

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MERCY HEALTH PARTNERS,
HACKLEY CAMPUS

Cases 07-CA-133887
07-CA-134026

and

NATIONAL UNION OF HEALTHCARE
WORKERS (NUHW)

07-CB-133889
07-CB-134027

and

DISTRICT LODGE 60, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS (IAM), AFL-CIO

07-CB-133890
07-CB-134028

and

HASAN ZAHDEH, an Individual

and

PATRICIA KELLY, an Individual

Colleen J. Carol, Esq.

for the General Counsel.

Keith J. Brodie, Esq.

for the Respondent Employer.

William H. Haller, Esq.

for the Respondent Unions.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Grand Rapids, Michigan on January 12, 2015, on unfair labor practice allegations set forth in an order further consolidating cases, second consolidated complaint and notice of hearing issued by the General Counsel on October 29, 2014.¹ The allegations litigated were based on charges filed by

¹ All dates are in 2014 unless otherwise indicated.

individuals Hasan Zahdeh (Charging Party Zahdeh) in cases 07-CA-133887, 07-CB-133889, and 07-CB-133890, and by Patricia Kelly (Charging Party Kelly) in cases 07-CA-134026, 07-CB-134027, and 07-CB-134028, which were the remaining allegations after the issuance of the General Counsel's order on January 6, 2015, severing cases and approving withdrawals, dismissing consolidated complaint, and withdrawing cases.²

The second consolidated complaint alleges that Respondent Mercy Health Partners, Hackley Campus (Respondent MHP) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by applying superseniority language at the request of Respondent District Lodge 60, International Association of Machinists and Aerospace Workers (IAM), AFL-CIO (Respondent IAM), the servicing agent of National Union of Healthcare Workers (NUHW) (Respondent NUHW), to ensure that Respondent IAM union steward Lynn Hartman maintained first-shift preference over other Hackley Tech Unit employees, including Charging Party Kelly, thereby encouraging employees to join or assist Respondent IAM and Respondent NUHW. The second consolidated complaint also alleges that Respondent IAM and Respondent NUHW violated Section 8(b)(2) of the Act by causing Respondent MHP to discriminate against employees who were not union stewards by denying those employees their shift preference and seniority rights, and 8(b)(1)(A) of the Act by failing to represent Charging Party Kelly for reasons that are arbitrary, discriminatory, or in bad faith, thereby breaching the duty of fair representation it owed to Charging Party Kelly and the other unit employees.

On the entire record,³ including my observation of the demeanor of the witnesses,⁴ and after considering the briefs filed by the General Counsel and Respondent Employer, and the proposed findings of law filed by the Respondent Unions, I make the following

² A full description of the pleadings are as follows: On July 31, 2014, a consolidated complaint and notice of hearing issued in cases 07-CA-124263, 07-CB-124264 and 07-CB-124265 on charges filed by Diane Lynn Smit, an Individual (Charging Party Smit). Charging Party Zahdeh filed the charge in case 07-CA-133887 on August 1, 2014 (and an amended charge on September 17, 2014), and the charges in 07-CB-133889 and 07-CB-133890, also on August 1, 2014 (and an amended charge in 07-CB-133890 on September 17, 2014). Charging Party Kelly filed charges in 07-CA-134026, 07-CB-134027, and 07-CB-134028 on August 4, 2014. On October 29, 2014, the General Counsel issued an order further consolidating cases, second consolidated complaint and notice of hearing, consolidating cases 07-CA-124263, 07-CB-124264 and 07-CB-124265 with cases 07-CA-133887, 07-CB-133889, 07-CB-133890, 07-CA-134026, 07-CB-134027 and 07-CB-134028.

On December 22, 2014, Charging Party Smit requested withdrawal of the charges in 07-CB-124264 against Respondent NUHW, and in 07-CB-124265 against Respondent IAM, having resolved all issues to her satisfaction, and on January 2, 2015, Respondent MHP and Charging Party Smit entered into an informal Board Settlement Agreement in 07-CA-124263. (GC Exh. 1(w)). On that basis, on January 6, 2015, the General Counsel issued an order severing cases 07-CA-124263, 07-CB-124264 and 07-CB-124265 from 07-CA-133887, 07-CB-133889, 07-CB-133890, 07-CA-134026, 07-CB-134027 and 07-CB-134028, and an order approving withdrawals, dismissing consolidated complaint, and withdrawing notice of hearing in cases 07-CB-124264 and 07-CB-124265.

³ Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "RE Exh." for Respondent Employer's Exhibit; "RU Exh." for Respondent Unions' Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's Brief; "RE Br." for Respondent Employer's brief; and "RU Br." for Respondent Unions' brief.

⁴ In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent

FINDINGS OF FACT

I. JURISDICTION

5 The Respondent Employer, a nonprofit corporation with a facility in Muskegon, Michigan (the Hackley Campus), has been engaged in the operation of a hospital providing inpatient and outpatient medical care. Annually, Respondent MHP, in conducting its operations described above, derived gross revenues in excess of \$250,000, and purchased and received at its facility, good, supplies and materials valued in excess of \$5,000 directly from points outside the State of Michigan.

10 The Respondent Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent Unions admit, and I find, that Respondent NUHW and Respondent IAM have been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

- 20
1. The Hackley Hospital and Mercy Hospital were separate hospitals with separate units that were merged by Respondent Mercy Health Partners in 2008.

25 In 2007 the Tech Unit at Hackley Hospital became represented by the Service Employees International Union Healthcare Michigan (SEIU) as a result of a merger with the then-existing LPN unit. Hackley Hospital and the SEIU negotiated a collective-bargaining agreement for that unit of employees that was effective by its terms from January 30, 2008 to May 31, 2010. (Jt. Exh. 1). In 2008, Respondent Mercy Health Partners, which already operated Mercy General Health Partners, an acute care hospital in Muskegon, Michigan, acquired Hackley Hospital, which is also an acute care hospital in Muskegon.

30 On April 2, 2008, Respondent MHP merged the two hospitals but continued to operate both hospital locations as separate campuses--the Mercy Campus and the Hackley Campus--and it continued to recognize the separate bargaining units. As a result, there were four bargaining units at each campus that had different collective-bargaining agreements, and in some cases, different labor organizations representing certain units of employees. Robin Belcourt, Respondent MHP's director of labor relations at that time, testified that the four bargaining units at the Mercy campus consisted of an RN Unit, an LPN Unit, a Service and Support Unit, and a

probabilities based on the record as a whole. In certain instances, I may have credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

Tech II Unit, and all were represented by the SEIU. The Hackley campus had four different bargaining units: the RNs were represented by the Michigan Nurses Association (MNA); the LPN/Tech Unit, the Laboratory Tech Unit, and the Service and Maintenance Unit were represented by the SEIU. According to Belcourt, the LPN component was subsequently eliminated from the LPN/Tech Unit, and that unit became the Hackley Tech Unit, which is the unit involved in this case.

The Hackley Tech Unit includes employees in several different departments, including Surgery, OB, Respiratory, Diagnostic Imaging/Radiology, Vascular, and others. (Jt. Exh. 1, at Tab 2, Section 1.3(B)). The record establishes that there are approximately 87 employees in the bargaining unit, and approximately 80 percent of the employees work on the first shift due to the fact that the majority of the unit employees are involved with diagnostic testing and treatment of out-patients, procedures of which are scheduled during the daytime or first-shift hours. The parties stipulated that the Hackley Tech Unit is described in a "Corrected Certification of Representative" dated January 13, 2012 as the following:

All full-time and regular part-time certified and registered respiratory therapists, surgical technologists, EKG technicians, physiology technicians, polysomnography technicians, physiology sonography technicians, registered radiological technologists, CT technologists, nuclear med technologists, diagnostic cardiac sonographers, diagnostic vascular sonographers, diagnostic medical sonographers, lead diagnostic medical sonographers, special procedure technologists, mammography technologists, cardiovascular interventional technologists, radiology clinical instructors, and Radiology Techs/Vascular Techs required to hold registration, certification, licensure from the State of Michigan or other specified registering bodies or who are in the process of obtaining such credentials, employed by the Employer at its Hackley Campus located at 1700 Clinton Street and 6401 Prairie Street, Muskegon, Michigan; but excluding clerical Associates, confidential Associates, managerial associates, supervisory Associates, relief, and guards and supervisors as defined in the Act, and all other Associates. (GC Exh. 2).

