Mercy Health Partners *and* SEIU Healthcare Michigan. Case 07–CA–052693

June 26, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On October 4, 2010, Administrative Law Judge George Carson II issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief,[1] and Mercy Health Partners (the Respondent) filed an answering brief. The Respondent also filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

I.

The Respondent, a regional healthcare provider, operated multiple hospitals in Michigan, including the two at issue in this case—Hackley and Mercy. Each hospital was responsible for performing pre-registration work for its own patients. The Union represented the Hackley-based pre-registration employees as part of a larger Hackley unit; Mercy's pre-registration employees were unrepresented.

The Respondent was also one of 19 subsidiaries of Trinity Health, a national healthcare provider. Until 2008, Trinity was a passive holding company. That year, it decided to transition to being an active parent company by assuming direct responsibility for, among other things, its subsidiaries' pre-registration work.

On November 23, 2009,[3] the Respondent's Director of Labor Relations, Robin Belcourt, along with several other supervisors, met with five employees who performed pre-registration work at Hackley. She notified them that, as part of Trinity's transition, their positions would be relocated to Mercy. Belcourt further informed the employees that, pursuant to the collective-bargaining agreement between the Respondent and the Union, they would have 72 hours to decide whether to accept layoff or to "bump" a less senior unit employee. She also gave them 72 hours to decide whether to accept one of the newly created positions at Mercy.[4] Belcourt informed them that the positions at Mercy were nonunion, but would have nearly the same wages and benefits as their positions at Hackley.[5] All five employees (four at that time and one a few days later) accepted Belcourt's offer to transfer to Mercy.[6] Belcourt also distributed letters to the five employees in which she summarized the above information. In that letter, Belcourt advised employees that, if they had any questions, they could consult with their labor relations manager or their union representative.

This relocation announcement likely did not come as a surprise to the employees. A couple of weeks before the November 23 meeting, a Hackley pre-registration employee learned from her colleague at Mercy that the Respondent was preparing an office for them at Mercy. Later, when confronted, her supervisor confirmed the rumor, but asked that she not tell a lot of people, particularly the union steward, because the Respondent had not yet formally announced the relocation. Despite her supervisor's request, the employee alerted the union steward.

Immediately following the November 23 announcement to employees, Belcourt formally notified the Union that the Respondent had decided to relocate unit work from Hackley to Mercy and that it had given employees notice of their rights under the collective-bargaining agreement. The Respondent informed the Union that the

[1] In his exceptions, the Acting General Counsel argues, apparently for the first time, that the Respondent unlawfully changed the scope of the bargaining unit. Because he did not pursue this theory before the judge, we deem it to be untimely raised and thus waived. Cf. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. 325 Fed.Appx. 577 (9th Cir. 2009).

[2] We shall order the Respondent to post 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.

In his decision, the judge cited *El Paso Electric Co*., 355 NLRB 428 (2010). The Fifth Circuit subsequently enforced the Board's decision in that case. __ F.3d __, 2012 WL 1760307 (May 18, 2012). The Board also supplemented its earlier decision. 357 NLRB No. 186 (2012).

[3] Unless otherwise stated, all dates refer to 2009.

[4] The judge found, and the parties agree, that the first two options offered to employees—i.e., accept layoff or bump a less senior unit employee—are contained in art. X of the parties' collective-bargaining agreement. Article XI governs transfers of unit employees; no party argues that art. XI is applicable to the transfers at issue in this case.

[5] A pre-registration employee testified that Belcourt said, "that we would not lose any of our benefits. Everything would stay the same, other than our vacation would accrue a little bit differently."

[6] A sixth Hackley pre-registration employee was unable to attend the November 23 meeting because she was on medical leave. She was later notified of the relocation and of her options. She accepted layoff. Another person was hired to fill the relocated position.

relocation of work would be completed by December 7. Later that day, the Union demanded effects bargaining.[7] The parties engaged in effects bargaining on December 7.[8]

II.

The Acting General Counsel alleges that the Respondent engaged in unlawful direct dealing at the November 23 meeting.[9] The judge disagreed. Relying on *Capital Ford*, 343 NLRB 1058 (2004), the judge found that the Respondent merely presented the Hackley employees with a predetermined course of action. The judge therefore recommended that the complaint be dismissed. For the reasons explained below, we find, contrary to the judge, that the Respondent unlawfully dealt directly with unit employees.

A.

Direct dealing "involves dealing with employees (bypassing the Union) about a mandatory subject of bargaining." *Champion International Corp*., 339 NLRB 672, 673 (2003). The Board will therefore find a direct dealing violation when (1) the employer communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

Even when an employer does not have a duty to bargain about a decision to relocate, it still has a duty to bargain with the union over the effects of that decision on unit employees. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). An employer therefore cannot bypass the union and deal directly with represented employees concerning such matters. See *Coated Products*., 237 NLRB 159, 165–166 (1978), enfd. 620 F.2d 289 (3d Cir. 1980).

