

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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BLUEFIELD HOSPITAL COMPANY,	:	
LLC D/B/A BLUEFIELD REGIONAL	:	Case No. 10-CA-093042
MEDICAL CENTER	:	

*and*

NATIONAL NURSES ORGANIZING	:	
COMMITTEE, AFL-CIO (NNOC)	:	

GREENBRIER VMC, LLC D/B/A	:	
GREENBRIER VALLEY MEDICAL	:	Case No. 10-CA-093065
CENTER	:	

*and*

NATIONAL NURSES ORGANIZING	:	
COMMITTEE, AFL-CIO (NNOC)	:	

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**RESPONDENTS' MOTION FOR RECONSIDERATION**

As the Respondents in the above-captioned cases, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center (hereafter, “Bluefield”) and Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center (hereafter, “Greenbrier”)<sup>1</sup> hereby move, by and through their

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<sup>1</sup> Hereafter, Bluefield and Greenbrier may be referred to collectively as the “Hospitals.”

<sup>2</sup> On February 8, 2013, the Hospitals filed a Second Amended Answer, whereby they re-averred the Third Affirmative Defense and set forth new Affirmative Defenses, two of which arose from the Decision issued by the U.S. Court of Appeals for the District of Columbia Circuit in Noel Canning v. NLRB, Case No. 12-1153 (January 25, 2013).

<sup>3</sup> It should also be noted that Bluefield and Greenbrier have been notified

Undersigned Counsel, for reconsideration of the Order Denying Motion and Remanding (hereafter, the “Order”) issued by the National Labor Relations Board (hereafter, the “Board”) in the above-captioned cases on June 20, 2013.

### **BACKGROUND**

On September 25, 2012, the Acting Regional Director for Region 10, Sub-Region 11 issued a Certification of Representative in favor of the National Nurses Organizing Committee (hereafter, the “NNOC” or the “Union”) as to the Registered Nurses employed by Bluefield and a separate Certification of Representative in favor of the NNOC as to the Registered Nurses employed by Greenbrier.

Because the Hospitals’ Objections to the Election (hereafter, the “Objections”) were never resolved, Bluefield and Greenbrier declined the NNOC’s subsequent requests to bargain. On November 9, 2012, the NNOC filed against Bluefield an Unfair Labor Practice Charge, which alleged the Hospital’s refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”). That same day, the Union filed the same Unfair Labor Practice Charge against Greenbrier.

On November 29, 2012, on behalf of the Acting General Counsel (hereafter, for ease of reference, the “General Counsel”), the Regional Director for Region 10, Sub-Region 11 (hereafter, the “Regional Director”) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (hereafter, the “Complaint”), which incorporated the Union’s allegations. On December 13, 2012, the Hospitals filed an Answer, which denied the materials allegations of the Complaint and set forth two Affirmative Defenses, specifically that (1) the Certifications were unlawful because they arise from the Board’s Healthcare Rule, which violates Section 9(c)(5) of the Act, and (2) under an Election Procedures Agreement entered into between the Hospitals and the NNOC, an arbitrator had exclusive jurisdiction over the Objections.

In response, on December 19, 2012, the General Counsel filed a Motion for Summary Judgment (hereafter, the “Motion”), whereby the General Counsel requested that the Board enter summary judgment, because, supposedly, the Hospitals had failed to raise any issues that would warrant further proceedings. On January 14, 2013, the Hospitals filed an Amended Answer, whereby the Hospitals averred, through a new, Third Affirmative Defense, that based upon an affiliation between the NNOC and another labor organization, namely, the National Union of Healthcare Workers (hereafter,

the “NUHW”), there was no longer a continuity of representation, and therefore, the Hospitals’ refusal to bargain with the NNOC was not unlawful. That same day, the Hospitals filed an Opposition to the Motion (hereafter, the “Opposition”) in which the Hospitals argued that, based upon the Third Affirmative Defense, the Board had no basis to award summary judgment in favor of the General Counsel, but instead, should remand the case for the scheduling of a hearing before one of the agency’s Administrative Law Judges. On January 22, 2013, the General Counsel filed a Reply to the Opposition (hereafter, the “Reply”) in which he requested that the Board return the proceedings to Region 10, Sub-Region 11 (hereafter, the “Region”) for further processing based upon the issues raised by the Third Affirmative Defense.<sup>2</sup>

On June 20, 2013, the Board issued the Order, whereby the Board remanded the proceedings to the Region “for investigation of the Respondents’ affirmative defense relating to the Union’s affiliation with another labor organization.” The Board went on to rule that the Regional Director would hold the authority to decide whether, based upon the

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<sup>2</sup> On February 8, 2013, the Hospitals filed a Second Amended Answer, whereby they re-averred the Third Affirmative Defense and set forth new Affirmative Defenses, two of which arose from the Decision issued by the U.S. Court of Appeals for the District of Columbia Circuit in Noel Canning v. NLRB, Case No. 12-1153 (January 25, 2013).

investigation carried out by the Region, the Third Affirmative Defense raised genuine issues of material fact that would warrant a hearing before one of the agency's Administrative Law Judges.

