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January 25, 2011

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 Mr. Heltzer:

Attached is **Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision**. As indicated on the last page of the document, copies have been served on the parties of record.

Very truly yours,

Joseph Canfield
Counsel for the Acting General Counsel

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

MERCY HEALTH PARTNERS, INC.

Respondent

and

Case 7-CA-52693

SEIU HEALTHCARE MICHIGAN

Charging Union

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

Counsel for the Acting General Counsel Joseph Canfield submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, which issued on October 4, 2010. Respondent's exceptions 1, 2, 3, and 5 assert that the ALJ erred in finding that the decision to move the work from the Hackley to the Mercy Campus was not a mandatory subject of bargaining because it was at the core of entrepreneurial control.

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 registration/admit assistants and insurance verification clerks at its Hackley Campus. (GC Ex. 2, Tr.17) There were 16 employees working in this classification, including six employees who performed pre-

registration work. (GC Exs. 10, 12) Employees in this classification at the Mercy Campus are not represented by any labor organization. (GC Ex. 11)

On November 23, 2009, Respondent met with five of the six clerks engaged in pre-registration duties at the Hackley Campus. One employee was absent. (Tr. 24, 161) During this meeting, the employees were informed that their positions at Hackley were eliminated and the positions were being moved to the Mercy Campus, to a non-union position. (Tr. 22, 15-59, 175-76) They were given 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) They were also 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) 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, another employee also elected to follow her work to the Mercy Campus. (GC Ex. 4(b), Tr. 26) On December 12, 2009, the employee who was absent from the meeting was told of the three choices available to her. She accepted the layoff. (GC Ex. 12(b), Tr. 178)

On December 7, 2009, the five employees started working at an off-site location at the Mercy Campus. (Tr. 32, 135-36) They continue to perform the same work they had performed at Hackley. (Tr. 32) 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. (Tr. 34) Other than a change to how their leave is categorized, there has been no change to their wages or benefits. (Tr. 40) They continue to have contact with admitting clerks who remained on the Hackley Campus. (Tr. 35, 44)

The employees are located in a room adjacent to the room which houses Mercy employees. They have only cursory contact with Mercy employees. (Tr. 34, 45, 55)

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 organization 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), which Respondent described 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. Respondent claims it cost \$89 million to develop the model for the URO, (Tr. 137) but did not otherwise elucidate this testimony.

Respondent gave three reasons for relocating the pre-registration work from Hackley to Mercy. The first reason was because the URO required standardization of processes within the patient financial services arena. This included consolidation of certain functions, including pre-registration. (Tr. 110, 118) Part of the reason for the move was 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. Respondent considers 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) The admitting employees, who have face-to face contact with patients, remained in the prime real estate; whereas “people who do their work over the phone or on computers can be placed elsewhere.” (Tr. 137) Consolidating pre-registration functions would assertedly increase productivity. For example, if one clerk were to call in sick, there would be sufficient coverage. (Tr. 118-19)

Respondent also claimed the work was moved in order to help with cross-training of associates and consolidation of management. (Tr. 119) The consolidation of management presumably refers to the fact that before the move, Linda Churchill supervised the pre-registration employees who were located in two separate locations, Hackley and Mercy. The cross-training refers to the Genesis computer system which was in use at Mercy but not Hackley.

Julie Champayne, Trinity’s URO Regional Manager for Patient Access and Patient Services for the West Michigan Shared Services Center, was involved in the decision to move the pre-registration work to Mercy. (Tr. 164) She 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, unlike the registration

employees who remained at Hackley, the employees who performed pre-registration work did not have face-to-face contact with patients. (Tr.184-85)

The computers the employees currently use will remain; that only the system will change. (Tr. 188) In effect, Champayne testified that it was more convenient and somewhat less costly to train the pre-registration employees at Mercy.

Champayne was charged with deciding where the pre-registration employees would be moved. (Tr. 197) In September, 2009 she, in turn, charged Trinity's Site Director Patient Access and Financial Services Diane Richter to meet with the local supervisors to look at available space. They considered several options including a location close to the Hackley Campus, but the neighborhood was not very safe and there would have been a cost to upgrade the plumbing and electrical systems. (Tr. 198, 199) Accordingly, the work and the employees were moved to the Mercy Campus.

ARGUMENT

Citing *Dubuque Packing Co.*, 303 NLRB 386 (1991) and *First National Maintenance Corp. v NLRB* 452 U.S. 666 (1981), Respondent contends that there was no obligation to bargain about the decision to relocate the work because the decision was at the core of entrepreneurial control, and was not a mandatory subject of bargaining.

In *First National Maintenance*, the Court found that a decision to close a discrete portion of a business was a decision which significantly changed the direction or scope of the business, and was, therefore, not a mandatory subject of bargaining. But in that case, the employer decided to terminate a discrete portion of its business because the

customer refused to increase the employer's fees. It had no intention to replace the terminated employees or move the operation elsewhere. Unlike the instant case, there were to be no ongoing negotiations, and there was no existing bargaining agreement.

In *Dubuque*, the Board found that there was no obligation to bargain on the decision to close a plant in Dubuque, Iowa and relocate the operation to Rochelle, Illinois. But central to that decision was the closing of the plant in Iowa and moving the entire business to Illinois, thereby encompassing not only a significant capital investment, but a change to the direction and scope of the business. Surely not every relocation of work rises to that level.

