Specialty Hospital of Washington-Hadley, LLC *and* 1199 SEIU, United Healthcare Workers East, MD/DC Division. Case 5–CA–33522

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On August 26, 2009, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answer, and the Respondent filed a reply.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

[1] On July 13, 2010, the Respondent filed a motion to vacate all decisions and orders issued in these proceedings based on the Supreme Court's decision in *New Process Steel v. NLRB,* 130 S.Ct. 2635 (2010), in which the Court held that the Board, which consisted of only two Members from January 2008 through March 2010, had no statutory authority to issue decisions and orders during that time. The General Counsel filed an opposition.

The two-Member Board issued the following decisions and orders in this proceeding. Following the issuance of the complaint, the Respondent filed a motion for summary judgment. On January 17, 2008, the two-Member Board issued a Notice to Show Cause why the motion should not be granted, and, on November 25, 2008, issued an Order denying the Respondent's motion and remanding this case for a hearing on the merits. The two-Member Board subsequently issued Orders denying the Respondent's initial and second motions for reconsideration of that Order. Finally, on January 15, 2009, the two-Member Board issued an Order denying the Respondent's request for review of the Regional Director's dismissal of its RM petition. Having reviewed these prior Orders, we affirm them for the reasons given therein.

Accordingly, we deny the Respondent's current motion.

[2] Member Pearce is recused and took no part in the consideration of this case.

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring,* Member Hayes would not require electronic distribution of the notice.

I. BACKGROUND

This case presents the following question under longstanding Board precedent on the law of successorship: whether an employer that satisfies all of the criteria for being a successor and would have an obligation to recognize and bargain with the representative of its predecessor's employees, but for the fact that its predecessor recognized the representative in an inappropriate unit, nevertheless becomes so obligated if the representative "perfects" the unit by disclaiming interest in representing specified employees in the predecessor's unit (here, guards and professionals). For the reasons stated below, we hold that the Respondent was a successor employer and had a duty to bargain with the Union in the perfected unit.

The workplace at issue is a long-term acute care hospital in Washington, D.C. On November 14, 2005, the predecessor employer, Hadley Memorial Hospital, voluntarily recognized a "mixed unit" of 169 employees, including 10 security guards and 5 pharmacists. There is no dispute that the pharmacists are professionals. The Union and Hadley met for three negotiating sessions from March through July 2006 but were unable to reach a contract. On November 13, 2006, the Respondent purchased the hospital's assets, hired virtually all of Hadley's unit employees, and took over operations. On November 17, 2006, the Respondent informed the Union that it refused to recognize or bargain with the Union because the preexisting unit included guards and professional pharmacists and was therefore inappropriate under Section 9(b)(1) and (3) of the Act.[4] On February 1, 2007, the Union renewed its request to bargain, this time excluding the guards and pharmacists from the scope of the request. Alternatively, the Union offered to have the pharmacists determine whether they wished to be included in the unit. In effect, the Union disclaimed interest in representing the guards and pharmacists. The "perfected" unit, which excluded guards and pharmacists, consisted of 148 employees, of whom 142 had worked for the predecessor.

The Respondent refused to recognize or bargain with the Union in the perfected unit, and the Union filed 8(a)(5) and (1) charges. Following a hearing on the Un-

[4] Sec. 9(b)(1) states that a unit is inappropriate if it includes professional and nonprofessional employees unless a majority of the professionals vote for inclusion in the unit. There was no evidence that the professionals in the unit voted for inclusion.

Sec. 9(b)(3) states that a unit is inappropriate if it includes employees together with "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premise."

ion's charges, the judge issued a decision finding that the unit in question, as perfected, was appropriate, and that the Respondent had a duty to bargain with the Union and thus violated Section 8(a)(5) and (1) by refusing to do so.

II. ANALYSIS

The Board has held, consistent with Supreme Court precedent, that a successor employer inherits the collective-bargaining obligation of its predecessor if a majority of the successor's employees in an appropriate bargaining unit were employed by the predecessor, and if there exists "substantial continuity between the enterprises." *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001), citing *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 41–43 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972). There is no dispute that the predecessor's unit, including guards and professionals, was inappropriate. That unit, however, is not at issue.

Rather, the questions before us are whether the perfected unit—which excluded guards and professionals—is appropriate,[5] and, if so, whether the Respondent had a duty to bargain in the perfected unit under established successorship policy and principles. We answer both questions in the affirmative.[6]

A. The Respondent's Bargaining Obligation

There is no question that, if the preexisting unit had been appropriate, the Respondent would have had the obligations of a successor: 142 of 148 employees working in the perfected unit had worked for the predecessor (and 157 of 163 employees in the unperfected unit). Moreover, the Respondent concedes that "there was substantial continuity between [the predecessor] enterprise and that of [the successor] SHW-Hadley."

There is also no question that, if the *Respondent* had altered the predecessor's unit by, for example, assuming the entire operation except for the security and professional functions—e.g., if it had contracted out those functions—the Respondent would have been a successor employer with the corresponding obligations. The Board has consistently found substantial continuity in analogous circumstances where a predecessor's unit, as here, has been changed or diminished in size, typically as a result of the successor's operational decisions. See, e.g., *Van Lear Equipment, Inc.*, supra (successor's bargaining obligation survived where successor hired predecessor's drivers only and not the entire unit, and where 19 of successor's 26 drivers had been employed by the predecessor); *Tree-Free Fiber Co.*, 328 NLRB 389 (1999) (successor bargaining relationship found where successor employed only 50 employees and predecessor employed 500; a majority of successor's employees worked for predecessor in a substantially similar operation).

Bronx Health Plan, 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999), is illustrative of the extent the unit may be altered without eliminating successorship obligations. There, the predecessor employed workers in hundreds of job classifications in the recognized unit. The successor hired a tiny fraction (.05 percent) of the predecessor's bargaining unit employees (16 out of 3500), who were scattered among those many job classifications. The union sought to bargain over the 16 employees in a clerical unit. The Board found successorship because, among other things, all of the successor's unit employees had been employees of the predecessor. In short, in *Bronx Health Plan*, the successor's unit no longer contained the vast preponderance of the predecessor's bargaining unit job classifications and employee complement. But, as there was continuity both in the nature of the enterprise and the work force (within the contracted unit), successorship principles resulted in a duty to bargain.

For purposes of successorship, we perceive no persuasive reason why it should matter whether it is the employer or, as here, the union that alters (or perfects) the unit by eliminating classifications from the unit. The Supreme Court has instructed that the question of substantial continuity must be considered from the employees' perspective.[7] Viewed from that perspective, it makes no difference whether the successor acquired only a part of the unit or the union disclaimed interest in a part of the unit. In either case, there is no reason to believe that employees' views on union representation have changed. Put another way, a diminution of unit scope or unit inclusion, by itself, is insufficient to meaningfully

[5] We address the appropriateness of the perfected unit in sec. II, B, below.

[6] Our dissenting colleague relies on *Russelton Medical Group, Inc*., 302 NLRB 718 (1991), for the proposition that the successor has no duty to bargain in an inappropriate unit. There, the Board found that the employer did not have to bargain in an inappropriate mixed professional and nonprofessional unit. *Russelton* is inapposite because the Union in the present case sought to bargain in a perfected appropriate unit.

On brief, the Respondent argues that *Mental Health Center of Boulder*, 222 NLRB 901 (1976), "controls" the outcome of this case. We disagree. In *Mental Health*, the Board refused to recognize the validity of a state-conducted election and certification because the unit in question included both professionals and nonprofessionals, and the professionals were not given a separate vote on inclusion in the unit, making the unit statutorily inappropriate under the NLRA. The union in *Mental Health* sought bargaining only in the inappropriate unit. There was no disclaimer of interest like the one here.

[7] See *Fall River Dyeing*, 482 U.S. at 43 ("This emphasis on the employee's perspective furthers the Act's policy of industrial peace.").

affect the way that unit employees perceive their jobs or significantly affect employee attitudes concerning union representation. *Bronx Health Plan*, supra, at 813.

Here, an overwhelming majority of the predecessor's employees, after the sale, continued to perform the same work alongside the same employees represented by the same union. The perfected successor unit consisted of 91 percent of the former predecessor unit (148 of 163 employees) and 96 percent of the successor's unit employees were former employees of the predecessor (142 of 148). Further, 93 percent of the predecessor's classifications remained in the perfected unit (28 of 30). The Respondent's functions were unchanged. It follows that the Union's disclaimer of interest in representing guards and professionals likely would have a minimal impact, if any, on how unit employees would perceive their jobs or the desirability of continued representation. Accordingly, there is no basis to conclude that the disclaimer of only a few job classifications and employees should affect the presumption of majority status in the perfected unit.

Our dissenting colleague, however, would draw a "bright line" in all cases where the predecessor's unit was inappropriate and would treat the Union's request for recognition after the modest alteration of the predecessor's unit here as "indistinguishable from any other initial request for voluntary recognition."[8] But, our colleague does not explain how this case is different from those discussed above, where the successor retained only part of the predecessor's unit and the Board found the duty to bargain attached in the new unit.[9] The dissent essentially finds that when the Respondent declined to bargain in the unperfected, inappropriate unit, that act destroyed the continuity between the predecessor and the Respondent and, at that point in time, the Respondent was transformed into a stranger employer. But there is no basis to find that the act of declining to bargain had any impact on continuity, especially not in the eyes of unit employees. On the contrary, all of the factors establishing a high degree of continuity remained unchanged. Indeed, the dissent does not point to a single fact in the record that might warrant some suspicion that employees' views on union representation changed simply because the Union disclaimed interest in representing the security guards and pharmacists.[10]

Here, the facts supporting a finding of continuity are overwhelming, both in the continuation of the business enterprise in unchanged form and the sheer numbers, discussed above, showing substantial continuity of the work force. Indeed, if anything, there is a far greater degree of continuity here than in the cited cases finding continuity and successorship.

The dissent's formalistic approach, which essentially treats all this evidence of substantial continuity as a nullity, is at odds with Board precedent, with the policy underlying the successorship doctrine, and, most importantly, with the fundamental goals of the Act: to promote industrial stability and to honor the employees' choice whether to have union representation. As the Supreme Court explained in *Fall River Dyeing*, supra, preserving a bargaining relationship is particularly significant in the successorship context because, "[i]f the employees find themselves in a new enterprise that resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation," and "[t]his feeling is not conducive to industrial peace." 482 U.S. at 39–40. Nor is the dissent's position supported by the policies underlying Section 9(b)(1) and (3) as, once the

[8] The dissent points to the brief nature of the prior bargaining relationship, but its "bright line rule" would apply in all cases regardless of the length of the predecessor's bargaining relationship. Similarly, the dissent also points to the 2-1/2-month delay before the Union disclaimed interest in the guards and professionals. But, again, the dissent's proposed rule would apply even if the disclaimer is immediate or precedes the successor's assuming the operation.

[9] The dissent suggests that the holding here will create "numerous uncertainties." But the uncertainties about what changes in the unit will destroy the requisite "substantial continuity" and when such changes may be made are no different from the parallel questions that arise when a putative successor does not acquire the entire unit or there is a hiatus in operations between when the predecessor ceases to operate the business and the successor begins. As to the dissent's question whether a union may "make changes for other reasons," our holding here applies only when a union "perfects" a previously inappropriate unit.

[10] We find no merit to the dissent's contention that the Union's effort to satisfy the requirements of Sec. 9 of the Act constitute inappropriate "gerrymandering." To equate an employer's unlawful discrimination in order to avoid its obligations under the Act with the Union's action here to conform the unit to the requirements of the Act, as the dissent does, is to compare apples with oranges and, bad apples at that.

Moreover, in analogous contexts, the Board has allowed a union to clarify an inappropriate unit by, among other things, excluding guards. *Libbey-Owens-Ford Glass Co.*, 169 NLRB 126 (1968). In *Libbey-Owens-Ford*, the Board processed the union's unit clarification (UC) petition and rejected the employer's position that the union was required to resort to a representation election to resolve the issue. We see no significant difference between the Union's disclaimer in this case and the union's UC petition in *Libbey-Owens-Ford.* The dissent would distinguish *Libbey-Owens-Ford* based on that distinction, but in both cases the unions' motive was to perfect the unit in order to preserve a bargaining relationship and render it enforceable.

In *SecTec, Inc.*, Case 5–RC–16611 (March 10, 2011), reported on the Board's website at www.NLRB.gov, the Board recently denied review of an Acting Regional Director's conclusion that a bargaining agreement had bar effect when the union disclaimed interest in representing a guard, even though the contractual unit was a mixed guard and nonguard unit. As in the present case, once the Union "perfected" the unit by disclaiming interest in the guard, there was an appropriate unit.

Union disclaimed interest, those policies were fully vindicated.[11]

For all of these reasons, we find there was substantial continuity.

B. Appropriateness of Perfected Unit

The Respondent argues that, even if the Board finds that the presumption of majority status continues in the perfected unit, it still has no duty to bargain because the perfected unit does not conform to the Board's Rule governing units in acute care hospitals[12] and, thus, the unit is inappropriate, even absent the guards and professionals. For the reasons stated by the judge, we find that the rule does not apply. Specifically, we find that the perfected unit falls into the "existing non-conforming unit" exception to the Board's Rule. Section 103.30(a).

Our dissenting colleague, however, does not believe that the "existing unit" exception should apply, and thus he agrees with the Respondent that the perfected unit is inappropriate. In the dissent's view, the perfected unit cannot preexist by definition, because it did not exist before the Union disclaimed interest in the guards and professionals. Basically, the dissent's contention as to the appropriateness of the perfected unit echoes his contention that the Board should treat the circumstances here as akin to an initial request for bargaining to a stranger employer, a contention that we have rejected.

In any event, such a narrow interpretation of the exception to the acute care hospital unit rule is not consistent with Board law. For example, in *Pathology Institute, Inc.*, 320 NLRB 1050 (1996), the successor took over the predecessor's operations but closed several of its nonacute care facilities and thus hired only a portion of the predecessor's unit of medical laboratory technologists. The successor argued that the smaller, surviving unit was substantially different from the historic unit and thus was not an "existing" nonconforming unit within the meaning of the health care rule. Disagreeing, the Board stated:

> [N]othing in Section 103.30 [the health care rule] suggests that an employer in the health care industry may cease to recognize a union as the representative of its employees merely because of a reduction in the number of unit employees or because of a closure of the nonacute care portion of an employer's facility. On the contrary, permitting an employer to withdraw recognition under such circumstances would be inconsistent "with the design and purpose of our decision to engage in rulemaking—to further the long-standing policy of promoting industrial and labor stability."

