55). General Counsel's argument is demonstrably factually inaccurate.

General Counsel argues the new theory alleged in "Exception" No. 8 has been "fully litigated."

Only in narrow circumstances has the Board upheld an ALJ's decision on an allegation that was not specifically alleged in a party's complaint and only if the "the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Meisner Electric*,

Inc., 316 NLRB 597 (1995). An unalleged violation will only be considered “fully litigated” if the Respondent had the ability to respond to the allegation and present a defense. *See Desert Aggregates*, 340 NLRB 289, 293 (2003). An unalleged violation is not fully litigated “simply because the facts giving rise to it emerge incidentally during the [ALJ] hearing.” *Id.* Critically here, and dispositive of the fact that the newly interposed allegation was never litigated, let alone fully litigated, is the fact that the ALJ never commented on this theory and never ruled on it.

Additionally, to allow General Counsel to interpose a substantially different allegation from those alleged and argued to the ALJ for the first time during the filing of Exceptions deprives Respondent of its due process rights.

This case has been consistently litigated as involving Respondent’s decision to relocate certain work from Respondent’s Hackley Campus to its Mercy Campus. General Counsel’s attempt to characterize it otherwise is not only tardy, and thus time-barred under Section 10(b) of the Act, but also in conflict with the entire scope of this unfair labor practice litigation. General Counsel’s new allegation, masquerading as “Exception” No. 8, must be rejected.

VI. CONCLUSION

For the reasons set forth above, Respondent asks that General Counsel’s Exceptions be rejected and that the ALJ’s Decision be affirmed on each matter excepted to.

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

GRDS01 KBRODIE 412805v6

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.

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

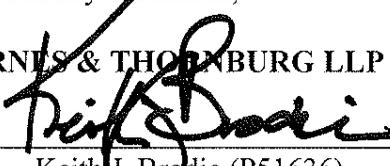
Stephen M. Glasser
National Labor Relations Board
stephen.glasser@nlrb.gov

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 I. 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