



United States Government
NATIONAL LABOR RELATIONS BOARD
Region Four
615 Chestnut Street - Seventh Floor
Philadelphia, PA 19106-4404

May 16, 2012

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 Fourth Street, N.W.
Washington, D.C. 20570-0001

Subject: Salem Hospital Corporation a/k/a The Memorial
Hospital of Salem County
Case 04-CA-64458

Dear Mr. Heltzer:

Accompanying this letter is Counsel for the Acting General Counsel's Answering Brief which is being electronically filed. I certify that copies of the Brief are being sent on this date to the parties listed below by electronic mail.

Sincerely,

William Slack, Jr.
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

SALEM HOSPITAL CORPORATION a/k/a
THE MEMORIAL HOSPITAL OF SALEM
COUNTY

and

Case 04-CA-64558

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES (HPAE)

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Dated: May 16, 2012



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I. PROCEDURAL HISTORY

Health Professionals and Allied Employees (the Union) filed the charge in this case on September 14, 2011 (GCX-1(a)).¹ A Complaint based on the charge issued on December 13, 2011. The Complaint alleges that the Union is the certified representative for a unit of registered nurses employed by The Memorial Hospital of Salem County (Respondent) and that Respondent has violated its duty to bargain and Section 8(a)(5) of the National Labor Relations Act by refusing to honor a Union request for information (GCX-1(c)).

Respondent filed an Answer to the Complaint on December 27, 2011, and an Amended Answer on February 16, 2012. The Answer and Amended Answer admit the Union's certification, the request for information and Respondent's refusal to honor the request. But, despite conceding the Union's certification, the Answer and Amended Answer deny the Union's status as the representative for Respondent's nurses, claiming the certification was improper for a variety of reasons. The Answer and Amended Answer also insist that the information requested was not relevant to the Union's performance of its representational functions, that the request was overbroad and that compliance with the request would be burdensome and result in the disclosure of confidential information (GCX-1(e)(f); Tr. 13).

A hearing regarding the Complaint was held before Administrative Law Judge Robert A. Giannasi on March 5, 2012. Judge Giannasi issued his Decision on April 17, 2012, rejecting Respondent's various defenses and finding that Respondent had unlawfully failed to supply the Union with requested information. Respondent filed

¹ GCX refers to General Counsel's exhibits, RX refers to Respondent's exhibits and numbers in parentheses refer to pages in the official transcript.

Exceptions to the Judge's Decision on May 15, 2012. This Brief represents Counsel for the Acting General Counsel's response to those Exceptions.

II. FACTS

On September 1 and 2, 2010, a majority of Respondent's registered nurses voted for Union representation in a Board conducted election. Respondent filed Objections to the election, and a hearing regarding certain of these Objections was held before an Administrative Law Judge who recommended that the Objections be overruled. On August 3, 2011, the Board adopted the Judge's recommendation and certified the Union as the representative for the registered nurses (GCX-2).

On August 15, Union representative Sandra Lane sent Respondent CEO Richard Grogan a letter requesting bargaining and asking for information which Lane indicated the Union needed "to provide adequate representation to our members and prepare for upcoming contract negotiations." The requested information was as follows:

"A. Bargaining Unit Information

1. Please provide in a Microsoft Excel File (or similar spreadsheet program) a list of current bargaining unit employees by first and last name. For each employee, please include:
 - Date of Hire
 - Years of accredited RN experience as of August 1, 2011
 - Unit/Department
 - Status (i.e. Full Time, Part Time, PRN/Per Diem)
 - Base rate of pay
 - Scheduled hours and shift per week
 - Total earnings for 2010 and 2011 to date
 - Total hours worked in 2010 and 2011 to date
 - Regular hours worked in 2010 and 2011 to date
 - Overtime hours worked in 2010 and 2011 to date
 - On call hours worked 2010 and 2011 to date
 - Shift differential payments 2010 and 2011 to date
 - PTO accrual at present for eligible employees
2. Total costs for the following items for 2010 and 2011 to present:
 - On-call pay
 - PTO paid for eligible employees

