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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21**

USC NORRIS CANCER HOSPITAL

Employer

and

GLORIA QUIOAN, An Individual,

Petitioner

and

CALIFORNIA NURSES ASSOCIATION,

Union

Case No. 21-RD-2890

**PETITION FOR REVIEW BY  
PETITIONER GLORIA QUIOAN**

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## **I. INTRODUCTION**

Pursuant to Rule 102.67(c) of the National Labor Relations Board, Petitioner Gloria Quioan hereby requests review of the Decision and Order issued in this case on February 23, 2011. Compelling reasons exist for granting the instant request on the following grounds: (1) A substantial question of law or policy is raised because the Regional Director ignored officially reported Board precedent; (2) The Regional Director's decision on substantial factual issues is clearly erroneous on the record and such errors prejudicially affected Petitioner's rights; and (3) the conduct of the hearing and/or rulings made in connection with the proceeding resulted in prejudicial error.

## **II. STATEMENT OF FACTS**

### **A. The Parties.**

Petitioner Gloria Quioan ("Petitioner") is a Registered Nurse employed at Norris Cancer Hospital ("Norris") located at 1441 Eastlake Avenue, Los Angeles, California. Norris is currently owned by the University of Southern California ("USC"). Prior to April 1, 2009, Norris was owned by Tenet HealthCare Systems ("Tenet"). The California Nurses Association ("CNA" or the "Union") is the certified bargaining representative for the Norris nurses. It was certified in January 2007, pursuant to an election held at Norris in December 2006. The collective bargaining agreement covering Norris expired on December 31, 2010. There is no new agreement. On January 13, 2011, Petitioner filed a decertification petition seeking a decertification election in the duly certified unit (the "Petition"). Region 21 dismissed the Petition on the ground that Norris was part of a contractually established two-facility unit. Petitioner seeks review of that Decision.

**B. In 2005, Tenet and CNA Agreed to the Terms for a Possible Future Statewide Unit.**

In 2005, Tenet and CNA entered into an agreement to try to create a statewide bargaining unit of registered nurses. That agreement was embodied in the “Side Letter on Scope of the RN Bargaining Unit.” (the “Side Letter”) (EX 6.) The express terms of The Side Letter set forth exactly how the statewide unit would be created: “All Tenet facilities which are currently signatory to the CNA-Tenet California Registered Nurse Contract [the “Master Agreement”]. . . are part of the same multi-facility bargaining unit. Likewise, other Tenet facilities which are currently represented by CNA shall become part of the same multi-facility bargaining unit upon becoming signatory to the CNA-Tenet California Registered Nurse Contract.” (EX 6, paragraph 1.)

The Side Letter also explicitly provides that, notwithstanding the parties’ agreement that represented nurses will be part of the statewide unit, a proper decertification petition filed in one of the individual hospital units would be appropriate, and that CNA would be REQUIRED to stipulate to the propriety of that unit for the decertification petition:

“the parties agree that should a decertification petition be properly filed with the NLRB at one Tenet hospital, *the parties shall stipulate that the appropriate unit for the decertification election is the single hospital unit in which the vote for representation was initially conducted.*”

(EX 6, paragraph 3, emphasis added.)

**C. An Election is Held at 1441 Eastlake Avenue, Norris Cancer Hospital.**

Pursuant to an election, CNA was certified as the collective bargaining representative for the registered nurses employed at Norris, located at 1441 Eastlake Avenue. The election took place on December 29, 2006, and the certification was effective as of January 12, 2007. (JTX 1, BX 8.) At the time of the certification, Norris was owned by Tenet.

**D. Norris Agrees to the Terms of the Tenet/CNA Master Agreement.**

Tenet and CNA announced the formation of a nine-hospital unit on August 17, 2007 through a Memorandum of Agreement (Tr. 50:6-9, UX 1), which specifically provided that all past terms and conditions for the statewide unit would continue *unless specifically modified by the parties*. (UX 1, paragraph 4, emphasis added.) Pursuant to the terms of the Side Letter, each of the nine hospitals agreed to the provisions of the 2007-2010 Master Agreement. (UX 2.) Contrary to the Region's Decision, the terms for creating a nine-hospital unit are not contained or discussed in the Master Agreement. (UX 2.) The terms for creating a multi-facility unit are contained only in the Side Letter (EX 6). Furthermore, nothing in the Memorandum of Agreement, the Master Agreement, or the individual CBA that resulted from local negotiations between Tenet and Norris (JTX 1), modified the Tenet/CNA Side Letter with regard to decertification petitions. As discussed more fully below, the Side Letter, on its face, contains no expiration date and there is no evidence in the record that the Side Letter has expired, or was ever modified in any way whatsoever by the parties.

The Master Agreement referred to in the Memorandum of Agreement was effective January 1 through December 31, 2010. (UX 1, UX 2.) In addition, each facility engaged in local bargaining, and contracts were prepared for each of the Tenet California hospitals. (JTX 1, UX 4-8.) All of the individual contracts, the Master Agreement and the Memorandum of

Agreement expired on December 31, 2010. (UX 1, UX 2, JTX 1, UXs 4-8.) There is no evidence in the record of any new master agreement or any agreements for any of the individual facilities, or any agreement for any Tenet statewide unit.

Negotiations to sell Norris to USC began in the Spring of 2008, almost immediately after being incorporated into the statewide unit. (Tr. 57:19-21.) The sale was closed on April 1, 2009 (Tr. 34:10-12). Also, one hospital of the original nine has been closed. (Tr. 88:16-19.) The record is thus virtually devoid of any history of multi-facility bargaining involving Norris.

**E. Tenet and CNA Engage in Local Bargaining.**

In addition to the statewide bargaining that resulted in the Master Agreement, there was local bargaining over working conditions at the nine Tenet hospitals. (Tr. 51:18-22). The purpose of the local bargaining was to supplement the provisions of the Master Agreement that applied to all of the CNA-represented Tenet facilities with provisions that were uniquely applicable to each individual hospital facility. (Tr. 63:17-23; 65:6-18.) The local bargaining resulted in Joint Exhibit 1.