B.

Bypassing the Union and dealing directly with the employees is precisely what the Respondent did here. Without seeking the approval of the Union,[10] Belcourt met directly with unit employees to inform them of the decision to relocate unit work. She then presented them with three offers—they could stay at Hackley by bumping a less senior unit employee, transfer to Mercy, or accept layoff. One of those offers, the option to transfer (which is a mandatory subject of bargaining in its own right), and the condition attached to that offer, acceptance within 72 hours, had not previously been presented to the Union. By that point, Belcourt had plainly crossed the line from discussing the relocation decision to discussing the effects of that decision on unit employees.[11] Thus, while excluding the Union, the Respondent discussed a mandatory subject of bargaining directly with unit employees at the November 23 meeting. See *Coated Products, Inc*., supra (finding unlawful direct dealing when employer discussed transfer rights after a relocation of unit work with represented employees); see also *Naperville Jeep/Dodge*, 357 NLRB No. 183, slip op. at 2–3 (2012) ("The obligation to bargain over the effects of the closing of the [employer's] facility entailed an obligation to bargain over the transfer of employees" to another facility).[12]

[7] A representative of the Union testified that the Union did not request decisional bargaining because "the decision had already been made."

[8] During that bargaining session, the parties apparently did not discuss the three options presented to the employees at the November 23 meeting. Rather, the Union made three alternative requests of the Respondent: (1) that it return the employees to Hackley, (2) that it apply the Hackley collective-bargaining agreement to the transferred employees, or (3) that it agree to card check recognition at Mercy. The Respondent rejected all three requests.

The Acting General Counsel does not argue that the Respondent failed to engage in effects bargaining in violation of Sec. 8(a)(5) and (1).

[9] The Acting General Counsel also alleges that the Respondent unlawfully failed to bargain about the decision to move unit work from Hackley to Mercy. We agree with the judge that the relocation decision is properly analyzed under *Dubuque Packing Co*., 303 NLRB 386 (1991), enfd. in pert. part sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994). We further agree with the judge, for the reasons he stated, that the Respondent failed to rebut the Acting General Counsel's prima facie showing that the decision involved a relocation of unit work unaccompanied by a basic change in the nature of the Respondent's operations. But we also agree with the judge, for the reasons he stated, that the Respondent proved that labor costs were not a factor in its decision. Accordingly, we agree with the judge that the decision to relocate unit work was not a mandatory subject of bargaining. We therefore find it unnecessary to pass on the judge's further finding that the Respondent proved that the Union could not have offered labor cost concessions that could have changed its decision.

[10] One of the pre-registration employees present at the November 23 meeting also served as a union steward. She clearly attended in her personal capacity, rather than in her official capacity however. Cf. *Coated Products, Inc*., supra at 162, fn. 8, 165–166 (finding that the employer dealt directly with employee in his personal capacity, rather than in his official capacity as union president).

[11] See, e.g., *Miami Rivet of Puerto Rico*, 318 NLRB 769, 771–772 (1995) (finding layoffs to be a subject of effects bargaining); *National Car Rental System, Inc*., 252 NLRB 159, 163 (1980), enfd. in pert. part 672 F.2d 1182 (3d Cir. 1982) (finding transfers to be a subject of effects bargaining).

[12] As discussed above and as noted by our dissenting colleague, the parties engaged in effects bargaining on December 7. But there is no evidence that the Union acquiesced in the Respondent's initial contact with unit employees. Thus, the subsequent effects bargaining did not cure the Respondent's earlier direct dealing violation. Cf. *Kansas*

Moreover, the Respondent's conduct suggests that it intended to undercut the Union's role as bargaining agent. After a unit employee heard rumors of the upcoming relocation, she confronted her supervisor, who, after confirming the rumor, asked her not to tell the union steward. As our dissenting colleague observes, the Respondent suggested in its letter to the employees that they could ask questions of the Union. But that option was of little practical benefit because, as a result of the Respondent's own actions, the Union had no more information than did the employees themselves.