- Shift differential payments
- Education payments
- 3. Total number of hours worked by Agency staff for 2011 to present broken down by department
- 4. A list of all Agency staff currently working and a copy of their contracts
- 5. The total number of hours worked by bargaining unit employees 2011 to present
- 6. A list of vacant positions in each job title as of August 1, 2011
- 7. A list of all exempt employees
- 8. A list of all departments that have on-call

B. Pension and Benefits

- 1. A list of current employees participating in the 401(k) plan, including the employee's Annual Earnings, contributions made by each employee, and the employer match for 2010 and 2011 to present
- 2. Employee and employer payments for health and/or dental insurance, premium cost per eligible employee, and status

C. Staffing

- 1. Please provide a copy of any policies
- 2. Copy of any and all acuity systems and guidelines used to staff
- 3. Process by which staffing is done
- 4. Staffing grids for each department

D. Employer Policies

- 1. Copy of all policy and procedure manuals"

Lane testified that, with the exception of the information sought regarding Agency staff (Section A, paragraph numbers 3 and 4), her intent was to seek only data relating to employees in the unit represented by the Union (Tr. 19, 21-25). With respect to the Agency staff, Lane explained that she intended to seek only information regarding Agency employees working in unit positions. Lane noted that the Union needed this information so it could analyze the frequency with which temporary Agency employees were used to perform unit work and the amounts which Respondent was willing to pay to secure such employees. This information would, Lane explained, be useful for purposes of formulating contract proposals regarding diversion of unit work. It would also provide

a benchmark against which unit wages could be measured and assist the Union in making its economic demands (Tr. 20-21).

Grogan responded to Lane's bargaining demand and information request in an August 17, 2011 letter. In this letter, Grogan noted that Respondent intended to seek Court of Appeals review of the Board's certification. As a consequence, Grogan indicated Respondent was declining to meet and bargain with the Union. No mention was made of the information requested by Lane (GCX-5).

The Union has received no further response to its August 15 information request and has never received any of the requested information from Respondent (Tr. 19). As promised in Grogan's letter, Respondent has refused to bargain with the Union. On November 29, 2011, the Board issued a Decision and Order finding the refusal to bargain unlawful. *Salem Hospital Corporation a/k/a the Memorial Hospital of Salem County*, 357 NLRB No. 119 (2011). The matter is currently pending in the United States Court of Appeals for the District of Columbia Circuit where Respondent has successfully managed to have the case held in abeyance on the theory that the Board is considering the representation case arguments being made by Respondent in this case.

III. ARGUMENT

An employer's duty to bargain encompasses an obligation to provide, upon request by a Union which represents its employees, information relevant to Union's performance of its representational functions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967). Data related to unit employees' wages and working conditions is considered presumptively relevant. The Union is not obliged to make any special showing of need to secure such information, and the Employer can avoid production only

if it either proves the information is not relevant or demonstrates some reason why it cannot be provided. *Ormet Aluminum Mill Products Corporation*, 335 NLRB 788, 801 (2001); *A-Plus Roofing*, 295 NLRB 967, 970 (1989), enf'd 39 F.3d 1410 (9th Cir. 1994). Where non-unit information is requested, the Union is obliged to show relevance although this burden has been described as “not exceptionally heavy.” *The Hertz Corp.*, 319 NLRB 597, 599 (1995), enf. den. 105 F.3d 868 (3d Cir. 1997). A liberal discovery type standard is applied, and the Union is not required to prove that the requested data will be dispositive of the issue before the parties. Information must be produced so long as there is “potential or probable relevance,” and the data will have some bearing on the Union’s representation of employees. *ATC/Vancom of Nevada Ltd.*, 326 NLRB 1432, 1434 (1998); *Ormet Aluminum Mill Products Corporation*, supra.