As to the local bargaining for Norris, Annette Sy, Associate Administrator, represented management of the Norris facility in the local negotiations for that facility. (Tr. 27:8-10.) In that capacity, she negotiated contract provisions specifically on behalf of just the nurses employed by Norris. (Tr. 30:15-31:14; 32:5-8, 32:18-33:23.) In particular, Ms. Sy testified that the holiday pay provision regarding holiday differentials, the charge nurse differentials, and the wage steps were negotiated separately and differently for Norris. (Tr. 32:20-33:18.) Theresa Murphy participated in the local negotiations on behalf of USC University Hospital (“USCUH”), the other hospital USC purchased from Tenet. (Tr. 27:16-20.) Ms. Sy testified that during the local

negotiations, she was not aware of any proposal to create a two-facility unit out of Norris and USCUI. (Tr. 28:15-29:18.)

**F. USC Purchases Norris From Tenet.**

Effective April 1, 2009, USC purchased the hospital located at 1441 Eastlake from Tenet. USC also purchased USCUI from Tenet at the same time. (Tr. 34:10-12.) As part of the due diligence process associated with the purchase, Tenet provided USC with certain information. In particular, John Spees, who acted as an advisor to the USC deal team during the purchase, received and reviewed several documents from Tenet during due diligence. (Tr.181:3-5, 181:15-182:2.) One document that Tenet provided to Mr. Spees was the 2005 Side Letter (Tr. 183:24-184:5; EX 6) which, as previously noted, expressly states that *should a decertification petition be properly filed with the NLRB at one Tenet hospital, the parties shall stipulate that the appropriate unit for the decertification election is the single hospital unit in which the vote for the union representation was initially conducted.*” (EX 6, paragraph 3, emphasis added.)

The sale document negotiated between Tenet and USC confirms both parties’ understanding that the two hospitals being sold were now no longer, and indeed could no longer be, part of a statewide Tenet unit, and therefore, Norris was sold as a separate unit. The Asset Purchase Agreement expressly addresses bargaining “units” being sold. (EX 9.) Subparagraph (h) of section 5.3 provides as follows:

“Purchaser acknowledges that California Nurses Association (“CNA”) is the exclusive collective bargaining representative of the *units* of full-time, part-time and per diem registered nurses, including those who serve as relief charge nurses, employed at

University Hospital and at Norris Hospital, as described in the CNA Collective Bargaining Agreement.”

(EX 9, subparagraph (h), emphasis added.) It was stipulated between the parties that the collective bargaining agreement referred to in the Asset Purchase Agreement was Joint Exhibit 1, which sets forth the description of each unit based on each separate location, separate election, and separate certification. (JTX 1.)

Mr. Spees was the only witness who testified on the record regarding the sale. According to Mr. Spees, JTX1, UX1, UX2, EX5 and EX6 were the only documents Tenet ever provided concerning the bargaining units. (Tr. 184:12-17.) Therefore, the evidence establishes that Tenet considered the Side Letter to be applicable to USC’s purchase of Norris. Consistent with the language in the Asset Purchase Agreement (EX 9), Mr. Spees confirmed that he was never privy to any conversations pertaining to establishing a single bargaining unit comprised of both of the hospitals that USC was purchasing. (Tr. 184:18-22.)

**G. CNA Negotiations Post Purchase.**

In October 2010, Ms. Sy began participating in negotiations with CNA for a successor collective bargaining agreement to JTX 1, which expired on December 31, 2010. (Tr. 36:10-13.) Again, Ms. Sy represents management for Norris in these current negotiations. (Id.).

In the course of the current negotiations, there have been recognition proposals passed across the table by the parties. (Tr. 36:14-17.) On October 20, 2010, CNA proposed a recognition clause that would combine the separately delineated units for the two USC hospital facilities into one unit description. (EX 1.)

On that same date, USC proposed a recognition clause that continues to delineate two units based on the separate election and certification dates and additionally excludes certain

nurses. (EX 2.) On October 27, 2010, USC presented a recognition proposal that explicitly rejected CNA's October 20 proposal and once again proposed recognition language based on two units in two hospitals, consistent with the original separate certifications for the two hospital facilities. (EX 3.)

According to Mr. Prediletto, lead labor negotiator for CNA, "The subject of the exact scope of the bargaining unit was never discussed in these negotiations." (Tr. 77:1-2.) Additionally, Mr. Prediletto confirmed that the Union understood that any such discussion was permissive, and the Union reserved its right to refuse to discuss it. (Tr. 76:17-22.) Thus, as of today, there is no agreement between CNA and USC as to the scope of any unit, and certainly no agreement to specify a unit inconsistent with the duly certified units. Indeed, Ms. Sy confirmed that, as of today, there has been no agreement between the parties with regard to the recognition clause. (Tr. 38:21-23.)

**III. THE REGION'S CONCLUSION THAT THE APPROPRIATE UNIT IS A TWO-FACILITY UNIT IS UNSUPPORTED BY THE EVIDENCE IN THE RECORD AND IGNORES ESTABLISHED BOARD PRECEDENT**

**A. The Region Erroneously Ignored the Terms of the Tenet/CNA Agreement.**

The Region concluded that the two-facility unit automatically appeared out of the Tenet/CNA agreement to create a statewide unit. However, the Region's analysis was incorrect. The Region asserted, without any support in the record, that "USC purchased two facilities out of the nine-facility unit *created by the master agreement.*" (Decision and Order, p.10.) This assertion is made without any reference to any specific provision of the Master Agreement, and without even addressing any of the evidentiary record pertaining to the creation of the Tenet/CNA multi-facility unit. The Master Agreement alone did not create a multi-facility unit.

(UX 2.) Instead, the terms for the creation of a multi-facility unit are described in the Side Letter and the Memorandum of Agreement (EX 6 and UX 1.) One of these specific terms is that a DECERTIFICATION Petition in one of the facilities would be stipulated as appropriate:

“the parties agree that should a decertification petition be properly filed with the NLRB at one Tenet hospital, *the parties shall stipulate that the appropriate unit for the decertification election is the single hospital unit in which the vote for representation was initially conducted.*”

(EX 6, paragraph 3, emphasis added.)<sup>1</sup> Additionally, the Memorandum of Agreement, announcing the creation of a statewide unit, provided that “all past statewide contract language [such as that in the Side Letter] will continue except as otherwise modified by the parties.”