Finally, we find the judge's (and our dissenting colleague's) reliance on *Capital Ford*, supra, to be misplaced, as that case is factually distinguishable.[13] In *Capital Ford*, the General Counsel alleged, among other things, that the employer unlawfully implemented unilateral changes—namely, authorizing two paid holidays and a productivity bonus—and unlawfully dealt directly with unit employees by announcing those changes directly to them. The Board majority found that the paid holidays and bonus were not, in fact, unilateral changes. In dicta, the Board majority further observed that, even assuming unilateral action, the employer's announcements did not constitute direct dealing because they merely notified employees of predetermined courses of action. 343 NLRB at 1059, 1066–1067. Here, conversely, the Respondent offered employees three options, one of which it had not previously presented to the Union, and received responses to the options from all but two of the employees, and all before informing the Union. It then allowed the employees to choose the option they preferred. Cf. *Baltimore News American*, 230 NLRB 216, 217–218 (1977) (finding unlawful direct dealing when employer distributed voluntary retirement options directly to its represented employees), remanded on other grounds by 590 F.2d 554 (4th Cir. 1979), supplemented by 243 NLRB 170 (1979). The Respondent also requested that its employee not inform the union steward of the decision to relocate. As discussed, that evidence indicates that the Respondent was primarily interested in resolving effects issues with its employees rather than with their Union.[14]

Accordingly, we find that the Respondent dealt directly with union-represented employees in violation of Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's conclusions of law.

"1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the representative for purposes of collective bargaining of a unit of employees in various departments and classifications at the Respondent's Hackley Campus.

4. By bypassing the Union and dealing directly with its bargaining unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. The Respondent has not otherwise violated the Act as alleged in the complaint."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we will order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Mercy Health Partners, Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Education Assn., 275 NLRB 638, 640 fn.13 (1985) (finding that, although the union waived by inaction its right to bargain about the employer's change in terms and conditions for one employee, there was no evidence that union acquiesced to the employer directly discussing that change with the employee).

Because of our conclusion above, we need not pass on the judge's finding that the Respondent lawfully presented the options of layoff and bumping to its employees at the November 23 meeting.

[13] The judge also mistakenly relied on *Spurlino Materials, LLC*, 355 NLRB 409 (2010) (adopting two-member decision at 353 NLRB 1198 (2009)), enfd. 645 F.3d 870 (7th Cir. 2011), *Windstream Corp*., 355 NLRB 406 (2010) (adopting two-member decision at 352 NLRB 44 (2009)), and *Johnson Industrial Caterers, Inc*., 197 NLRB 352 (1972), to support his finding that the Respondent simply announced a predetermined course of action. Those cases are not precedential because no party excepted to the relevant portions of the administrative law judges' findings. *Spurlino Materials*, supra at 1198 fn. 4; *Windstream Corp.,* supra at 44; *Johnson Industrial*, 197 NLRB at 352 fn. 1.

[14] The proposition for which the judge cited *Capital Ford* is arguably in tension with other Board precedent. See, e.g., *Crittenton Hospital*, 343 NLRB 717, 717 fn. 3, 733, 740–741 (2004); *Owen Lee Floor Service, Inc.*, 260 NLRB 651, 654–655 (1980), enfd. 659 F.2d 1082 (6th Cir. 1981). Because we believe *Capital Ford* is distinguishable on its facts, we need not resolve that tension here.

The Board's decision in *Huttig Sash & Door Co.*154 NLRB 811 (1965), enfd. 377 F.2d 964 (8th Cir. 1967), also cited by our dissenting colleague, is likewise distinguishable. There, the employer first informed the union of its intended change in wages, and the union permitted the employer to notify employees individually because, as explained by the union, the company was going to make the change in any event. Although the company asked the employees if they would accept the change, the Board observed that they had little choice because the change was predetermined. The Board concluded that "those conferences [with employees] amounted in reality to nothing more than notification to the employees of a predetermined course of action to which [the r]espondent was committed." Id. at 817.

(a) Refusing to bargain collectively with SEIU Healthcare Michigan, the exclusive representative of an appropriate unit of the Respondent's employees, by bypassing it and dealing directly with bargaining unit employees.

(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) Within 14 days after service by the Region, post at its Hackley and Mercy facilities located in Muskegon, Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, 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 November 23, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 7 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. June 26, 2012

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[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."

MEMBER HAYES, concurring in part and dissenting in part.

I concur in my colleagues' decision to affirm the judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the decision to relocate bargaining unit work from the Hackley campus to the Mercy campus. However, I would do so for different reasons. Further, I dissent from my colleagues' decision to reverse the judge and find that the Respondent violated 8(a)(5) by dealing directly with Hackley unit employees about the option of transferring to nonunit positions at Mercy.

