

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BLUEFIELD HOSPITAL COMPANY,
LLC D/B/A BLUEFIELD REGIONAL
MEDICAL CENTER

Case No. 10-CA-093042

and

NATIONAL NURSES ORGANIZING
COMMITTEE, AFL-CIO (NNOC)

GREENBRIER VMC, LLC D/B/A
GREENBRIER VALLEY MEDICAL
CENTER

Case No. 10-CA-093065

and

NATIONAL NURSES ORGANIZING
COMMITTEE, AFL-CIO (NNOC)

**RESPONDENTS' REPLY TO CHARGING PARTY'S OPPOSITION
TO ACTING GENERAL COUNSEL'S REQUEST FOR PARTIAL
REMAND**

As the Respondents in the above-captioned cases, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Hospital and Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center (hereafter, collectively at times, the "Hospitals"), hereby reply, by and through their Undersigned Counsel, to the Opposition filed by the Charging Party, National Nurses Organizing Committee (hereafter, the "Union" or the "NNOC"), to the

Request for Partial Remand filed by Counsel for the Acting General Counsel.

BACKGROUND

On November 29, 2012, the Acting General Counsel, acting through the Regional Director (hereafter, the “Regional Director”) for Region 10, Sub-Region 11 (hereafter, the “Region”) issued the Consolidated Complaint (hereafter, the “Complaint”) in the above-captioned cases. In the Complaint, the Acting General Counsel alleges that the Hospitals have refused to bargain with the Union in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended. In response, the Hospitals filed a timely Answer.

On December 19, 2012, Counsel for the Acting General Counsel (hereafter, for ease of reference, the “General Counsel”) filed a Motion to Transfer Cases To and Continue Proceedings Before the Board and For Summary Judgment (hereafter, at times, the “General Counsel’s Motion”). On December 21, 2012, the National Labor Relations Board (hereafter, the “Board”) issued an Order in which the agency transferred the proceedings to the Board and a Notice to Show Cause as to why the General Counsel’s Motion should not be granted. On January 14, 2013, the Hospitals submitted a Response to the Notice to Show Cause and Opposition to the

General Counsel's Motion (hereafter, at times, the "Hospitals' Opposition"). At the same time, the Hospitals filed an Amended Answer, whereby they set forth an affirmative defense (hereafter, at times, the "Affiliation Defense") to the effect that, due to the NNOC's affiliation with another labor organization, namely, the National Union of Healthcare Workers (hereafter, the "NUHW"), there was no longer a continuity of representative, and therefore, the Hospitals' refusal to bargain with the Union was not unlawful.

On January 22, 2013, the General Counsel filed a Request for Partial Remand and Reply to the Hospitals' Opposition (hereafter, the "General's Counsel's Remand Request"), whereby the General Counsel requested that the Board return the proceedings to the Region, because the Affiliation Defense "raise[d] issues of fact that [had] not been investigated by the Region." See General Counsel's Remand Request, page 3. On February 4, 2013, the Union filed an Opposition to the General Counsel's Remand Request (hereafter, the "Union's Opposition"), which was accompanied by a document that purports to be the Affiliation Agreement between the NNOC and the NUHW (hereafter, the "Affiliation Agreement"). Based upon the Affiliation Agreement, the Union claimed that no question of fact could exist as to whether there was no longer a continuity of representative.

For the reasons set forth below, under the assumption, solely for the sake of argument, that the Board currently holds the power to conduct any agency business¹, the Board should conclude that the Union's proffer of the Affiliation Agreement does not put to rest any question as to the lack of sufficient continuity between the pre-affiliation labor organization and the post-affiliation labor organization. Accordingly, the Board should grant the General Counsel's Remand Request.

ARGUMENT

The Union's contention that no question could be raised as to the continuity between the pre-affiliation labor organization and the post-affiliation labor organization teeters upon, and ultimately, topples over because of, the Affiliation Agreement.²

¹ The Hospitals respectfully submit that, insofar as the appointment of Members Block and Griffin violated the U.S. Constitution, the Board currently lacks the quorum required by Section 3(b) of the Act. See Noel Canning v. NLRB, D.C. Cir. Case No. 12-1153 (January 25, 2013); New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). Accordingly, the Hospitals respectfully request that, for whatever period of time the Board continues to lack a quorum, the Board place all submissions currently before the agency in abeyance.

² As a preliminary matter, the Union has not provided the Board with any evidence from which the agency would be able to properly authenticate the Affiliation Agreement. Insofar as the Agreement is signed by people under the Union's control, the absence of an affidavit from at least one signatory of the Agreement is noteworthy.