(UX 1, paragraph 4.) These are the specific terms upon which a statewide unit was created.

Mr. Spees testified that the Side Letter and the Memorandum of Agreement were provided to USC as part of the sale. (Tr. 182:7-13; 183:24-184:5.) The Union offered no evidence to contradict the terms of those documents. Significantly, the Union offered no evidence that the Side Letter language pertaining to the appropriate unit for decertification petitions was ever modified.

Thus, from the totality of the documents pertaining to the Tenet/CNA agreement to create a statewide unit, the terms of that agreement are abundantly clear. Tenet and CNA agreed to negotiate a master agreement, and agreed that if a hospital accepted the terms of the master agreement, it would become part of a statewide unit, but that, notwithstanding the statewide unit,

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<sup>1</sup> The decertification petition filed in this case is for the same “single hospital unit in which the vote for representation was initially conducted.” (BX 1(a).)

any individual hospital that filed a decertification petition would be deemed to be the proper unit for such an election. In 2007, nine hospitals agreed to the terms of the Master Agreement. That Master Agreement specifically provided that each hospital would have local bargaining and that each hospital would retain a recognition clause that specifically referenced its original election date, and certification. (UX 2.) That Master Agreement did not specifically provide for any modification to the Side Letter, and did not modify in any way the agreement to stipulate to a single unit decertification petition.

In order to avoid the clear terms of the Side Letter, the Region engaged in what amounts almost to slight-of-hand. First, the Region asserted that the Side Letter expired when the previous master agreement expired because it was part of the “2003-2006 master agreement.” (Decision and Order, p. 4.) This assertion is simply made up by the Region without any evidence in the record. Neither the Union nor any other witness testified to such a thing.

Moreover, although the Region asserted that the Side Letter is “part” of the 2003-2006 master agreement, the Region also admitted that that agreement is not in the record (Decision and Order, fn. 5), so the Region had no basis for such an assertion. On its face the Side Letter does not purport to be tied to any other specific agreement, it has no expiration date, and it was formed two years after the 2003-2006 Master Agreement. No one testified that it was part of, or tied to the previous master agreement, or that its duration was in any way tied to that previous agreement. Indeed, since the Side Letter is a contract that pertains to statewide contract issues, its ongoing force and effect is specifically preserved in the Memorandum of Agreement which states that those terms continue unless specifically modified. (UX 1, paragraph 4.) The terms of the Side Letter were never specifically modified.

The Region tried to avoid these facts by stating that the Side Letter “is not referenced anywhere in the second master agreement.” (Decision and Order, p. 4.)<sup>2</sup> That very assertion undermines the Region’s conclusion. An agreement cannot be “specifically modified” by being ignored. Indeed, the only conclusion from the Region’s assertion that the Side Letter is not mentioned in the 2007 Master Agreement is that it is still in existence. No one testified and there is no documentary evidence that it was concluded. In short, there is not one piece of evidence or testimony that supports the Region’s conclusion, and there is consistent evidence that such conclusion is wrong. Under such circumstances the Region’s conclusion cannot stand. The Side Letter contains relevant terms and conditions for the creation of the statewide unit, and specifically provides for the propriety of the Norris Petition. The Norris Petition must be accepted.

Perhaps aware that its conclusion concerning the “expiration” of the Side Letter had no basis in the record, the Region then jumped to an even more bizarre conclusion – specifically that the Side Letter is not relevant because it pertains to a Tenet hospital, and Norris is now a USC hospital. (Decision and Order, p. 11.) This assertion is absurd. ALL of the negotiations about a multi-facility unit were between Tenet and CNA. Every document the Region relied on deals exclusively with Tenet hospitals because all of the agreements were with Tenet. As set forth in detail below, there have been NO agreements between CNA and USC. All parties agree with that. Thus the Region’s position comes down to the assertion that USC is bound by all of the Tenet agreements pertaining to a statewide unit except for the ones that the Region finds inconvenient to its position. Those it dismisses on the grounds that they are agreements with

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<sup>2</sup> This point also ignores the fact that the Side Letter could not have been referenced in the 2003-2006 master agreement either, since it was not executed until two years after that master agreement was created.

Tenet, not USC. The Region simply cannot have it both ways. If USC is bound by the Tenet multi-facility agreement, it is bound by all of the terms. If the terms do not apply because it is USC, not Tenet, then it is not bound by the Tenet agreement, there is no multi-facility unit, and the Norris Petition in the previously certified unit is proper.

Simply put, the Region's Decision is fatally flawed because it claims that the multi-facility unit is determinative; however, it completely misinterpreted the predicate documents that created that unit. It fabricated an expiration date for the Side Letter and tied it to the 2003-2006 master agreement despite the absence of any testimony to that effect, or any indication to that effect on the face of the document. It wanted to bind Norris to a document that created a multi-facility unit that would foreclose the Petition; however, in order to do that, it had to ignore the documents that actually created the multi-facility unit and expressly sanctioned the Petition. Consistent with the goals of the Act, the Side Letter provides a means by which Petitioner and her fellow Norris nurses can have their Section 7 representation rights honored. The Petition is valid under the operative documents and should not have been dismissed.

The nurses of Norris properly filed a decertification petition (BX 1(a)). CNA refused to stipulate to the propriety of the Norris unit, and instead sought to dismiss the Petition. Instead of enforcing the Side Letter, which by its very terms governs the Petition, the Region dismissed the Petition. In doing so, Region 21 ignored the relevant record evidence and violated the Section 7 rights of the Norris nurses. Its decision must not stand.