As to the decisional bargaining issue, I agree with the Respondent's argument in exceptions that it had no bargaining obligation because the work relocation decision was part of a major companywide consolidation of operations involving a massive infusion of capital. Accordingly, the relocation decision entailed a "change in the scope and direction" of the Respondent's enterprise and was exempt from the statutory duty to bargain under the principles set forth in *First National Maintenance*, 452 U.S. 666 (1981). In the alternative, I agree with the judge and my colleagues that the decision was lawful even under the test set forth in *Dubuque Packing.*[1]

As to the direct dealing issue, I agree with the judge that the Respondent lawfully offered the Hackley unit employees a predetermined transfer option, in addition to the contractual bumping and layoff options previously negotiated with the Union. The judge correctly relied on precedent holding that the mere presentation of a predetermined employment term does not constitute proscribed dealing with unit employees about the establishment of, or changes in, their terms and conditions of employment.[2] My colleagues' attempts to distinguish such precedent are unavailing. Further, there is negligible support for their claim that the Respondent intended to undermine the Union's representative status,[3] much less

[1] *Dubuque Packing Co*., 303 NLRB 386 (1991), enfd. in pertinent part sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994).

[2] E.g., *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), and *Capital Ford*, 343 NLRB 1058 (2004). See also *Huttig Sash & Door Co.*, 154 NLRB 811 (1965), enfd. 377 F.2d 964 (8th Cir. 1967).

[3] At most, one low-level supervisor on one occasion told an employee not to prematurely "tell a lot of people," including the union steward, of the planned relocation of the preadmission patient registration work because the Respondent had not yet formally announced the move. There is no evidence that the Respondent affirmatively concealed from the Union that it planned to present employees with the option of following their work from Hackley to Mercy. Upon presenting its employees with their postrelocation options, the Respondent distributed letters advising the employees that, if they had any ques-

that it had this effect. On the contrary, I find it significant that there is no allegation that the Respondent failed to fulfill its statutory obligation to engage in bargaining about the effects of its relocation decision. In fact, the parties did engage in effects bargaining subsequent to the presentation of the transfer option, and the Union did not seek to discuss this option. Particularly in these circumstances, I would find that the judge correctly applied Board law in finding no unlawful direct dealing.

Dated, Washington, D.C. June 26, 2012

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 refuse to bargain collectively with SEIU Healthcare Michigan, the exclusive representative of an appropriate unit of our employees located at our Hackley facility, by bypassing it and dealing directly with those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

MERCY HEALTH PARTNERS

tions, they could consult with their labor relations manager or their union representative. It also notified the Union of its action. This conduct hardly demonstrates an intent to undercut the Union's role as bargaining agent.

Joseph P. Canfield, Esq., for the General Counsel.
Michael A. Snapper and *Keith J. Brodie, Esqs.*, for the Respondent.
Brenda D. Robinson, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on August 3, 2010, pursuant to a second amended complaint that issued on July 20, 2010.[1] The complaint, as amended at hearing, alleges that the Respondent violated Section 8(a)(5) of the National Labor Relations Act by eliminating the work of certain unit employees and by direct dealing.[2] The Respondent's answer denies any violation of the Act. I find that the Respondent did not violate the Act and shall recommend that the complaint be dismissed.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Mercy Health Partners (Mercy), is a Michigan not-for-profit corporation with facilities in Muskegon, Michigan, that include acute care hospitals. The Respondent annually derives gross revenues in excess of $250,000 and purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

The Respondent admits, and I find and conclude, that SEIU Healthcare Michigan, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Mercy is a subsidiary of Trinity Health, a national healthcare provider created by the merger of Mercy and Holy Cross Healthcare in 2000. Various hospitals that operate under the Trinity umbrella have retained their historic names such as St. Joseph. Mercy operates multiple hospitals named Mercy, many of which are in Iowa and Michigan, including a hospital in Muskegon, Michigan. In 2008, Mercy, in Muskegon, merged with Hackley Hospital, which continues to operate under that name. The hospitals and related buildings are referred to respectively as the Mercy Campus and the Hackley Campus.

The Vice President of Patient Financial Services for Trinity is Linda Schaeffer, whose office is in Farmington Hills, Michi-

[1] All dates are in 2009 unless otherwise indicated. The charge in Case 7–CA–52693 was filed on January 27, 2010, and was amended on May 26, 2010, and July 14, 2010.

[2] The General Counsel withdrew par. 12 of the second amended complaint.

gan. She explained that, over the past several years, Trinity began a transition from being a passive parent company "to an operating company for specific functions." In that regard, Trinity looked at business models, including Tenent Healthcare and HCA, Inc., in an effort "to standardize and make our processes more efficient." Schaeffer pointed out that, previously, Trinity's "hospitals were autonomous, decisions were made locally." In 2008, Trinity adopted an organizational model called the Unified Revenue Organization, referred to throughout the hearing as the URO "that spans across the revenue cycle from patient access all the way through managed care contracting." Implementation of the model is ongoing. It includes use of a standardized computer system platform, Genesis, which Trinity began implementing in 2003. The platform utilizes different applications specific to various functions such as clinical matters and financial information. Once fully implemented, Genesis, with its specific applications, will be systemwide for all Trinity facilities.