2. Respondent MHP and the SEIU negotiated a Transfer of Work Agreement in February 2009 to deal with the removal of work at one campus that was transferred to the other campus.

As a result of the hospital merger, Respondent MHP and the SEIU met to address the impact of the merger and what would happen in the event that work or job positions were transferred from one hospital campus to the other. In February 2009, Respondent MHP and the SEIU entered into a letter of understanding entitled "Permanent Transfer/Relocation of Work," which is also referred to by the parties as the "Transfer of Work Agreement." (Jt. Exh. 2).⁵ Belcourt testified that before the Transfer of Work Agreement was implemented, work transferred from one hospital campus to the other required Respondent MHP to eliminate the work at the one campus and lay off the affected employee, and then post the identical position at

⁵ Belcourt testified that the Transfer of Work Agreement was never signed, but the parties have continued to operate according to its terms.

the other facility. Belcourt testified that the Transfer of Work Agreement afforded employees affected by the transfer of their work with the right, if exercised, to move with the work.

5 According to Belcourt, the Transfer of Work Agreement was utilized numerous times by the parties when work was permanently transferred or relocated from one hospital campus to the other, which resulted in the elimination of positions. She testified that the Transfer of Work Agreement does not identify the person who is affected by the elimination of the position, but the practice of the parties was to utilize the layoff provision of the collective-bargaining agreement to identify the person affected. Belcourt testified that the Transfer of Work Agreement was not
10 part of the collective-bargaining agreement, but was an agreement by the parties used to provide the employee affected by the transfer of work with the additional rights or opportunities to transfer with the work.

The Transfer of Work Agreement provides, in relevant part:

- 15
1. When work is being transferred to another bargaining unit located on another MHP campus and the transfer of work results in the elimination of a position, the employee whose job is being eliminated will be given the opportunity to follow the work. In the event there are not enough positions on a comparable shift in the
20 department receiving the work for the number of impacted employees, the positions will be filled on the basis of seniority using a combined seniority list between both SEIU bargaining units. The impacted employee will become a member of the SEIU bargaining unit at the receiving campus which includes their job classification.
 - 25 2. In the event that there are not enough positions in the unit receiving the work to accommodate the impacted employees, these employees will be given the opportunity to exercise his/her displacement/bumping rights in accordance with the provisions of his/her current collective bargaining agreement in an attempt to avoid a layoff.
 - 30 3. In the event the impacted employee does not wish to transfer with his/her work, he/she will be given the opportunity to exercise his/her displacement/bumping rights in accordance with the provision of his/her current collective bargaining agreement in an attempt to avoid a layoff.

35 Under the Transfer of Work Agreement, when work is transferred from one hospital to another, the employee whose job was eliminated is provided the opportunity or option to transfer to the other hospital with the work, without any loss of benefits. If the employee decides not to transfer with the work, he/she is allowed to bump within their own department. If the employee decides not to exercise either of those two options, he/she would then suffer a layoff.
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3. On or about November 30, 2011, Respondent MHP implemented the terms of its last, best and final offer.

45 After the 2008-2010 collective-bargaining agreement expired on May 31, 2010, Respondent MHP and the SEIU engaged in negotiations throughout 2010 and 2011 for a successor agreement. A successor collective-bargaining agreement was reached, but the ratification vote failed twice. The parties reached impasse on or about November 30, 2011.

Thereafter, Respondent MHP unilaterally implemented its last, best, and final offer and the associated tentative agreements.

5 The record establishes that the “status quo” or “Implemented Terms” consist of Respondent MHP’s last, best, and final offer, with the tentative agreements, and to the extent that those provisions did not change the prior agreement, the terms of the expired SEIU collective-bargaining agreement. (Jt. Exh. 1). These Implemented Terms set forth the terms and conditions of employment for the Hackley Tech Unit employees. Since there has been no ratified successive collective-bargaining agreement, the working conditions for the unit employees have
10 been governed by the Implemented Terms from on or about November 30, 2011 to the present.

4. On January 13, 2012, Respondent NUHW became the collective-bargaining representative of the Hackley Tech Unit.

15 Approximately 1 month after the Implemented Terms were imposed on the Hackley Tech Unit, the employees in that unit voted to have Respondent NUHW as its union representative, and Respondent NUHW was thereafter certified on January 13, 2012. (GC Exh. 2). Respondent NUHW’s bargaining committee included Hasan Zahdeh, who later became chief steward, and Michele Seeger, a Respiratory Department employee.

20 Since the Hackley Tech Unit was no longer represented by the SEIU, in the spring of 2012, an issue arose as to whether the Transfer of Work Agreement would continue to be applicable to the Hackley Tech Unit employees. In Case No. 07-CA-073242, Respondent NUHW alleged, inter alia, that Respondent MHP violated the Act by changing the employees’
25 working conditions by ceasing to allow cross-campus transfers of employees as permitted by the Transfer of Work Agreement, without affording Respondent NUHW an opportunity to bargain over that change. (GC Exh. 3). In that case, the parties entered into an Informal Board Settlement Agreement whereby Respondent MHP agreed to apply the terms of the Transfer of Work Agreement to the Hackley Tech Unit, and the settlement was approved by the Regional
30 Director for Region 7 on June 6, 2012. (GC Exh. 3). The record establishes that the parties are therefore in agreement that the Transfer of Work Agreement is applicable to the issue of Kelly’s transfer to the Mercy campus. (Tr. 134-135).

35 5. On September 20, 2012, the Hackley Tech Unit became represented by Respondent IAM.

On September 20, 2012, Respondent NUHW entered into a servicing agreement with Respondent IAM, whereby Respondent IAM was empowered with full representational responsibility for the Hackley Tech Unit. In May 2013, Respondent IAM removed all of the elected stewards, except Michelle (Shelly) Seeger from the respiratory department. It then
40 appointed Shawn Nutt (from the vascular department), Lynn Hartman (from the radiology department), and Autumn Witteveen (from the surgery department) as union stewards.⁶

⁶ Subsequent to the transfer of the fluoroscopy work, the exercise of superseniority by Hartman, and the transfer of Kelly to the Mercy campus, which are the matters at issue in this case, a stipulated election between Petitioner Respondent IAM and Petitioner Michigan Union of Healthcare Workers (MUHW) was conducted by the National Labor Relations Board to determine the collective-bargaining representative of the Hackley Tech Unit. In that regard, Petitioner MUHW won the election, and on October 9, 2014, in Representation case No. 07-RC-111849 and 07-RC-116273, the NLRB certified that

6. The relevant Implemented Terms governing the terms and conditions of employment for the Hackley Tech Unit employees.

5 The Implemented Terms that define the terms and conditions of employment for the Hackley Tech Unit employees include of an article pertaining to the layoff of employees. In that regard, article XI provides, inter alia, the following:

10 Article XI, Layoff/Recall, Section 11.1 Layoff Defined:

A layoff shall be defined as reduction in the work force or hours of work within a department. In the event of a mandatory time off of less than [sic] eight hours it will be done on the basis of seniority. If a layoff becomes necessary it shall be by shift and the following order will be followed:

- 15 (a) Temporary employees.
 (b) Probationary employees provided the remaining employees are qualified to perform the work.
 (c) Management or employees will request a voluntary reduction in hours to meet the reduction needs. Voluntary reduction of
 20 hours will be granted based on operational efficiency and in descending seniority order.
 (d) If further reductions are necessary, the Hospital shall identify the position(s) to be eliminated or reduced based upon seniority and budgeted status.