As the Administrative Law Judge correctly found and as Respondent appears to concede, most of the Union’s August 15 request deals with presumptively relevant information concerning unit employee terms of employment. The Union, for instance, seeks a list of unit workers with each employee’s date of hire, department, full or part-time status, rate of pay and scheduled hours. For each employee, it also requests total earnings and hours worked in the two previous years, hours broken down into regular, overtime and on-call hours, shift differential payments and leave accruals. All of this is plainly data related to unit wages, hours and working conditions, and has been deemed presumptively relevant by the Board. *Piggly Wiggly Midwest*, 357 NLRB No. 191, at slip. opin. p. 2 (2012)(information on accrued vacation presumptively relevant); *Essex Valley Visiting Nurses Association*, 353 NLRB 1044, 1050 (2009)(accrued vacation and annual earnings of unit employees); *U.S. Information Services*, 341 NLRB 988

(2004)(gross salary, total hours worked and total overtime hours); ***Dexter Fastener Technologies, Inc.***, 321 NLRB 612 (1996), enf'd 145 F.3d 1330 (6th Cir. 1998)(names, job classifications, wage rates, hours of work and labor costs per employee presumptively relevant); ***A-Plus Roofing***, supra. (names, job classifications and wage rates presumptively relevant).

In addition to seeking this employee specific information, the Union is requesting data for the unit as a whole. Specifically, it is seeking the total cost in 2010 and 2011 for on-call, time off, shift differentials and education payments made to unit employees; total hours worked by unit employees in 2011; and lists of vacant unit positions, departments which require unit employees to be on-call and unit employees considered exempt from overtime premium pay. Again, all of this relates to unit working conditions and is presumptively relevant. ***Essex Valley Visiting Nurses Assoc.***, supra. (annual cost of overtime, holiday and vacation pay plus list of vacant unit positions); ***U.S. Information Services***, supra. (total hours worked).

Another portion of the Union's request involves unit employee benefits. The Union seeks a list of unit employees participating in Respondent's 401(k) plan with an indication of both each employee's contribution in 2010 and 2011 and Respondent's matching contribution. It also has requested employee and employer payments for health and dental insurance along with the premium cost per employee. The Board has found such information about employee benefits and benefit costs presumptively relevant. ***Pavilion at Forrestal Nursing***, 346 NLRB 458, 462-63 (2006)(cost of benefit plans and number of participating employees).

The Union is also seeking information on staffing. It has requested staffing policies and guidelines, staffing grids showing unit employee assignments and a description of the process used to make staffing determinations. The Board has indicated that this sort of information on workload and staffing “relates directly to employee terms and conditions of employment” and enjoys a presumption of relevance. *Beverly Health and Rehabilitation Services, Inc.*, 328 NLRB 885, 888 (1999).

A final presumptively relevant piece of information being sought by the Union is policy and procedure manuals which will show the rules and regulations under which unit employees operate. The Board has found that such policies must be provided upon request. *Dexter Fastener Technologies, Inc.*, supra.

The only area in which the Union’s request arguably delves into non-presumptively relevant information involves data on agency nurses used as substitutes for unit workers. Section A-3 of the Union’s August 15 information request seeks “the total number of hours worked by Agency staff for 2011 to present broken down by department.” Section A-4 seeks “a list of all Agency staff currently working and a copy of their contracts.” Since Section A of the request is labeled “bargaining unit information,” it is reasonably inferable that the Union in these paragraphs is only asking for data on Agency employees hired to fill unit positions and is not seeking information on Agency workers employed outside the unit. If there was some doubt on this point, it was resolved at the hearing when Union representative Sandra Lane testified that her request went only to Agency personnel in unit jobs (Tr. 20).

Agency registered nurses are temporary workers hired to fill unit positions (Tr. 20). In *Pavilion at Forrestal Nursing*, supra., the Board found that “information

regarding temporary workers performing bargaining unit work is presumptively relevant.” Assuming this statement is an accurate recitation of the law, the data requested by the Union in this case regarding Agency nurses would be producible without any need for the Union to show its relevance.