One aspect of implementation of the URO is the centralization of what Schaeffer called "shared services" pursuant to which employees performing the same function are brought from different locations and placed at one consolidated location.

The Union herein represents clerical employees, including registration/admit assistants at the Hackley Hospital.[3] It also represents employees in six other units, some at Hackley and others at Mercy Hospital. Registered nurses at Mercy, represented by the Michigan Nurses Association, constitute an eighth unit. Registration clerks at Mercy are not unionized.

The issues in this proceeding are whether the Respondent violated the Act by failing to bargain with the Union before eliminating the jobs of four registration/admit assistants and two insurance verification clerks at the Hackley Campus and engaged in direct dealing by explaining to those employees their options, which included accepting a nonunion position performing the same job at a location on the Mercy Campus.

B. Facts

Employees classified as registration/admit assistants perform different functions. Some meet face-to-face with patients who come directly to the hospital such as those who present themselves at the emergency room. Others, including the employees involved in this proceeding, perform preregistration for patients who are scheduled for testing, such as CT and MRI scans. As explained by shop steward, Anna Winters, "[w]e call the patient, get insurance information, demographics, their name, date of birth, that type of thing," and verify it prior to the patient coming to the hospital. Similarly, some insurance verification clerks do not deal directly with patients. They confirm insurance information prior to the patient coming to the hospital.

Vice President Schaeffer pointed out that the employees performing the preregistration and insurance verification functions prior to patients coming to the hospital do not see the patient and do "not need to be located at the hospital." She noted that "[h]ospital real estate is prime real estate, and we need to reserve that space for our physicians and our patients." She explained that Trinity considered preregistration to be a "shared service," and, consistent with implementation of the URO, Trinity was centralizing that service so that it was provided "in a very uniform, standardized manner." The work of the registration/admit assistants and insurance verification clerks who meet face-to-face with patients at the time they come into the hospital were unaffected by the centralization of the preregistration function.

Employees at the Mercy Campus who perform the preregistration function do so for patients who are to be treated at the Mercy hospital. They use an application on the Genesis computer system. The preregistration employees at the Hackley Campus use a computer system referred to as "Star," and for that reason only preregistered patients who were to be treated at the Hackley hospital. The employees who performed the preregistration function at the Hackley Campus heard rumors that their jobs might be moved throughout 2009. Shortly after Mercy and Hackley merged in 2008, scheduling was centralized and the employees at Hackley involved in scheduling moved to the Mercy Campus. In March 2009, Michael Grant, Trinity's regional director for West Michigan, came to Hackley and made a powerpoint presentation explaining the URO. The powerpoint presentation twice notes that "[s]ome preregistration and financial clearance functions will also migrate to shared services center over three to four years." Shop steward Winters did not deny having seen that presentation and recalled that Grant, consistent with the presentation, mentioned moving preregistration "that they were looking at different buildings, they were looking at different places."

Following the merger of Mercy and Hackley, employees performing the preregistration function at both Hackley and Mercy were supervised by Linda Churchill. Employee Mary Erickson recalled that, a couple of weeks before the preregistration employees were formally told of the elimination of their jobs at Hackley, a preregistration employee at Mercy asked her when they would be moving, that "they were preparing a place for us." Erickson reported the conversation to fellow employee Amber Grainer, and they informed Supervisor Churchill of the conversation. Churchill confirmed the report and asked that they "not tell a lot of people because it hasn't been announced yet and . . . not to say anything to Anna [Winters] [b]ecause she was a union steward." Notwithstanding that instruction, Erickson and Grainer informed Winters that "there was going to be a move and that Linda Churchill validated that." Winters did not deny being told of the move by Erickson and Grainer. I credit Erickson. Having received the foregoing hearsay report from her coworkers, I do not credit the denial of Winters that she was unaware of the upcoming move until November 23. I note, however, that the Union did not receive clear and unequivocal notice until the formal announcement on November 23 that the

[3] The collective-bargaining agreement recognizes the Union as the exclusive collective-bargaining representative of employees in various departments and classifications at the Hackley Campus including, insofar as relevant to this proceeding, the following:

> Patient Access: courtesy representative, insurance verification clerk, registration/admit assistant, denial specialist, central scheduling clerk I, central scheduling clerk II, bed assigner, financial counselor, ER admitting clerk, material handling, par management attendant, materials specialist, mailroom assistant.

jobs at Hackley were to be eliminated. See *Dedicated Services*, 352 NLRB 753, 759 (2008).