Id. at 1051 (citation omitted).[13]

In *Pathology Institute*, the Board found that the unit, although smaller, was essentially the same as the unit that existed before the closing of the nonacute care facilities, and thus the unit fell within the "existing nonconforming unit" exception. In the present case, as discussed above, the removal of two classifications and only 15 of 163 employees from the existing unit did not substantially alter the unit. As an "existing non-conforming unit," the perfected unit falls into the exception to the rules and is thus appropriate.[14]

The perfected unit, which excludes the guards, respiratory therapists, and recreation technicians, is appropriate. As the judge found, there are numerous community-of-interest indicia that distinguish employees in these classifications from employees in the unit and, therefore, they do not share an overwhelming community of interest with unit employees that requires their inclusion.

In sum, we adopt the judge's decision and find that the Respondent, as a successor employer, had a duty to bargain with the Union in the perfected unit. By refusing to do so, it violated Section 8(a)(5) and (1).

ORDER

The National Labor Relations Board orders that the Respondent, Specialty Hospital of Washington-Hadley, LLC, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with 1199 SEIU United Healthcare Workers East, MD/DC Division (the Union) as the exclusive collective-bargaining representative of its employees in the below-described appropriate bargaining unit:

> All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers,

[11] Our approach advances the policies underlying Secs. 9(b)(1) and 9(b)(3) as the perfected unit does not include guards and professional employees.

[12] Board's Rules and Regulations, Sec. 103.30.

[13] In *Pathology Institute*, the Board noted that the Board's Rule by its terms, applies only in representation cases, but assumed it applied in the unfair labor practice case and proceeded to find that the unit remained an existing nonconforming unit. We take the same approach here without reaching the question of whether the Rule actually applies to this case.

[14] The dissent "reject[s]" reliance on *Pathology Institute* on the grounds that there the successor employer altered the preexisting unit while here the Union did so, but offers no explanation of why that distinction should make a difference in deciding whether the altered unit remained an "existing non-conforming unit" for purposes of the Rule.

LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Respondent at its Washington, D.C. facility; but excluding all other employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the above described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Promptly notify the Union, in writing, of all changes in terms or conditions of employment of the above-described unit that have been implemented by the Respondent since February 1, 2007.

(c) On request by the Union, rescind changes specified by the Union made in terms or conditions of employment for the above-described unit since February 1, 2007.

(d) Make the employees in the above-described unit whole plus interest compounded on a daily basis for any loss of earnings or benefits suffered as a result of any changes which the Respondent has made in their terms and conditions of employment subsequent to February 1, 2007, for the above-described unit.

(e) Within 14 days after service by the Region, post at its Washington, D.C. location, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2011

Wilma B. Liebman,	Chairman
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

In this case of first impression, the majority decides to require the Respondent, an alleged *Burns*[1] successor, to recognize and bargain with a newly formed unit of employees based on its predecessor's voluntary recognition of a *different*, and statutorily inappropriate, unit. Although the majority attempts to characterize its decision as one governed by "longstanding Board precedent on the law of successorship," it is not; the Board has never found a successorship bargaining relationship where, as here, the union unilaterally altered the predecessor's existing bargaining unit for the sole purpose of preserving a bargaining obligation. My colleagues, however, gloss over the Union's actions and find that the Respondent was obligated to bargain with the Union in this unilaterally created unit despite the absence of any preexisting bargaining relationship in the unit between the Union and either the predecessor or the successor. This finding abnegates the Respondent's well-established right to refuse to accept evidence of a union's majority status other than through a Board election.[2] Because the majority's decision deprives the Respondent of that right, I dissent.

Contrary to the majority, and for the reasons stated below, I would find that the Union's representative status terminated when the Respondent lawfully refused the

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 406 U.S. 272 (1972).

[2] See *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

Union's demand for recognition in the inappropriate predecessor unit. From that moment on, the Union's efforts to secure recognition in a new unit, which is also inappropriate, are indistinguishable from any other initial request for voluntary recognition.

In *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001), the Board summarized its test for determining successorship:

> An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a '"substantial continuity' between the enterprises." *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972) (footnote omitted).

There is no dispute that all of the elements of successorship are met here save one: the predecessor's unit, which included guards and professionals, is not an appropriate bargaining unit.[3] The Board has held, consistent with its successorship test, that a successor has no duty to bargain with an incumbent union where the predecessor's bargaining unit is inappropriate. *Russelton Medical Group, Inc.*, 302 NLRB 718 (1991) (holding that successor was not obligated to bargain with union in predecessor's unit, which included professional and nonprofessional employees). Thus, when the Union demanded that the Respondent recognize it as the exclusive bargaining representative in the predecessor's unit, the Respondent had no duty to do so, and its refusal did not violate the Act.

In my view, the Respondent's bargaining duty *as a successor* ended at that point. When the Union requested in February 2007 to bargain with the Respondent in a new unit excluding guards and professionals, this was an initial request to a new employer for voluntary recognition.[4] Accordingly, the parties should have proceeded as with any initial bargaining request: the Union could request voluntary recognition with a showing of majority support, the Respondent could lawfully decline recognition on this basis, and the burden would then be on the Union to pursue recognition by filing a petition, with the proper showing of interest, for a Board-conducted election.

This "bright-line" approach rests on sound Board policy preferring resolution of questions concerning representation through Board elections.[5] It does no violence to the *Burns* policy of preserving an existing bargaining relationship because the predecessor's bargaining relationship involved an inappropriate unit and there is no bargaining history between the Union and the Respondent in the new "perfected" unit.[6] Further, this approach provides employers and unions with clear guidance: if the predecessor's unit is inappropriate, the successor has no duty to bargain and the union may not manipulate the unit in an attempt to create a duty to bargain.

Remarkably, the majority virtually ignores this final point—the Union's manipulation of the unit for its representational purposes. This is the key fact, however, that makes this a case of first impression and distinguishes

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[3] I disagree with the majority's contention that the predecessor's unit, including guards and professionals, is not the unit at issue. This is the unit the Respondent inherited, with which it began its operations, and with which the Union requested bargaining. Under traditional successorship principles, it is the only unit to consider in evaluating the Respondent's bargaining duty.

[4] The majority claims that the Board should require the Respondent to bargain in the perfected unit because there is substantial continuity between the predecessor's unit and the perfected unit, especially in the eyes of unit employees. In my view, the majority overstates its claim that the employees' point of view is the definitive, indeed the only, criterion the Board should consider when evaluating continuity of operations. More importantly, by focusing on the employees' view of the new unit, the majority ignores the novel issue we must consider here: whether the Board should allow a union to unilaterally alter a predecessor's unit to preserve its representation status. Because I would answer "no" to that question, I would not reach whether substantial continuity exists in the perfected unit.

[5] *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001) (stating that "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions"). According to the Acting General Counsel's summary of operations for Fiscal Year 2010, 95.1 percent of all initial elections were conducted within 56 days of filing the petition, and initial elections were conducted in a median of 38 days from a petition's filing. Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,831 (June 22, 2011). Accordingly, under a "bright-line" approach, the parties can resolve any questions concerning representation far more quickly through an election than through the inevitable litigation that will result following a union's unilateral revisions to the predecessor's unit. The "bright-line" approach, therefore, promotes industrial stability by providing a quicker resolution of questions concerning representation.

[6] The majority roots its analysis in the importance of "industrial stability" and the preservation of the parties' bargaining relationship. In fact, however, the record belies that claim. The Union was not certified by the Board and the bargaining history here consists of only three meetings in 2006 between the predecessor and the Union, which did not result in a contract. There was no relationship whatsoever with the successor. Moreover, as the judge observed, the Union hardly demonstrated a compelling interest in preserving any bargaining relationship, as it sat on its hands for nearly 3 months before proposing to disclaim interest in the guards and pharmacists in the inappropriate unit recognized by the predecessor. Industrial stability may be valued by the Act, but it is not advanced by the majority's unprecedented decision. And to be clear, while I have adopted the judge's use of the term "perfected" to describe the unilaterally altered bargaining unit, that unit was inappropriate as a matter of law both before and after the Union disclaimed interest in the guards and professionals.

this case from those on which the majority relies. The majority cites several cases in which the Board has found a successor's duty to bargain in a unit significantly different from the predecessor's unit. The Board finds a duty to bargain where the new unit includes a substantial and representative complement of the predecessor's employees, the unit is appropriate, and there is substantial continuity of operations. In those cases, however, the unit changes result from the successor's business and operational needs, not from any consideration for its duty to bargain. Indeed, if a successor makes hiring decisions with the sole intention of avoiding a duty to bargain, it commits an unfair labor practice. See, e.g., *Planned Building Services,* 347 NLRB 670, 674 (2006) (finding that employer violated Section 8(a)(3) by refusing to hire predecessor's employees to avoid its bargaining obligation); *Love's Barbeque No. 62,* 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). But in this case, the Union makes unilateral changes to the predecessor's bargaining unit for one reason only—to preserve its representation status. Under no circumstances has the Board allowed a party to unilaterally alter a bargaining unit for the sole purpose of affecting its duty to bargain.[7] I cannot join the majority's decision to grant the Union in this case such unprecedented power.

The majority's approach does not reflect Board policy and results in ambiguity and uncertainty for the parties involved. As noted, the majority cannot accurately claim that its decision preserves an existing bargaining relationship. Moreover, allowing the Union to gerrymander the predecessor's unit creates numerous uncertainties that will, as here, lead to litigation: what kinds of changes may a union make to a predecessor's unit; at what point, or at what number, will those changes "substantially alter" the size and scope of the unit; can a union change the predecessor's unit only when the unit is statutorily inappropriate, or may the union make changes for other reasons? None of these uncertainties exist under the "bright-line" approach.

Even assuming, arguendo, that a successor employer could be obligated to recognize a "perfected" version of a statutorily inappropriate predecessor unit in certain circumstances, I further disagree with the majority's decision to adopt the judge's finding that the "perfected" unit here was appropriate because, as an "existing nonconforming unit," the Health Care Rule did not apply. As stated above, the "perfected" unit did not exist at all before the Union agreed to disclaim interest in the guards and professionals.[8] Thus, the newly formed unit could not, by definition, fall under the "*existing* nonconforming unit" exception. Rather, I would find that the Health Care Rule did apply, and under the rule, the "perfected" unit was inappropriate because it excluded respiratory therapists and recreation technicians from a unit including all other nonprofessional employees.

In sum, I would find that the Respondent had no duty to bargain in the "perfected" unit, and thus its refusal to bargain did not violate Section 8(a)(5). I would therefore dismiss this allegation.

Dated, Washington, D.C. August 26, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU, United Healthcare Workers East, MD/DC Division (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

[7] The majority's reliance on *Libbey-Owens-Ford Glass Co.*, 169, NLRB 126 (1968), illustrates this point. There, the union sought to "perfect" an inappropriate unit of employees by removing guards. The union accomplished this, however, not by unilateral action, but by filing a UC petition and availing itself of the Board's processes. Thus, contrary to the majority's claim, *Libbey-Owens-Ford* does not present a context analogous to this case.

[8] For the reasons stated above, I reject the majority's reliance on such cases as *Pathology Institute, Inc.,* 320 NLRB 1050 (1996), where changes to a predecessor's unit resulted from the successor's business and operational decisions. Such cases are fundamentally different from this case, where the Union unilaterally altered the predecessor's unit only to preserve its representational status.

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by us at our Washington, D.C. facility; but excluding all other employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit set forth above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL promptly notify the Union, in writing, of all changes in terms or conditions of employment of the above-described unit that we have implemented since February 1, 2007.

WE WILL, on request by the Union, rescind unilateral changes we made in terms or conditions of employment of the above-described unit since February 1, 2007; except that nothing in this provision requires that we withdraw or eliminate any improvement in wages or benefits.

WE WILL make all affected unit employees whole, together with interest, for any and all losses they incurred by virtue of the changes in their wages, fringe benefits, and other terms and conditions of employment from February 1, 2007, until we negotiate in good faith with 1199 SEIU, United Healthcare Workers East, MD/DC Division to agreement or to impasse.

SPECIALTY HOSPITAL OF WASHINGTON–HADLEY, LLC

Thomas J. Murphy, Esq., and *Sean R. Marshall, Esq.,* for the General Counsel.

Charles F. Walters, Esq., of Washington, D.C., and *Kristin E. Michaels, Esq.,* of Chicago, Illinois, for the Respondent.

Stephen W. Godoff, Esq., of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Washington, D.C., on May 12 and 13, 2009. The charge was filed on March 26, 2007, by 1199 SEIU, United Healthcare Workers East, MD/DC Division (the Union) against Specialty Hospital of Washington-Hadley, LLC (Respondent). The complaint alleges that Respondent, a successor employer, has violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to recognize and bargain with the Union as the collective-bargaining representative in a requested unit that is appropriate for collective bargaining.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent with an office and place of business in Washington, D.C. (Respondent's facility), has been engaged in the operation of a hospital providing long term, acute medical care. During the twelve month period preceding the issuance of the complaint in conducting its business operations, Respondent derived gross revenues in excess of $250,000. During the same period, Respondent purchased and received at its facility goods valued in excess of $5000 directly from points located outside of the District of Columbia. Respondent admits and I find it is a health care institution within the meaning of Section 2(14) of the Act, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent admits the following in its answer to the amended complaint:

From on or about November 14, 2005 to in or around late October 2006 or early November 2006, the exact date being unknown, the Union was the exclusive collective-bargaining representative of the following employees referred to as the Hadley Memorial unit, employed by Doctors Community Healthcare Corporation d/b/a Hadley Memorial Hospital (Hadley Memorial), and, during that time, the Union had been recognized as such representative by Hadley Memorial:

[1] In making the findings, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d. Cir), reversed on other grounds 340 U.S. 474 (1951). I found the witnesses in this proceeding testified in a truthful manner to the best their recollections would permit, and have credited their testimony as set forth in the body of this decision.

> All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacists, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, security guards, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Hadley Memorial Hospital at its Washington, D.C. facility.

In or around late October or early November 2006, Respondent purchased Hadley Memorial and since then, has continued to operate it in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Hadley Memorial.