Even if the requested information on Agency nurses is regarded as not presumptively relevant, however, the Union has shown a sufficient need for the material to require its production. According to Lane, the Union wants information on hours worked by Agency nurses so that it can see how much unit work is being diverted to the temporary workers and develop proposals on bargaining unit work preference. As for the contracts under which the Agency nurses work, they would show the compensation received by the temporary workers, permit comparison with rates paid unit workers and allow development of proposals on compensation for unit employees. Keeping in mind that the Union is merely required to show that non-presumptively relevant data would have “some bearing” on issues between the parties, it seems clear Lane’s explanations are sufficient to compel production of the requested data on Agency nurses. The Board has found information on use of non-unit temporary employees relevant under similar circumstances. *St. George Warehouse, Inc.*, 341 NLRB 904, 925 (2004), enf’d 420 F.3d 294 (3d Cir. 2005); *ATC/Vancom of Nevada Ltd.*, supra. at 1435.

In short, the information sought in the Union’s August 15 request is, as the Administrative Law Judge properly concluded, either presumptively relevant or has been demonstrated to have some relation to the Union’s performance of its representational functions. The burden was, therefore, on Respondent to show either that the requested information was not relevant or that there was some other excuse for non –production.

Absent such a showing, Respondent's failure to produce the requested material was an unlawful refusal to bargain within the meaning of Section 8(a)(5) of the Act.

Respondent's Substantive Defenses

Although Respondent's Answer and Amended Answer deny that the information requested by the Union is relevant, Respondent made no attempt at the hearing to present evidence supporting this position. Nor did the Company make much effort to support the laundry list of affirmative defenses asserted in its pleadings. Many of the affirmative defenses are based on Respondent's claim that the Union was improperly certified and will be dealt with separately below. But, Respondent also insisted that the Union information request was overly broad, unduly burdensome and improperly sought extra-unit and confidential data.

I have already dealt with the question of whether the Union improperly sought information concerning non-unit personnel. As I previously noted, the only portion of the Union request which dealt with such information involved the use of Agency nurses, and the Union has demonstrated a sufficient need for this information to require its production.

This leaves Respondent's claims of over-breadth, burdensomeness and confidentiality. The burden was on Respondent to prove these claims, and it introduced nothing at the hearing which might substantiate them. *Martin Marietta Energy Systems*, 316 NLRB 868 (1995); *Jacksonville Area Ass'n for Retarded Citizens*, 316 NLRB 338, 340 (1995); *Anthony Motor Co., Inc.*, 314 NLRB 443, 450 (1994). Further, even if Respondent had legitimate complaints to make about some aspects of the Union request, this would not have entitled the Company to ignore the request in its entirety.

If the request was overbroad, Respondent should have supplied whatever information was unquestionably relevant and sought clarification from the Union as to any data which it felt was out-of-bounds. *Watkins Contracting, Inc.*, 335 NLRB 222, 226 (2001); *Keauhou Beach Hotel*, 298 NLRB 702 (1990). Assuming production would have been burdensome, Respondent should have spoken to the Union about possibly narrowing its demands at the time the request was made and was not entitled to wait until unfair labor practice proceedings had been initiated to raise its concerns. *Anthony Motor Co., Inc.*, supra.; *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 673 (1999). And, if Respondent felt some of the requested information was confidential, it was obliged to seek an accommodation with the Union. *Roseburg Forest Products Co.*, 331 NLRB 999, 1002 (2000); *Metropolitan Edison Co.*, 330 NLRB 107 (1999).

Of course, Respondent did none of this. It did not communicate any concerns to the Union about over-breadth, excessive burden or confidentiality. Instead, it simply refused to supply the requested information based on its assertion that the Union had been improperly certified. Respondent seeks to excuse this failure by pointing to its pending Court challenge to the Union's certification. It is, however well-settled that any infringements of Section 8(a)(5) which occur while a test of certification is pending constitute separate violations of Act, and that an employer assumes the risk of being found guilty of an unfair labor practice if it refuses to provide information while challenging a Board certification in the Courts. *San Miguel Hospital Corp.*, 357 NLRB No. 36, at slip. opin. p. 2 (2011); *Advertiser's Manufacturing Company*, 294 NLRB 740, 751 (1989). Thus, Respondent's pending Court suit did not excuse its failure to reply to the Union's request for information, and the Administrative Law Judge's

decision to reject Respondent's substantive defenses to the production of the requested information was clearly appropriate.