On November 23, the four Hackley registration/admit assistants performing the preregistration function, Winters, Erickson, Grainer, and Jodi Pallas, and one of the two clerks performing preregistration insurance verification, Barbara Hoffman, were called to a meeting. Insurance verification clerk Tanna Lock was absent on medical leave. Supervisor Churchill, Manager Connie Hasenbank, URO Regional Manager Julie Champayne, Muskegon Site Director Deana Richter, and Director of Labor Relations Robin Belcourt were present for management. Belcourt conducted the meeting. She informed the employees their jobs at Hackley had been eliminated and the jobs "were going to be placed over at the Mercy Campus." Belcourt told the employees that they would be given 72 hours to decide whether, pursuant to the collective-bargaining agreement, they wanted to bump at Hackley or take a layoff, or whether they wanted take one of the preregistration jobs being moved to Mercy. She explained that the position at Mercy was nonunion, but the employees' pay and benefits would remain the same and, as Winters recalled, "we would not lose any of our benefits."

All employees present except Winters elected, at that time, to move. Winters did so a few days later. The absent employee, Tanna Lock ultimately decided to accept a layoff.

Immediately following the meeting, Winters informed Loretta Briggs, member representative for the Union, of what had occurred. Belcourt sent Briggs the following email:

> MHP [Mercy Health Partners] is consolidating the pre-registration component of the patient registration process. Effective December 7, 2009, the first phase of consolidation will take place and work of the pre-registration process will be completed at the Mercy Campus. As SEIU does not represent the employees conducting the registration process at the Mercy Campus any open positions will be considered non-union. The move involves a total of 6 union employees at the Hackley Campus. Today we met with the pre-registration clerks affected and these employees were issued position elimination notices giving them the rights afforded under the SEIU Service and Maintenance Collective Bargaining Agreement.

Later on the afternoon of November 23, Attorney Brenda Robinson, on behalf of the Union, replied to Belcourt by email as follows:

> As exclusive bargaining representative for the Registration Clerks at the Hackley campus of Mercy Health Partners, please consider this SEIU HealthCare Michigan's formal demand to bargain the effects of the employer's anticipated December 7, 2009, move of these members to the Sherman [Mercy] Campus. Please notify myself and Loretta Briggs of your available dates for bargaining these effects as soon as possible.

The affected employees moved their computers, office chairs, and other office materials to the Mercy Campus on December 4 and began working at that location on December 7.

Also on December 7, Attorney Robinson and member representative Briggs met with Robin Belcourt. Supervisor Churchill, Manager Connie Hasenbank, and Site Manager Deana Richter were also present. The Union asked whether the Employer would "move the clerks back from Mercy to Hackley." Belcourt answered, "No." The Union asked whether the employer would apply the Hackley collective-bargaining agreement to the employees who had been moved. Belcourt explained that would not be possible because the "employees that do this function over at the Mercy Campus were non-union." The Union asked whether the Employer would agree to a card check if a sufficient number of employees signed authorization cards. Belcourt effectively denied that request by responding that the Employer would follow whatever directive it received from the National Labor Relations Board.

Attorney Robinson represented the Charging Party Union in this proceeding but did not testify. Member representative Briggs, when asked why the Union did not request to bargain regarding the decision, answered, "Because the decision had already been made." The formal notification of the move was given 2 weeks prior to its actual occurrence. The Union did not assert that the Company had violated the collective-bargaining agreement, and the complaint alleges no contractual violation. The Union did not file a grievance.

Although Belcourt's email does not mention the URO, the consolidation was part of the implementation of the "shared services" concept in the URO. Initially the Hackley Campus was to be converted to the Genesis system in October 2010 pursuant to implementation of the Genesis system at all Trinity facilities, but implementation of Genesis has been delayed until February 2011, because of a delay in implementation at another Trinity location. The employees who worked at Hackley must be trained to use Genesis prior to the actual implementation. Shop steward Winters acknowledged that Supervisor Churchill had informed the employees that, if they were moved, they would have to be trained on the Genesis computer system. Because Hackley uses the Star system and the employees who were moved use only the Star system, they have continued to preregister patients only for Hackley.

C. Analysis and Concluding Findings

1. The transfer of work

The complaint alleges that the Respondent eliminated the unit work of registration/admit assistants and insurance verification clerks engaged in preregistration duties at Hackley by assigning that work to nonunion positions at the Mercy Campus without notice to or bargaining with the Union.

The threshold issue herein is whether this case should be analyzed under the multistep burden-shifting test set out in *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994), or as a subcontracting case under *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

The General Counsel contends that the relocation of the work of the affected employees constituted substitution of "the union workers at Hackley with the non-union workers at Mercy." Citing *Torrington Industries*, 307 NLRB 809 (1992), and *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021

(1994), the General Counsel argues that "virtually the only . . . circumstance the employer has changed is the identity of the employees doing the work" and that the Respondent's decision is "closer to the subcontracting of the work found in *Fiberboard* rather than to a movement of the work found in *Dubuque*" and that, therefore, the Respondent was obligated to bargain "regardless of whether the decision was based on labor costs."