Respondent also admits in its answer that a phone call took place on place November 9, 2006, between Stephen Godoff, attorney for the Union, and Joseph R. Damato, attorney for Respondent, and that in response to that phone call Damato wrote Godoff a letter dated November 17, 2006, wherein Damato stated, "I am writing in response to your request that Specialty Hospital of Washington-Hadley (the Company) recognize SEIU Local 1199 as the bargaining representative of the bargaining unit recognized by the prior owners of Hadley Memorial, and begin bargaining for a collective bargaining agreement." In the letter, Damato went on to state Respondent would not recognize the Union in the unit recognized by Hadley Memorial because the unit was an inappropriate unit for bargaining in that it included guards with nonguards, and it included pharmacists, who are professional employees, along with non professional employees, and the professional employees were not given their right under the Act to decide whether they wanted to be included in a unit of nonprofessional employees.

Respondent admits in its answer that by letter to Damato, dated February 1, 2007, Godoff requested Respondent bargain with the Union in the following unit, specifically excluding guards and pharmacists, or in the alternative to provide pharmacists the right to determine whether they should be included in the unit:

> All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Respondent at its Washington, D.C. facility; but excluding professional employees, guards and supervisors as defined in the National Labor Relations Act.[2]

By letter dated, February 8, 2007, Damato refused Godoff's request for Respondent to recognize and bargain with the Union, stating the bargaining unit that existed under the prior ownership was fatally flawed as a matter of law, and that Respondent was not prepared to recognize a modified unit. Rather, any issue regarding union representation should be decided by the Board's election rules and processes.

The parties stipulated to the following at the hearing: At the time of recognition by Hadley Memorial on November 15, 2005, there were 169 employees in the Hadley Memorial unit, of which were 10 guards and 5 were pharmacists. The parties submitted a joint stipulation, dated June 1, 2009, following the close of the hearing showing that as of November 13, 2006, when the Respondent took over the operation of the Hospital, there were 169 employees in Hadley Memorial unit, including 12 guards and 5 pharmacists. At that time, all 169 employees had been previously employed by the predecessor employer. On February 1, 2007, the date of the Union's request for recognition in the amended unit excluding guards and pharmacists (amended unit), there were 163 employees in the Hadley Memorial unit 157 of who had previously been employed by Hadley Memorial of which 11 were guards, and 4 were pharmacists. At that time, there were 148 employees in the amended unit, 142 of who had previously been employed by Hadley Memorial. On December 31, 2007, there were 192 employees employed by Respondent in the amended unit, 136 of who had previously been employed by Hadley Memorial. On April 30, 2009, there were 178 employees in the amended unit employed by Respondent, with 108 having been previously employed by Hadley Memorial.[3]

A. Procedural History

The initial complaint in this matter issued on June 29, 2007, setting the trial for August 22, 2007.[4] By letter dated July 24, 2007, Respondent sought a 30-day postponement to the trial. The amended complaint issued on July 24, 2007, setting the

[2] Respondent stipulated at the hearing that it employed a representative complement of employees at the time the Union made its second request to bargain.

[3] As jointly requested by the parties, I have admitted into evidence the cover letter dated June 2, 2009, the attached joint stipulation dated June 1, 2009, and Jt. Exhs. 1, 2, and 3 attached thereto. I am also admitting in evidence R. Exh. 13, as requested by the parties in their joint submission. Upon the admission of the described documents the record is closed.

[4] On June 29, 2007, Respondent filed an RM petition. In its cover letter to the petition, written by its attorney, Joseph Damato, Respondent stated, "The Petition is being filed in response to the Union's demand for recognition on February 1, 2007, in which there has never been a finding of majority status. The unit described in the enclosed Petition approximates to the extent possible the unit we understand the Union is currently seeking. There has never been a finding regarding the appropriateness of this unit, but if the Region and the Union are prepared to have an election in this unit, Specialty Hospital of Washington-Hadley will, for the purposes of this case, concede that the unit is appropriate." By letter dated July 10, 2007, the Region dismissed the petition citing the outstanding unfair labor practice complaint alleging the appropriateness of the unit, and stating that "The Employer made no claim that it believes the Union has lost its majority support among the employees, nor did it submit any evidence of objective considerations to support such a claim." By Order dated January 15, 2009, the Board affirmed the Region's dismissal of the RM petition. Thus, Respondent was willing to concede the appropriateness of the currently disputed unit when it suited its purposes to do so.

trial for October 9, 2007. On September 14, 2007, Region 5 issued an order rescheduling the hearing to December 17, 2007. On November 16, 2007, Region 5 issued an order postponing the hearing indefinitely. On December 3, 2007, Respondent filed a "Motion for Summary Judgment" with the Board. On January 17, 2008, the Board issued an "Order Transferring Proceeding to the Board and Notice to Show Cause."

On November 25, 2008, the Board, by a two member panel, issued an "Order Denying Motion," in which the Board denied Respondent's motion for summary judgment and remanded the matter for hearing. In its "Order Denying Motion," the Board stated the parties' pleadings reveal that certain facts are not disputed. The facts the Board stated are not disputed are summarized as follows: The facility at issue is a hospital providing long-term acute care. On November 14, 2005, the predecessor Employer, Hadley Memorial, voluntarily recognized the Union in the unit set forth above. The Board stated that of the 169 employees in the unit at that time, about 10 were security guards and 5 were pharmacists. In October 2006, Respondent purchased Hadley Memorial and took over operations on November 13. Respondent hired virtually all unit employees, who composed a majority of the Respondent's employees, and it maintained the employees' terms and conditions of employment, at least initially. Respondent's take over involved no operations hiatus. Respondent continued to provide the same services as that of the predecessor Employer, at the same location, for the same clients. When Respondent took over the facility, there were about 177 employees in the unit, including about 12 statutory guards and 4 pharmacists. The Board further stated, that "the parties do not dispute that the original unit was not an appropriate unit, and we agree. Second, the General Counsel concedes that the Respondent was not obligated to bargain with the Union in the original unit, and again, we agree. Third, the parties appear to agree that, under the standards set out in *Burns* and its progeny, there is 'substantial continuity' between the Respondent's enterprise and Doctors (Hadley Memorial): the business of both employers is essentially the same; the Respondent's employees are doing the same jobs in the same working conditions; and the Respondent performs the same services for essentially the same customers." (Footnotes omitted.)

In its November 25 remand, the Board went on to state, "This is an issue of first impression. The parties have cited no binding cases, and we have found none, that address whether a *Burns*-successorship bargaining obligation can attach under the circumstances presented here: a successor employer has lawfully refused the union's initial demand for bargaining in a unit that was inappropriate both before and after the change of ownership; and the union later demands bargaining in a unit that the union unilaterally created by disclaiming interest in certain unit employees, and that it now claims is appropriate."

Respondent filed a "Motion for Reconsideration and Motion to Stay," dated December 3, 2008, of the Board's "Order Denying Motion." Respondent's argument was based, in part, on its contention that a two member panel of the Board was not properly constituted to consider its initial motion for summary judgment. By order dated, January 7, 2009, the Regional Director set the trial in this case for March 23, 2009. The Board issued an "Order Denying Motion for Reconsideration and Motion to Stay Hearing," on January 26, 2009. On February 3, 2009, Respondent requested a postponement in the hearing until May 11, 2009, premised on the lack of availability of lead counsel Damato. On February 13, 2009, the Regional Director issued an order postponing the hearing to May 12, 2009. On May 6, 2009, Respondent filed with the division of judges a "Motion to Reschedule the Hearing," citing *Laurel Baye Healthcare of Lake Lanier, Inc., v. NLRB,* No. 08-1162 (D.C. Cir. May 1, 2009), renewing its argument that a two member panel of the Board does not constitute an appropriate quorum for the consideration of Respondent's initial motion for summary judgment. On May 7, 2009, Respondent filed with the Board a "Second Motion for Reconsideration and Motion to Stay," The Chief Administrative Law Judge issued an "Order Denying Motion to Reschedule Hearing" on May 8, 2009. The Board, also on that date, issued an "Order Denying Second Motion for Reconsideration and Motion to Stay Hearing."

The hearing was held on May 12 and 13, 2009. Damato did not appear as counsel for Respondent at the hearing, although at least one and possibly two of Respondent's requests to the Region for postponement of the hearing were based on the necessity of his being there. It should also be pointed out that I did not view the Board's Order denying Respondent's motion for summary to judgment to restrict the scope of this hearing in any way. The Board stated in its November 25, 2008 Order at fn. 6 that, "Our denial of summary judgment is without prejudice to the Respondent's right to renew its arguments to the administrative law judge and to the Board on any exceptions that may be filed to the judge's decision. In addition, we take no position on the resolution of the novel successorship question presented here." I did not restrict any arguments at the hearing that Respondent sought to raise based on the Board's Order. Rather, I conducted the hearing based on my own views as a judge as to what was appropriate, as if no motion for summary judgment had been filed.

B. The Evidence Presented at the Trial

1. Continuity of operations

Donovan Mabry was working for Respondent as a painter, at the time of his testimony, a position he has held at the Hospital for 5 years. Mabry had the same supervisor before and after Respondent took over the operation of the Hospital. Mabry testified he used the same equipment before and after the take over, and there was the same staffing in the maintenance department before and after the take over. Mary Sistrun Williams works for Respondent and had worked for the Hospital for 9 years. Williams was a patient care technician with Hadley Memorial, during which time she provided services for patients such as bathing, feeding, and walking. Williams testified her job functions did not change when Respondent took over. Williams' supervisor at Hadley Memorial was Beth Michaels, who remained Williams' supervisor for a few months when Respondent took over. Williams testified the equipment did not change that she used at Hadley Memorial and at Respondent.

2. Bargaining history at Hadley Memorial

Rhonda Brady works for the Union. In January 2006, Brady

was assigned bargaining with Hadley Memorial as part of her responsibility.[5] Upon receiving the Hadley assignment, Brady contacted Janine Finck-Boyle (Boyle), then hospital administrator, to set up bargaining dates. On January 20, 2006, Brady faxed to Boyle a letter requesting information to allow the Union to prepare for bargaining. By letter to Brady, dated January 25, 2006, Boyle responded to Brady's letter and she listed the information Hadley Memorial would provide in response to Brady's request for information. Brady responded to Boyle by fax dated February 1, 2006, stating she would be in the Hospital that date to pick up the materials Boyle had ready. By letter dated February 22, 2006, Brady sent Boyle a list of 12 named employees who were to be on the Union's bargaining committee for the then scheduled March 1 negotiation session. Brady testified Hadley Memorial allowed the Union to hold weekly membership meetings in the hospital cafeteria.

Brady testified the first bargaining session took place on March 30, 2006, at Hadley Memorial. Present for the Union were, Stephen Godoff, the Union's attorney, then Union Official Bruce Lang, Brady, and the employee members of the bargaining committee. Present for Hadley Memorial were Chief Operating Officer Ron Davis and Boyle. During the session, the Union presented Hadley Memorial with the Union's initial written proposal, and the parties reviewed the proposal. Brady testified she received Respondent's written response to the Union's proposal in May. It is reflected on page one of Hadley Memorial's May proposal that Hadley Memorial was seeking to ensure that the following positions were excluded from the bargaining unit:

> [A]ll other employees, registered nurses, physical therapists, occupational therapists, speech therapists, registered and certified respiratory therapists, recreation therapists, and recreation/activity technicians. [G.C. Exh. 10, p. 1.]

Brady testified she participated in another bargaining session on July 17, 2006, with Hadley Memorial. She testified the same attendees were there for both sides, and the meeting was held at the same room at the Hospital. The meeting lasted a couple of hours. Brady faxed Boyle a letter dated July 14, 2006, listing 11 employees on the Union's bargaining committee who were scheduled to attend the July 17 meeting. Brady testified that, during the July 17 session, they discussed Hadley Memorial's reaction to the Union's initial proposals. She testified there were some areas of agreement, including union security, checkoff, and the definition of part-time employees. By email dated July 18, Boyle notified Brady that she would let her know the following week as to Boyle's availability for another session. Brady testified the Union continued to hold meetings with employees after July 17, in the Hospital's cafeteria. Brady identified a flyer notifying the employees of a July 20, 2006, meeting. By email to Boyle dated July 27, 2006, Brady requested bargaining dates, and made another request for information. Brady repeated a request for bargaining dates in an email to Boyle dated August 4. Boyle responded by email that date stating Hadley Memorial officials would not be able to meet for bargaining until the end of September 2006. By email to Boyle dated September 12, 2006, Brady renewed her request for bargaining dates. Boyle responded stating Boyle was beginning maternity leave on September 15, and would not be able to begin bargaining the following week. Boyle stated in the email that, "I also want to state, as I did during the call today, we are in the process of a sale transaction that should be completed in the next few weeks."

Brady testified she did not attend any other bargaining sessions with Hadley Memorial. Brady testified Boyle told her to contact an attorney named Cindy Sehr. Brady testified she notified Godoff and the Union's executive vice president, John Reid of the contact information. Brady testified she continued to hold the Union's weekly meetings at the Hospital in an area in the cafeteria provided for the Union. She testified the last employee meeting at the Hospital was held in November 2006. Brady testified while conducting the membership meeting, she was approached by a man who identified himself as part of the Hospital administration. He asked Brady to leave, and she complied with the request. Brady testified that, thereafter, the Union scheduled daily visits in front of the Hospital where they handed out literature, and talked to employees to maintain the Union's presence and to keep them informed.

Godoff testified he contacted Hadley Memorial attorney Cindy Sehr in September 2006, when Godoff was notified the Union was having difficulty scheduling a bargaining session. Godoff told Sehr the Union was concerned and wanted to know why there was difficulty in scheduling further sessions. Godoff told Sehr the Union wanted Godoff to set a deadline and to notify Sehr that, if the deadline was not met, the Union would file an unfair labor practice charge for refusal to bargain. Sehr asked Godoff if the Union would grant forbearance, that there were difficulties with Boyle's maternity leave, and that Hadley Memorial was exploring a stock sale. Godoff testified Sehr assured him they had every intention of returning to the table. Godoff told Sehr he was not in a position to grant Sehr's request for forbearance and the response would have to come from the executive vice president of the Union.

