

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

MERCY HEALTH PARTNERS

Respondent,

-and-

Case No. 7-CA-52693

SEIU HEALTHCARE MICHIGAN

Charging Party.

**RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE ACTING GENERAL
COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

BARNES & THORNBURG, LLP
Attorneys for Respondent
Michael A. Snapper (P24135)
Keith J. Brodie (P51636)
171 Monroe Ave., N.W., Suite 1000
Grand Rapids, Michigan 49503

I. INTRODUCTION

This dispute was precipitated by Mercy Health Partners' ("Respondent" or "MHP") decision to cease performing certain "pre-registration" and related duties at Respondent's Hackley Hospital facility and to consolidate such work with the pre-registration work for Respondent's other facilities at a different non-hospital location. As noted by the ALJ, Respondent's decision "was part and parcel of the URO adopted by Trinity in 2008" (Decision p. 7 line 4).

"Trinity" is Trinity Health. Trinity owns and operates 19 Ministry Organizations ("MOs") across the United States at which it employs more than 47,000 employees (Tr. p. 104). Respondent is one of those 19 MOs. Respondent operates medical care facilities in Muskegon, Michigan, including two acute care hospitals known as the Hackley Campus and the Mercy Campus (Tr. pp. 46, 72-73, 91-92, 104, 184).

The URO, or Unified Revenue Organization, that Trinity adopted, and which precipitated this dispute, encompasses all of the following functional areas for the entire Trinity organization, including all of the hospitals run by Respondent and the 18 other Trinity MOs: patient financial services, health information management, medical reimbursement, revenue integrity and reimbursement, managed care payers and strategy contracting (Tr. p. 107). Prior to the disputed adoption of the URO, all of these areas of operation had been conducted autonomously by each of Trinity's 19 MOs. Implementation of the URO by Trinity represented an internal reorganization by which all of these functions have been or will be removed from the MO structures and placed within the newly created URO (Tr. p.107; Res-2).

Trinity's capital investments in creating the URO will be approximately \$90 million over a period of five to seven years, and Trinity projects revenue enhancement of approximately \$500 million over the first five years, as well as improved patient and physician experience and

enhanced legal compliance (Tr. pp. 109, 137; Res-8 p. 5). The adoption of this URO, and the removal of the encompassed duties from the previously autonomous MOs, represents a major restructuring of Trinity, described as conversion from a “holding company” to an “operating company” (Tr. pp. 116-17). This restructuring also encompasses Trinity’s information systems, legal services, tax, accounting and accounts payable functions (Tr. pp. 107, 117-18).

II. ARGUMENT

Respondent’s Exceptions relate primarily to Respondent’s contention that its decision at issue, involving implementation of the URO, is not a mandatory subject for bargaining under the National Labor Relations Act. The Respondent will not reiterate its arguments in support of that contention except to note that, as measured by the Board’s considerations in *Dubuque Packing Co.*, 303 NLRB 386 (1991), and its progeny, the Respondent’s decision was not a mandatory subject for bargaining. Respondent will, however, show that Counsel for the Acting General Counsel (“General Counsel” or “GC”), in its Answering Brief to the Respondent’s Exceptions, has failed to accurately represent the record before the ALJ, in ways that tend to obscure an accurate portrayal of Respondent’s decision.

General Counsel inaccurately characterized, and sought to minimize, Trinity’s capital investment in the URO: “Respondent claims it costs \$89 million to develop the model for the URO, (Tr. 137) but did not otherwise “elucidate” this testimony” (GC Brief p.3). In fact, the record shows substantial elucidation of this capitalization, made to the ALJ’s satisfaction:

Q. Can you give us a dollar amount for that investment?

A. Yes, over a five- to seven-year period, the investment is about \$90 million, 89 point something.

MR. CANFIELD [Counsel for the Acting General Counsel]: Excuse me. How much?

THE WITNESS [Ms. Linda Schaefer]: Eighty-nine point something million dollars.

- Q. BY MR. SNAPPER: Thank you. That does not include the operating costs of your department –
- A. Right. No that's above and beyond operating costs.

JUDGE CARSON: That's the development costs –

THE WITNESS: That's the development for build, for technology, the –

JUDGE CARSON: – with regard to checking out these other people –

THE WITNESS: Right. Project management, hiring, resources –

JUDGE CARSON: – and hiring Deloitte and whoever you hired and whatever, okay.

THE WITNESS: Absolutely.

JUDGE CARSON: I got the picture.

(Tr. pp. 137-38).

This witness, Linda Schaefer, had earlier testified that Trinity had made substantial use of outside resources including consultants to develop the URO, including hiring Deloitte & Touche, as well as Accenture, to help build the URO (Tr. pp. 128-29). In addition, Trinity has created an entirely new position, Vice President of Patient Financial Services, within that structure to implement the URO (Tr. pp. 111, 115, 116; Res-3; Res-4).