The Respondent argues that the decision to relocate the work of the registration/admit assistants and insurance verification clerks engaged in preregistration duties is properly analyzed under the multistep burden-shifting test set out in *Dubuque Packing Co.* Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981), the Respondent argues that the URO was a business decision that represented a change in "the scope and direction of the enterprise" and, even if that argument be rejected, that labor costs played no part in its decision and the Union could offer no concessions that would alter its decision.

I agree with the Respondent that this case is properly analyzed as a relocation decision under the multistep burden-shifting test set out in *Dubuque Packing Co*. There was no subcontracting. Unlike *Fiberboard*, there was no "replacement of employees in the existing bargaining unit with those of an independent contractor." 379 U.S. at 215. There was consolidation of the preregistration function pursuant to implementation of the URO "shared services" concept. Implementation of the URO resulted in the transfer of the Hackley unit work.

The Board, in *El Paso Electric*, 355 NLRB 428 (2010), recently reiterated the *Dubuque Packing* test:

> Under this test, the General Counsel must initially show that the decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. Satisfaction of that burden establishes a prima facie case that the relocation decision is a mandatory subject of bargaining. The employer may rebut the prima facie case by establishing that the work performed at the new location varies significantly from that performed at the old facility, that the work performed at the old facility is to be discontinued entirely rather than moved, or that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer an affirmative defense and "show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Dubuque Packing*, 303 NLRB at 391.

The Respondent remains in the business of providing health care at its Hackley and Mercy facilities in Muskegon. The preregistration work performed at the consolidated location on the Mercy Campus pursuant to the "shared services" concept of the URO does not differ significantly from the work formerly performed at Hackley. The preregistration work formerly performed at Hackley that does not involve face-to-face dealing with patients has not been discontinued; it has been moved. The employees performing the preregistration function continue to do so. The basic nature of the Respondent's operations remains the same.

I am mindful that the employees from Hackley who use the Star system have continued to preregister patients only for Hackley because implementation of the Genesis system was delayed. The record does not establish whether the move of the work would have been premature if the original schedule, which contemplated training and actual implementation of the Genesis system in October, had been successfully followed. Pursuant to the centralization of this "shared service" and introduction of the Genesis computer system, both the former Hackley employees and the Mercy employees will preregister patients for both Hackley and Mercy. The only reason they were not doing so at the time of the hearing was the delay in implementation of the Genesis system.

I reject the argument of the Respondent that implementation of the URO constituted a business decision relating to the "scope and direction of the enterprise." The URO changed the manner in which the Respondent sought to carry out the same mission that it has always had, providing health care. I find that the basic nature of the Respondent's operations remains the same as does the work that was moved to the Mercy Campus. Therefore, I must address the issue of labor costs or whether the Union could have offered concessions that would have affected the Respondent's decision.

Vice President Linda Schaeffer credibly denied that labor costs were a factor in the Respondent's decision, and there is not a scintilla of evidence to the contrary. The employees who accepted the positions at Mercy continued to receive their former wages and benefits. The number of employees remained the same. Tanna Lock was replaced by a new hire and another employee was hired when Amber Grainer left. Labor costs were not a factor in the Respondent's decision.

The relocation decision was part and parcel of the URO adopted by Trinity in 2008 pursuant to which "shared services" were to be consolidated. No concession by the Union could alter the business model the Respondent had adopted. The powerpoint presentation made to the Hackley employees in March 2009 twice notes that "[s]ome preregistration and financial clearance functions will also migrate to shared services center over three to four years." Vice President Schaeffer confirmed that there was "no way to reverse" the changes called for by the URO. The transfer of work occurred pursuant to the "shared services" concept of the URO and standardization resulting in the elimination of local autonomy. In short, the decision herein was not an issue "amenable to resolution through the bargaining process." *First National Maintenance Corp.*, supra at 678. The Union could offer no concession "that could have changed the employer's decision to relocate" the preregistration work that did not involve face-to-fact contact with patients insofar as that decision was mandated by the URO.

In view of the foregoing, I need not address the argument of the Respondent that the failure of the Union to request bargaining over the decision that was not to be implemented until 2 weeks after the formal announcement to the employees on November 23 constituted a waiver, or the argument of the Union that it was presented with a fait accompli.