**B. The Region Abdicated its Obligation to Determine an Appropriate Unit.**

After completely misinterpreting the relevant evidence that establishes the terms of the Tenet/CNA agreement, the Region then compounds its mistake by baldly asserting that as a successor to Tenet, USC purchased a two-facility unit because the two separate facilities it

purchased were once part of a multi-facility unit. However, the Region cannot rely on the successorship doctrine because it utterly failed to engage in the analysis mandated by that doctrine, namely, whether the allegedly purchased two-facility unit constitutes an appropriate bargaining unit.

As established by the chronology outlined above, there is no “extensive” bargaining history in the Tenet multi-facility unit. Indeed, the nine-facility unit was created by the Memorandum of Agreement in August 2007 (UX 1). The Union admitted that negotiations for the sale of Norris and USCUH commenced almost immediately in the Spring of 2008. The sale of the two hospitals was closed April 1, 2009 – almost immediately after being incorporated into the statewide unit. Also, the record contains no evidence of any new agreements providing for any multi-hospital units, even by Tenet. Thus, Norris, as a Tenet hospital, was part of Tenet’s Master Agreement for only about a year and a half (August 17, 2007 to April 1, 2009).

Even if there had been an extensive multi-facility bargaining history, which there was not, the law is clear that the central inquiry in a successorship case is whether the proposed unit is appropriate: “Critical to a successorship finding is whether the bargaining unit of the predecessor employer remains appropriate for the successor employer.” Trident Seafoods, Inc., 318 NLRB 738 (1995). Here, the Region did not engage in the mandated evaluation of whether the purchased unit was appropriate. Rather, it simply declared the existence of an appropriate two-facility unit. There is no precedent for the Region’s bald assertion that the purchase alone, without discussion, documentation, or clarification, morphed a nine-facility Tenet unit into a two-facility USC unit without any input from or agreement by USC or any independent Board determination that such a unit is proper.

Indeed, the very case cited by the Region, International Union of Electrical Radio and Machine Workers v. NLRB (White-Westinghouse), 604 F.2d 689 (D.C. Cir. 1979), documents its misapplication of Board precedent. In White-Westinghouse, the employer argued that the diminution in the size of a multiplant unit from forty-two units to six is a change sufficient to avoid assumption of successorship duties. (Id. at 695.) In that case, the Board and reviewing court first noted that, in spite of the 25-year bargaining history as a multi-facility unit, the successorship obligation for multifacility bargaining would only apply to the smaller piece of the old unit “... as long as the union maintains majority status *and the acquired unit remains appropriate.*” (Id., emphasis added.) In White-Westinghouse, the Board did exactly what the Region refused to do here – it took the small piece of the bargaining unit and examined whether “the five plants, when severed from the larger Westinghouse multiplant unit, remain an appropriate unit.” Thus, the White-Westinghouse court engaged in the community of interest test – a test that the Region found completely inapplicable to this case, thereby refusing to allow community of interest evidence into the record.

See e.g. Midwest Air Traffic Control Service, Case 14-UD-296 (2009) (discussed more fully below), where in a UD context Region 14 observed that “each facility is essentially independent of the others in its day-to-day operation, with separate local supervision and no evidence of employee interchange or contact ... Thus, factors that would ordinarily show a *multi-facility* community of interest are absent here.” (Id., emphasis added.)<sup>3</sup>

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<sup>3</sup> “It is well established that a single-facility unit in the health care industry is presumptively appropriate.” Catholic Healthcare West, 344 NLRB 790 (2005) (citing, Manor Healthcare Corp., 285 NLRB 224 (1987)). The central inquiry regarding whether the single-facility presumption has been rebutted is whether the rebutting party demonstrates “integration so substantial as to negate the separate identity of the single facility.” Catholic Healthcare West, 340 NLRB 790 (citing Heritage Park Health Care Center, 324 NLRB 447, 451 (1997)), enf’d, 159 F.3d 1346 (2d

Although the Union objected, and the Region refused to allow the development of a full record (Tr. 252:19-253:7), USC attempted to put on evidence regarding community of interest factors, which evidence would have established that the two-facility unit was inappropriate, and the presumptively appropriate, originally certified, single facility unit should prevail. Despite the Union's repeated protest, the evidence that did get into the record establishes that there is legally an insufficient community of interest among Norris and USCUH to establish the two facilities as one bargaining unit. The Region's Decision inappropriately ignored the entirety of this evidence. Testimony at the hearing established (1) a low level of employee interchange; (2) different requisite skill sets and different services at the two hospitals; (3) a high level of autonomy; and (4) functional independence.

Annette Sy, Associate Administrator for Norris, testified that nurses who work at Norris do not float (temporarily transfer) from Norris to USCUH. (Tr. 236:2-25.) In addition, the only

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Cir. 1998). In evaluating the strength of the rebuttal evidence, the Board examines the following factors: centralized control over administrative functions, including the extent of local autonomy and degree of employee interchange, transfer, and contact; functional integration; similarity of skills, functions, and working conditions; geographic proximity; and bargaining history. Catholic Healthcare West at 790. Where, as in this case, there is no clear agreement to alter the certified bargaining units, there has never been a finding by the Board that there is a community of interest between the two hospitals, the Norris facility was sold by Tenet almost immediately after it was made a part of the state wide unit, the state wide unit agreement, relied on by the Region, specifically provided for a single facility appropriate unit in the case of a decertification petition, it was error for the Board to unilaterally impose a unit contrary to the certified units and the single facility presumption. See, Food Fair Stores, Inc., 204 NLRB 75 (1973) (decertification petition for single unit proper even in face of existing multi-store unit, where Board concluded, based on the record, "particularly the substantial authority and autonomy of individual store managers and the insignificant amount of temporary interchange . . . that the presumptive appropriateness of a single-store unit has not been rebutted in this case."). (Id. at 76.) The same factors that were important to the Board in Food Fair Stores, Inc. compel application of the single-facility presumption in this case. Union counsel argued strenuously that the single-facility presumption analysis does not apply in the context of a decertification petition. (Tr. 236:2-6, 238:3-6, 239:1-11.) Her authority for this proposition, Campbell Soup Co., 111 NLRB 234, is completely inapposite in that Campbell Soup was a severance case that involved severing off part of an existing unit.

floating that occurs in the other direction is two employees at USCUH who choose to float to Norris on a strictly voluntary basis. (Tr. 250:8-9.) Indeed, JTX 1 specifically provides that floating between the hospitals cannot be compelled. (JTX 1, p. 23. Article 12.)