And, in response to cross-examination by General Counsel, the witness did further “elucidate” her testimony:

- Q: And I think you said that there was a cost of the model for 89 point something million dollars?
- A: That's the investment that our ministry organizations are contributing to build this new organization. So it includes technology, it includes the consultants that we've used for Accenture, the project planning, the standardization of processes, process flows, the actual physical build-out of our facilities, yes. So it's above and beyond just our operating costs; it's additional investment that Trinity has made to get us to the future state.
- Q: Is that money that's already been spent?
- A: We've spent, through fiscal year '10, which ended June 30th, approximately 42 million of the 89.

(Tr. pp. 145-46).

On pages 3, 4, and 5 of his Brief, General Counsel has distorted and minimized Trinity's reasons for adopting the URO and relocating the work. General Counsel claims:

"The reason for consolidating services . . . was to free up space in the acute care hospital Consolidating pre-registration functions would assertedly increase productivity. For example if one clerk were to call in sick, there would be sufficient coverage. . . . Respondent also claimed that the work was moved to help with cross-training of associates Champayne [one of Respondent's witnesses] testified that it was more convenient and somewhat less costly to train the pre-registration employees at Mercy."

(GC Brief pp. 3, 4, 5). In fact, and remarkably contrary to General Counsel's characterizations, the ALJ, as noted earlier, explicitly found that Respondent's decision "was part and parcel of the URO adopted by Trinity in 2008" (Decision p.7 line 4). The record is abundantly clear that the decision by Trinity to establish the URO represented a substantial Trinity-wide restructuring and reorganization, for reasons that General Counsel ignores: projected revenue enhancement of approximately \$500 million over just the first five years, as well as improving patient and physician experience in communications and insuring full compliance with legal regulations (Tr. p. 109; Res-8 p.5). And this national, Trinity-wide restructuring, including the creation of a single new entity, the URO, comes at an initial capitalized cost in excess of \$89 million (Tr. pp. 116-17, 137).

General Counsel also seeks to obscure the full import of Trinity's decision to implement the URO, by taking events as they existed at an early point in time, and freezing those as representative of the entire URO over the course of implementation. General Counsel does this, for example, by representing that the affected employees "continue to perform the same work They do their work in the same manner, using the same equipment They have only cursory contact with Mercy employees." (GC Brief pp. 2-3). Although General Counsel's references to the record accurately reflect the testimony of events as they existed at one earlier point in time,

General Counsel fails to point out that implementation of the URO is a progression which over time will greatly transform work location, duties and equipment.

For example, Respondent's witness Linda Schaefer testified as follows: "Migration means the continuous movement to the ultimate state or the future state. . . . [Y]ou cannot change everything – you can't flip a switch and say, all of a sudden, we're going to operate this way, without a plan to get to the future state. And so that plan and the change that occurs around that plan is a migration to the future state." (Tr. p. 145). Ms. Schaefer also testified that the jobs which had been relocated (prompting the instant Charge) will continue with a more complete regional relocation to a location in Kentwood, Michigan, as part of the overall plan for the URO (Tr. pp. 134-35). Moreover, in the URO future state (post-Genesis implementation), these positions will service both MHP MO facilities, and will ultimately operate regionally to service other Trinity MOs. (Tr. p. 134). The record demonstrates the adoption and implementation of Genesis across all of Trinity's MOs is central to facilitating this fundamental operational change. (Tr. p. 121). The broader content of this centralization also was illustrated by the relocation of Trinity employees in South Bend, Ann Arbor, and Columbus (Tr. pp. 142-43).

In addition, General Counsel incorrectly states that "the decision as to where the work would be moved was made by Hackley supervisors rather than by Trinity officials" (GC Brief p. 8). The record clearly shows that the decision makers, Julie Champayne and Deana Richter, both are Trinity employees (Tr. p. 122; Res-5). Remarkably, elsewhere in his Brief, General Counsel himself acknowledges that Ms. Champayne is a Trinity official: "Julie Champayne, Trinity's URO Regional Manager for Patient Access . . ." (GC Brief p. 4).

Many of General Counsel's arguments flow from the following assertion: "[C]ontrary to Respondent's argument, what is at issue in this case is not the URO, but the relocation of the work from Hackley to Mercy" (GC Brief p. 6). This assertion by General Counsel contradicts

the ALJ's finding that the decision to relocate the jobs "was part and parcel of the URO adopted by Trinity in 2008" (Decision p. 7 line 4). However, General Counsel did not timely file an exception to this cited finding by the ALJ and his efforts to characterize the relocation of workers at anything other than implementation of the URO is contrary to the record and to the ALJ's finding, to which General Counsel has made no exception. Therefore, General Counsel's argument seeking to separate Respondent's decision from implementation of the URO is not only contrary to the great weight of the record, it is also untimely given the absence of the appropriate exception to the ALJ's finding.