25 Section 11.2 Employee Displacement:

30 Recognizing that the Hospital must have qualified employees at all times the displaced employee will notify the Hospital no later than 72 hours after notification of whom they intend to displace. An Associate whose position is eliminated or laid off may accept the layoff or exercise one of the following options (1-2) which is available:

a majority of the valid ballots in the election had been cast for the MUHW. Thus, on that date the MUHW was certified as the collective-bargaining representative of the Hackley Tech Unit. (GC Exh. 9). The record reveals that Hasan Zahdeh was elected interim president of the MUHW, and the union stewards consisted of Seeger (from the respiratory department), Brenda Chilcote (from the surgery department), Darcy Welsh (from the surgery department), and Krista Bignall Cadriel (from the OB department).

In its brief, the General Counsel references events during this time period which occurred after Respondent IAM represented the bargaining unit. Specifically, it asserts that in October 2014, there was a transfer of outpatient vascular work from the Hackley campus to the Mercy campus and Shawn Nutt, the highest senior employee, volunteered as the employee to transfer, which differed from the procedure involved in Kelly's transfer. (GC Br. at p. 11). I find the October 2014 transfer is not relevant to the issues in the instant case because it occurred after Kelly's transfer, it involved a different union than the Respondents NUHW and IAM, and the record demonstrates that the Nutt transfer was pursuant to an agreement negotiated between Respondent MHP and the MUHW, whereby they agreed to abandon the Transfer of Work Agreement and use a different procedure for determining who would be affected by the transfer of work. Accordingly, I provide no weight to these facts or any arguments relying on them.

1. Select from a vacant position, with equal or less hours, within the bargaining unit in which the Associate has the required qualifications to perform the duties of the position;
2. Displace the least senior associate within their classification within the same shift with either equal or greater hours with the same benefit eligibility status; if not available, the Associate may choose one of the following options (3-4);
3. Displace the least senior associate within their classification on a different shift with either equal or greater hours with the same benefit eligibility status; or,
4. Displace the least senior associate within their classification within the same shift with lesser hours; or if not available,
5. Displace the least senior associate within their classification on a different shift with lesser hours.

If an Associate is unable to maintain his/her budgeted status by exercising any of the above options, the Associate may displace the least senior associate with the same eligibility status, within the bargaining unit, provided the Associate meets the required qualifications to perform the duties of the position as presented in the job description and with minimal training, generally not to exceed but not less than two (2) weeks. If the Associate cannot displace a less senior associate with the same eligibility status, he/she may displace the least senior associate at a lower eligibility status within the bargaining unit, provided the associate meets the required qualifications to perform the duties of the position as presented in the job description and with minimal training, generally not to exceed but not less than two (2) weeks. (Jt. Exh. 1).

There is no specific mention of the Transfer of Work Agreement in article 11 of the Implemented Terms. Article XIII, 13.2 is the only portion of the Implemented Terms that specifically references the Transfer of Work Agreement. Section 13.2 (Vacancies) states that:

Positions that result from transfer of work as defined in the Transfer of Work Agreement between the hospital and the [SEIU] bargaining units...shall be governed by that Agreement and any provisions herein contrary to that Agreement shall not apply to such positions. (J Exh. 1).

Article X details the definition and use of seniority in the Hackley Tech Unit. Section 10.2 defines seniority as “the length of continuous employment on the Hospital records from the Associate’s last date of hire into the bargaining unit.” (Jt. Exh. 1). Seniority is used to determine the positions and rights of employees in both benefit situations, as well as situations that may negatively impact employment.

Superseniority for union stewards is found in article I, Section 1.3(H), which provides that “[f]or the purposes of Call to Stay Home, layoff and recall only, the stewards during the

term of office shall hold top seniority, recognizing that the Hospital must have qualified associates in all sections at all time (sic).” (Jt. Exh. 1).⁷

5 7. The transfer of the fluoroscopy work from the Hackley campus to the Mercy campus in the Spring/Summer of 2014.

10 In or around December 2013, Respondent MHP informed Respondent IAM that it was considering transferring all outpatient fluoroscopy procedures from the Hackley campus to the Mercy campus. (RE Exh. 1; Tr. 159).⁸ Fluoroscopy is a type of x-ray and it is work that is performed by the radiology techs. The record reveals that all radiology techs were required to perform fluoroscopy procedures, and they perform those procedures on a regular basis. In the summer of 2014, Respondent MHP’s two fluoroscopy machines were moved from the Hackley campus to the Mercy campus. As a result of the transfer of work, Respondent MHP determined that one full-time radiology tech would be affected and offered the opportunity to transfer with the work pursuant to the Transfer of Work Agreement.

15 Although the person who was to be affected was not yet identified at that time, the parties agreed that superseniority would be applied to protect the stewards since a position was being eliminated at the Hackley campus. In this connection, Stewart credibly testified that in a negotiating session on December 13, 2013, there was extensive discussion between the parties in terms of clarifying the application of the superseniority provision to the union stewards in the case of a layoff. According to Stewart, the parties agreed that the superseniority provision was applicable to a layoff situation, and that it applied to the stewards. (Tr. 158–159).⁹ In addition, Stewart testified that the parties agreed that superseniority would apply to the transfer of fluoroscopy work since a position was being eliminated, and that was essentially tantamount to a layoff. The record reveals that the matter was again discussed in negotiating sessions between the parties on April 21, 2014, May 29, 2014 and July 24, 2014. (RE Exh. 2; RU Exh. 2, RU Exh. 3, Tr. 161–162, 165).

20 At the May 29, 2014 negotiating session, Ken Urganski, Respondent MHP’s vice president of clinical operations, informed Respondent IAM representatives that Respondent MHP interpreted the Transfer of Work Agreement to mean that the affected tech employee would be selected by shift seniority. The record establishes that the least senior full-time radiology tech on first shift was Lynn Hartman. Kelly was then the next least senior full-time radiology tech on first shift. The only full-time radiology tech in the department with less seniority than Hartman was Joe Etterman, who worked on the second shift.

⁷ The superseniority provision applies to “call to stay home” hours which are described as situations where there is not enough work for all techs scheduled (the “available work does not warrant they work their scheduled shift”) and the low senior tech is “called to stay home.” (See Jt. Exh. 1 at tab 1, sec. 12.7(A) of the Implemented Terms). The record establishes that the “call to stay home” aspect of the superseniority provision is not at issue in this case.

⁸ Respondent MHP’s decision and ability to transfer the fluoroscopy work is not at issue in this case.

⁹ Consistent with Stewart’s testimony, the bargaining notes from the December 13, 2013 session reflect that the superseniority issue was clarified in that meeting, and it was determined that it applied to the union stewards. (RE Exh. 1).

At the meeting on May 29, 2014, Hartman asked whether special procedure techs would be immune from the effect of the transfer. (Tr. 252). When she was informed that special procedures techs would not be shielded, and that the tech would be chosen by shift seniority, Hartman indicated that Kelly would be the employee who would be transferred. (Tr. 98).

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8. On July 31, 2014, Respondent MHP informed Kelly that fluoroscopy work was being removed from the unit and that she would be the person affected by the transfer of work.

10 On July 31, 2014, Mark Stewart, Respondent MHP's current director of labor relations, sent an email to Respondent IAM president and business representative, Peter Jazdzyk, as well as union stewards Shawn Nutt, Lynn Hartman, Autumn Witteveen and Michelle Seeger, the subject of which was "Fluoral Work – Transfer of Work." In that email, Stewart stated:

15 As we have recently discussed, the Hospital is proceeding to transfer the outpatient fluoral work to the Mercy campus, resulting in the transfer of one Hackley Technologist, who is being offered the opportunity to follow the work and transfer into the Tech II Unit at the Mercy campus. Recall that in prior discussions it was confirmed that Pat Kelly is the appropriate, affected individual. We will be meeting with Pat this afternoon to notify her of this matter, and provide her with a displacement notice and related information. She may:

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- Choose to follow the job and transfer to the Tech II unit.
- Decline the opportunity, and exercise displacement rights.
- Decline the opportunity, elect not to exercise displacement rights, and take a voluntary layoff.

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I wanted to afford you this pre-emptive notice to ensure your awareness of this development. Please call Scott or me if you have any questions. (GC Exh. 10).