In addition, Ms. Sy testified that she has a dedicated nursing director, Amy Surnock, who reports directly to her and who supervises only those nurses employed at Norris. (Tr. 34:16-19.) Ms. Surnock does not supervise any nurses at USCUH. (Tr.34:23-25.) She has responsibility for the separate budget and position control (which determines staffing allocations) at Norris. (Tr. 35:18-20.) She also has responsibility for hiring and counseling the nursing staff at Norris. (Tr. 255:4-11.) The scope of services is also different at the two separate hospitals. Norris is primarily devoted to ambulatory care, and is comprised of clinics, a day hospital, and a breast center “where patients arrive during the day and go home at night.” (Tr. 241:7-10.) Since the Spring of 2010 however, the inpatient beds are all at USCUH. (Tr. 241:23-25.) Thus, each hospital provides completely different services. Also, each hospital has its own Materials Management Department and the department directors take responsibility to make purchases for their hospital within their budget. (Tr. 255:22-256:6.) Finally, Ms. Sy testified that if an employee at USCUH wanted to take a position at Norris (and vice versa), the employee would have to apply for the position and go through the interview process. (Tr. 259:24-260:7.) Therefore, the record evidence, before the taking of testimony was foreclosed, demonstrates very little community of interest between the Norris nurses and the USCUH nurses and very little functional integration between the two hospitals.

Accordingly, under Board precedent, the factors in this case, as established by competent evidence in the record, compel the appropriateness of the single facility unit in which the original certification occurred and the Petition was filed. The Region’s failure to consider this evidence

in rendering its Decision constituted an abdication of its responsibility to determine an appropriate bargaining unit. Since the Region made no determination as to the appropriateness of the unit, the Region had no basis for relying on White-Westinghouse to conclude that a small piece of a previously agreed to multi-facility unit constituted an appropriate unit.

**C. The Record Establishes That There Was Never Any Agreement to Create a Two-Facility Unit.**

Not only did the Region ignore the terms of the Tenet/CNA multi-facility agreement and abdicate its established duty to determine whether the proposed bargaining unit was appropriate, the Region also completely ignored all of the evidence in the record that the parties never agreed to a two-facility unit.

CNA was certified as the exclusive collective bargaining representative of the unit at 1441 Eastlake on January 12, 2007. (BX 8.) The Certification of Representative in Case 31-RC-8620 expressly identifies the bargaining unit as all registered nurses employed by Tenet “at its hospital facility located at 1441 Eastlake Avenue, Los Angeles, California.” (BX 8.) One month earlier, on December 13, 2006, CNA was certified as the exclusive collective bargaining representative of 1500 San Pablo. (BX 7.) The 1500 San Pablo Certification of Representative in Case 31-RC-8614, expressly identifies the 1500 San Pablo bargaining unit as all registered nurses employed by Tenet “at USC University Hospital at 1500 San Pablo Street, Los Angeles, California.” (BX 7.) Furthermore, the operative CBA (JTX 1) contains a recognition clause that follows the certifications exactly, is comprised of separate paragraphs for each of the USC hospital facilities, and distinguishes them by address, election date, and case number. The Union stipulated that what USC acknowledged in the purchase of the two hospitals from Tenet was the CBA identified as JTX 1. (Tr. 226:15-24.)

**1. The Region Erroneously Ignored Board Precedent Regarding the Primacy of the Certified Unit.**

It is well-settled that certification by the Board constitutes a presumption that the certified unit is appropriate. The Board has stated that “in decertification cases the appropriate unit in which to conduct an election is the certified or contract unit. If the certified unit has been changed by contract, the Board relies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.” Continental Can Company, 217 NLRB 316 (1975). As explained above, there is no evidence in the record that “the certified unit has been changed by contract,” or by any agreement between the parties.

As noted by the Region in Case 21-UD-407, “parties may agree to a bargaining unit which is different from the certified or recognized unit, as long as the unit is established by consensual agreement.” (BX 6 at p. 4, citing, Radio Corp. of Am., 135 NLRB 980 (1962). Indeed, as stated by the Board in Arizona Electric Power, 250 NLRB 1132, 1133 (1980):

“It is axiomatic that parties to a collective-bargaining relationship cannot bargain meaningfully unless they know the scope of the unit for which they are to bargain. Thus, it is well established that the integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action.”

250 NLRB 1133 (footnotes omitted.) See also, Hunt Brothers Construction, 219 NLRB 177 (1975) (“Our certifications are a conclusive determination of the bargaining unit and may be varied only by mutual agreement of the parties”); The Leonard Hospital, 220 NLRB 1042 (1975)

(explaining that “unit compositions different from those set forth by the Board” will be given effect if supported by proper stipulations by the parties). Thus, recognizing a bargaining unit other than the one certified by the Board mandates the parties’ agreement to that effect.

Here, there is no evidence of any agreement with USC that would make the decertification petition in this case improper. There is absolutely no evidence in the record that USC agreed to purchase Norris and USCUH as a two-facility bargaining unit. In fact, the evidence in the record is contrary to such an assertion, but such evidence was ignored by the Region.

**a. The Region Ignored the Union’s Testimony as to the Lack of a Two-Facility Unit.**

The testimony of all the witnesses was consistent on one point. There was never a two-facility unit created by anyone. The Union testified that Tenet created a nine-facility unit in 2007, and never modified that unit by any local bargaining. (Tr. 52:23-53:12, 88:20-89:12.) The Union also testified that it never negotiated with USC during the purchase of the units, and never signed any document with USC dealing with the scope of the unit, or any other subject. (Tr. 66:20-24).<sup>4</sup>

**b. The Region Erroneously Ignored the Asset Purchase Agreement and the Due Diligence Process.**

John Spees, who advised USC during the purchase of the units, testified that there was never any discussion of which he was aware creating a two-facility unit. (Tr. 180:21-25, 181:4-5, 181:15-182:2, 184:18-22.) He was the only witness who testified about the sale. The Asset

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<sup>4</sup> The Union’s testimony in this regard is consistent with the testimony of Annette Sy, who negotiated on behalf of Norris, that during the Tenet local bargaining, there was never any discussion of creating a two-facility unit. (Tr. 27:8-10, 29:12-14.)