General Counsel further contradicts the record, and engages in his own speculation, when he writes: "Alternatively, the parties could have agreed to consolidate the pre-registration employees at Hackley, thereby satisfying the URO's desire for standardization and Respondent's bargaining obligation" (GC's Brief p. 6). The record, of course, and as cited above, makes clear that the consolidation process was implemented Trinity-wide and relocation from Hackley to the Mercy facility was merely the first step towards a regional service model that will service multiple MOs. (Tr. pp. 133-35).

Finally, General Counsel's Brief places mistaken reliance on *Westinghouse Electric Corp.*, 313 NLRB 452 (1993). *Westinghouse* is distinguishable on several grounds. The employer in *Westinghouse* was doing nothing remotely analogous to Trinity's action in implementing the URO. In *Westinghouse*, the Board found that the employer simply shifted work from one group of employees to another group in the same facility. "The present case involves essentially one plant ... and the reassignment of work from one group of calibration employees to another." *Id.* at 453. By contrast, Trinity's adoption and implementation of its URO is nation-wide, affecting numerous hospitals and MOs in several states.

Although not essential to its conclusion, the *Westinghouse* Board also found that labor costs were a factor in the employer's decision. "We nevertheless specifically disavow the judge's [ALJ's] mistaken statement that financial savings gained from the layoffs here are not the kind of labor costs contemplated by *Dubuque*. We also disavow any implication that an evaluation of labor costs as a factor and a managerial decision to transfer work is limited to the comparison of wages of the employees involved." *Id.* at 453 n.5. Quite to the contrary, in the instant case, it is undisputed on the record that labor costs were not a factor in implementing the URO. (Decision p. 7 line 1-2). And General Counsel has not filed an exception disputing this finding by the ALJ.

In addition, the Board noted that in *Westinghouse*, "the employer has essentially decided to continue doing the same work with fewer employees." *Id.* at 453. By contrast, in the instant case, Respondent did not decrease the number of employees.

III. CONCLUSION

For the reasons set forth in its Brief in Support of its Exceptions, Respondent respectfully asks that its Exceptions be upheld.

Respectfully submitted,

BARNES & THORNBURG LLP

Dated: February 7, 2011

By: 
Michael A. Snapper (P24135)
Keith J. Brodie (P51636)
Business Address:
171 Monroe Ave., NW, Suite 1000
Grand Rapids, Michigan 49503
Telephone: (616) 742-3930
Facsimile: (616) 742-3999
Email: msnapper@btlaw.com
keith.brodie@btlaw.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MERCY HEALTH PARTNERS

Respondent,

-and-

Case No. 7-CA-52693

SEIU HEALTHCARE MICHIGAN

Charging Party.

CERTIFICATE OF SERVICE

Document Served: *Respondent's Reply Brief To Counsel For The Acting General Counsel's Answering Brief To Respondent's Exceptions*

Person served: Brenda D. Robinson, Esq.
SEIU Healthcare Michigan
brenda.robinson@seiuhhealthcaremi.org

Joseph Canfield, Esq.
National Labor Relations Board
joseph.canfield@nlrb.gov

Stephen M. Glasser
National Labor Relations Board
stephen.glasser@nlrb.gov

The undersigned certifies that a copy of the documents listed above was electronically transmitted upon the parties listed above on February 7, 2011.

Dated: February 7, 2011

Respectfully submitted,

BARNES & THORNBURG LLP

By: 
Keith J. Brodie (P51636)

Business Address:
171 Monroe Ave., NW, Suite 1000
Grand Rapids, Michigan 49503
Telephone: (616) 742-3936
Facsimile: (616) 742-3999
Email: kbrodie@btlaw.com

February 7, 2011

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20005-3419

**Re: Case No. 7-CA-52693
Respondent's Reply Brief To Counsel For The Acting General Counsel's
Answering Brief To Respondent's Exceptions**

Dear Mr. Heltzer:

Enclosed please find Respondent's Reply Brief To Counsel For The Acting General Counsel's Answering Brief To Respondent's Exceptions and Certificate of Service in the above-mentioned case.

Thank you for your attention to this matter.

Very truly yours,

BARNES & THORNBURG LLP



Keith J. Brodie

KJB/mcj
Enclosures
cc (w/encls.): Stephen M. Glasser, NLRB
Brenda D. Robinson, Esq.
Joseph Canfield, Esq.
Mercy Health Partners