Consistent with the analysis prescribed in *Dubuque*, I find that the General Counsel presented a prima facie case that the relocation of the preregistration work was a mandatory subject of bargaining but that the Respondent has established that labor costs were not a factor and that no concession by the Union would or could have affected its decision. Thus, I shall recommend that the allegation that the Respondent violated the Act by eliminating the unit work of registration/admit assistants and insurance verification clerks engaged in preregistration duties at Hackley by assigning that work to nonunion positions at the Mercy Campus without notice to and bargaining with the Union be dismissed.

2. Direct dealing

The complaint alleges that the Respondent unlawfully bypassed the Union and dealt directly with the employees whose work was transferred by offering the options of applying for another unit position, accepting a layoff, or taking a nonunit position at the Mercy Campus.

The General Counsel, citing cases, argues that "[p]resenting employees with options and asking employees to make a choice between the options amounts to direct dealing." I am unaware of any case stating that proposition, and the cases the General Counsel cites do not stand for that proposition. *Paul Mueller Co.*, 332 NLRB 332, 334 (2000), and *Harris-Teeter Super Markets*, 293 NLRB 743, 744–745 (1989), enfd. 905 F. 2d 1530 (4th Cir. 1990), involved polling employees regarding their preferences. *JRR Realty Co.*, 273 NLRB 1523, 1528 (1985), related to negotiating individual settlements. In this case there was no polling or negotiation. The Respondent informed the employees of its decision, advised them of their rights under the contract, and informed them of the availability of the nonunit positions. There was no polling and there was no negotiation.

The Respondent contends that announcement of a predetermined decision without seeking employee input negates any basis for finding an unlawful instance of direct dealing. I agree.

When addressing direct dealing allegations, the Board considers whether "(1) . . . the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union." *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1995).

Although the Respondent communicated directly with the employees when it announced the elimination of unit work at Hackley, there was no discussion or negotiation. Announcement to affected employees of an employer's predetermined course of action, even if that action constitutes a unilateral change, does not constitute direct dealing. *Capitol Ford*, 343 NLRB 1058, 1067 (2004), citing *Johnson's Industrial Caterers*, 197 NLRB 352, 356 (1972). The Respondent "did not invite any feedback from employees." It announced a predetermined decision. *Windstream Corp.*, 355 NLRB 74 (2010), adopting the decision of the two-member Board panel in 352 NLRB 44, 51 (2008).

The first two options given to the employees related to their rights under the collective-bargaining agreement with regard to a layoff. Article X of the contract sets out those rights: exercise bumping rights or take the layoff. Shop steward Winters did not contradict Belcourt's correct statement of the employees' contractual rights. The Respondent is a party to the contract. I am aware of no case holding that an employer engages in direct dealing by stating the rights of employees as set out in a contract that binds both the employer and Union.

In *Spurlino Materials, LLC*, 355 NLRB 409 (2010), adopting the decision of the two-member Board panel in 353 NLRB 1198 (2009), the Respondent offered a position, a newly created unit position, to certain employees. Notwithstanding the unilateral change, the administrative law judge dismissed a related direct dealing allegation because the Respondent "did not solicit . . . [employees'] input on the terms and conditions of employment . . . or otherwise engage in any kind of 'bargaining' with them. Instead, . . . [the Respondent] conveyed to them as a fait accompli a predetermined company decision that there would be such a position and what it would entail. This did not amount to unlawful 'bypassing' of the Union and direct dealing with employees." 353 NLRB at 1218.

The Mercy Campus position was not a unit position. The Respondent advised the affected Hackley employees that there would be the nonunit positions at the Mercy Campus and requested that anyone who wished to take those positions elect to do so within 72 hours. As the brief of the Respondent points out, that is the same time period that the collective-bargaining agreement, article X, sec. 10.2 F, provides for employees to elect whether they desire to bump or take a layoff. The Respondent did not engage in any bargaining. It simply announced its predetermined decision that the nonunit position was available.

The Board, in *Preterm, Inc.*, 240 NLRB 654, 656 (1979), recognized that healthcare institutions need to know what their staffing demands will be in the event of a strike and held that a healthcare institution could noncoercively inquire regarding which unit employees intended to strike. The same rationale applies herein. The Respondent needed to know what staffing actions it needed to take to assure that patients were preregistered. The Union had no representational rights regarding the nonunit positions. The affected Hackley employees were asked to state whether they intended to accept the offered nonunit positions within the same time period that, under the collective-bargaining agreement, they were required to state whether they desired to bump or take a layoff. There is no allegation or evidence of coercion. The request that the affected employees advise whether they wanted to accept the nonunit positions did not undercut the Union and did not constitute direct dealing. I shall recommend that the allegation of direct dealing be dismissed.

CONCLUSIONS OF LAW

The Respondent has not violated Section 8(a)(5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 4, 2010

[4] 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.