By letter dated September 25, 2006, Hadley Memorial's COO Mounce wrote to Reid stating the Hospital was in a transition period due to Boyle being on maternity leave and the sale of the Hospital's stock which was expected to close within the next 2 weeks. It was stated in the letter, "We do not expect to be able to schedule a bargaining session until after the sale is consummated; however, we have every intention to continue bargaining in due course after completion of the transition period." Reid responded to Mounce by letter dated October 18, in which Reid summarized the course of bargaining to date, and stated if the employer did not commence bargaining on or before October 27, 2006, the Union would take legal steps to

[5] The pleadings by the parties to the Board concerning Respondent's motion for summary judgment reveal that on November 14, 2005, an arbitrator issued a letter to the Union and Hadley Memorial certifying that a majority of employees in the then agreed upon unit signed cards authorizing the Union to represent them for collective bargaining. The agreed-upon unit at that time contained 169 employees, 5 classified as pharmacists, and 10 as security guards. As a result of the card check, Hadley Memorial recognized the Union as the collective-bargaining representative of the employees in the then agreed upon unit and the Union and Hadley Memorial began bargaining for a contract as detailed above.

ensure the Hadley Memorial's return to the bargaining table. On November 6, 2006, Mounce wrote Reid as follows:

> In response to your letter to me dated October 18, 2006, this is to advise you that the sale of the assets of Hadley Memorial Hospital to Specialty Hospitals of America, LLC has taken place. Although we previously advised you that the sale was to be a sale of stock, in the last several days of negotiations the form of the transaction was changed to an asset sale. Brian Wells is the current chief executive officer of the Hospital; please contact him at the Hospital for all further union discussions.

Godoff testified that around November 9 Godoff was contacted by Attorney Joseph Damato, who identified himself as counsel for the new owners of the Hospital. Godoff told Damato the Union was prepared to begin bargaining with the new owners towards a contract. Damato told Godoff he was very much looking forward to bargaining another contract with Godoff as they had bargained contracts together successfully in the past. Damato then told Godoff that he would provide Godoff with bargaining dates.[6] However, Godoff identified a letter dated November 17, 2006, from Damato to Godoff stating it was in response to the Godoff's request to bargain on behalf of the Union. In the letter, as set forth above, Damato stated in reviewing materials related to the Union's request that the bargaining unit appeared to be inappropriate under the Act in that it included guards with non guards, and that it included pharmacists who are professional employees with nonprofessional employees, and the professional employees were not afforded their right under the Act to decide on their inclusion in the unit. Damato went on to state that Respondent was not prepared to recognize the Union as the bargaining representative in this inappropriate unit. By letter to Damato, dated February 1, 2007, Godoff stated the Union was willing to disclaim any interest in representing Respondent's security guards, and to disclaim interest in representing the pharmacists or to afford the pharmacists a right to decide for or against their inclusion in the unit. By letter dated February 8, 2007, Damato continued to deny the Union's request for recognition.

3. Respondent's operations

Jerry Amato is Respondent's CEO. Amato testified Respondent is a single facility providing long-term acute care (LTAC) and skilled nursing services. Amato's responsibilities include: the day-to-day operations of the entire facility, marketing, financial review, quality improvement, quality measures, employee-staff relationships, and community service. The employees and managers ultimately report to Amato. The first floor is where the administrative offices are located, and all patient care is provided on the second and third floors.

Amato testified there are 83 LTAC beds at Respondent. The LTAC services are provided on the second floor, which is considered its own unit. The LTAC core specialties include ventilator management, complex respiratory patients, severe wounds, long-term IV antibiotics, and medically complex patients transferred from other hospitals. Amato testified Respondent is distinguished from a regular hospital based on length of stay. Amato testified that most other hospitals based on payment sources will have a length of stay between three and seven days. Based on Respondent's Medicare reimbursement, its patients stay 25 days or longer. In addition, to LTAC inpatient care, Respondent provides skilled nursing services on the third floor. Skilled nursing services include chronic ventilator care, serving patients needing feedings tubes, or with chronic tracheotomies. There are 62 skilled nursing beds at the hospital, which is considered its own unit. Patients using skilled nursing beds stay longer than those in acute care, as their care is of a chronic nature. The LTAC and the skilled nursing facility units are the only patient care units at the Hospital.

Amato testified in the LTAC unit in 2005, the average length of the patient stay was 27 days; and in 2006 it was 25 days. In the skilled nursing unit the average length of patient stay in 2005 was 119 days, and it was 152 days in 2006. In 2005, there were 887 patients admitted to LTAC, and 138 in skilled nursing. The number of patients admitted to the LTAC unit in 2006 was 1005 and 158 in the skilled nursing unit. In 2005, 82 percent of the Hospital's revenues were derived from the LTAC unit, and the rest of the income came from skilled nursing. In 2006, 81 percent came from the LTAC unit.

Shelita Domino-Stoddard (Stoddard) was employed by Respondent as human resources coordinator, at the time of her testimony. As such, Stoddard was the highest level person in the human resources department. Stoddard testified Respondent basically just brought the employees over from Hadley Memorial in its November 2006 startup. She testified the next time they hired would have been in December when they had their orientation. Stoddard testified that was to replace people who may have left or to fill vacant positions. Stoddard testified, to her knowledge, Respondent has not increased the number of beds since it purchased Hadley Memorial. However, Stoddard testified the staff size has increased by 100 or more. Stoddard testified the increase was over the years in that there was not a drastic hiring increase. Stoddard testified that as of February 1, 2007, all Respondent's employees received the same benefits, were covered by the same employment policies and rules, and were covered by the same handbook, which was the handbook used by Hadley Memorial. The Hadley Memorial handbook was not replaced by Respondent's handbook until January 2008. The employees at the Hospital all had the same biweekly pay period.

4. The bargaining unit

It was Respondent's position at the hearing that the bargaining unit for which recognition was sought on February 1, 2007, is inappropriate because it excludes respiratory therapists (RTs) and recreation technicians. The parties stipulated that LPNs, who are included in the amended bargaining unit, are technical employees. The parties also stipulated that the stockroom coordinator, stock clerk, and the central supply technician (utility aide) positions included in the amended bargaining unit are nonprofessional employees and nontechnical employees. The

[6] There is no contention before me that Damato's remarks to Godoff constituted a voluntary recognition of the Union on the part of Respondent.

status of the amended bargaining unit will be discussed in detail in the Analysis section of this decision.

C. Analysis

1. Respondent's status as a successor employer and the Union's agreement to remove professional employees and guards from the predecessor's bargaining unit

In *NLRB v Burns Security Services,* 406 U.S. 272, 278–279 (1972), a union was certified by the NLRB, and reached a collective-bargaining agreement with an employer. A few months after the certification, the employer lost its contract to provide security services, and the contract was taken over by Burns, which employed 27 of the predecessors 42 security guards. The Court stated, "It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract. In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer." In *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987), the Court held that an employer which purchases the assets of another, is required to recognize and bargain with a union representing the predecessor's employees when there is a "substantial continuity" of operations after the takeover, and following a demand for bargaining there is a majority of the new employer's work force, in an appropriate unit, consisting of the predecessor's employees at a time when the successor has reached a "substantial and representative complement." The Court stated, even in situations where there has not been a recent election certification by the NLRB, a union that has previously been recognized through an NLRB certification is entitled to a rebuttable presumption of majority support. The Court stated at 482 U.S. at 38–40 that:

> These presumptions are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision. The overriding policy of the NLRB is "industrial peace." The presumptions of majority support further this policy by promoting stability in collective-bargaining relationships, without impairing the free choice of employees. (Citations omitted.)
>
> . . . .
>
> The rationale behind the presumptions is particularly pertinent in the successorship situation and so it is understandable that the Court in *Burns* referred to them. During a transition between employers, a union is in peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. . . . Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' right and to develop a relationship with the successor.
>
> The position of the employees also supports the application of the presumptions in the successorship situations. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace…..Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.[7]

In *Sunrise Nursing Home,* 325 NLRB 380, 381 (1998), it was noted, citing *Fall River Dyeing Corp.,* supra at 43, that "The Court further instructed that these characteristics of the substantial continuity factor were to be assessed primarily from the perspective of the involved employees, that is, 'whether 'those employees who have been retained will ... view their job situations as essentially unaltered."' (Additional citations omitted.) It was stated in *Sunrise,* supra at 381 that:

> While the Board has held subsequent to *Burns*, supra, that employees acquired from a predecessor "themselves must constitute an appropriate unit," *Irwin Industries,* 304 NLRB 78 (1991), the Board however, has also held that the Act does not require an evidently only, ultimately, or most appropriate unit, but only that it be at least appropriate in nature. *Vincent M. Ippolito, Inc.,* 313 NLRB 715 (1994), *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950).

In *Van Lear Equipment, Inc.,* 336 NLRB 1059, 1063 (2001), in finding a respondent was successor employer the Board stated:

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[7] The Court found in *Fall River* that the successor employer had a bargaining obligation even though there was a 7-month hiatus between the predecessor's demise, and the successor's start up. The court held that in the circumstances there the 7-month hiatus was not sufficient to disrupt the continuity of operations.

> The test for determining successorship has been summarized as follows: An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "'substantial continuity' between the enterprises." *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns Security Services,* 406 U.S. 272, 280 fn. 4 (1972) (footnote omitted.).

In *Van Lear Equipment, Inc.,* supra at 1064, the Board specifically nedecessor employer is a public employer. Implicit in such a finding was that the union was not certified by the NLRB as the bargaining representative at the predecessor employer and that such a certification is not a prerequisite to a successorship finding. As stated in *Lincoln Park Zoological Society,* 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997):

> Respondent does not dispute that the successorship doctrine applies even though the predecessor was a public employer. See *JMM Oper*ational Services, 316 NLRB 6 (1995). Respondent claims, however, that the General Counsel must nevertheless establish that the Union had achieved majority status as the predecessor's bargaining representative. There is no such requirement in successorship cases. Indeed, it is clear from the Supreme Court's opinion in *Fall River* that the usual presumptions of majority status inherent in Board law apply in successorship situations to ensure stability in collective-bargaining relationships. 482 U.S. at 37–39. See also *Saks Fifth Avenue,* 247 NLRB 1047, 1051 and fn. 10 (1980), enfd. 634 F.2d 681 (2d Cir. 1980). Such presumptions include those that flow from voluntary or historical recognition and contractual relationships. See, in addition to *Saks*, supra, *Vincent M. Ippolito, Inc.,* 313 NLRB 715, 721 (1994), and *Exxel/Atmos, Inc., v. NLRB,* 28 F.3d 1243, 1247 (D.C. Cir. 1994).

Similarly, in *Proxy Communications,* 290 NLRB 540, 541 (1998), enfd. 873 F.2d 252 (2d Cir. 1989), the Board stated:

> It is well settled that there is a rebuttable presumption in favor of a union's majority status following the certification year. This presuoted that the successorship doctrine applies even if the prmption also applies where the union has been accorded voluntary recognition as in the instant case. Further, this presumption applies in the successorship context.

In *Proxy Communications* the union had been granted voluntary recognition by the predecessor employer. The Board concluded the respondent was a successor employer and it succeeded to the predecessor's obligation to bargain with the union. id. at 541. The Board went on to state that "an employer continuing the predecessor's business without change stands in shoes of predecessor vis a vis its relationship with the union." Id at 542 fn. 16. See also *Lockheed Engineering, Co.,* 271 NLRB 119 (1984), where a successor employer was found to have a bargaining obligation with a union, although the union had never reached a collective-bargaining agreement with the predecessor employer.

In *Southern Power Co.,* 353 NLRB 1085, 1085 (2009), it was stated:

> [T]he Board has assigned the same weight to bargaining history in cases where the unit in the successor's operation is only a portion of the predecessor's bargaining unit. See *White-Westinghouse,* 229 NLRB 667, 675-675 (1977), enfd. sub nom. *Electrical Workers v. NLRB,* 604 F.2d 689 (D.C. Cir. 1979) (successor's employees in five plants of the predecessor's larger multiplant unit remained an appropriate unit), and *Community Hospitals of Central California v. NLRB,* 335 F.3d 1079, 1085 (D.C. Cir. 2003) (stating that there is no authority supporting the successor employer's argument that the presumptive appropriateness of a unit of historically-represented employees does not apply to a subset of the predecessor's recognized unit).

In *Van Lear Equipment,* supra, an employer was found to be a successor employer when a union represented a bargaining unit at the predecessor consisting of bus drivers, mechanics, maintenance workers, and secretaries (the PVSD unit) which included 38 employees, 21 of who were bus drivers. The Board in finding the respondent employer was a successor employer stated that as of August 1997, the respondent employed 26 bus drivers at Panther Valley, 19 of who were former PVSD drivers, thus the vast majority of the Panther Valley drivers were former PVSD unit employees. The Board stated:

> Additionally, even though the Respondent did not take over all the operations and functions of the prior PVSD bargaining unit—the custodians, maintenance workers, and secretaries remained with PVSD—a finding of successorship is not precluded. Indeed, the Board has frequently found substantial continuity where the successor employer has taken over only a discrete portion of the predecessor's heterogeneous bargaining unit. See *Bronx Health Plan,* 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999); *M.S. Management Associate,* 325 NLRB 1154 (1998), enfd. Sub nom. NLRB v. Simon De-Bartelo Group, 241 F.3d 216 (7th Cir. 2001); Lincoln Park Zoological Society, 322 NLRB 263 (1996), enfd. 116 F.3d 216 (7th Cir. 1997); Louis Pappas Homosassa Springs Restaurant, 275 NLRB 1519 (1985); and Stewart Granite Enterprises, 255 NLRB 569 (1981).

See also *Shares, Inc.,* 343 NLRB 455, 460 (2004), enfd. 433 F.3d 939 (7th Cir. 2006), stating the "Board has frequently found substantial continuity where the successor employer has taken over only a discrete portion of the predecessor's heterogeneous bargaining unit." (Citations omitted.) In *Tree-Free Fiber Co.,* 328 NLRB 389 (1999), a successor bargaining obligation was found when the predecessor employed 500 employees, and the successor only employed 50.

