

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION

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In the Matter of:

KALEIDA HEALTH,

Employer,

-and-

Case No. 3-RC-077821

CONCERNED CARPENTERS FOR  
A DEMOCRATIC UNION,

Petitioner,

-and-

BUFFALO BUILDING AND CONSTRUCTION  
TRADES COUNCIL, AFL-CIO,

Intervenor,

-and-

NORTHEAST REGIONAL COUNCIL OF CARPENTERS,

Intervenor.

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**BUFFALO BUILDING and CONSTRUCTION TRADES COUNCIL'S STATEMENT IN  
OPPOSITION TO THE CONCERNED CARPENTERS FOR A DEMOCRATIC  
UNION'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION  
AND DIRECTION OF ELECTION**

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## **PRELIMINARY STATEMENT**

The Buffalo Building & Construction Trades Council, AFL-CIO (herein “BBCTC”) submits this Statement in Opposition to the Concerned Carpenters for a Democratic Union’s (“CCDU”) Request for Board Review of the Regional Director’s Decision and Direction of Election (“Decision”) issued on June 7, 2012. The CCDU’s request for review should be denied because there is no compelling reason for the Board to review the decision. Moreover, the Regional Director’s legal analysis and discussion is consistent with the governing Board law, and the CCDU cannot show that the decision is clearly erroneous on a substantial factual issue. Accordingly, the CCDU’s request should be denied.

## **FACTUAL BACKGROUND**

The Petitioner, CCDU, filed an RC petition with Region 3 of the National Labor Relations Board seeking to represent a unit of all journeyperson and apprentice carpenters and millwrights employed by the employer and presently covered under a collective bargaining agreement between the Buffalo Building Trades Council and Kaleida Health (hereinafter the “Employer” or “Kaleida”). All other employees, including supervisors, clerical, guards, boilermakers, cement masons, ironworkers, laborers, painters, plasterers, and plumbers and steamfitters, were excluded from the petitioned for unit (Board Ex. 1).

The petitioned for employees are covered under a Memorandum of Agreement (“MOA”) between the BBCTC and Kaleida. The Northeast Regional Council of Carpenters intervened in this matter (herein “NERCC”). NERCC is the regional council which incorporates what was

formerly Carpenters Local 289 which is now Local 276. NERCC is a signatory to the MOA between the BBCTC and Kaleida.

The BBCTC and NERCC argued to the Region that the petitioned-for unit of Carpenters was not an appropriate unit for collective bargaining. Both the BBCTC and NERCC argued that Kaleida Health is a health care institution as defined in Section 2(14) of the Act. As such, it is improper to fragment the craft unit under the Board's Health Care Rule. Additionally, both BBCTC and NERCC contend that even aside from the Board's Health Care Rule, the petitioned-for unit is not an appropriate unit in light of the fact that all craft union employees' duties were essential to the Employer's overall renovation projects, and that the bargaining history is in the overall unit and not solely with the carpenters. The collective bargaining relationship is not between Kaleida and the Carpenters Union, but with Kaleida and the Building Trades.

Dave Croston is the vice president of facilities for Kaleida Health. Kaleida operates a number of acute care hospitals. In 2006 Croston was considering self-employing skilled craftsmen to perform work at the Kaleida facilities. He reached out to BBCTC President Paul Brown. The two men negotiated a Memoranda of Agreement for a one year period from 2006 to 2007. In its form it is essentially the same as Joint Exhibit 4. The MOA was extended again from 2007 to 2011. Once again, the Agreement was negotiated solely between Brown and Croston. Again in 2011, Croston and Brown negotiated a third MOA, which is Joint Ex. 4. The MOA is for the period July 1, 2011 through July 30, 2016. The Agreement is "by and between Kaleida Health, 726 Exchange Street, Buffalo, New York 14210 (hereinafter Kaleida)" and the Building & Construction Trades Council of Buffalo, New York and Vicinity, AFL-CIO (hereinafter "Council"). See Jt. 4. Notably, the MOA is NOT between Kaleida and the Carpenters Union. The MOA was not negotiated with any of the individual local unions. The

MOA makes some reference to the local collective bargaining agreements, but it does not incorporate them. See Jt. 4.

The MOA states that it covers small construction projects related to Kaleida renovations which must be completed in a timely manner. Kaleida provided a list of jobs completed utilizing the MOA, and the amount of money spent on each job, for the period 2009 through 2011. Jt. Ex. 1. The Jobs show that the work involves primarily renovations to existing facilities at Kaleida. The jobs range from replacing a countertop or flooring, to renovation of a hospital floor.