For the reasons set forth below, the Hospitals respectfully request that the Board reconsider the remand, and upon reconsideration, make the modifications requested below.

### **ARGUMENT**

The Hospitals respectfully submit that the Board erred by imposing on the Hospitals an obligation to provide the Region with the Hospitals' evidence in support of the Third Affirmative Defense, and at the very same time, expressly vesting the Regional Director with the power to decide whether, based upon the Hospitals' evidentiary proffer, a hearing on the Third Affirmative Defense is necessary. Lest the fact be forgotten, the Regional Director has not withdrawn the Complaint. Accordingly, the Regional Director's role is that of prosecutor against, and adversary of, the Hospitals. Given the pendency of the Complaint, the Hospitals should not be required to provide the Regional Director with any evidence in support of the Third Affirmative Defense. In the circumstances, the Regional Director lacks the objectivity to make an appropriate determination as to whether the Hospitals' evidence would warrant an evidentiary proceeding. Indeed,

though the Regional Director did request (here also, on behalf of the General Counsel) that the proceedings be remanded to the Region, the Reply suggests that the Regional Director already views the Third Affirmative Defense with disfavor. Thus, the Reply styles the Third Affirmative Defense as the Respondents’ “attempt to justify their continued refusal to recognize and bargain with the NNOC,” and “attempt to obviate their continued duty to recognize and bargain” with the NNOC. See Reply, pages 3-4.<sup>3</sup>

Alternatively, in the event the Regional Director decided that a hearing was warranted by the Hospitals’ evidence, the Hospitals would suffer undue prejudice, insofar as the Regional Director, acting as the General Counsel, would have the benefit of pre-hearing production of the Hospitals’ evidence. Stated another way, as matters now stand, the Regional Director may improperly leverage the Order as a pre-hearing discovery device.

Furthermore, as part of the Opposition, the Hospitals provided an Offer of Proof, which plainly shows that the Hospitals are entitled to a

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<sup>3</sup> It should also be noted that Bluefield and Greenbrier have been notified that, as part of other unfair labor practice charges filed by the NNOC against the Hospitals (Case Nos. 10-CA-094403 and 10-CA-094646, respectively), the Region intends to issue a Complaint. Accordingly, the adversarial relationship between the Hospitals and the Region extends well beyond the cases presently before the Board.

hearing on the Third Affirmative Defense. The Region may or may not have doubts as to whether the Hospitals' evidence will be sufficiently strong to meet the burden of proof associated with the Third Affirmative Defense, but such a question is not for the Regional Director to decide now in lieu of a hearing. Instead, the question is one for an Administrative Law Judge to decide later and only after the conduct of a hearing.

### **CONCLUSION**

For all the reasons set forth above, the Respondents respectfully request that the Board reconsider the Order, and upon reconsideration, modify the Order by remanding the case to the Division of Judges for the scheduling of a hearing before one of the agency's Administrative Law Judges. Alternatively, to the extent that, in spite of the arguments set forth above, the Board believes that the Hospitals' evidence should be evaluated in the context of deciding whether a hearing is necessary, the Board should remand the case to another Region, which would not be affected by the Region's clear lack of impartiality.<sup>4</sup>

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<sup>4</sup> The Hospitals note that they believe the Board also erred by virtue of the rulings set forth by footnotes 1 and 2 of the Order. By confining this Motion for Reconsideration to the nature of the Board's remand, the Hospitals do not intend to waive their rights, and indeed, expressly reserve each and every right, to challenge, in the context of later proceedings before the Board and / or any reviewing court, the Board's other rulings as set forth by the Order.

Dated: Glastonbury, Connecticut  
July 22, 2013

Respectfully submitted,

/s/ \_\_\_\_\_

Bryan T. Carmody, Esq.  
Attorney for Respondents  
134 Evergreen Lane  
Glastonbury, Connecticut 06033  
(203) 249-9287  
[bryancarmody@bellsouth.net](mailto:bryancarmody@bellsouth.net)

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**CERTIFICATE OF SERVICE**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that a copy of the Respondents’ Motion for Reconsideration is being provided this date to the following *via* e-mail:

Shannon R. Meares  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 10, Sub-Region 11  
Republic Square, Suite 200  
4035 University Parkway  
Winston-Salem, NC 27106-2235

Jane Lawhon  
Counsel for Charging Party  
2000 Franklin Street  
Oakland, CA 94612

Dated: Glastonbury, Connecticut  
July 22, 2013

Respectfully submitted,

/s/ \_\_\_\_\_

Bryan T. Carmody, Esq.  
Attorney for Respondents  
134 Evergreen Lane  
Glastonbury, Connecticut 06033  
(203) 249-9287  
[bryancarmody@bellsouth.net](mailto:bryancarmody@bellsouth.net)