Purchase Agreement, Employer’s Exhibit 9, expressly addresses the bargaining units being sold. Subparagraph (h) of section 5.3 provides as follows:

“Purchaser acknowledges that California Nurses Association (“CNA”) is the exclusive collective bargaining representative of the *units* of full-time, part-time and per diem registered nurses, including those who serve as relief charge nurses, employed at University Hospital and at Norris Hospital, as described in the CNA Collective Bargaining Agreement.”

(EX 9, subparagraph (h), emphasis added.) The Region’s Decision completely ignored this relevant language of the Asset Purchase Agreement, and the testimony of Mr. Spees.

**c. The Region Erroneously Ignored USC’s Conduct Post Purchase.**

The Region’s Decision also failed to account for USC’s conduct post-purchase, which confirms the existence of a separate bargaining unit for Norris. In fact, the Decision and Order did not even address the testimony of the individual who is charged with administering the CBA.

Matthew McElrath, Chief Human Resources Officer for the two hospitals, testified that it is his responsibility to oversee implementation of the CBA. (Tr. 193:6-9.) Importantly, Mr. McElrath has always understood the CBA to encompass two distinct bargaining units:

“Q: What is your understanding of the registered nurse unit or units contained within the collective bargaining agreement?

A: It’s my understanding that there are two units, a unit at University Hospital and that there are provisions specific to

that unit, and a unit at Norris Cancer Hospital, and there are some different provisions for that unit. . . .”

(Tr. 194:6-11.) Also, Mr. McElrath provided a pertinent example of the separateness of the two hospital units.

In March of 2010 there was a significant layoff at Norris as the result of an administrative decision to put virtually all of the inpatients at USCUH. (Tr. 194:18-25, 195:8-13, EXs 7 and 8.) The Norris nurses whose positions were eliminated were offered new employment at USCUH. (Tr. 214:16.) The laid off nurses who accepted employment were taken off the Norris payroll and added to the USCUH payroll. (Tr. 198:25-199:10, 223:19-25; EX 7 and EX 8, UX 25.) Additionally, consistent with USC’s position that the two hospitals constitute two separate bargaining units, after being hired by USCUH, the former Norris nurses were incorporated into the USCUH bargaining unit under the CBA. For instance, once hired by USCUH, these nurses received the wage increases and holiday differentials that applied to USCUH nurses under the CBA, whereas prior to their change in employment to USCUH, they were receiving the wage increases and holiday differentials provided in the CBA for the nurses employed at Norris. (Tr. 223:23-25, 224:8-19.) Accordingly, there was competent evidence to support the existence of two separate and distinct bargaining units, consistent with the original Board certifications. Certainly, the Region’s failure to consider this evidence contributed to its erroneous conclusion on the seminal factual issue of bargaining unit scope.

**d. The Region Erroneously Ignored The Parties’ Disagreement Over the Scope of the Unit.**

The Region’s decision also completely ignored the parties’ conduct relative to the scope of the unit during the current negotiations. The CBA expired December 31, 2010. (JTX 1.)

Negotiations for a successor contract began on or about October 20, 2010. (Tr. 67:1-5.) During negotiations, CNA proposed a recognition clause that would no longer refer back to the two separate certifications and elections, but would define one unit composed of both hospitals. However, Mr. Prediletto's testimony destroys any argument that there is an agreement for a two facility unit. CNA's proposal to lump the two separate hospitals into a single unit was not and has not been agreed to by USC. (EX 1-3.)

The October 20, 2010 recognition proposal that was presented to CNA by USC retained a description of two separate units, set forth in two separate paragraphs, which identified the units by address, election date, and case number. (EX 2.) Accordingly, there was no agreement on October 20, 2010 as to recognition, as confirmed by Ms. Sy's testimony:

“Q: There was no agreement as to what the recognition clause would be on October 20<sup>th</sup>, 2010, was there?

A: That's correct. There was no agreement.”

(Tr. 38:3-5.) On October 27, 2010, USC made a subsequent recognition proposal that expressly rejected the Union's October 20 proposal and again proposed a recognition clause that would separately identify two separate bargaining units, by facility location. (EX 3.) Mr. Prediletto acknowledged that the CNA recognition proposal was rejected. (Tr. 83:5-10.) Ms. Sy confirmed that as of today, there has been absolutely no agreement with regard to the recognition clause. (Tr. 38:21-23.) The Petitioner stated that it was her position that Norris was a separate, stand-alone unit. (Tr. 10:15-17.)

None of this testimony, nor any of these documents, were addressed by the Region in its Decision. However, since it is all consistent, there is only one conclusion to be drawn. No one, not CNA, not Tenet, not USC, ever agreed to a two-facility unit. In the face of this consistent

testimony that no one ever agreed to a two-facility unit, the Region's Decision that Norris is part of a "contractually established" two-facility unit is totally unsupported. The Region's Decision completely disregarded the record, thereby unduly prejudicing Petitioner, who consistently has tried to bring an opportunity to vote to the nurses in the Norris unit. Such a stifling of Section 7 rights cannot be condoned.

Indeed, Board precedent is clear that contractually establishing a unit inconsistent with the duly certified units requires "unmistakable evidence that the parties *mutually* agreed to extinguish the separateness of the previously recognized or certified units' and in the absence of such evidence, the Board will find the individually certified units appropriate." Midwest Air Traffic Control Service at p. 9, citing Utility Workers Local 111 (Ohio Power Co.), 203 NLRB 230, 239 (1973), enf'd. 490 F.2d 1383 (6<sup>th</sup> Cir. 1974).

Furthermore, "[w]here the applicable recognition clause refers to separate units or is otherwise ambiguous, the Board generally finds against an effective merger in the absence of other evidence clearly pointing to a merger." Id., citing Sears, Roebuck, and Co., 253 NLRB 211, 212 (1980); Metropolitan Life Insurance Company, 172 NLRB 1257, 1258 (1968).