The Affiliation Agreement does not provide the Board any grounds on which to conclude that the document sets forth the parties' **entire** agreement. In particular, the Agreement does not contain a "mergers clause." The Union's Opposition does not represent that the Agreement happens to set forth the entirety of the parties' agreement. Nor does the Opposition represent that the Agreement, which was executed nearly three (3) months ago, has not been the subject of any amendment(s). Simply put, given the fact the document offered by the Union does not even purport to cover the entirety of the parties' agreement, the Board has no grounds to conclude that the Affiliation Agreement has single-handedly ruled out any question as to whether a sufficient difference exists between the pre-affiliation labor organization and the post-affiliation labor organization. For that reason alone, the Board must grant the General Counsel's Remand Request.³

Contrary to the Union's contention, a review of the Affiliation Agreement only **raises** questions as to whether, by virtue of the affiliation, there is no longer a continuity of the representative. As part of the preamble,

³ In the Opposition, the Union argues that, as part of the evaluation of whether a lack of sufficient continuity has taken place, the lack of initiation and transfer fees, the lack of change to members' status and the continuity of the union's leadership and operation are "[o]f great significance." See Union's Opposition, page 3. Ironically, none of these subjects are even addressed by the Affiliation Agreement, which is obviously all the more reason for the Board to reject the Union's efforts to deprive the Hospitals of their due process rights.

the Affiliation Agreement confirms that, whereas the NNOC was previously an RN-only labor organization, the parties' intention is to mesh together all employees who work side-by-side in the healthcare industry. Thus, the Agreement provides for the formation of an "Integration Team," which "will work towards the **integration of resources** and other matters" between the NNOC and the NUHW. See Affiliation Agreement, Paragraph 3 (emphasis added). Indeed, the Agreement suggests that the NNOC has already provided loans to the NUHW and contemplates the future provision of even more monetary assistance. Id., Paragraph 9. Clearly, while the Affiliation Agreement may provide that neither party shall have any right to the funds of the other (see Paragraph 2), the parties have obviously elected to voluntarily exchange and / or combine their resources. See also Paragraph 8 (NNOC promises to provide the NUHW with "appropriate support," but does not specify the nature or extent of the support).

In addition, the Affiliation Agreement raises rudimentary questions of what degree of control the NNOC has maintained over the Union's affairs. For the NUHW, the Affiliation Agreement expressly retains (1) the NUHW's current structure and officer positions, (2) the NUHW's authority, jurisdiction, functions and by-laws, together with the NUHW's right to make any related alterations, and (3) for those employees represented by the

NUHW, the right to negotiate collective bargaining agreements, as well as the right to administer any collective bargaining agreements, on the employees' behalf. See Affiliation Agreement, Paragraphs 12-14. Notably, the Affiliation Agreement does not set forth, or even arguably imply, any such comparable reservation of rights for the NNOC.

Similarly, the Affiliation Agreement expressly retains the NUHW's right to employ outside consultants and legal counsel, but sets forth no comparable retention of rights for the NNOC. See Affiliation Agreement, Paragraph 7. Thus, on the face of the document, the Agreement presents a question as to whether the NNOC plays any role in the employment of consultants who work for, or lawyers who will represent, the post-affiliation labor organization.⁴

The Board may or may not have some expectation as to how the questions raised above may be answered, but any such expectations are beside the point. The only question, of course, is whether there is a question. In spite of, and actually, as matters happen, partially because of, the Affiliation Agreement, there is a question as to whether sufficient

⁴ The questions as to what degree of control the NNOC has retained under the Affiliation Agreement are particularly pressing given the fact that, under the Agreement, the NNOC may terminate the Agreement only with the NUHW's consent. See Paragraph 16.

differences exist between the pre-affiliation and post-affiliation labor organization.

CONCLUSION

In the case at bar, presently before the Board is the (unauthenticated) evidence of only one party. Lest the Board abuse the agency's discretion, and violate the Hospitals' due process rights, which obviously by the Region's own estimation, require further investigation of the Hospitals' Affiliation Defense, the Board has only one fair and lawful response, which is to return the case to the Region. Only by taking such a step will the Hospitals have the opportunity to present and develop the evidence referenced by their Offer of Proof, and only by taking such a step, will the agency have the benefit of a complete record developed by both sides.

Dated: Glastonbury, Connecticut
February 22, 2013

Respectfully submitted,



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

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CENTER	:	
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NATIONAL NURSES ORGANIZING	:	
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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 the Respondents' Reply to Charging Party's Opposition to Acting General Counsel's Request for Partial Remand (hereafter, the "Reply") was e-filed on Friday, February 22, 2013 with the National Labor Relations Board through the website of the National Labor Relations Board (www.nlr.gov).

The Undersigned does hereby further certify that, on February 22, 2013, a copy of the Reply was served upon the following by email, as follows:

Shannon R. Meares
Counsel for the Acting General Counsel
NLRB
Region 10, Sub-Region 11
Republic Square, Suite 200
4035 University Parkway
Winston-Salem, North Carolina 27106
Shannon.Meares@nlrb.gov

M. Jane Lawhon, Esq.
National Nurses Organizing Committee
2000 Franklin Street
Oakland, California 94612
jlawhon@calnurses.org

Dated: Glastonbury, Connecticut
February 22, 2013

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bryan T. Carmody", written over a horizontal line.

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