Respondent's Procedural Arguments

In its Answer and Amended Answer, Respondent, in addition to the substantive defenses dealt with above, seeks to avoid liability by attacking the Union's certification. According to Respondent, the certification was improperly issued because the Board and the Board's General Counsel: (1) failed to sustain Respondent's objections to the representation election; (2) failed to grant Respondent's appeal from the Regional Director's decision to set the objections for hearing; (3) refused to have the representation and related unfair labor practice cases transferred from the Philadelphia Regional Office; (4) failed to issue Complaint on an unfair labor practice charge filed by Respondent against the Union; and (5) failed to dismiss the Union's representation petition due to supervisory taint. Respondent also maintains that "the Certification is not valid or enforceable, insofar as the Certification arises from the Board's 'Healthcare Rule,' 29 C.F.R. Part 103, 284 NLRB 1579 (1989), which is no longer valid or enforceable due to, *inter alia*, new Board precedent, Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011)."

As a general rule, an employer is not entitled to defend a refusal to bargain charge by attacking a union's certification based on issues which were or could have been raised in the underlying representation case. This rule has been applied to cases involving post-certification refusals to provide information. Challenges to the underlying certification are permitted in refusal to bargain cases only where an employer claims to have newly discovered and previously unavailable evidence to support its representation case claims

or alleges special circumstances which would require the Board to reexamine the decisions made in the representation proceeding. *Dexter Fastener Technologies, Inc.*, supra.; *Keauhou Beach Hotel*, supra.; *American Marine Delivery Systems*, 277 NLRB 433 (1985), enf'd 804 F.2d 145 (9th Cir. 1986); *Staco, Inc.*, 248 NLRB 1329, 1331 (1980), enf'd 647 F.2d 162 (2d Cir. 1981).

All of Respondent's certification challenges were or could have been raised in the underlying representation case. In fact, the Board has already found Respondent's post-certification refusal to bargain unlawful, and a review of the Board Decision indicates that most of Respondent's certification challenges have already been raised, considered and rejected. *Salem Hospital Corporation*, supra. In footnote 2 of its Decision, for instance, the Board specifically rejects Respondent's claims that the certification is invalid because of the failure to transfer cases to a different Regional Office and the Region's dismissal of Respondent's unfair labor practice charges against the Union. Respondent's assertion of supervisory taint is also specifically mentioned in the Decision, and the Board Decision certifying the Union (GCX-2) adopts an Administrative Law Judge's dismissal of Respondent's Election Objections and denies reconsideration of a Board Order refusing to set certain Objections for hearing.

Respondent was given an opportunity in this proceeding to submit an Offer of Proof detailing what evidence it would produce in the event it was allowed to relitigate its representation case claims. The Offer of Proof (RX-1) deals only with Respondent's contention that the Board Decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, supra., renders the Union's certification "not valid or enforceable." No mention is made of newly discovered evidence or special circumstances which might warrant

reconsideration of Respondent's other attacks on the certification. It is, therefore, clear that, with the possible exception of its *Specialty Healthcare* argument, Respondent can not rely on its representation case claims to justify its otherwise unlawful refusal to provide information.

Respondent does, however, maintain that the *Specialty Healthcare* Decision is a special circumstance which warrants reconsideration of the certification. And, it is true that the Board issued *Specialty Healthcare* following the Union's certification in August 2011 and that Respondent could not have relied on *Specialty Healthcare* to support any pre-certification attacks on the representation case proceedings. On the other hand, *Specialty Healthcare* had issued prior to the Board's November 2011 Decision finding Respondent's refusal to bargain unlawful, and Respondent could have made its *Specialty Healthcare* argument to the Board in defending its failure to negotiate. Nothing in the Board Decision suggests that Respondent exercised this option, and this failure should be viewed as a waiver which precludes Respondent from raising *Specialty Healthcare* here.