In spite of this clear Board precedent, the Region completely ignored the record evidence. The Decision does not even address the plural form "units" in the Asset Purchase Agreement that memorialized USC's and Tenets' understanding of the bargaining units USC was purchasing. Furthermore, the Region ignored the evidence of the disagreement over the recognition proposals that have been exchanged in the current negotiations. Instead of relying on the record evidence, the Region claims that the nine-facility unit set forth in the Tenet Master Agreement controls, and makes the empty assertion that "when USC purchased two of those nine facilities, the two facilities did not suddenly become separate units." (Decision and Order, p.12.) The Region cites

no authority for this, other than White-Westinghouse, which, as discussed above, is factually distinguishable (25-year multi-facility bargaining versus almost none) and, in any event, was not followed by the Region because it refused to analyze the appropriateness of the unit. In short, the Region jumped to the conclusion, in the absence of any evidentiary or precedential support, that there was somehow an “agreement” to create a two-facility unit between CNA and USC because Tenet and CNA created a nine-facility unit.

In sum, the Region’s Decision is unsubstantiated by any evidence, required by well-settled precedent, that the parties (1) agreed that USC was purchasing a single two-facility bargaining unit; (2) mutually agreed to depart from the certifications and treat the two separate hospitals as one unit; and (3) administered the CBA in a manner that suggests the existence of a two-facility unit. In fact, the Region impermissibly ignored specific evidence to the contrary. Instead, the Region essentially concluded out of whole cloth that because USC purchased two facilities that had been part of a nine-facility unit at one time, those two facilities automatically morphed into one appropriate bargaining unit.

**D. The Region Erroneously Relied on Irrelevant Facts and Situations That Have Nothing to With the Scope of the Unit.**

In the face of the glaring lack of evidence of any agreement to treat the bargaining units as anything other than those certified by the Board, the Union attempted to rely on totally irrelevant conduct to establish a single two-facility unit. The Region improperly credited the Union’s unavailing efforts.

The Union’s only “evidence” that USC ever agreed to a single two-facility bargaining unit consists of two employee lists that were provided to CNA in response to its requests for

information. This “evidence” is meaningless and therefore, the Region’s reliance on it was erroneous. (Decision and Order, p.12.)

It is undisputed that certain provisions of JTX 1 applied to both bargaining units. The three “grievances” that CNA introduced pertained to matters that were equally applicable to the nurses in both bargaining units. The Union offered Dinorah Williams, CNA Labor Representative, to testify about these grievances.

Ms. Williams testified that she has “never” filed a grievance which treats the Norris and USCUH facilities as separate bargaining units. (Tr. 97:24-98:1.)<sup>5</sup> This is immaterial, however, because Ms. Williams confirmed that all three of the grievances she placed in the record concerned benefits that she admits are available to employees employed at both hospitals. (Tr. 167:10-16.)<sup>6</sup> Further, Ms. Williams testified that she has “never” received responses to grievances in which USC has claimed that the two hospitals are separate bargaining units.

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<sup>5</sup> Mr. Prediletto testified about a grievance he filed “on behalf of all affected Registered Nurses.” (UX 9.) The grievance was directed to the University of Southern California – not to one of the individual hospital facilities. (Tr. 68:5-10.) Mr. Prediletto confirmed that the grievance was filed on behalf of employees at both facilities. (Tr. 68:16-20.) Union counsel questioned Mr. Prediletto about whether USC ever took the position that CNA could not file a single grievance concerning nurses at both hospitals. (Tr. 69:16-21.) This line of questioning rings completely hollow. It defies logic that USC would direct the Union to file two separate grievances about the same subject matter that unquestionably applies to employees within both bargaining units, or that USC would ever claim that CNA, as the certified bargaining representative for both hospitals was somehow barred from filing grievances on behalf of both units. Filing a grievance on behalf of both units does not create a single unit out of two.

<sup>6</sup> Union counsel questioned Ms. Williams about the fact that during arbitration proceedings on the benefits grievance, none of the representatives for the two hospitals took the position that the grievance only pertained to one bargaining unit. (Tr. 102:25-103:4.) Again, this line of questioning is ridiculous because all parties admit that the grievance pertains to members of both bargaining units, and the scope of the bargaining units is not the subject of the grievance. Filing two separate grievances and having two arbitrations over the identical benefits available to both bargaining units would be a duplicative waste of effort and resources and could lead to inconsistent results.

(Tr. 98:6-9.) Her categorical assertion is both irrelevant and inconsistent with the evidence she placed in the record.

First, none of the grievances concerned the scope of the units and no one claims that either party made or needed to make any express representation concerning the scope of the units in order to process the grievances.

Additionally, the Union's evidence is, at best, ambiguous concerning any party's position as to the scope of the units. For example, Union Exhibits 13c and d contain emails sent by Ms. Williams requesting information relating to a grievance the Union had filed over holiday differentials. (Tr. 114:22-116:2; UX 13c and d.) Ms. Williams testified that "it was always very clear" that the holiday differential grievance concerned "all the affected RNs at both USCUH and Norris Hospital." (Tr. 114:18-21.) Ms. Williams authenticated Union Exhibit 13e as the information she received in response to her information request. (Tr. 116:3-11.)

Union Exhibit 13e is an alphabetical list of all affected employees. (Tr. 116:3-8.) Ms. Williams identified the numbers 363 and 314 under the column on the left titled "FAC" as pertaining to the separate facility designations for 1500 San Pablo and 1441 Eastlake. (Tr. 118:2-19; UX 13e.) Accordingly Ms. Williams, the Union's witness, confirmed that information she received from the hospitals' human resources department was classified by separate hospital facility. (Tr. 118:2-19; UX 13e.)<sup>7</sup> Similarly, Ms. Williams requested an excel list of bargaining unit members receiving Tenet opt out benefits and the amount they are receiving. (Tr. 178:5-9; UX 21b.) This request was addressed to hospital administration, namely, Mr. McElrath who is Chief Human Resources Officer for the hospitals. (UX 21b.)