In the instant case, Respondent took on all of the predecessor's employees and maintained all of the predecessors operations. Nevertheless, the bargaining unit requested by the Union

to Respondent has been diminished in size, because the Union has acquiesced in Respondent's objection to inclusion of the guards and professional employees who were included in the bargaining unit at the predecessor. The issue of whether a union can retain representational status when its agrees to amend an agreed upon bargaining unit of a predecessor employer, to exclude statutorily excluded positions, to perfect the unit for its bargaining demand to the successor employer has been addressed previously by two administrative law judges. The judge's opinions, while not binding, are instructive here. In *Northern Montana Health Care,* 324 NLRB 752, 767, enfd. in part 178 F.3d 1089 (9th Cir. 1999), amended 161 LRRM 2576 (9th Cir. 1999), the judge found certain LPNs who had been included in a predecessor employer's bargaining unit to be supervisors. The judge nevertheless found a successor employer to have a bargaining obligation with the union there even though he excluded the LPN's from the bargaining unit pertaining to the successor employer.[8] In *Northern Montana Health Care,* there were 5 LPNs in a unit of 75 employees at the predecessor employer. The judge stated as follows:

> [W]hat seems to remain respecting the continuity of bargaining unit is that the instant case differs from the situations presented in the cases cited by the General Counsel and the Charging Party in that the new employer herein acquired all the classifications in the previous employer's recognized unit, but that some of those classifications are not properly part of the new unit.
>
> I have found no cases which match the precise factual situation presented here, i.e., discussing successorship unit continuity where the new unit differs from the old unit because only a portion of the operations was acquired but rather because the old unit was inappropriate. I am able to perceive no significant difference between a situation where the new bargaining unit arises as a result of a partial assumption of the predecessor's operation or because the appropriate unit simply excludes some of the employees previously included in the predecessor unit. The test of unit continuity turns on the roots or origins of the predecessors' appropriate unit employee compliment. In both the situations discussed in the cases cited, supra respecting partial acquisitions and the situation here where licensed practical nurses are excluded from a unit, the new units are both appropriate under Section 9 of the Act and have a direct relationship to a portion of the predecessor unit.[9] [Footnotes omitted.]

I also do not find a significant difference between the situation here, where a union voluntarily drops some positions from a predecessor's unit based on statutory exclusions, and the cases cited above, where an employer only acquires a portion of a predecessor's operation, and thereby diminishes the size of the bargaining unit. The principle calculation made in the latter situation is whether the new unit is an appropriate unit, whether there is a substantial continuity of operations, and whether the successor employer maintains a majority of employees in the new unit from the predecessor employer at the time the successor employer obtains a representative complement of employees. See, *Van Lear Equipment, Inc.,* 336 NLRB 1059, 1063 (2001); *Tree-Free Fiber Co.,* 328 NLRB 389 (1999); *Bronx Health Plan,* 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999); *M.S. Management Associates,* 325 NLRB 1154 (1998), enfd. 241 F.3d 216 (7th Cir. 2001); *Lincoln Park Zoological Society,* 322 NLRB 263 (1996), enfd. 116 F.3d 216 (7th Cir. 1997); *Louis Pappas Homosassa Springs Restaurant,* 275 NLRB 1519 (1985); and *Stewart Granite Enterprises,* 255 NLRB 569 (1981).

In the instant case, Respondent stipulated it employed a representative complement of employees on February 1, 2007, the date the Union made its request for recognition in the amended unit. At that time, there were 148 employees in the amended unit, 142 of who had been employed by Hadley Memorial.[10] As set forth in the cases cited above, the Board relies on presumptions inherent in successorship situations for majority status findings. That is, the Board will presume the union maintains majority status in the new shrunken unit at the successor, based upon its hiring a majority of the employees in the predecessor unit in the new unit at the time there is a representative complement of employees in the new unit. The Board does not go back in time and calculate whether this new grouping of employees actually voted for the union in the new unit at the time of the Board election, or whether they supported the union as a majority in the new unit, at the time the union was initially recognized by the predecessor if there was a voluntary

[8] In *Northern Montana Health Care,* supra, the union's demand for recognition was based on a unit that included LPNs. However, the union and the General Counsel took the position at trial that the respondent had an obligation to bargain even if the LPNs were found to be supervisors and removed from the requested unit. The Board, in reviewing the judge's decision, held the LPNs were not supervisors and included them in the bargaining unit for the successor employer. Thus, the Board never reached the issue which is similar in nature to that presented in the present case whether a bargaining obligation pertains to a successor employer when a group of individuals is excluded from the historic unit based on statutory considerations as opposed to a successor employer only acquiring a portion of the unit.

[9] Similarly, in *Concord Associates,* 1999 WL 3345473, a union was certified in a unit by the Board, and over time the parties expanded the unit to include guards and supervisors. The successor employer refused to recognize the union because it only acquired a small portion of the predecessors operation, and because the predecessor's unit included guards and supervisors. There, as here, the union made a second demand for recognition to the successor employer, which unlike the union's initial demand excluded security guards. The judge found a bargaining order warranted for the successor employer despite a substantial diminution of the size of the successor employer's unit to that of the predecessor, and although the unit of the predecessor included guards and supervisors. The judge's decision was not appealed to the Board.

[10] The Union agreed to the removal of 11 security guards and 4 pharmacists from the amended unit. There was no showing that the functions of the pharmacists and/or the security guards was so integrated into the unit so as to destroy the fabric of the unit. I do not find the circumstances here any different from the cases where successorship is found when the successor only acquires a portion of the original unit.

recognition. The Board has also not used concerns that the employees may not have initially selected union, if they had known at the time that the bargaining unit would have been smaller than initially recognized in successorship cases. Rather, in the interest of industrial stability the Board relies on the presumption of majority status amongst the successor's employees articulated by the Court in *Fall River*. That is a majority status amongst successor's employees is presumed based on that employer's hiring a majority of the predecessor's employees in the new unit when that unit is found to be appropriate for collective bargaining.[11]

The Board does not eliminate historical bargaining units merely because they include statutorily excluded employees. This is particularly so when the Union acquiesces in the removal of those employees from the bargaining unit. The Board has allowed in a variety of circumstances the removal of guards from established mixed units of guards and non guards without dismantling the bargaining unit. In *Libbey-Owens-Ford Glass Co.,* 169 NLRB 126, 127 (1968), the Board used a unit clarification petition filed by a union to remove guards from a long standing bargaining unit. The Board stated as follows:

> The Employer contends that both the multiplant unit and the Brackenridge unit includes guards as defined in the Act, and it contends that neither of these units may be clarified by the Board because to do so would be in contravention of Section 9(b) of the Act. That section precludes the Board from finding appropriate any unit which includes with other employees any individual employed as a guard. The Union has stated, however, that it seeks clarification of its multiplant unit with the exclusion, *inter alia,* of such categories as the Board, either by statute or by decision, customarily excludes from production and maintenance units. We construe this statement as an acknowledgment by the Union that the guards may not be included in a unit found appropriate by the Board and a request that the Board clarify the unit or units by excluding them. Accordingly, we shall clarify the multiplant unit and the unit of Brackenridge employees by excluding therefrom any individuals who are employed as guards as defined in the Act. [Footnotes omitted.]

In *Briggs Mfg. Co.,* 101 NLRB 74 (1952), an employee filed a petition for decertification premised on the assertion that non-guards were included in a unit of guards. The Board found the employees in contention were non guards, but nevertheless dismissed the petition finding that since the union took the position that it did not seek to represent employees who were not guards no question of representation existed as to the unit of guards since by its position the union had waived its claim to represent the non guard employees. In *Atlanta Hilton & Towers,* 278 NLRB 474 fn. 1 (1986), an employer was found to have violated the Act by its withdrawal of recognition from a union. One of the employer's arguments was that guards were included in a unit of non-guards. There the Board stated, "We find it unnecessary to determine whether the three individuals classified as operators are guards under the Act because even if they are, the Respondent would not be justified in withdrawing recognition from the Union. Guards are excluded in the unit description, and if the Respondent believes that certain individuals should be excluded because of their guard status, the proper procedure for determining the issue is unit clarification, not withdrawal of recognition." See also *Control Services,* 303 NLRB 481, 482 fn. 8 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992).

I do not find *Russelton Medical Group,* 302 NLRB 718 (1991) controlling here. There a Board majority dismissed an 8(a)(5) complaint against an alleged successor employer based the predecessor's unit including both professional and non-professional employees. The union's only demand for recognition was based on the bargaining unit of the predecessor. The Board majority discussed other cases where the Board had enforced bargaining in historical mixed professional and non professional units, where those units had been voluntarily recognized by the employer in question. Noting that the unit had

[11] Respondent relies on such cases as *NLRB v. Beverly Health & Rehab. Services*, 120 F.3d 262 (4th Cir. 1997); *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986); *NLRB v. Lorimar Productions, Inc.,* 771 F.2d 1294 (9th. Cir. 1985); and *Hamilton Test Systems, N.Y., v. NLRB*, 743 F.2d 136 (2d Cir. 1984), in support of its argument that the Union could not unilaterally alter the predecessor's unit. First, I do not find that the Union unilaterally altered the predecessors unit. Rather, the Union acquiesced in Respondent's objections to the predecessors unit. Moreover, the four cited cases involve the propriety of initial Board conducted elections where larger units were voted on by employees, ballots were then impounded, and the vote was counted for a smaller unit than the one initially advertised in the Board's election notice. The reviewing courts concluded the after the fact reduction of the announced unit may have altered the outcome of the election if the actual unit had been announced to employees before they voted. These cases do not pertain to historical bargaining units and the attendant presumptions applicable to successor employers. I do not find that concepts in postelection challenges apply to, or should serve to alter principles in a long of line successorship cases where established units are diminished as a result of changes in scope of operations of the successor from that of the predecessor, or objections to the established unit by the successor employer which are acquiesced to by the Union. In fact, Respondent cited the aforementioned cases to me during the unfair labor practice trial in an effort to convince me to revisit the card count by the arbitrator establishing the Union's majority status and recognition by Hadley Memorial. I refused to recount the cards, or to revisit the initial recognition as it pertained to Respondent's obligation as a successor employer. I relied on *Local 1424 v. NLRB, Bryan Mfg., 362 U.S. 411 (1960),* for the proposition that the original recognition by Hadley Memorial, occurring more than 6 months prior to the filing of the unfair labor practice charge was not in play in this proceeding.

not been recognized by the successor employer, the Board majority dismissed the refusal to bargain violation alleged against it. The current case is clearly distinguishable from *Russelton Medical Group,* supra, because the Union has perfected its demand for recognition by agreeing to the removal of guards and professional employees from the unit. The Union's acquiescence in their removal from the unit removes them from consideration as to whether the requested unit is now appropriate.[12]

In the present case, Hadley Memorial had voluntarily recognized the Union around November 14, 2005, following a card check by an arbitrator, in an agreed upon unit between Hadley Memorial and the Union. The agreed upon unit between Hadley Memorial contained technical and non technical employees, professional employees, and guards. In this regard, there were 169 employees in the unit at the time of recognition, of whom 10 were guards, and 5 classified as pharmacists were professional employees. Around November 2006, Respondent purchased the assets of Hadley Memorial, and on November 13, 2006, Respondent assumed the operation of the Hospital with all of the employees in the bargaining unit previously recognized by Hadley Memorial. The employees were performing the same functions, and Respondent admits in its answer to the complaint that it continued to operate the Hospital in basically unchanged form as it was operated by Hadley Memorial. There was also no hiatus in operations between Respondent and Hadley Memorial. It is clear in the circumstances here that from the employees perspective they would have assumed their jobs as "essentially unaltered" when Respondent began operating the facility. See, *Sunrise Nursing Home,* 325 NLRB 380, 381 (1998); and *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 43 (1987). It is also clear under the standards set forth in *Burns* and *Fall River* that the similarities between the between Hadley Memorial and Respondent's operations manifested a "'substantial continuity' between the enterprises." The fact that Hadley Memorial had voluntarily recognized the Union does not preclude a successorship finding. See *Southern Power Co.,* 353 NLRB No. 116 (2009); *Van Lear Equipment, Inc.,* 336 NLRB 1059, 1063 (2001); *Lincoln Park Zoological Society,* 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997); and *Proxy Communications,* 290 NLRB 540, 541 (1998), enfd. 873 F.2d 252 (2d Cir. 1989). The fact that the Union had not achieved a collective-bargaining agreement with Hadley Memorial also does not serve as a bar for finding for successorship with Respondent. See *Lockheed Engineering, Co.,* 271 NLRB 119 (1984). The fact that the Union only had a collective-bargaining relationship for a year with Hadley Memorial should also not serve to vitiate Respondent's bargaining obligation, for in *NLRB v Burns Security Services,* 406 U.S. 272, 278–279 (1972), Burns was found to be a successor employer, although the union there had only been certified a few months as the bargaining representative to the predecessor employer, when the predecessor lost its contract for the work to Burns.

Moreover, Respondent cannot claim surprise here, as it is clear that Respondent was aware there was a union in place at the time Respondent acquired the Hospital. Respondent admitted the Union was the exclusive collective-bargaining representative at Hadley Memorial to the unit specified in the complaint, which included both guards and pharmacists for the period of November 14, 2005, to around October or early November, 2006, in Respondent's answer to the amended complaint. Union attorney Godoff's undisputed testimony reveals that on November 9, it was Respondent, through a phone call from its attorney Damato to Godoff, that first contacted the Union concerning Respondent's bargaining obligation with the Union. While they discussed bargaining during the call, there was no claim that there was a discussion of the parameters of the bargaining unit. In fact, Damato by letter dated November 17, 2006, to Godoff stated in reviewing materials related to the Union's request for bargaining that the bargaining unit appeared to be inappropriate under the Act in that it included guards with non guards, and that it included professional employee pharmacists with non professional employees, and the professionals had not been given the opportunity to vote as to their inclusion. Damato went on to state that Respondent was not prepared to recognize the Union as the bargaining representative in this inappropriate unit. Thus, Respondent was aware of the Union's presence at the time it acquired the Hospital, and it had materials in its possession to define the bargaining unit at Hadley Memorial. See, *NLRB v. Burns Security Services, Inc.,* supra, where the Court cited the respondent employer's knowledge of union's status at the predecessor, in finding the successor employer had a bargaining obligation.