Setting aside the waiver question, however, it is clear from a reading of *Specialty Healthcare* that its issuance is not a special circumstance which would justify revocation of the Union's certification in this case. Respondent is an acute care hospital.² Under the Board's *Rules on Collective-Bargaining Units in the Health Care Industry*, 284 NLRB 1576 (1987), a unit of registered nurses in an acute care hospital is appropriate absent extraordinary circumstances. Thus, under the Rules, the certified unit in this case is appropriate.

The Hospital Rules specifically indicate that they do not apply to nursing homes, and Respondent's Offer of Proof concedes that *Specialty Healthcare* is a case about units

² The Complaint alleges and Respondent's Answers admit this fact (GCX-1(c), (e), (f)).

in nursing homes not hospitals. The question in *Specialty Healthcare* was whether a unit of nursing home certified nursing assistants was appropriate. If the nursing home in *Specialty Healthcare* had been an acute care hospital, the Board's acute care hospital rules would have required that the certified nursing assistants be included in a unit with other service and maintenance employees, and the employer in *Specialty Healthcare* argued that the Board should apply the acute care hospital standards in evaluating nursing home units. The Board rejected this argument, specifically noting that the acute care hospital rules did not apply to nursing homes. 357 NLRB No. 83, at slip opin. p. 5. To the extent that an earlier Board Decision in *Park Manor Care Center*, 305 NLRB 872 (1991), suggested that the acute care hospital rules should help guide nursing home unit determinations, the Board overruled that Decision. The Board did not, however, modify or overrule the standards applied in setting bargaining units in acute care hospitals. How then can Respondent claim that Specialty Healthcare renders the unit of acute care hospital registered nurses certified in this case no longer appropriate?

In the course of deciding *Specialty Healthcare*, the Board expressed some reluctance to rely on the evidence regarding nursing home operations developed in connection with the creation of the acute care hospital rules. It noted that over 20 years had passed since the acute care hospital rules had been enacted and indicated that the nursing home industry was, at least in the Board's view, "highly dynamic."³ 357 NLRB No. 83, at slip. opin p. 5. Respondent seizes on these comments and argues that the acute care hospital industry is also dynamic and that changes in acute care hospital operations

³ At the time the acute care hospital rules were established, the Board declined to also create rules for nursing homes as result of its conclusion that the nursing home industry was in a period of transition and that only limited information had been developed regarding the industry in the hearings leading to the rules regarding acute hospitals. *Specialty Healthcare*, supra. at slip. opin. p. 5.

since the enactment of the Board's rules on hospital units warrant reconsideration of the hospital rules.

There are several problems with this argument as applied to this proceeding. First, no matter how hard Respondent tries, it can not make *Specialty Healthcare* into a case about hospital bargaining units. The Board in *Specialty Healthcare* did not even suggest an intent to modify its existing rules on hospital units, and it certainly did not overturn those rules. And, since this case involves a hospital unit, it is not impacted by *Specialty Healthcare* at all. In short, there is no reason to view the Board Decision in *Specialty Healthcare* as a special circumstance which would warrant overturning any unit determinations in this case.

Second, to the extent Respondent argues that changes in the acute care hospital industry over the last 20 years warrant reconsideration of the rules on hospital units, there was no reason it had to wait for *Specialty Healthcare* before making this argument. If there have been dramatic changes in hospital operations, they should or could have been apparent to Respondent when the petition in this case was originally filed. Nothing prevented Respondent from arguing at the outset of this proceeding that those changes made registered nurse units in hospitals no longer appropriate. The arguments which Respondent wants to make now could have been made in the underlying representation case. And, the Board rule is that an employer who fails to make such arguments in the representation case can not raise them to defend a post-certification refusal to bargain.

Finally, Respondent has completely failed to either describe the changes in hospital operations on which it is supposedly relying or to explain why those changes make hospital registered nurse units no longer appropriate. The Offer of Proof submitted

by Respondent in this proceeding consists mostly of legal argument about the supposed impact of *Specialty Healthcare* on acute care hospital bargaining units. Respondent, for instance, offers “testimony to support its assertion that the Board’s Decision in Specialty Healthcare overrules the Board’s previous decisions applying the Healthcare Rule” and promises to “elicit information regarding the eroding effect of the Board’s decision in Specialty Healthcare upon the Board’s Healthcare Rule.” But, *Specialty Healthcare* either overrules the Healthcare Rules or it does not.⁴ It is hard to see how “testimony” would assist in determining the Decision’s impact.