From 2006 to date, the MOA has worked extremely well. Over a one year period there have been 135 employees working for Kaleida. See Jt. Ex. 2. The Carpenters make up 50% of the bargaining unit with 68 employees. *Id.* In order for the MOA to work effectively, Kaleida must employ persons in a number of different trades to get the job done. Carpenters must work with painters, plumbers, steamfitters, plasterers, laborers, and asbestos workers. (Joint Ex. 2) While the testimony showed that the employees generally work within their own skill set, they must work with other trades to get the renovation project done. A carpenter acts as a general foreman for all trades.

Kaleida did not bargain with the NERCC over a collective bargaining agreement or any other agreement. If the CCDU is certified, there *is no collective bargaining agreement that the CCDU has with any employer or any employer association.* Thus, Kaleida will have to bargain a new contract with the CCDU, separate and apart from the MOA it has with the BBCTC. Additionally, the BBCTC does not accept non-AFL-CIO affiliated labor organizations to become a part of the BBCTC. Petitioner produced Resolution 70 of the AFL-CIO 2009 Convention. Petitioner Ex. 1. The resolution states that the national Building and Construction Trades Department (BCTD) is authorized to establish a Carpenters' Organizing Committee for the

purpose of providing opportunities to workers in the carpentry trades to work in solidarity with the affiliates of the BCTD and that the President of the AFL-CIO is authorized to issue a charter or certificate of affiliation to the Carpenters' Organizing Committee. However, CCDU witnesses' testified that the CCDU is not affiliated with the AFL-CIO. (Tr. 155) The BBCTC simply cannot allow the CCDU as a member of its organization.

### **The Regional Director's Decision**

The Regional Director issued a Decision and Direction of Election on June 7, 2012. The Regional Director concluded that Kaleida is an acute care hospital where the employees in the petitioned-for unit work and perform and, therefore, the Health Care Rule applies. Additionally, the Regional Director found that, even if the Rule does not apply, a unit of all full-time and regular part-time craft employees employed by the Employer who perform in hours construction renovation is the only appropriate unit, and she directed an election be held in that unit. Finally, the Regional Director determined that the BBCTC and the other signatory unions are joint bargaining representatives.

### **The CCDU's Request For Review**

The CCDU seeks review of the Regional Director's Decision because (1) the health care rules should not apply, (2) the Decision failed to apply the community of interest standard.

The BBCTC disagrees with the CCDU's position and asserts that the Regional Director's Decision was proper.

## **POINT I**

### **The Regional Director Correctly Applied Board Precedent in Finding that the Employer is an Acute Care Hospital and is, Therefore, Governed by The Board's Health Care Rule**

The Regional Directory properly found that Kaleida Health is an acute care hospital covered by the Board's health care Rule. The parties stipulated that the Employer is a health care institution as defined in Section 2(14) of the Act. Section 2(14) of the Act defines the term "health care institution" to "include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person."

The Board's Health Care Rule provides that, except in extraordinary circumstances, or where there are existing nonconforming units, the following units are appropriate: 1. All registered nurses, 2. all physicians; 3. All professionals except registered nurses and physicians; 4. All technical employees; 5. All skilled maintenance employees; 6. All business office clericals; 7. All guards; and 8. All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. 29 C.F.R. 103.30. The rule was approved by the Supreme Court in *American Hospital Assn. v. NLRB*, 111 S.Ct. 1539 (1991). The Board will find appropriate only units which comport, insofar as practicable, with these units. The Rule specifically seeks to avoid the undue proliferation of units.

In this case, the Carpenters are part of an existing unit at Kaleida under the MOA of the BBCTC. A unit of skilled maintenance employees is a homogenous craft. The Board has

determined that severance of one craft is not appropriate. See, *Kaiser Foundation Hospital*, 312 NLRB 933 (1993). Petitioner seeks to carve out a unit of carpenters and millwrights which would obviously create a proliferation of units. It is clear that to avoid a proliferation of units in the health care industry, the Regional Director correctly determined that the health care Rule should apply.

Asserting a position with no precedent, Petitioner alleges that Kaleida is not covered by the Board's Health Care Rule for the purposes of this Petition. Rather, Petitioner argues that Kaleida Health is "primarily engaged in the building and construction industry", and thus the Rule has no effect.

The Regional Director correctly determined that the Rule cannot be ignored simply because the employer chose to perform its own in house renovations.<sup>1</sup> It is clear, and the parties have stipulated, that Kaleida Health is a health care institution as defined in Section 2(14) of the Act. Kaleida is the largest health care provider in Western New York. See NERCC Ex. 4. Kaleida's mission is to advance the health of the community. *Id.* Its vision is to be a regional healthcare system providing exceptional quality services with a commitment to education and research accessible to all. *Id.* Its values put patients and families first. *Id.* It services more than 1 million sick or injured patients annually at a number of acute care facilities including Buffalo General Hospital, DeGraff Memorial Hospital, Millard Fillmore Suburban Hospital, Women and Children's Hospital of Buffalo, and Gates Vascular Institute. Kaleida generates annual revenue of 1.2 billion dollars. Kaleida employs over 10,000 employees.