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On that day, after Stewart notified Respondent IAM and the union stewards of the meeting via email, Kelly was called to a meeting in Stewart's office and she was presented with the choice to transfer with the fluoroscopy work to the Mercy campus, bump Etterman on second shift, or be laid off. Respondent MHP presented Kelly with an "Option Form" (GC Exh. 6) which informed her that, under Section 11.2 "Employee Displacement" of the Implemented Terms, as an employee whose position was being eliminated, she could accept the layoff, or exercise one of the following options which were available:

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1. Select from a vacant position, with equal or less hours, within the bargaining unit in which the Associate has the required qualification to perform the duties of the position.
2. Displace the least senior associate within their classifications within the same shift with either equal or greater hours with the same benefit eligibility status; if not available, the Associate may choose one of the following options (3-4).
3. Displace the least senior associate within their classification on a different shift with either equal or greater hours with the same benefit eligibility status or,

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4. Displace the least senior associate within their classification within the same shift with lesser hours; or if not available,
5. Displace the least senior associate within their classification on a different shift with lesser hours.

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A memo dated July 31, 2014, to Kelly from Scott Hawkes, Respondent MHP's labor relations specialist, was attached to the "Option Form," stating the subject of the memo was "Wage Rate Result Due to Job Transfer or Exercise of Displacement Rights." The memo listed the radiology tech rates of pay for the Hackley Tech Unit and the rates of pay for the Registered Radiology Tech II Unit. The memo also set forth the following "Adjustment" for Kelly, reflected by the following bullet points:

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- If you transfer to Tech II, your rate will be \$27.90 (Red Circled at the top rate of the job at Hackley.
 - Your rate will be adjusted to \$28.01 in December, due to a planned base wage adjustment.
- If you elect to remain in the Hackley Tech Unit and exercise displacement rights, you would bump Joe Etterman from a 1.0 FTE position on 2nd shift. The applicable pay rate is \$27.90, plus a \$1.75/hour shift differential.

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Even though the "Option Form" did not make specific reference to the Transfer of Work Agreement, it is undisputed that the parties agreed the Transfer of Work Agreement was applicable to the transfer of the Hackley Tech Unit fluoroscopy work, and the memo attached to the form specifically stated that "transfer to Tech II" was an option for Kelly. In that connection, Kelly, who was clearly aware she was being provided the option of transferring with her work, signed and dated the Option Form on August 5, 2014, and chose to follow the work to the Mercy campus by indicating on the form in her handwriting: "I choose to follow the work to Mercy Campus." (GC Exh. 6).

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On July 31, 2014, several of the first-shift radiology techs asked Hartman whether Kelly was going to be transferred and expressed their disapproval of the fact that Kelly would be affected. (Tr. 88). On that date, Michelle Seeger sent an email to William Rudis, Respondent IAM Grand Lodge Representative, informing him that "[t]he hospital is transferring the fluoroscopy work to Mercy, and the good part of that is that they are following what was set up in the transfer or work agreement; i.e., allowing one tech who will be affected to either transfer over to the Mercy campus; or to "bump" someone with less seniority in the same department at Hackley who is on a different shift; or to choose to be laid off." (GC Exh. 11; Tr. 102). In that email, she informed Rudis that "the problem" is that the person to be affected is supposed to be the least senior, and that Hartman is the least senior. In her email, Seeger informed Rudis that she believed "super seniority" is not applicable to that situation because it is for layoff and recall only, and it was not a layoff situation since Hartman, as the least senior, could bump to second shift at Hackley and she would not be laid off.

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9. Kelly's transfer to the Mercy campus in mid-August 2014, and the effect of the transfer on Kelly.

The record establishes that Kelly began working at the Mercy campus in or around mid-August 2014, shortly after executing the Option Form. While the Hackley Tech Unit was represented by Respondent IAM, the Mercy campus Tech II Unit was represented by the SEIU, so when Kelly transferred to Mercy, she became a member of the SEIU. Her duties at the Mercy campus mirrored those she performed at the Hackley campus. Kelly testified that while she was paid at her Hackley wage rate of \$30.37 an hour for a few months, in mid-November 2014, she was informed that her wages would be adjusted to the Mercy campus rate of \$27.90 an hour. Thus, starting in mid-November 2014, her hourly wage was reduced at the rate of \$2.47 an hour from the wage rate she was earning at the Hackley campus. In addition, Kelly testified that at the Hackley campus, she had access to what was termed a “special procedures calls,” which paid special procedures techs \$3 per hour to be on call during off hours. The record establishes that only four techs could perform special procedures at the Hackley campus--Kelly, David Weller, Thomasine Thomas, and Hasan Zahdeh. Kelly testified that she performed special procedure work at the Hackley campus for 48 hours every 2 weeks. (Tr. 84; 92). However, Kelly testified that while working at the Mercy campus, she no longer had access to special procedures work. Therefore, transferring with her work to the Hackley campus resulted in a reduction in Kelly’s earnings on the basis of the \$2.47 reduction in her hourly wage rate and in the loss of special procedures work.

10. The union representation for the Hackley Tech Unit at the time the fluoroscopy work was transferred.

The record reveals that the Hackley Tech Unit includes several different departments, including surgery, OB, respiratory, diagnostic imaging/radiology, vascular, and others. (Jt. Exh. 1, tab 2, section 1.3(B)). Robin Belcourt, Respondent MHP’s former director or labor relations and Mark Stewart, Respondent MHP’s current director of labor relations, credibly testified¹⁰ that these departments are functionally different as they are in different locations of the hospital, they are supervised by different managers, and they have different schedules. Stewart also testified that there are provisions of the Implemented Terms which only apply to certain departments and have no relevance to other departments, particularly in regard to scheduling issues such as on-call, overtime, and mandation.

¹⁰ The facts in this case are, for the most part, undisputed. However, on any occasions where the testimonies of the Respondents’ witnesses may conflict with the testimonies of the General Counsel’s witnesses, I credit the Respondents’ witnesses. Credibility determinations may rely on a variety of factors, including the content of the witness’ testimony, the witness’ demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction/ Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)(citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). My overall observation during the trial was that the Respondent Employer’s and Respondent Unions’ witnesses were largely credible in their testimony and demeanor, and that they testified in a convincing and straight forward manner indicative of truthfulness. In particular, I find that Respondent MHP witnesses Robin Belcourt and Mark Stewart, and Respondent IAM witnesses Karl Heim and Pete Jazdyk appeared honest and forthright, and presented very credible testimonies that were both believable and plausible. On the other hand, the General Counsel’s witnesses testified in a less convincing manner.

Article I, section 1.3 of the Implemented Terms governs union representation for the Hackley Tech Unit employees. Section 1.3(B) provides that “. . . five bargaining unit members chosen by the membership shall serve as stewards to represent [employees] in the grievance procedure and on the negotiating committee.” The stewards represent employees in radiology/vascular, respiratory, surgery, and physiology departments. This provision sets the number of stewards that can come from these departments, stating specifically that the five union stewards shall consist of two stewards from radiology/vascular, one from respiratory, one from surgical, and one from physiology. (JE Exh. 1). Other departments that do not have specific stewards are considered to be part of the radiology/vascular departments.

Stewart testified that the need for a steward in the physiology department was effectively eliminated when the physiology department was previously transferred to the Mercy campus. This left four union stewards from the following departments: radiology/diagnostic imaging, vascular, respiratory, and surgery. Belcourt, who participated in negotiations for Section 1.3(B) for Respondent MHP, testified that this provision was negotiated to “ensure that they had some representation with expertise in the individual areas, because in each one of these areas, there [are] little different nuances to the area.” (Tr. 126). Belcourt further testified that both parties wanted this provision included in the collective-bargaining agreement because it helped “facilitate explaining issues, . . . if somebody [is] in the area that works there, that understands the nuances, you’re easier able to come to some conclusions . . . in situations where there [are] issues.” (Tr. 127). Karl Heim served as Respondent IAM’s representative during the time period in question until he retired from his union position in June 2014. Heim credibly testified that he felt it was “very important, based on the nuances and the specialties of each department,” that issues which arose in the individual departments be addressed and handled by the steward from that department.