[12] I would also urge the Board to revisit the result reached in *Russelton Medical Group,* 302 NLRB 718 (1991). For, the Board has stated that a successor employer stands in the shoes of a predecessor vis a vis its relationship with a union. See *Proxy Communications*, 290 NLRB 540, 542 fn. 16 (1998), enfd. 873 F.2d 252 (2nd Cir. 1989). The holding in *Russelton Medical Group*, supra, that a voluntarily recognized historically mixed professional and non professional units are sanctioned by the Board in a 8(a)(5) context, but do not attach to a successor employer, would seem to fly in the face of the Board's prior pronouncement in *Proxy Communications*, supra. Moreover, Sec. 9(b)(1) of the Act appears to be written to protect the interests of professional employees, not for successor employers to use it as a shield to escape their bargaining obligations with a historically recognized unit. This is particularly so here when Respondent filed an RM petition on June 27, 2007, which was subsequently dismissed because Respondent made no claim that the Union had lost majority support amongst the employees, nor did it supply any evidence of objective considerations to support such a claim. Here, there is no dispute, that the pharmacists did not vote as to whether they wanted to be included in a unit with non professionals, as required under Sec. 9(b)(1) for the Board to certify the unit. However, the Board has enforced bargaining orders pertaining to mixed units of professionals and non professionals that were voluntarily created and maintained by the parties, without the professional employees being afforded the opportunity to vote concerning their status in the unit. See *Integrated Health-Services*, 336 NLRB 575, 580 (2001); *Gibbs & Cox*, 280 NLRB 953, 955 fn. 12, and 968 (1986); *St. Luke's Hospital Center*, 221 NLRB 1314, 1315 (1976), enfd. 551 F.2d 476 (2d Cir. 1976); and *Retail Clerks Local 324 (Vincent Drugs),* 144 NLRB 1247 (1963). Regardless of its viability, *Russelton Medical Group*, supra, as set forth above, is clearly distinguishable from the present case, because unlike there, the Union here has filed an amended request for recognition agreeing to Respondent's position to eliminate guards and professionals from the unit.

The parties stipulated that as of February 1, 2007, there were 148 employees working for Respondent in the amended bargaining unit which excluded pharmacists and guards, and that 142 of those employees had previously worked for Hadley Memorial. Respondent took over Hadley Memorial's Hospital on November 13, 2006. On November 9, during a phone call initiated by Respondent's counsel, union attorney Godoff requested recognition for the Union in the bargaining unit that had been recognized at Hadley Memorial, which was a mixed unit totaling 169 employees, including 12 guards and 4 professional employees. Respondent's attorney responded to the request to recognition by letter dated November 17, 2006, declining recognition because the predecessor's unit constituted a mixed unit including guards and professionals, with employees not in those categories.[13] By letter to Respondent's counsel dated February 1, 2007, Godoff renewed the Union's request for recognition, stating the Union was willing to disclaim interest in the guards and professionals (pharmacists). Thus, it was about 2-1/2 months after Respondent took over the Hospital's operation that the Union perfected its request for recognition in the currently sought after unit. I do not view this delay as having a significant impact on the bargaining unit employees, or as to the bonafides of the Union's representative status. In *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987), the Court made a successorship finding although there was a 7-month hiatus in operations between that of the successor and the predecessor. Moreover, the Board has provided a union with leeway as to the specificity of its bargaining demand pertaining to the bargaining unit to a successor because of the vagaries inherent in the change of the operation as to ultimate unit where bargaining obligation inures to the union. See, *Trident Seafoods,* 318 NLRB 738, 739 (1995), enfd. in part 101 F.3d 111 (D.C. Cir. 1996); and *Hydrolines, Inc.,* 305 NLRB 416, 420 (1991). Accordingly, I find Respondent is a successor employer with a bargaining obligation with the Union providing that the amended unit requested by the Union is an appropriate unit for bargaining.

2. The Union has requested bargaining in an appropriate unit

a. The Board's Rules for Acute Care Hospitals do not apply here

The law is clear in successorship and other cases that it is not necessary the requested unit be the most appropriate unit, or that there are no other units that are more appropriate. All that is required is that the requested unit be an appropriate unit. *Professional Janitorial Service of Houston, Inc.,* 353 NLRB No. 65 (2009); *Sunrise Nursing Home,* 325 NLRB 380, 381 (1998); and *Hartford Hospital,* 318 NLRB 183, 191 (1995), enfd. 101 F.3d 108 (2nd Cir. 1996). See also *Phoenix Resort Corp.,* 308 NLRB 826, 827 (1992); and *J.C. Penny Co.,* 328 NLRB 766.

In *Trident Seafoods, Inc.,* 318 NLRB 738, 738 (1995), enfd. in part. 101 F.3d 111 (D.C. Cir. 1996), the Board set forth the following principles:

> Regarding the appropriateness of historical units, the Board's longstanding policy is that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales,* 288 NLRB 1123 fn.5 (1988). The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate. id. The evidentiary burden is a heavy one. See, e.g., *Children's Hospital,* 312 NLRB 920, 929 (1993) ("compelling circumstances' are required to overcome the significance of bargaining history"); *P.J. Dick Contracting,* 290 NLRB 150, 151 (1988) ("units with extensive bargaining history remain intact unless repugnant to Board policy").

The Board stated in *Trident Seafoods* that, in reviewing the facts pertaining to a successorship situation, the Board keeps in mind the question of whether the employees who have been retained will understandably view their job situation as essentially unaltered. The Board stated, "By requiring the party challenging a historical unit to show the unit is no longer appropriate, the Board recognizes the importance *Fall River* places on employees' perspective in a successorship analysis." *Trident Seafoods, Inc.,* supra at 738–739. In *Trident Seafoods* the Board found the respondent employer was a successor employer with respect to three bargaining units in question relying in principal part on the fact that the units had been historically recognized by the predecessor employer.[14]

Counsel for the General Counsel argues that the Board's health care bargaining unit rules for acute care hospitals only apply to representation petitions involving new units of previously unrepresented employees and are not applicable in cases involving successor employers with existing bargaining units. In *Hartford Hospital,* supra, an employer was found to be a successor employer following the merger of two hospitals resulting from a stock transfer. The smaller of the hospitals specialized in mental health services, and had a longstanding collective bargaining unit which included technical employees, which at the time of the merger consisted mostly of psychiatric technicians. There, the respondent's argument that following

[13] It is of note that during this exchange, Damato never claimed to Godoff that respiratory therapists and recreational technicians should be included in any appropriate unit. Rather, the sole reason Respondent gave at the time for its refusal to recognize the Union was that Hadley Memorial unit included guards and pharmacists.

[14] In *Trident Seafoods, Inc., v. NLRB,* 101 F.3d. 111 (D.C. Cir. 1996), the court acknowledged the heavy burden on a party attempting to demonstrate that a historical unit is not appropriate. Thus, the court approved two of the three bargaining units at the successor employer found by the Board, but refused to enforce the Board's order for a historical separate bargaining unit of non resident processors in that the court concluded there is no difference between those employees and resident processors, although the latter had been excluded from the unit. The facts applicable to the resident processor bargaining unit are not applicable to the instant case as the respiratory therapists and recreation technicians are separately supervised, and perform different functions from the bargaining unit employees.

the merger a combined unit of all technical employees was required was rejected. It was held that the centralization of administration functions of the two hospitals and top level management did not require a combined unit, where site supervision favored separate units following the merger. Unit employees participation in training with non unit employees was also not sufficient to overcome the historic unit. The respondent's argument that the Board's health care rules required the unit to comport with one of the units required by the rules for acute care facilities was rejected by the Board, as it was stated under the Board's rules there was an exception for existing non conforming units. It was specifically stated that "As the legal successor of the IOL, Respondent stands in the IOL's shoes with regard to the application of the health care unit rules." It was stated "the exception for preexisting nonconforming units mandates the continuing viability of the IOL unit as an appropriate unit following the merger." id. at 193-194. It was noted that even if the health care bargaining unit rules were applied, the exception for psychiatric institution would preclude the application of the acute care unit rules, and it was established beyond any question that the IOL unit continued to exist as an appropriate unit. [15]

Similarly, in *Pathology Institute,* 320 NLRB 1050, 1051 (1996), enfd 116 F.3d 482 (9th Cir 1997), cert denied, 522 U.S. 1028 (1997), there was a transfer of represented employees from one to another entity constituting a single employer in which the scope of the bargaining unit was reduced to only acute care hospital locations. There, the judge found applicable the Board's Rule on collective-bargaining units in the health care industry and concluded a unit confined to medical laboratory technologists is not one of the eight appropriate units enumerated in Section 103.30(a) of the Rule. The judge recognized that the Rule specifically excepts "existing nonconforming units," but he found that after June 1992 the unit was "substantially different" from the historic unit and thus was not an "existing" nonconforming unit within the meaning of the Rule. Consequently, the judge concluded that the post-June 1992 unit was not an appropriate one and could not be the subject of a bargaining order. The Board disagreed with the judge's conclusion noting that Section 103.30(a) sets forth the specific units appropriate "for petitions filed pursuant to Section 9(c)(1)(A)(i) or 9(c)(1)(B) of the ... Act." The Board stated that the instant case did not involve such a petition. The Board stated, "Assuming, however, that the Rule is applicable in unfair labor practice cases, we find, contrary to the judge, that the unit in issue here is an 'existing nonconforming unit' within the meaning of Section 103.30(a)." The Board found that the unit, although smaller, is essentially the same unit of medical laboratory technologists that existed prior to closing the nonacute care facilities. The Board stated:

Moreover, nothing in Section 103.30 suggests that an employer in the health care industry may cease recognizing a union as the representative of its employees in an existing unit merely because of a reduction in the number of unit employees or because of a closure of the nonacute care portion of an employer's facilities. On the contrary, permitting an employer to withdraw recognition under such circumstances would be inconsistent "with the design and purpose of our decision to engage in rulemaking—to further the long-standing policy of promoting industrial and labor stability." (fn 3).

> For these reasons, we find that even if the Rule applies to unfair labor practice cases, the instant case falls under the "existing non-conforming units" exception. Therefore, the appropriate unit issue must be decided not under the Rule, but under traditional representation principles. We agree with the judge's implicit finding that the post-June 1992 unit is appropriate under such principles. Thus, as the judge found, the unit that remained after the closure of Respondent PI "contravenes no statutory policy and works no injustice to Respondents." Nor was it a unit "which totally lacked viability. It was what was left of a historic unit. It was employer-wide in scope, consisting of all medical laboratory technologists who remained employed by Respondents." In sum, the change in the size of the unit resulting from the Respondents' reduction of its laboratory operations did not "destroy the continued appropriateness of [the] historic unit." Accordingly, the Respondents' refusal to recognize the Union as the collective-bargaining representative of its medical laboratory technologists, and their failure to apply to unit employees the collective-bargaining agreement between Respondent PI and the Union, violated Section 8(a)(5) and (1) of the Act. (fn 4).

See also *St. Mary's Duluth Clinic,* 332 NLRB 1419, 1420–1421 (2000); *Crittenton Hospital,* 328 NLRB 879 (1999); and *Kaiser Foundation Hospitals,* 312 NLRB 933, 934-935 (1993) as other instances where the Board's health care bargaining unit rules for acute care hospitals were not applied to pre-existing non conforming units.

[15] The charging party, citing *Child's Hospital,* 307 NLRB 90, 92 (1992), argues that Respondent's nursing home and acute care units are so integrated that the Board's bargaining unit rules for acute care hospital's do not apply here. In *Child's Hospital,* the Board refused to apply the bargaining unit definitions for its rules for acute care hospitals to that particular institution. The Board stated that, under the extraordinary circumstances there, such as the physical joinder of the nursing home and the hospital, the substantial nature of both operations, and the integrated support services provided to both parts of the operation by Samaritan, which was located at the facility, it would not be feasible or sensible to automatically apply the rule as to bargaining units for acute care institutions for that facility since the rule was meant to cover more typical free-standing acute care hospitals. The Board in finding that the acute care unit rules did not apply due to the nature of the operation, stated it was not necessary to determine whether the nursing home in combination with the acute care operation technically met the Board's rule's definition for length of patient stay for an acute care facility, stating if the calculation was made by the year, in that instance it would probably skew in favor of an acute care facility finding, but it if was made by the day, the results would probably skew in favor of a non acute care status. id at 92 fn 14. In the instant case, as in *Child's Hospital,* Amato's testimony reveals that the nursing home and acute care aspects of the facility were centrally managed through Amato, and that the first floor administration unit serviced both the acute care and long term care units. Respondent's operation is similar in nature to the operation in *Child's Hospital,* and for the reasons set forth in detail in that case it would appear that the Board's bargaining unit rules for acute care institutions would not be applicable to Respondent since Respondent is a combined nursing home and acute care facility.

I find that Respondent's operations, a combination of acute care facility and long term care center remove it from the Board's rules concerning specified units for acute care hospitals. See, *Child's Hospital,* 307 NLRB 90, 92 (1992). I also find that even it the Board's regulations for acute care hospitals were found to apply to Respondent's facility they do not apply here as they were not by their terms meant to apply to "existing non-conforming units." See, *St. Mary's Duluth Clinic,* 332 NLRB 1419, 1420–1421 (2000); *Crittenton Hospital,* 328 NLRB 879, 880–881 (1999); *Pathology Institute,* 320 NLRB 1050, 1051 (1996), enfd 116 F.3d 482 (9th Cir 1997), cert denied 522 U.S. 1028 (1997); *Hartford Hospital,* 318 NLRB 183 (1995), enfd. 101 F.3d 108 (2d Cir. 1996); and *Kaiser Foundation Hospitals,* 312 NLRB 933, 934-935 (1993).

b. The requested unit is appropriate without the inclusion of respiratory therapists

In *New Orleans Public Services,* 215 NLRB 834, 836 (1974), in finding a unit of all of an employer's technical employees was not the appropriate unit there, the Board stated:

> It is the Board's policy to join in a single unit all technical employees similarly employed and to find a unit of technical employees inappropriate where it does not include all of the employees in that category. However, if the technical employees in the proposed unit perform functions which are sufficiently distinct from those of other employees, this will justify their inclusion in a separate unit to the exclusion of other employees who may be technical employees.
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> . . . .
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> The Board has defined technical employees as "employees who do not meet the strict requirements of the term 'professional employee' as defined in the Act but whose work is of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses." (Footnotes omitted.)