Respondent's core business is the operation of the acute care hospitals. Respondent points to the URO requirements to standardize operations and consolidate some functions throughout Trinity's system and the need to clear up space in the acute care hospitals as the reasons for relocating the work. It claims that the restructuring of the operations pursuant to the URO was akin to a decision whether to be in business at all. However, contrary to Respondent's argument, what is at issue in this case is not the URO, but the relocation of the work from Hackley to Mercy. But even if the URO were at issue herein, bargaining on the relocation of the work would not have put the URO in jeopardy. If, as a result of bargaining, the work stayed at Hackley, at most, that would have created a minor deviation in the URO's standardization plan. It would have affected only one of the 19 ministries – it would have been a hiccup. Alternatively, the parties could have agreed to consolidate the pre-registration employees at Hackley, thereby satisfying the URO's desire for standardization and Respondent's bargaining obligation.

Relocating work from one location to another in order to follow the dictates of the URO and have a standard procedure throughout the Trinity system does not make the decision entrepreneurial. A decision is not an entrepreneurial decision merely because it is applied corporate-wide. There is nothing in *First National Maintenance* or *Dubuque* which excuses a bargaining obligation for the sake of corporate consistency. For example, a corporate decision to institute a pay decrease across the corporation remains a mandatory subject of bargaining. While it is no doubt tidier if the application were corporate-wide, the six employees who were affected by Respondent's decision to relocate the work had a bargaining agent, and Respondent owed both them and their Union an obligation to bargain over matters such as moving their work out of the unit.

Basing a decision to move work from one location to another on a desire to clear up floor space at the acute care hospital is clearly not a change in either the direction or the scope of Respondent's business Respondent's core work - operating Hackley as an acute care hospital - remains exactly the same. There is no doubt the work moved were viewed by Respondent as peripheral to direct acute care work. Indeed, that is exactly why this work was relocated; it was peripheral to Respondent's core business – the operation of the acute care hospital.

The relocation of the employees to Mercy in order to train them on the Genesis computer system did not change the direction or scope of the business. Everyone doing registration work at Hackley and Mercy, including the registration employees who remained at Hackley, will have to be trained on the Genesis system. Thus, Respondent can hardly claim that its decision to relocate the pre-registration work to the Mercy

Campus would be easier or less expensive to train employees on the Genesis system there makes the decision to relocate the work an entrepreneurial decision. Further, the movement of the work to make it easier to train the employees on a computer system was not a change to the manner in which they contacted patients. Therefore, basing the move on the “need” to train the pre-registration employees on the Genesis computer system would not have any impact on the direction or scope of the business. This is true not only because pre-registration work is peripheral to Respondent’s core business, but also because after being trained on Genesis, the pre-registration employees would continue to interact with patients in the same way. *Winchell Inc.*, 315 NLRB 526, fn. 2, (1994).

The fact that the decision as to where the work would be moved was made by Hackley supervisors rather than by Trinity officials, and that a location near Hackley was one of the places considered, emphasizes the fact that the decision to relocate the work was a mandatory subject of bargaining.

In short, a decision to relocate six out of 16 registration jobs two miles had absolutely no effect on either the direction or scope of Respondent’s business. Respondent continues to operate its essential business, the providing of health care, in exactly the same way as it was provided before the move. Significantly, the relocation of the work was made not to change the direction or scope of the business, but to enhance it by freeing up room at Hackley Hospital, so the core work could continue in a more efficient manner. All Respondent did in relocating the work from Hackley to the Mercy Campus was rearrange the furniture. It continued to do the same work, in the same

manner, with essentially the same people, under the same supervision, using the same equipment and chairs. Only the location changed.

In a factual situation much like the facts in the instant case, *Westinghouse Electric Corp.*, 313 NLRB 452 (1993), enfd. sub nom. 46 F.3d 1126 (4th Cir. 1995) *cert denied* 514 U.S. 1037, the Board found the employer had an obligation to bargain about the decision to lay off employees and transfer their work to another location. The Board also has consistently found that when the only thing that has changed was the identity of the employees performing the work, to wit, replacing one group of employees with another, this is a form of subcontracting, and the decision is a mandatory subject of bargaining even if it did not turn on labor costs. See e.g. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 258 (2006); *Torrington Industries*, 307 NLRB 809 (1992).

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 two-mile relocation of a few jobs. 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. 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. 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. It is clear

that what Respondent did was substitute the union workers at Hackley with the non-union workers at Mercy.

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 the move here is closer to the subcontracting of the work found in *Fiberboard* than to a movement of the work pursuant to a change in the direction and scope of the business found in *Dubuque*, Respondent had an obligation to bargain over the decision to relocate this work, regardless of whether the decision was based on labor costs. It failed to do so, thereby violating Section 8(a)(5) of the Act.

CONCLUSION

Based upon the entire record in this matter and upon the foregoing arguments and citations of authority, it is clear Respondent's decision to relocate the work was not at the core of entrepreneurial control and was a mandatory subject of bargaining.

Dated at Detroit, Michigan, this 25th day of January, 2011.



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CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2011, I electronically transmitted Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision to the following parties of record:

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