When the fluoroscopy work was transferred in the summer of 2014, the four union stewards were Michelle Seeger from the respiratory department, Shawn Nutt from the vascular department, Lynn Hartman from the radiology department, and Autumn Witteveen from the surgery department. The stewards served as both department stewards and negotiating team members. Zahdeh, who was a union steward when the Hackley Tech Unit was represented by the SEIU and Respondent NUHU, testified that all union stewards were required to assist employees in other departments in all representational capacities, and that there were several departments that did not have a steward present. Seeger also testified that she had, on occasion, performed union steward duties on the behalf of employees who worked outside of her department.

Respondent MHP’s witnesses credibly testified that the union stewards for Respondent IAM were very active in dealing with Respondent MHP’s managers with regard to negotiating a contract and in dealing with issues that arose for employees in their respective departments concerning unit employees’ terms and conditions of employment. Respondent IAM’s negotiating committee consisted of the unit’s four stewards, plus a staff member of the Union. Belcourt credibly testified that during the time that Respondent IAM represented the Hackley Tech Unit, the union stewards and Respondent IAM officials met at least once a month from September 2013 through July 2014 to negotiate a contract. According to Belcourt, Respondent MHP had different managers for each department, and the union stewards interacted with their

respective managers with regard to questions about terms and conditions of employment for the employees in those departments.

5 Belcourt also testified that after the collective-bargaining agreement expired on May 31, 2010, and Respondent MHP's last, best, and final offer was implemented, there was increased uncertainty regarding the terms and conditions of employment for the unit employees. Belcourt testified that due to that uncertainty, there was more interaction between the stewards and the managers, and the increased interaction was particularly apparent on the day shift because most employees worked that shift, and the managers all worked day shift. In addition, Belcourt also testified that the union stewards' knowledge of their departments was beneficial to handling and resolving working condition issues because the Implemented Terms were not consistent on certain topics between the different departments, such as the scheduling provisions, and that there were differences in certain working conditions between the surgical techs, radiology techs, and the vascular techs.

15 Stewart credibly testified that during the time that Respondent IAM represented the Hackley Tech Unit, Respondent MHP and Respondent IAM held monthly "mutual interest" meetings, which were attended by the stewards. At these meetings, which were held during the first shift hours when the managers were present, the stewards discussed and attempted to remedy issues regarding working conditions. Stewart testified that there were no managers or supervisors with oversight responsibilities for the Tech Unit assigned to second or third shift, and that all managers who were responsible for the Tech Unit worked exclusively during the first shift. Stewart testified that even though no written grievances were filed by the union stewards during the time Respondent IAM represented the unit employees, he had many verbal discussions with stewards about working conditions and grievance matters, and he had spoken to stewards about issues, concerns, and problems that were not necessarily identified as being part of a grievance step. In this regard, Stewart testified that there were many questions about whether the status quo had been violated and there were more shop floor operational issues in the unit at that time because the parties were operating under the status quo and without a collective-bargaining agreement in effect. Stewart also testified the reason that few grievances were filed could have been attributed to the fact that there was no binding arbitration in effect at that time.

25 Heim credibly testified that the union stewards received complaints and concerns about working conditions and terms of employment from unit members, and they then met with management to try to resolve those issues or grievances. Similar to Respondent MHP's witnesses, he testified that the union stewards participated in negotiating committee meetings held twice a month during the first shift, and that it would have been difficult to have the stewards work other than on the first shift because that was when the managers worked and were present at the facility. He testified that at the time, contract interpretation and administration were discussed at the negotiation sessions and there was confusion in the unit about the implemented terms and what terms to apply. Even though Heim serviced the Hackley Tech Unit in Muskegon, Michigan, he lived a considerable distance away in Detroit. As such, Heim testified that he had indicated at bargaining sessions and mutual interest meetings that he wanted the union stewards and committee members to participate with management in an effort to resolve work issues, and that issues pertaining to interpretation and application of the implemented terms were handled by the stewards. Stewart also testified that it was his

understanding from Heim that the stewards had the authority to conduct day-to-day union business relative to the administration of the contract (Implemented Terms) and resolve issues.

5 Despite the fact that Heim testified he did not recall any grievances being filed by the
 stewards at that time, he testified that workplace issues were adjusted to conclusion by the
 stewards, such as vacation, paid time off allocations and accounting, overtime, and extraneous
 overtime issues. He also testified that there were specific examples of settlement or resolution of
 10 issues by the stewards, including a vacation issue in the respiratory department and an overtime
 issue in the radiology department. Heim testified that after the stewards had resolved matters, he
 would follow up with Stewart to confirm the understanding of the agreement reached by the
 stewards. Heim also testified that it was important for stewards to handle matters that arose from
 their own departments because they were familiar with those areas. With regard to grievances
 filed by the union stewards, Hartman testified that she filed one grievance in 2014 for a tech
 employee in the radiology department. (Tr. 258).

15 Pete Jazdyk, who replaced Heim as the Respondent IAM representative in June 2014,
 also credibly testified that he was involved in the negotiation sessions with the union stewards
 and that it would have been difficult for the stewards to represent the needs of the unit if they
 were not working on the first shift. He testified that if the stewards worked second or third
 20 shifts, the Respondent Employer would have had to change their schedules and move personnel
 to the off-shifts in order to have the stewards moved to first shift when the managers were
 present and the bargaining was taking place. Jazdyk also testified that the union stewards
 addressed issues that arose in their departments at the bargaining sessions and in meetings with
 management. Jazdyk testified that one issue in particular that was resolved by the stewards was
 25 a grievance concerning the posting of job positions for work that was transferred from the Mercy
 campus to the Hackley campus.

30 *B. The Contentions of the Parties*

The General Counsel argues that article XI (Layoff and Recall) should not apply to the
 Transfer of Work Agreement and therefore there was no basis to determine the affected
 employee by shift seniority. He argues that the Transfer of Work Agreement should have instead
 been applied by departmental seniority. On that basis, according to the General Counsel,
 35 Hartman should not have been immediately impacted by the transfer of work because second
 shift employee Etterman would have been affected. Since the steward should not have been
 impacted, the application of the superseniority language was beyond the minimum exercise of
 such protection allowed by the Board.

40 The General Counsel contends that even assuming there would have been an impact on
 the steward, the Respondent Unions “did not rebut the presumption to show that Hartman’s
 presence on first shift was necessary to the administration of the collective-bargaining agreement
 and the representational interests of the unit employees” because there were three other stewards
 who worked first shift, and issues that arose came through the stewards to the Respondent IAM
 45 international representative, who would handle them at the negotiation sessions, and that
 Hartman could have “continued her limited steward duties with equal measure on second shift.”
 (GC Br. at p.17). On that basis, the General Counsel asserts that Respondent MHP and

Respondents NUHW and IAM, by agreeing to apply the superseniority language to the transfer of fluoroscopy work, discriminated against Kelly in violation of the Act.

5 The Respondent Unions assert that the parties' practice in the event of a transfer of work outside the bargaining unit covered by the Transfer of Work Agreement, was to utilize the layoff provisions of the expired collective-bargaining agreement to identify the employee to be affected by the transfer. They also contend that if the Respondent Employer and Respondent Unions had not applied superseniority to exempt Hartman from the transfer of work, Hartman would have had the choice of either transferring with the work out of the bargaining unit, exercising her bumping right to displace Etterman on second shift, or being laid off. The Respondent Unions argue that any of these options would have deprived the radiology department their union steward, and that they had legitimate and substantial representational reasons for providing Hartman superseniority and keeping her from being transferred out of the unit, moved from the day shift, or being laid off, and thereby removing her ability to communicate with management or attend regularly scheduled labor-management meetings.

20 The Respondent Employer, like the Respondent Unions, argues that the layoff language of the Implemented Terms was correctly used to identify the person who was to be affected by the transfer of work. In addition, the Respondent Employer argues that the application of the superseniority provision did not violate the Act because it was purely defensive in nature and was used to enhance the Respondent Unions' ability to represent its members by assuring that Hartman kept her position on first shift in her area of representation.