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<sup>7</sup> Also, although the point is so obvious as to not require explanation, there is no reason that a request for information about "bargaining unit employees" could not relate to "bargaining unit employees" in two separate bargaining units.

Union Exhibit 21c is the “Tenet Opt Out List” requested in Union Exhibit 21b. (Tr. 178:10-17; UX 21c.) Notably, the information received from hospital administration contains a facility description that identifies the employee as either a 1441 Eastlake employee or a 1500 San Pablo employee.<sup>8</sup> (UX 21c.)

Ms. Williams entire evidence of an “agreement” to create a dual facility unit consists of her unilateral use of the word “unit” instead of “units” when she files a grievance that affects both 1441 Eastlake and 1500 San Pablo, and the fact that on two occasions when she received an alphabetical listing of all employees who received certain retirement benefits (UX 16d),<sup>9</sup> and an alphabetical listing of all employees receiving certain medical benefits, (UX 21b), the alphabetical list did not specify to which bargaining unit each employee belonged. However, there was no issue as to the bargaining units. Each employee in each unit was entitled to the same benefits. The Union wanted information as to all of the employees and got information as to all of the employees. Providing an alphabetical list of all employees and how much they are receiving in response to a request for information as to all employees and how much they are receiving, does not constitute an “agreement” to create a two-facility bargaining unit in

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<sup>8</sup> In fact, Ms. Williams could not state with certainty whether she ever received a list from the hospitals’ human resources department, in response to her periodic requests for lists of bargaining unit employees, that did NOT designate between those employed at 1441 Eastlake and those employed at 1500 San Pablo. (Tr.155:22-25, 157:25-158:7.)

<sup>9</sup> Ms. Williams received information regarding employee retirement benefits from Debra Fabanish (UX 16c.) Ms. Williams did not testify as to who Ms. Fabanish is or what her role is with USC. However, USC established that Ms. Fabanish is the Director of Retirement Plans for the University of Southern California. (Tr.209:23-24.) Ms. Fabanish’s office is located in the University Park Campus, and she has responsibility for administering all the USC retirement plans, which includes not only the two hospitals, but other schools and departments within the overall umbrella of the University. (Tr. 209:25-210:7.) Further, Ms. Fabanish’s office is the only place from which the hospitals’ human resource function can obtain information about 401(k) or retirement plan benefits in response to an information request from the Union, such as Union Exhibit 16c. (Tr. 210:8-11.)

contravention of the certified units. An agreement to vary the certified bargaining units must be clear and mutual. Nothing about the grievance processing referred to in this testimony suggests that the scope of the unit was a subject on anybody's mind, or that anybody thought he was taking a position one way or the other as to the definition of the RN units. There cannot be a "meeting of the minds" on a subject that is not on anyone's mind at the time.<sup>10</sup>

Thus, even if the Union's evidence were considered for the proposition that the Union thought there was a two facility unit, the most that would be established is a disagreement between the parties as to the scope of the unit. The Union cannot unilaterally impose its perception of the appropriate unit on the Employer. E.g., General Drivers and Helpers Union v. Young and Hay Transport. Co., 522 F.2d 562, 566 (8th Cir. 1975) ("Although parties may voluntarily agree to merge separate bargaining units for purposes of contract negotiations so long as the resulting unit is an appropriate one, neither party may insist that negotiations must include other units and the other party is free to reject such a demand."). The failure of the parties to agree on a unit definition different from the certification does not constitute an agreement. Lacking an agreement, the certifications control. Arizona Electric Power, 250 NLRB 1132, 1133 (1980); Hunt Brother Construction, 219 NLRB 177 (1975); Radio Corp. of Am., 135 NLRB 980 (1962).

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<sup>10</sup> ". . . I find little evidentiary value in the use of the singular form of the word as a modifier. Thus, I note that the use of the term 'bargaining unit employee' as a modifier is commonly used to distinguish unit employees from non-unit employees, but does not clearly define the scope of the unit referenced. (Midwest Air Traffic Control Service, 14-UD-296 (2009) at 11.) Similarly, the fact that "on occasion, to the extent their interests coincide, grievances originating from multiple facilities have been consolidated and processed together" (Id. at p.8) had absolutely no bearing on Region 14's ultimate conclusion that the single facility unit was appropriate.

**E. The Region's Decision Would Create Absurd Results**

Finally, the Region's Decision is illogical. If, for example, an employer had purchased Desert Regional Medical Center located in Palm Springs, California (UX 5) and San Ramon Regional Medical Center located in Northern California (UX 7), the Region's reasoning would lead to the absurd result that those hospitals automatically became a single, two-facility unit. The mere act of purchasing two separate hospitals from an entity that had agreed with the union to make them part of a multi-facility bargaining unit does not automatically make those separate facilities part of a two hospital multi-facility unit based on the purchase alone.

**IV. CONCLUSION**

The Decision and Order issued in this case strongly suggests that the Region had a preconceived notion, perhaps based on Petitioner's previous UD petition (filed under completely different circumstances), that there would be a single bargaining unit composed of two separate facilities. However, there is absolutely no evidentiary support in the record for this preconceived notion. To avoid that problem, rather than change the preconceived notion, the Region either ignored or misstated all of the evidence actually introduced into the record, made up evidence that did not exist, failed to apply the applicable standards, and ignored Board precedent. By doing so, the Region once again deprived the Norris nurses of their statutory right to be heard on the question of representation. The Region's Decision is contrary to the goals of the Act. The Region's purpose is not to ensure the Union's representative status no matter what the factual record may provide. Instead, the Region's responsibility is to ensure the valid exercise of Section 7 rights by employees who are under its jurisdiction. It has an obligation to address the facts in the record and apply the proper legal standard, not ignore facts and legal precedent to

protect the Union regardless of the employees' desires. Through Petitioner, the Norris nurses have requested an election in the appropriate bargaining unit, and they have a right to that election. The record evidence in this case mandates review and reversal of the Region's February 23, 2011 Decision and Order.

DATED: March 9, 2011

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