When comparing the number of employees involved in this petition: 135 craft employees on a rolling basis over a period of one year as compared to 10,000 regular employees is miniscule (about 1%). Also, comparing \$6 million dollars in wages to \$1.2 Billion dollars of

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<sup>1</sup> The employer does not act as its own general contractor for new build construction.

annual revenue (this is not even the operating budget number) is a tiny, tiny fraction (a fraction of 1%) of the work Kaleida performs.

Petitioner relies upon an advice memo dated October 23, 1992, *Wegmans Food Markets, Inc.*, Case No. 3-CA-17272, for the premise that Kaleida should be deemed to be primarily engaged in the building and construction industry. In that case the Division of Advice found that *Wegmans* was primarily engaged in the building and construction industry for purposes of Section 8(f) when it employed bricklayers and masons to perform new store construction and maintenance on existing facilities.

The *Wegman's* memo relied on *Zidell Explorations*, 175 NLRB 887 (1969), where the Board found that the employer was primarily engaged in two businesses: shipbuilding and construction work. This case is more like *Frick Company*, 141 NLRB 1204 where the employer was only incidentally engaged in construction work, less than 1% of its total gross income.

In *Frick*, the employer was engaged primarily in manufacturing, although it performed some construction work. The ALJ stated that the word "primarily" meant "primarily". The ALJ further rejected the counsel for the general Counsel's argument that the applicability of Section 8(f) should not depend upon an appraisal of the employer's entire operations but only the particular contract in issue, which was related to construction. The ALJ noted,

the vice of this argument is that it reduces to a nullity the limitation in Section 8(f) upon the type of employer covered by that provision, for it is difficult to imagine any contract with a building trades union "covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry " which would not be a contract for the performance of work primarily, if not exclusively, related to construction. Accordingly, adoption of the General Counsel's view would render valid under Section 8(f) any contract with a building trades union for work to be done on a construction job regardless of the nature of the employer's business. It is a well settled rule of statutory construction that Congress will not be presumed to have intended a vain act. It is also a familiar canon that a statutory provision, which, like Section 8(f) creates an exception to the general scheme of a statute, will be strictly construed. Both these rules militate

against acceptance of the General Counsel's construction, and I reject it. Accordingly, I find that Section 8 (f) is not applicable here because the Respondent is not primarily engaged in the building or construction....

Like *Frick*, the BBCTC's position is that Kaleida is obviously not an employer "engaged primarily in the building and construction industry." To make such a finding would contradict the plain meaning of 8(f).

The Regional Director correctly found that the *Wegmans* advice memo had no precedential value in the instant matter, and was distinguishable from the instant matter because the *Wegmans* case did not involve an acute care hospital. The Board has repeatedly stated its policy of avoiding an undue proliferation of bargaining units in acute health care facilities. In this case, Dave Croston testified that the work at issue is not on new facilities (such as set out in NERCC Ex. 2 and 3). Rather, the work is on small projects taking place in existing facilities. Thus, the jobs need to be completed in a timely fashion without work stoppages so as to avoid patient disruption. In passing amendments to the Act to extend coverage to hospital workers, Congress expressed concern that unit fragmentation in health care institutions would adversely affect patient care, and asked the Board to give due consideration to avoid an undue proliferation of units in the health care industry, resulting in the Board's Rulemaking. Petitioner ignores the fact that its petition would result in a proliferation of bargain units in direct contravention of the Board's policy to limit the number of units in an acute care facility. Kaleida would now be faced with bargaining 15 separate agreements with 15 separate trade unions. Because of the concerns of disruption of patient care, the Board should not permit the fragmentation of this unit.

Additionally, unlike *Wegmans*, Kaleida's relationship with the BBCTC is not to build new facilities. Rather, it only involves renovation projects, which the MOA defines as "small projects". Patients remain at the facilities and all health care workers remain at the facilities

while the renovation projects are underway. This is not the kind of work typical of construction work found in building new facilities. The MOA does not apply to the construction of retail stores such as in *Wegmans* or *Church's Fried Chicken*, 183 NLRB 1032 (1970).

The BBCTC contends additionally, that unlike *Wegmans* the work at issue here is a tiny and miniscule percentage of Kaleida's business. Kaleida is a huge organization employing 10,000 workers and having an operating budget in the billions of dollars. The work at issue here is so small as to render it inconceivable that Kaleida could "primarily" be engaged in the construction industry.

It is clear that Kaleida is an acute care hospital and subject to the Board's rulemaking on appropriate units in the health care industry. Accordingly, the Decision to apply the Rule is proper.