25 C. Analysis

30 Superseniority provisions have been bargained for and obtained by unions in collective-bargaining agreements to assure continuity of function and maximum use of a union steward's skill and expertise in representing the bargaining unit employees. Collective-bargaining provisions granting superseniority to union officials in matters relating to layoff and recall have been upheld by the Board where the union official's responsibilities have a direct relationship to the effective and efficient representation of the bargaining unit employees. *Industrial Workers (AIW) Local 148 (Allen Group Inc.)*, 236 NLRB 1368, 1370 (1978). However, in *Dairyalea Cooperative Inc.*, 219 NLRB 656 (1975), enfd. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2nd Cir. 1976), the Board determined that superseniority provisions, by their nature, inherently tend to discriminate against employees for union-related reasons, and "thereby . . . restrain and coerce employees with respect to the exercise of their rights protected by Section 7 of the Act." Id. at 658. As such, a superseniority clause that is not on its face limited to layoff and recall is presumptively unlawful, and the party that asserts the legality of such a provision has the burden of demonstrating substantial and legitimate business justification. Id.

45 In *Dairyalea*, the Board held that the lawfulness of such restricted superseniority provisions is based on the ground that ". . . it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job." Id. at 658. Thereby, it not only serves a legitimate statutory purpose, it also "redounds in its effects to the benefit of all unit employees." Id. The Board has found the application of superseniority lawful only as to those employees who are agents of the union who must be on the

job to accomplish duties directly related to contract administration. *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983). While the exercise of superseniority to protect a union steward from layoff from his or her area of representation has been described as “geographically defensive” and consistent with the principles of *Dairylea*, only the minimal exercise of such protection is permitted. *Mechanics Educational Society of America Local 56 (Revere Copper)*, 287 NLRB 935, 936 (1987). Thus, the application of superseniority to provide protection that goes beyond that which is minimally necessary for the union steward to remain in a job in his or her area of representation will be found to be an overly broad use of superseniority that is unlawful. *Joy Technologies, Inc.*, 306 NLRB 1 (1992).

While the facts of this case are somewhat complicated, the issue before me is rather simple--whether the superseniority provision was unlawfully applied to Union Steward Hartman with regard to the transfer of fluoroscopy work on July 31, 2014, thereby constituting a violation of Section 8(a)(3) and (1) of the Act by the Respondent Employer, and violations of Section 8(b)(2) and 8(b)(1)(A) of the Act by the Respondent Unions. For the reasons set forth below, I find that the evidence does not establish that the Respondents have violated the Act as alleged.

1. The superseniority provision was lawful on its face.

Although there is no dispute that the superseniority provision in this case is lawful on its face because it is limited to layoff and recall, as mentioned above, the provision also applies to “Call to Stay Home.” Section 12.7(A) of the Implemented Terms states that “call to stay home” hours are where the “available work does not warrant they work their scheduled shift.” (Jt. Exh. 1 at tab 1). “Call to stay home” thus describes situations where there is not enough work for all Techs scheduled and the low senior Tech is “called to stay home.” (See Jt. Exh. 1 at tab 1, sec. 12.7(A) of the Implemented Terms).

The record establishes that the “call to stay home” aspect of the superseniority provision is not at issue in this case, and the General Counsel admits that there is “no dispute that the superseniority clause in Section 1.3(H) of the Implemented Terms is facially lawful.” (GC Br. at p. 12). I note that article XI of the Implemented Terms defines “layoff” as a “reduction in the work force or hours of work within a department.” Since “call to stay home” describes situations where there is not enough work for all employees scheduled, and therefore there is a reduction in the “hours of work,” I find that “call to stay home” is consistent with the definition of layoff and that it presents a layoff-type situation. Therefore, I find that the superseniority provision in this case, even with the “call to stay home” language, is limited to layoff and recall. Accordingly, I agree with the parties that the superseniority provision in this case is lawful on its face.

2. The transfer of the fluoroscopy work was related to, and constituted, a layoff of a Hackley Tech Unit employee, and therefore it was appropriate to apply the superseniority provision to the transfer of that work.

The record in this case, including the credible testimony of the Respondent Employer’s witnesses, establishes that the transfer of the fluoroscopy work was, for all practical purposes, a layoff situation. The transfer of work was consistent with the definition of “layoff” in the Implemented Terms because it resulted in a reduction of the work force and hours of work for one full-time first shift tech, which in turn resulted in the elimination of that position from the

Hackley Tech Unit. In addition, the Board has held that for the purposes of superseniority analysis, there is no significant distinction between a transfer and a layoff. *Joy Technologies*, supra at 2, fn. 6 (1992) (“The fact that here we are dealing with a transfer rather than a layoff is a distinction without significance”); See also *Auto Workers (Scovill, Inc.)*, 266 NLRB 952, 953 fn. 9 (1983) (steward superseniority for defensive shift maintenance is like layoff protection and presumptively lawful). Since the Board has found that superseniority provisions granting union officials protection have been found lawful by the Board when they are in matters “relating to” layoff and recall,¹¹ it was appropriate to have applied the superseniority provision to the transfer of fluoroscopy work in this case.

3. Respondent MHP’s application of the layoff provision with the Transfer of Work Agreement and subsequent determination that Kelly would be affected by the transfer of work was consistent with the status quo or Implemented Terms, and there is insufficient evidence to establish that such application and determination were discriminatory.

The General Counsel does not dispute that the Transfer of Work Agreement is applicable to the instant case, and the complaint does not allege that Respondent MHP’s interpretation and application of the Transfer of Work Agreement violated the Act. Nevertheless, the General Counsel argues that the Transfer of Work Agreement should not have been applied by shift seniority, but instead should have been applied by straight departmental seniority. In support of this argument, the General Counsel asserts that the Transfer of Work Agreement makes no mention of using the layoff language of article XI (Layoff and Recall) to identify the person to be affected by the transfer of work. To the contrary, Respondent MHP argues that the evidence does not reveal that the Transfer of Work Agreement was discriminatorily applied, and that it applied the Transfer of Work Agreement as written and consistent with past practice.

It is undisputed that the transfer of the fluoroscopy work was going to result in the loss of work and the elimination of a position. Respondent MHP determined that the work to be affected would be that of a full-time tech who performed fluoroscopy work on first shift, which is also not disputed by the parties. The parties also agree that the Transfer of Work Agreement is applicable to the transfer of the fluoroscopy work, but that the Agreement is silent as to how the person to be affected by that transfer of work is identified. Both Belcourt and Stewart credibly testified that since the Transfer of Work Agreement was silent with regard to determining which employee would be affected by the transfer of fluoroscopy work, Respondent MHP applied the Transfer of Work Agreement in conjunction with the Implemented Terms of the status quo, which resulted in the elimination of the lowest senior tech who performed fluoroscopy work on the first shift. It was determined that the employee who was subject to layoff, would be offered the opportunity to transfer with the work pursuant to the Transfer of Work Agreement. Belcourt and Stewart also credibly testified that since a position was being eliminated (and that was tantamount to a layoff), Respondent MHP and Respondent IAM agreed that superseniority would apply as the status quo to layoffs in general and to the transfer of the fluoroscopy work.

The credible testimony of Belcourt and Stewart also reveals that Respondent MHP’s use of article 11.1 of the Implemented Terms with the Transfer of Work Agreement was consistent with the past practice of the parties. They testified that the layoff provision of the collective-

¹¹ See *Industrial Workers (AIW) Local 148 (Allen Group)*, supra at 1370.

bargaining agreement was used in the past to identify whose job was being eliminated by the transfer of work so that the employee could be given the opportunity to transfer with or follow the work. Belcourt and Stewart testified that while it is true that Section 1 of the Transfer of Work Agreement does not mention layoff or the use of the layoff provision of the contract, it describes that “the transfer of work results in the elimination of a position,” which is synonymous with a layoff. In addition, reference is made to “layoff” in Sections 2 and 3 of the Transfer of Work Agreement where it refers to the affected employee’s displacement/bumping rights “in accordance with the provisions of his/her current collective-bargaining agreement in an attempt to avoid a layoff.” According to Belcourt, when the Transfer of Work Agreement was applied in the past, the Respondent Employer and the SEIU used the layoff provision from the “sending campus” where the work was being eliminated to determine whose position was being eliminated. I find this credible testimony from Belcourt and Stewart was not only unrebutted by the General Counsel, it is entirely plausible when consideration is given to the fact that the Transfer of Work Agreement is silent with regard to identifying the persons whose positions are being eliminated, and the fact that the transfer of work, described in the Transfer of Work Agreement as the “elimination of a position,” is synonymous with and tantamount to a layoff as defined in the Implemented Terms.