In *Alta Vista Regional Hospital,* 352 NLRB No. 100, (2008), the Board issued a Section 8(a)(5) refusal to bargain order on summary judgment for a bargaining unit at an acute care hospital where respiratory technicians were defined as professional employees within the bargaining unit, although the unit in question there included both professional, technical employees, and other non professional employees. Similarly, in *Kentucky River Medical Center,* 333 NLRB No. 29, (2001), enfd. 33 Fed. Appx. 735 (6th Cir. 2002), pertaining to an acute care hospital, the Board approved a Section 8(a)(5) finding premised on a motion for summary judgment in a unit which included certified respiratory therapists as technical employees, but excluded registered respiratory therapists. It was noted there that although the Respondent was presently contesting the unit, it had stipulated to the unit in the underlying representation proceedings. In *Lakeside Community Hospital, Inc.,* 307 NLRB No. 189 (1992), enfd. 8 F.3d 71 (D.C. Cir. 1993), respiratory therapists were included in a bargaining unit defined as professional employees. In *Presbyterian/St. Luke's Medical Center,* 289 NLRB 249, 250 (1988), in affirming the Regional Director's finding that respiratory therapists should be included in a bargaining unit with registered nurses, and other professional employees the Board stated:

> The registered nurses are the largest group of professional employees and they work 24 hours a day, 7 days a week. The record shows that a number of other professionals, e.g., pharmacists, dieticians, and respiratory therapists, also work the same schedule. All the Employer's professional employees have specialized skills, training, and education which require post-secondary education. Their common educational background (in certain courses of study) provides for some overlap in qualifications, skills, and duties with the other professionals.

On the other hand, Respondent cites several cases where respiratory therapists were found to be technical employees. In *St Anthony Hospital Systems, Inc.,* 884 F. 2d 518, 523 (10th Cir 1989), the court stated the Regional Director concluded the evidence did not support a finding that the respiratory therapist positions satisfied the strict requirements of a "professional" under Section 152(12). The court went on to state without discussing the specifics of the positions involved that, "The Hospital has not persuaded us, however, that the Regional Director's conclusion is unsupported by substantial evidence in the record." The court went on to state if there were recent changes in those positions it could properly addressed in a unit clarification petition. This latter statement signifies that the professional status of these employees may shift based on their actual job functions and requirements at a particular employer. There are other cases cited by Respondent where respiratory therapists were found to be technical employees such as: *Meriter Hospital Inc.,* 306 NLRB 598 (1992); *Samaritan Health Services, Inc.,* 238 NLRB 629; *Children's Hospital of Pittsburgh,* 222 NLRB 588, 591 (1976); *Jewish Hospital of Cincinnati,* 223 NLRB 614 (1976); and *Barner Memorial Hospital Center,* 217 NLRB 775, 779 (1975).

The testimony of Waddell Swilling, the former clinical manager for respiratory therapists (RTs) at Hadley Memorial reveals that, Swilling oversaw the dispensing of doctors' orders for respiratory therapy, and he organized the RTs staff to perform the required work, including: the delivery of oxygen therapy, medication therapy, monitoring flow meters and drawing blood for the arterial blood gas tests, assessing the patients and making recommendations to the physicians as to patient care plans. Around 28 to 32 RTs reported to Swilling, who reported to the director of nursing. Swilling testified that no RTs transferred in from other departments, or vice versa. Of the 28 to 32 RTs in 2007, about six were part time working between 16 to 32 hours a week.

Swilling's educational background is a two-year degree from the University of the District of Columbia. It is an associate degree for respiratory therapy which qualified Swilling for a

respiratory license, upon the passing of a licensing exam. Swilling explained there was a requirement of a total of 120 college course hours to receive the associate's degree; 60 of which pertain to respiratory therapy. Swilling testified that, currently, under D.C. licensing requirements, the RT has to take three credits in ethics. Swilling testified that, in 2007, there was only a one credit hour requirement for ethics. Upon completion of the two year course, and passing the licensing exam, an individual is certified as a respiratory therapist. The requirements to be hired as an RT at Hadley Memorial were the completion of an approved respiratory program, a license as a respiratory therapist, possession of a CPR card from a sanctioned American Hearth Association CPR program, and six months to a year prior experience. When Swilling oversaw RTs at Hadley Memorial, there were continuing education requirements. The license renewal the requirements include 16 course hours dealing primarily with respiratory therapy or related care every two years. RTs receive training lifting patients, along with CNAs. RTs receive CPR training with RTs, but sometimes with other employees such as CNAs.

Swilling testified there are certified RTs and registered RTs employed at Respondent. A certified RT is trained in the basic elements of the discipline of respiratory care. A registered RT is trained in more advanced concepts and has a higher education level. A certified RT should be able to set the machine up safely and implement the physician's orders. Swilling initially testified a certified RT would not be expected to assess the patient and make a recommendation to the physician. A registered RT would engage in assessments and recommendations to physicians.[16] There are separate tests for certified and registered RTs. The test for a registered RT employs more advanced concepts. An RT needs either clinical exposure or additional training to take the registered RT exam. Swilling was certified and registered. He testified he took several seminars in order to qualify for the registered exam, the different required topics included, airway management, innovation, and EKG. Swilling testified he thought he took at least four two day seminars before he qualified for the registered exam. In 2007, about one third to one half Respondent's RTs were registered. Swilling testified there were certified RTs with many of years of experience who could perform like a registered RTs. Registered RTs generally make higher wages than certified RTs, however, that can be overcome based on length of service. The RTs are part of an IDT or interdisciplinary team which at Hadley Memorial met at least three times a week with the physician. During the meeting they would go through all of the disciplines and ask for updates on the care plan the doctor has implemented for a patient. The doctor takes control of changes to the plan.

Respondent's job description of RTs I and II, state they should be a member of AARC and the local chapter of AARC which is the American Association of Respiratory Care. The District of Columbia has issued "Municipal Regulations for Respiratory Therapy." The regulations provide that, in addition to specified educational requirements, an applicant for a license shall receive a passing score on the National Board Examination developed and administered by the National Board for Respiratory Care. Renewal of the license requires the demonstration of specified continuing education requirements. The Commission on Accreditation of Allied Health Education Programs has issued a document entitled, "Standards and Guidelines for the Profession of Respiratory Care." It states, "These accreditation standards are the minimum standards of quality used in accrediting programs that prepare individuals to enter the Respiratory Care profession." The preamble of the document states, "Respiratory therapists are members of a team of health care professionals working in a wide variety of clinical settings to evaluate, treat, and manage patients of all ages with respiratory illnesses and other cardiopulmonary disorders. As members of this team, respiratory therapists should exemplify the standards and ethics expected of all health care professionals."

The patients at Hadley Memorial were a mix of an older nursing home population and LTAC patients. The majority in LTAC are very ill, including patients with lung cancer, AIDS, chronic diseases like emphysema, and chronic bronchitis. The RTs perform diagnostic work and therapeutic work with the patients. Concerning diagnostics, RTs obtain sputum and breath samples and analyze them in order to determine levels of oxygen, carbon dioxide, and other gases in the blood. RTs then interpret the data received with respect to the specimens, and present recommendations with respect to the data to the physicians who act upon the recommendations most of the time. RTs also spend time measuring the capacity of patient's lungs to function. The RTs perform limited stress tests on patients to test the capacity of their cardiopulmonary systems.

Swilling testified procedures RTs perform on patients include: pulse oximetry, where they check the oxygen saturation in the blood; arterial blood gas studies, to let the doctor know whether the lung function is working, and whether the level of oxygen given to the patient is sufficient; and tracheal oxygenating. As to the latter, a patient may become obstructed, and they may need assistance to clear the airway, which is called tracheal suctioning. There are alternate procedures, such as the RTs going directly through the nose or through the mouth when a patient's airway is obstructed. RTs perform pulmonary function studies testing a patient's lung output, and they compare the results to preset norms based on the age, height, and the weight of the patient. They record the results of the studies for the doctor's review. RTs perform mechanical ventilation, which is when a patient has respiratory failure the doctor will order the patient's breathing to be supported or controlled and the therapist, based on the order, will make sure that the patient is maintained. RTs perform continuous oxygen therapy where a patient is given oxygen for support. RTs administer drugs such as nebulization treatments ordered by a doctor to open up someone's airway.

RTs follow the doctor's orders in implementing treatments unless the patient reacts to the treatment or there is something the doctor did not notice such as a broken rib or an allergic reaction. RTs have the right to look at the procedures laid out for the treatment and decide which of those procedures are necessary for a particular patient. If an RT realizes a procedure

[16] However, Swilling later testified that both registered and certified RTs assess patients.

that they are asked to perform cannot be performed, they can they make a recommendation to the doctor for a different procedure to accomplish the same goal. Doctors will follow RTs recommendations from time to time such as using a new piece of equipment for treatment. RTs interact with the patients to assess the effects of the treatments.

RTs operate and maintain a range of equipment whose purpose is to administer oxygen or to assist with breathing. RTs use mechanical ventilators for treating patients who cannot breathe adequately. RTs administer medication in an aerosol form to alleviate breathing problems. RTs make judgments as to how to administer treatments. The equipment RTs use include: a spirometer to measure the patient's breathing; nasal cannulas to deliver oxygen; the venturi mask for oxygen delivery; an ultrasonic nebulizer to make a fine mist to help in breathing; a percussor to vibrate the chest wall to help clear it; a pulse oximeter to monitor a patient's oxygen absorption rate; ventilators; oxygen masks; an aerosol T is used for moisture when there is an artificial airway in the trachea.

Concerning the equipment RTs operate, the RTs hook it up to the patient and monitor it. In the absence of an RT, an LPN or RN may give the medication for a nebulization treatment to the patient and they may activate the compressor. Primarily RTs manage the mechanical ventilator. In the absence of an RT, if the machine is malfunctioning or the nurse feels the patient is not safe, then they are instructed to take the patient off the machine and operate a resuscitator and bag until an RT or physician arrives to troubleshoot or replace the machine. The spirometer is primarily used by the RTs. Everyone who is caring for a patient uses the nasal canola. The venturi mask is also a universal piece of equipment used by the nurse and the RTs based on a patient's needs. The ultrasonic nebulizer is more sophisticated. It is used primarily by the RTs, but if a nurse sees the machine is not working correctly, they can turn it off and call for assistance. The physician orders the procedures, but the RTs perform arterial blood gas studies, checking oxygen levels in blood and checking oxygen levels in the blood gas studies. The RNs who work in the intensive care area have knowledge of performing these procedures. However, it is primarily the RTs that perform them.

RTs at Hadley Memorial worked throughout the hospital in the patient care areas. During the course of their job, RTs interact with LPNs. They share information about the patients as to whether the care plan is working, and they answer the nurses' questions about the patient's breathing. The LPN's also provide the RTs information about the patients. The RTs interact with the LPNs at least two to three times a shift. RTs also interact with CNAs in the care of patients about two to three times a shift. The RTs interact with the unit secretaries to receive information about physicians' orders for patients. The parties stipulated the RTs interact with a range of service and maintenance and technical employees in the bargaining unit for which the Union sought recognition.

RTs keep patient progress notes in that when they perform a procedure they document the results. The LPNs also use progress notes to document the results of anything that is done to a patient. The RTs and LPNs use the MAR , the medical administration record, listing the schedule for the medications the doctors prescribe a patient. The MAR is a chart with squares with the times assigned to it. Nursing and RTs check off the medications they administer to the patient on the MAR. Swilling testified RTs fill out critical value reports if test results are outside of the normal limits in that the RTs has to make sure the information is communicated up the chain of command and the doctor is notified. LPNs also use critical value reports for such things as Glucose monitoring. An RT, RN, and doctors do program notes, and MARS.

Swilling testified RTs use their own judgment in making decisions on how to take care of a patient. The RTs have a policy and procedure manual containing guidelines for the RTs including 20 procedure related items. The RT can elect to use all 20 procedures for a patient, or they can choose a short list, if that solves the patient's needs. Swilling testified there is independent judgment involved in choosing which procedures to follow. The doctors order a treatment such as a nebulization treatment, and it is up to the RT to decide which procedures to follow to institute the treatment from the list of procedures provided by the Hospital in its policy and procedure manual. The RT can review the list and decide which of the items is necessary for a particular patient based on the patient's needs. The RT communicates with the patient and checks the different parameters to determine whether to continue or stop a treatment, or the RT calls a physician, or notifies the nurse to call a physician. The RT can stop a treatment prior to calling a doctor if they notice the procedure is not working or if it is causing the patient stress. If there is an emergency with a patient, the nurse who is an RN or an LPN and the RT join together in their assessments based on the guidelines for nursing and the guidelines for RTs. They have steps that they are supposed to follow, and the RTs usually maintain the airway to make sure the patient is breathing, take their pulse, and monitor their heart rate.

Respondent's records reveal that it employed 35 LPNs and 35 RTs as of April 30, 2009.[17] At that time, the LPNs pay ranged from $19.50 to 31.82 per hour. The RTS pay ranged from $26.28 to $32 an hour. There were 13 LPN's being paid $25 an hour, and 14 RTS being paid $30 an hour. The mean average hourly rate for the LPNs was $24.64 and for the RTS it was $29.31. The LPNs were the highest paid employees in the requested bargaining unit. There was one painter earning $22.60 an hour.[18]

The charging party argues the RTs are professional employees under Section 2(12) of the Act, while Respondent contends that they are technical employees. From, my perspective I need not decide the status of these employees as to whether they are technical or professional to determine

[17] Jt. Exh. 2

[18] The above calculations were derived from figures obtained from R. Exh. 13. I used the April 2009 wage rates because the wage rate figures provided for February 2007, were incomplete. In this regard, in Jt. Exh. 3, covering February 2007, there were wage rates for 21 RTS, while the record revealed Respondent employed 27 RTs at that time. Similarly, there were only pay rates for six LPN's provided for February 2007, while the record revealed Respondent employed 22 LPNs at that time.

that their exclusion from the unit here does not vitiate Respondent's bargaining obligation with the Union. I have found that Respondent is a successor employer to Hadley Memorial. The bargaining proposals between the Union and Hadley Memorial reveal that Hadley Memorial specifically sought the exclusion of RTS from the unit it agreed to with the Union. Moreover, I find that the RTS have a separate and distinct community of interest from the bargaining unit employees. The RTS are separately supervised from the unit employees, and they are higher paid. The have unique training and skills from the remainder of the bargaining unit. Their accreditation labels them as professional employees. They are required to receive training in ethics, and to take continuing education courses specific to their specialty in order to retain their licenses. They operate sophisticated equipment and are required to make patient assessments based on their testing, and to make recommendations to doctors concerning patient care. There is no history of interchange between the RTS and the bargaining unit positions. While they have daily contact with some of the bargaining unit employees, they also have frequent contact with RNs and doctors, but there is no contention that the latter should be in the unit. I find the nature of the contact of the RTS with unit classifications is not sufficient to override both the historical nature of the unit, as well as the unique status and separate community of interest of the highly skilled and specialized RTS whether they are labeled technical or professional employees. See, *Hartford Hospital,* 318 NLRB 183 (1995), enfd. 101 F.3d 108 (2d Cir. 1996); *New Orleans Public Services,* 215 NLRB 834, 836 (1974);[19] and *Ochsner Clinic,* 192 NLRB 1059 (1971) (radiological techs were found to constitute a separate unit apart from other technical employees); and *Pontiac Osteopathic Hospital,* 227 NLRB 1706 (1977) (LPN's were excluded from a unit of all technical employees based on separate bargaining history). While Respondent has cited several cases where RTS were found to be technical employees, there have been other instances where the Board has approved bargaining units labeling them as professional employees, or at a minimum excluding them from units of technical employees. See, *Alta Vista Regional Hospital,* 352 NLRB No. 100, (2008); *Kentucky River Medical Center,* 333 NLRB No. 29, (2001); Lakeside Community Hospital, Inc., 307 NLRB No. 189 (1992); and *Presbyterian/St. Luke's Medical Center,* 289 NLRB 249, 250 (1988). Accordingly, I find the unit requested on February 1, 2007, is an appropriate unit, although it excludes respiratory therapists.

c. The requested unit is appropriate without theinclusion of recreation technicians

Debbie Scott is employed by Respondent as therapeutic and recreation coordinator. Scott has worked at the Hospital in that position for over 16 years. Scott's job consists of planning and coordinating recreational leisure activities for the Hospital. Scott plans the activities for the second and third floor of the facility on a daily basis. The recreation unit is located on the second floor of the Hospital in one office area. Scott testified she is the only supervisor who supervises the employees in the recreation department. Caliathia Green is the nursing home administrator and she is Scott's supervisor. Green is not the administrator for the whole hospital, just the third floor.