Regional Director properly decided that under the Rule, a unit of all craft employees is the only appropriate unit. Contrary to Petitioner's arguments, the Regional Director did not contradict herself. Rather, she argued alternatively: (1) that the craft employees are akin to a residual unit of unrepresented employees (because only a Section 8(f) relationship exists), or (2) that the craft employees constitute a pre-existing non-conforming unit which is acceptable under the Rule (because they have limited 9(a) status under 8(f) of the Act), or (3) even if the Rule is not applied the petitioned-for unit is not appropriate per *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), see *infra*. Under any scenario, and covering all of Petitioner's contentions, the Regional Director correctly applied Board law in finding that the petitioned-for unit is not appropriate, and that the only appropriate unit constitutes all craft employees.

## POINT II

**The Regional Director Correctly Applied Board Precedent in Finding that Even If the Health Care Rule Does Not Apply, The Petitioned-For Unit is Not Appropriate. Moreover, the Regional Director's Decision is Supported by the Record Evidence and is not Clearly Erroneous.**

The Regional Director found that even if the Health Care Rule did not apply to the instant petition, as Petitioner argues, she would still find that the petitioned-for unit was not appropriate. The Regional Director correctly applied the criteria set forth in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). Petitioner contends that the Regional Director based her findings on erroneous facts and conclusions of law. This is not the case.

The bargaining history since 2006 is that the BBCTC has been the bargaining agent for an overall unit. One MOA covers all the craft employees. While the carpenters have a collective bargaining agreement with an employer association, all work for this Employer, Kaleida, takes place under the MOA negotiated between the BBCTC and Kaleida. The MOA was not negotiated by the Carpenters.

There is no dispute that the MOA has been successfully working for 6 years. The BBCTC has successfully represented the Carpenters, about half of the craft unit, for 6 years.

The Regional Director correctly found that the Carpenters are integrated into the larger craft unit. Renovation projects cannot happen with one trade involved. In order for the MOA to work, all the relevant trades must work, and work together on projects. Bob Kulczyk, a carpenter, testified that he is a general foreman over other trades working for the Employer. (Tr. 201, 203). The Carpenters working cannot perform the work without the asbestos workers, the laborers, the plasterers, the cement masons, the steamfitters, the plumbers, and the painters. As

CCDU witness Bob Kulczyk testified, “In order for a job to be successful you have to coordinate with those trades.” Tr. 187. At Kaleida working under the MOA the trades work together as composite crews more often. (Tr. 201-02) Thus, the Regional Director correctly concluded based on the evidence that the carpenters are integrated with the overall craft unit. In *Beaunit Corp.*, 224 1502 (1976), the petitioner attempted to sever a unit of electrical mechanics and instrument mechanics from an overall production and maintenance unit involved in the production of nylon fiber. The Board found that even assuming the craft status of the mechanics, severance was not appropriate, particularly in light of the fact that these employees’ duties were essential to the overall production process, the bargaining history in the overall unit (7.5 years), and the absence of any countervailing considerations.

The Regional Director also correctly determined that Petitioner, CCDU, lacks experience in representing employees such as in the petitioned for unit. The CCDU is a recently formed union. It has not elected officers, it is not affiliated with an international union, it has never represented carpenters in collective bargaining, it has no contracts with employers in the construction industry or otherwise, it has never bargained with any employer over terms and conditions of employment, it does not have an apprentice program, nor a pension fund, nor a health and welfare fund. (Tr. 155-157). Petitioner contends that one member of the CCDU “steering committee” had sat on a negotiating committee in the past. However, no evidence was presented that he would have any role in the CCDU negotiations in the future. The Regional Director’s finding was clearly supported by record evidence.

## CONCLUSION

The Regional Director's decision is consistent with applicable Board precedent and supported by the record evidence presented at the hearing. The Regional Director considered every argument raised by Petitioner concerning the appropriateness of the unit. Whether it is considered under the health care Rule or not, the outcome remains that the only appropriate unit, based on the record evidence, is a unit of all craft employees employed by the employer. The BBCTC asks that the Board not disturb the current bargaining unit, and that the Board deny the Petitioner's request for review.

Dated: Buffalo, New York  
July 6, 2012

CREIGHTON, JOHNSEN & GIROUX

/s/ Catherine Creighton

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**AFFIDAVIT OF SERVICE BY E-MAIL**

I, Catherine Creighton, certify and affirm that on the 6<sup>th</sup> day of July, 2012 a true copy of the within Buffalo Building and Construction Trades Council's Statement in Opposition to the Concerned Carpenters for a Democratic Union's Request for Review of the Regional Director's Decision and Direction of Election in this matter; Case No. 3-RC-077821, was electronically mailed to the following:

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