While the General Counsel argues that the Transfer of Work Agreement should not have been applied by shift seniority, but instead should have been applied by straight departmental seniority, that assertion is not supported by the record and the credible testimony of Respondent MHP’s witnesses. Under the General Counsel’s argument, Joe Etterman, a second shift full-time radiology tech should have been the person affected by the transfer of work and had his position eliminated. However, Section 11.1 provides that layoffs “shall be by shift,” and Stewart testified that Respondent MHP determined that the impacted employee was determined by shift, a determination not alleged by the General Counsel in the complaint to be unlawful. In addition, Stewart testified that only first shift work was being transferred, and on that basis, only one employee who performed fluoroscopy work on the first shift would be impacted. Since Etterman worked second shift, he could not have been the person whose position was being eliminated by the transfer of the first shift work. On that basis, I find no merit to the General Counsel’s argument on this issue.

The record reveals that on the first shift, eight full-time techs performed fluoroscopy work in the Hackley Tech Unit. Hartman was the lowest in seniority and Kelly was the next lowest in seniority. (RE. Exh. 4). Under the terms of the Transfer of Work Agreement and the applicable layoff provision in the Implemented Terms, the full-time tech with the lowest seniority on that shift would have their position eliminated and they would be laid off, but they would first be given an opportunity to transfer with the work to the Mercy campus. Since Hartman was the lowest in seniority, but also the only union steward from the radiology department, Respondent MHP, with the agreement of the Respondent Unions, applied the superseniority provision to her, which provides that the union stewards “shall hold top seniority” for the purpose of layoff (which I find is functionally what the transfer of work constituted). After Hartman was moved to the top of the seniority list, Kelly was the lowest full-time tech in seniority on the first shift who performed fluoroscopy work. On that basis, Respondent MHP determined that Kelly was the employee whose job was going to be eliminated, and she was offered the opportunity to transfer for the work to the Mercy campus, an offer which she ultimately accepted.

Based on the above, the evidence in this case establishes that Respondent MHP's application of the article XI layoff provisions of the Implemented Terms in conjunction with the Transfer of Work Agreement to determine that the lowest senior full-time tech on first shift would be the one whose position was to be eliminated, was consistent with the status quo and the parties' past practice. In addition, the application of superseniority protection to Hartman as the only union steward in that department to shield her from being removed from the shift, thus causing Kelly to be the person whose position was to be eliminated, was also consistent with the status quo and past practice. Furthermore, I note that contrary to the General Counsel's assertions, the record in this case is devoid of any evidence that Respondent MHP's application of shift seniority and the layoff language in article XI of the Implemented Terms was discriminatorily motivated or unlawful.

4. The credible evidence establishes that Respondents had legitimate and justifiable reasons for applying superseniority to Hartman to allow her to continue to carry out her representational duties as union steward.

As mentioned above, the General Counsel contends that even assuming there would have been an impact on Hartman as the steward, the Respondents did not show that Hartman's presence on first shift was necessary to the administration of the collective-bargaining agreement and the representational interests of the unit employees because: (1) Hartman could have continued her steward duties on second shift; (2) there were three other stewards who worked first shift, and (3) issues that arose came through the stewards to the Respondent IAM international representative who would handle them at the negotiation sessions. For the reasons set forth below, I find these assertions are not supported by the credible record evidence.

The record reveals that if Hartman was not granted superseniority with regard to the transfer of the fluoroscopy work, as the person lowest in seniority she would have had her position eliminated and she would have been provided certain options pursuant to the Transfer of Work Agreement, all of which would have either removed her from the unit or severely affected her ability to perform her representational duties. For example, if she would have exercised the option of transferring to the Mercy campus with the work, she would have transferred to the Mercy Tech II unit, which is a completely different bargaining unit represented by a different labor organization (the SEIU). Under those circumstances, she would have no longer been able to exercise her duties as a union steward of Respondent IAM and service the representational needs of the Hackley Tech Unit.

If Hartman would have declined the transfer option, she could have exercised the option of bumping into the Hackley Tech Unit second shift. The General Counsel contends that Hartman could have then continued her steward duties with equal measure on the second shift. However, that assertion is belied by the credible testimony of the Respondent's witnesses. Both Belcourt and Stewart testified without contradiction that the union stewards were very active in dealing with their respective managers with regard to questions that arose from employees in their respective departments about terms and conditions of employment. Stewart testified that the stewards were active in the "mutual interest" meetings held monthly during the first shift where they discussed and resolved matters with management. The stewards were also participating in monthly negotiation sessions for a successor contract which were also held

5 during the first shift. If Hartman was removed from the first shift, it would have restricted her
access to the managers and to the mutual interest meetings and negotiation sessions. In addition,
the record reveals that 80 percent of the bargaining unit worked on the first shift, and most of the
unit employees in Hartman's department worked on first shift (13 of the 18 radiology techs
worked first shift). Thus, if Hartman bumped into second shift, she would have been assigned to
a shift where few bargaining unit members worked, and where few employees in her department
worked. In addition, no management or supervisory personnel would be present to try to resolve
issues that arose, and it would require frequent scheduling adjustments in order to attend
regularly scheduled negotiating and mutual interest meetings which take place at least three
10 times per month during the day shift.

15 Belcourt's and Stewart's credible testimony was corroborated by Heim, one of the
Respondent IAM representatives during the relevant time period, who testified that the union
stewards received complaints and concerns about working conditions from the unit members,
and they met with management to resolve those issues at both negotiation meetings twice a
month or in mutual interest meetings once a month. Heim testified that it would have been
difficult for stewards to work other than on the first shift because that was when the managers
were present at the facility. Jazdyk also corroborated the testimony presented by the
Respondent Employer's witnesses when he testified that it would have been difficult for the
20 stewards to represent the needs of the unit members if they did not work the first shift because
that was when the managers were available and it would have been difficult to change the
schedules and move other employees to the other shifts in order to have the stewards moved to
the first shift when the meetings with management were taking place. Thus, the credible
evidence establishes that removing Hartman from the first shift would have severely limited her
25 access to the management officials and access to many of the unit members and their questions
and concerns, thereby restricting her ability to exercise her representational duties on behalf of
the Respondent Unions.

30 Finally, if Hartman declined to exercise either of those two options, she would have been
subject to layoff, thereby removing her from the unit, the workplace, and her representational
duties. Thus, contrary to the General Counsel's assertions, the credible and un rebutted evidence
establishes that Hartman's presence on first shift was beneficial and necessary to the
administration of the Implemented Terms and the representational interests of the unit
employees.

35 The General Counsel also argues that it was not necessary to protect Hartman from layoff
or from transferring to the Mercy campus because there were three other stewards from other
departments who were on first shift, and those stewards, as Zahdeh and Seeger testified, were
expected to handle complaints and grievances from members outside their departments. While it
40 may be true that those were the expectations for the stewards, the credible evidence in this case
reveals that under the facts that existed at the relevant time period in question, there were
legitimate and substantial reasons that Hartman was needed to deal with the representational
needs of the employees in her particular department.

45 As mentioned above, it is undisputed that the different departments comprising the
Hackley Tech Unit were functionally different in a number of ways, including that they had
different locations in the hospital, they each had their own supervision or managers, and there

were differences in certain working conditions, such as their scheduling. Belcourt testified that having stewards from each of the major departments was important to ensure that employees had representation from individuals with expertise in their particular areas of work and understood the certain nuances that were unique to those areas. According to Belcourt, such knowledge aided representation and contract administration because it made it easier to understand and resolve issues. Belcourt also testified that the union steward's knowledge of their departments was beneficial to resolving issues concerning working conditions because the Implemented Terms were not consistent on certain topics between the different departments, such as scheduling and certain working conditions between the surgical techs, radiology techs, and the vascular techs. Heim also corroborated this testimony when he testified that he believed it was very important, based on the nuances and specialties of each department, that issues be handled by the steward from that department.