Scott testified that, at the time of the hearing, there were four recreation technicians, a recreation assistant, and one cosmetologist reporting to her, and that Scott had the same number of recreation technicians reporting to her in the beginning of 2007.[20] Scott testified the cosmetologist came within her department two years prior to the hearing, which was held in May 2009. She testified the cosmetologist was not in her department at the time Respondent took over the operation. Scott testified that, at that time, the department consisted of the four recreation technicians, and a recreation assistant. Scott testified the function of a recreation technician has not changed since 2007. She testified they carry out the care plans for a patient and make goals. Scott testified that on a typical day, the patients come from their room to a day room where they participate in a group activity. The recreation technician also sees patients or residents on a one-to-one basis.

Scott testified three CNAs transferred into the recreation department in the past 16 years. Libby Rodriguez is a CNA who transferred in around seven years ago. Anita Cunningham, a prior CNA, transferred in around three years ago to become a recreation technician. Scott testified that Cheryl Cunningham, a former CNA, went back to school for cosmetology and then she applied for the cosmetology position in September 2008. Cunningham went to school while she was a CNA. Scott testified no one has transferred out of the department to other positions.

Scott evaluates employees and directs the employees in her department. Scott testified there are recreation techs I's and II's in Scott's department. Scott testified the recreation tech II is trained on how to document charts. Scott testified the job requirements for a recreation technician used to be a high school diploma and some college. It changed around 2007 to require a high school diploma and six months of experience working in a long-term healthcare facility. Scott was not sure of the actual timing of the change in the requirements. The recreation therapists are required by Respondent to have a CPR certification, the training and testing for which is provided by Respondent. Scott testified that others who have had CPR training at the hospital are technicians, nurses, security, dietary, and environmental service.

Scott testified a patient is cared for by interdisciplinary team members, including the doctor, a nurse, a social worker, case manager, RTs, dietitian, and recreation technician. Scott testified there is a weekly meeting where the team members discuss

[19] The applicable results of these two cases were described in detail above in a prior section of this decision.

[20] Respondent is not contending that the cosmetologist should be included in the bargaining unit. (Tr. 43). Respondent is apparently not contending that the recreation assistant should be in the unit. Scott testified the recreation assistant has the authority to discipline employees.

the patient's care plan. The recreation technicians have been attending the care plan meetings since 2007. The recreation technicians work on both the second and third floor. They interact with LPNs and CNAs on a daily basis to receive information about a patient or resident. They can also receive such information from an RN. Scott testified recreation technicians also interact with unit secretaries in that they will ask unit secretaries to order lunch for the long term care residents when the recreation technicians take them on outings. Unit secretaries also provide recreation technicians with information about patients. Scott testified there is interaction between recreation technicians and food service employees when there are special events or when the food service employees bring the food up to the floor. Scott testified recreation technicians also interact with other employees when they use the cafeteria. If there is a special family meeting to discuss a patient's care that Scott cannot attend she will designate a recreation technician to attend. A nurse would usually attend, a doctor if requested, the dietician, and a social worker would be there as well as a respiratory therapist. The nurse could be an LPN or an RN.

Scott testified the activities department has one computer which is used by Scott and the four recreation technicians and it is hooked up to the hospital network computers. The recreation technicians use an attendance sheet where they track the residents. The recreation technicians record when they go to a room to visit a resident. They have a wallboard where they write down when they saw the patient and the patient's progress so Scott will be able to tie the progress into the resident's medical chart. The resident's medical chart is used by all interdisciplinary team members, including LPNs and CNAs.

Scott testified the department employees usually work 9:00 a.m. to 5 p.m. There is a part time recreation technician who works from 4:30 p.m. to 8:30 p.m. Scott testified that the four recreation technicians include the part time employee. The recreation techs work every other weekend as set forth in their job description. No one is in charge of them over the weekend. If something happens on the weekend the tech will call Scott. Scott testified the recreation department uses TVs, VCRs, Wii games, table games, arts and crafts. Scott testified their equipment is not medically oriented.[21]

[21] To the extent it should become an issue in this proceeding, I do not find that it has been established on this record that Susan Harris is a statutory supervisor. Harris is the only recreation technician II. As such, she substitutes for Scott at management meetings, when Scott is absent from work, at which time Harris will also give other recreation technicians assignments if necessary, and she can approve up to one day off in Scott's absence. When Scott is away from work, Harris will call Scott if anything unusual occurs for approval on how to handle it. Harris cannot hire or fire employees. She cannot recommend discipline and does not evaluate employees. The recreation technicians' assignments are worked out by Scott on a monthly basis, they are somewhat repetitive in nature, and the employees alternate weekends when they work without on site supervision, with only telephone access to Scott. It has not been established that Harris is anything other than a lead person in Scott's absence. She does not exercise independent judgment in exercising supervisory functions, and it has not been established on this record that she responsibly directs employees.

Respondent argues that the requested unit is not an appropriate unit, in part, because it does not include the recreation technicians. Respondent argues that since the requested unit includes some non technical employees, that it is not an appropriate unit unless the recreation technicians are included in the unit. It is true, that the recreation technicians have some contact with the unit employees, and there has been an exchange with unit employees in that in the past 16 years two CNAs have transferred into the recreation department as recreation technicians. On the other hand, no employees from the recreation department have transferred to bargaining unit positions, and one of the CNAs who transferred into the recreation department assumed the position of cosmetologist, a position Respondent does not contend should be included in the unit. The evidence also reveals that the recreation technicians have their own office, and, along with the cosmetologist are separately supervised.

The bargaining history reveals that the predecessor employer, in its proposal to the Union sought to exclude, registered nurses, physical therapists, occupational therapists, speech therapists, registered and certified respiratory therapists, recreation therapists, and recreation/activity technicians from the bargaining unit. In these circumstances, I do not find the exclusion of four employees from bargaining unit of 148 employees at the time the Union made its February 1, 2007, request for bargaining renders that unit as inappropriate. The law is clear in terms of a successor's duty to bargain that he unit merely needs to be an appropriate unit, not the most appropriate unit. *Professional Janitorial Service of Houston, Inc.,* 353 NLRB No. 65 (2009); *Phoenix Resort Corp.,* 308 NLRB 826, 827 (1992); *Hartford Hospital,* 318 NLRB 183, 191 (1955) enfd. 101 F.3d 108 (2nd Cir. 1996); *J.C. Penny Co.,* 328 NLRB 766. Accordingly, I find the amended unit is an appropriate unit with the exclusion of the recreation technicians.

d. Conclusions

In sum, the Union was voluntarily recognized in November 2005, by Respondent's predecessor Hadley Memorial, following a card check by an arbitrator establishing the Union's majority status. Thereafter, Hadley Memorial participated in two bargaining sessions with the Union, the parties exchanged proposals, and they reached agreement on certain terms of a contract. The bargaining sessions took place in the hospital cafeteria and were well attended by employees as part of the Union's bargaining committee. The Union also established a presence the Hospital cafeteria where it held weekly meetings with the employees. The Union sought additional bargaining sessions from Hadley Memorial, but was put off with a variety of excuses, including vacations and maternity leave by one of Hadley Memorial's principals. Towards the end of Hadley Memorial's ownership of the Hospital, the Union was given assurances that bargaining would continue, although Hadley Memorial was in the midst of a sale of its stock. The Union was later told that, that in fact the transaction was an asset sale, and that the Union would be dealing with a new owner. While, Hadley Memorial provided the Union with a variety excuses for the delay in negotiations, it is likely that one of the reasons

for the delay, although it was not mentioned, was that Hadley Memorial was attempting to sell the Hospital, and did not want to encumber the new owner with a Union contract.

In November 2006, Respondent began operating the Hospital in unchanged form from the manner it was operated by Hadley Memorial, and retained virtually all of Hadley Memorial's employees. In November 2006, Respondent's attorney Damato contacted Union attorney Godoff by phone, and informed Godoff that Damato was serving as labor counsel for Respondent. Damato, by letter to Godoff following their phone call, stated that Respondent was refusing Godoff's request to bargain with the Union because the bargaining unit at Hadley Memorial included pharmacists, who are professional employees, and guards. Godoff responded by letter dated February 1, 2007, requesting bargaining stating the Union was willing to disclaim any interest in representing Respondent's security guards, and to disclaim interest in representing the pharmacists or to afford the pharmacists a right to decide for or against their inclusion in the unit. By letter dated February 8, 2007, Damato continued to deny the Union's request for recognition.

Respondent has since advanced additional arguments as reasons in support of its refusal to bargain, including the requested unit was inappropriate because it does not include respiratory therapists and recreational technicians. Respondent has also has filed multiple motions as well as requests for postponement causing or seeking to delay these proceedings, and it advanced an argument at the trial that employee turnover establishes the Union no longer has majority support. As to the latter argument, Respondent's records show that as of February 1, 2007, 142 of the 148 employees in the requested unit had worked for Hadley Memorial; and as of April 30, 2009, which was close in time to the trial, 107 of the 178 employees in the requested unit had worked for the predecessor employer. Respondent had also filed an RM petition which was dismissed by the Region and on appeal by the Board, because Respondent submitted no evidence that the employees were no longer supporting the Union. Respondent's actions reveal an intent to delay these proceedings in the hope that time will strengthen its argument as to employee turnover. I do not find Respondent's conduct or its argument here to be persuasive.

Respondent also argues that length of the bargaining history between Hadley Memorial and the Union warrants the conclusion that the bargaining unit does not constitute a historical unit whose composition is binding on the successor employer. I disagree. The Supreme Court and Board have directed me through precedent for purposes of industrial stability to view a successor's bargaining obligation through the eyes of employees, so they will not feel their ability to be represented by a union is subject to the vagaries of the ownership of an operation. Here, the employees signed authorization cards, those cards were validated by an arbitrator, and by agreement Hadley Memorial recognized and bargained with the Union. Employees participated in the bargaining sessions, and attended union meetings at the Hospital. The employees do not control when they select a union vis a vis an employers desire sale of its facility. Here, the selection was a year before the sale, and there was no evidence that the selection was merely a last minute ruse or vehicle by the employees to protect themselves during the sale. Rather, in the circumstances here, as viewed by a reasonable employee, Respondent's refusal to honor its predecessor's recognition of the Union could only be viewed as subjecting their rights to union representation based on the whims of ownership of the facility. Accordingly, I find that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union in the unit requested on February 1, 2007.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with 1199, SEIU, United Healthcare Workers East, MD/DC Division in the following appropriate unit:

> All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Respondent at its Washington, D.C. facility; but excluding all other employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

2. The above violations constitute an unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it cease and desist from engaging in such violations, take affirmative action to remedy them, including recognizing and bargaining in good faith with 1199, SEIU, United Healthcare Workers East, MD/DC Division, and post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

That Respondent Specialty Hospital of Washington-Hadley, LLC, its officers, agents, successors, and assigns shall be ordered to:

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain in good faith with 1199 SEIU UNITED HEALTHCARE WORKERS EAST, MD/DC DIVISION (the Union) as the exclusive collective-bargaining representative of its employees in the below-described appropriate bargaining unit:

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenancemechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids,employed by Respondent at its Washington, D.C. facility; but excluding all other employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the above described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Promptly notify the Union, in writing, of all changes in terms or conditions of
employment of the above-described unit that have been implemented by Respondent since February 1, 2007.

(c) Upon request by the Union, rescind changes specified by the Union made in terms or conditions of employment for the above-described unit since February 1, 2007.

(d) Make the employees in the above-described unit whole plus interest as traditionally calculated by the Board for any loss of earnings or benefits suffered as a result of any changes which Respondent has made in their terms and conditions of employment subsequent to February 1, 2007, for the above-described unit.

(a) Within 14 days after service by the Region, post at its Washington, D.C. location copies of the attached notice marked "Appendix." [23] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2007.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU, UNITED HEALTHCARE WORKERS EAST, MD/DC DIVISION (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary
clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Respondent at its Washington, D.C. facility; but excluding all other employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit set forth above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request by the Union, rescind changes specified by the Union made in terms or conditions of employment of the above-described unit since February 1, 2007, and make all affected unit employees whole, together with interest, for any and all losses they incurred by virtue of the changes in their wages,

fringe benefits, and other terms and conditions of employment from February 1, 2007, until we negotiate in good faith with 1199 SEIU, UNITED HEALTHCARE WORKERS EAST, MD/DC DIVISION to agreement or to impasse; except that nothing in this provision requires that we withdraw or eliminate any improvement in wages or benefits.

SPECIALTY HOSPITAL OF WASHINGTON – HADLEY, LLC