Respondent does at one point in its Offer insist that “testimony produced by the Hospital would illustrate that the acute healthcare industry is no less dynamic than the non-acute healthcare industry, highlighting the developments in medical technology, business models, governmental oversight and other factors that necessitate the Board’s revisiting of its now antiquated Healthcare Rule.” However, this single sentence represents the entirety of Respondent’s factual presentation. Respondent makes no effort to detail the “developments” it references or explain why those developments would render the unit of registered nurses at issue in this case no longer appropriate. This is a critical defect because this is not a case about hospital bargaining units in general. At most, it is a case about a single unit of registered nurses at one hospital in Salem, New Jersey.⁵ Assuming Respondent claims that “developments” in the hospital industry over the last twenty years are a special circumstance warranting reopening the representation case here, it had an obligation to say exactly what those developments are, how they

⁴ And, as I argued above, it is clear *Specialty Healthcare* did not overrule the Healthcare Rules.

⁵ I say “at most” because this is really not a case about unit appropriateness at all. The question of whether the certified unit is appropriate was previously resolved in the representation case. The only issue here is whether Respondent unlawfully failed to provide the Union with relevant information.

impact its operations and why they make a unit of its registered nurses inappropriate. Its Offer of Proof does not come remotely close to doing any of this, consisting as it essentially does of a single sentence making vague allusions to unspecified “developments” which would supposedly make Respondent’s case if only they were spelled out. Something more is surely required before Respondent is permitted a further opportunity to overturn the Union’s certification at this late date. And, Respondent’s failure to offer anything more substantial plainly suggests that its *Specialty Healthcare* argument is a particularly transparent attempt to confuse this proceeding in the hope that the confusion will somehow delay its obligation to honor the Union’s certification.⁶

In sum, Respondent’s attempt to rely on *Specialty Healthcare* and its other representation case arguments to excuse its refusal to provide information should be rejected. Most of the arguments have already been expressly considered and rejected by the Board. The sole exception is the *Specialty Healthcare* claim which Respondent could have, but choose not to, raise before the Board in the test of certification case. In any case, it is apparent the *Specialty Healthcare* Decision is not a special circumstance which would warrant reconsideration of the Union’s certification. Since *Specialty Healthcare* does not deal with units in acute healthcare facilities and did not overrule the Board’s rules regarding such units, it actually has no relevance to this case. To the extent Respondent claims developments in the acute healthcare industry over the past 20 years warrant reconsideration of the Board’s acute healthcare rules, it was or could have been aware of such developments prior to the Union’s certification, should have raised them in

⁶ Respondent’s desire to use its *Specialty Healthcare* argument as a delaying tactic is underscored by its recent submission of a Motion in the Court of Appeals for the District of Columbia Circuit to hold the test of certification case pending there in abeyance based on a claim that the *Specialty Healthcare* issue is being litigated here. A copy of the Motion is attached.

the original representation case and can not rely on them now. Further, Respondent has completely failed in its Offer of Proof to identify what the supposed developments are or explain why they make the certified unit in this case no longer appropriate. Respondent's representation case defenses should fail. For the reasons set out in the Administrative Law Judge's Decision, it should be found that Respondent violated Section 8(a)(5) by refusing to provide information relevant to the Union's performance of its duties as the representative for Respondent's registered nurses.

IV. REMEDY

The Board should adopt the Administrative Law Judge's Decision and order Respondent to supply the information requested by the Union on August 15, 2011, and to cease and desist from refusing to provide the Union, upon request, with information relevant to the Union's performance of its representational functions. Respondent should also be required to post an appropriate Notice to Employees.

Respectively submitted,

Dated: May 17, 2012



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IV. REMEDY

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Dated: May 16, 2012



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