Hartman worked in the radiology department and had knowledge of the nuances and special features of the radiology department. Based on the credible evidence establishing that there were nuances and specialties to the different departments, and that no collective-bargaining agreement was in effect and the terms and condition of employment were governed by a status quo consisting of the Implemented Terms and portions of the expired contract, it was necessary for Hartman to remain on first shift in her department to service the representational needs of the employees in that department. In addition, even if other stewards were available to assist the techs in the radiology department, the evidence reveals it was necessary for Hartman to remain on first shift to provide representation for the unit employees because based on Hartman's work schedule, she was the steward most available for the unit employees on first shift.¹²

The General Counsel also asserts that Hartman's presence on first shift was not necessary to the representational interests of the unit employees because issues that arose came through the stewards to the Respondent IAM international representative, who would handle them at the negotiation sessions. This assertion also lacks support in the record as the credible testimony from the Respondents' witnesses demonstrates that the stewards were very active in dealing with Respondent MHP's managers in negotiating a contract and in dealing with issues that arose in their respective departments. This credible testimony from the Respondents' witnesses is not only uncontradicted, it is plausible when considering the fact that during this time period, there was increased uncertainty regarding the terms and conditions of employment for the unit employees. As mentioned above, the Implemented Terms consisted of the Respondent Employer's last, best, and final offer and the parties' tentative agreements, along with portions of the expired SEIU collective-bargaining agreement that were not changed by the last, best, and final offer and the associated tentative agreements. Under those circumstances, it is plausible that there would have been some confusion and uncertainty with regard to the terms and conditions of employment that were in effect. It is also plausible that due to the uncertainty, there would be increased interaction between the stewards and management, particularly on the day shift when the stewards and managers were present.

¹² In this connection, the record reveals that Hartman was the only steward who consistently worked 5 weekdays (Nutt worked 3-5 days depending on the schedule for the weekend; Witteveen worked 3 days per week; and Seeger worked 2-3 days per week).

Heim also credibly testified that since he lived a considerable distance away from the hospital, he indicated at bargaining sessions and mutual interest meetings that stewards were to participate with management to resolve work issues, and that such issues were in fact handled by the stewards. In fact, Heim provided specific examples of issues resolved by stewards, including a vacation issue in the respiratory department and an overtime issue in the radiology department. Heim credibly testified that after the stewards resolved matters, he would follow up with Stewart to confirm the understanding of the agreements reached by the stewards and managers. Heim also testified that it was important for the stewards to handle the issues that arose in their own departments because they had familiarity with those areas and issues. Jazdyk also credibly testified that in bargaining sessions and meetings with management, the stewards handled and resolved issues that came up in their own departments, such as a grievance concerning the posting of job positions for transferred work from the Mercy campus.

Based on the above, I find that the General Counsel's arguments lack merit,¹³ and that the Respondents have presented credible and compelling evidence establishing that Hartman's presence on first shift was beneficial and necessary to the administration of the Implemented Terms and the representational interests of the unit employees, and that providing her superseniority regarding the transfer of fluoroscopy work was the minimal action necessary to prevent her removal from the first shift through transfer to the Mercy campus, bumping onto second shift, or being laid off.

5. The evidence does not establish that the Respondents violated the Act by granting superseniority to Union Steward Hartman to shield her from being removed from her shift or the bargaining unit.

Since Hartman's presence on first shift was directly related to and necessary for her to effectively perform her representational duties as a union steward, it was appropriate and permissible under the Act for the Respondent Employer, in agreement with the Respondent Unions, to provide her superseniority protection and to prevent her removal from the first shift or her department. *Industrial Workers (AIW) Local 148 (Allen Group Inc.)*, supra at 1370. This determination is supported by Board precedent, as the Board has held in similar cases that applying superseniority to prevent a shift change where doing so would enhance the labor organization's ability to represent the employees, is not unlawful. *Auto Workers Local 561*

¹³ In addition, the General Counsel argues that no written grievances were filed during this time period, thus inferring that the stewards had little, if any, involvement in representational grievance activities. This assertion is unfounded and lacks merit. The credible evidence shows that the union stewards were very active in dealing with and attempting to resolve issues regarding the working conditions. The fact that few, if any, written grievances were filed during this time period does not evince an inability to resolve workplace issues. In fact, the General Counsel failed to provide any credible evidence that the lack of filed written grievances was the result of a lack of representational activities by the stewards. To the contrary, the lack of filed grievances could have been attributed to the fact that the stewards and Respondent IAM representatives were effective and successful and resolving issues and problems before they reached the written grievance stage, and it could also be attributed to the fact that the Implemented Terms under which the parties were operating did not contain a provision for final and binding arbitration for grievances.

(*Scovill, Inc.*), 266 NLRB 952 (1983); *Consolidated Freightways*, 302 NLRB 984, 985 (1991); *Goodyear Tire & Rubber Co.*, 322 NLRB 1007 (1997).

5 In *Auto Workers Local 561 (Scovill, Inc.)*, 266 NLRB 952 (1983), the Board found the application of superseniority to provide shift protection for a union steward was lawful where the employees worked on three shifts, and where the shift protection assured “that an official with steward-like duties for a particular shift [would be] able to remain on that shift.” *Id.* at 953 fn. 9. In that case, the Board concluded that “[i]n this regard, the shift protection clause is akin to layoff protection and the same considerations which lead us to find presumptively lawful steward
10 superseniority for layoff protection similarly mandate that steward superseniority for defensive shift maintenance be found presumptively lawful.” *Id.*

15 In *Consolidated Freightways*, 302 NLRB 984, 985 (1991), a steward was awarded a preferential starting time for an 8 a.m. shift in accordance with the parties’ contractual superseniority provision, when his natural seniority would have required him to relinquish that opportunity in favor of a more senior employee, and he would have to work the 9 a.m. shift instead. *Id.* In that case, the Board found the provision and its application lawful since the steward could better serve the overall unit by working that shift which provided him contact with a greater number of employees than would the 9 a.m. shift, and it assured the steward greater
20 accessibility to employees for performance of his duties, which “is clearly intended to, and does, further the effective administration of the parties’ collective-bargaining agreement.” *Id.* The Board found the application of superseniority lawful even though the steward could have chosen to work the 3 a.m. shift where he could have served even more coworkers. *Id.* The Board reasoned that “[i]t is sufficient, for *Dairyalea* purposes, that superseniority was used to enhance
25 the union’s ability to represent employees. The fact that it was not exercised to enhance that ability to the maximum extent possible does not render the exercise unlawful.” *Id.*

30 In addition, in *Goodyear Tire & Rubber Co.*, 322 NLRB 1007 (1997), the Board found the application of superseniority to shield a steward from being bumped from his position was lawful because the evidence demonstrated that if he were bumped, a great deal of uncertainty would result. *Id.* at 1008. The Board reasoned that if the steward were bumped from his position, “continuity of representation for unit employees would be disrupted at a time when the employees particularly need the expertise of the person they have selected to represent them in grievances and help them protect their contractual rights.” *Id.* The Board found that “once
35 respondents had shown sufficient evidence to justify their application of the superseniority clause, the fact that there might be other approaches is irrelevant,” and “[i]t is sufficient, for *Dairyalea* purposes, that superseniority was used to enhance the Union’s ability to represent employees.” *Id.*

40 I find that the facts of the instant case are similar to the cases discussed above, and I find the principles set forth in these well established Board cases are applicable to the instant case. In this case, applying superseniority to Hartman allowed her to remain on the first shift and thereby serve more bargaining unit employees than if she were bumped to the second shift. The application of superseniority also ensured that the employees would have some representation
45 with expertise in the individual areas of the radiology department with its different nuances in terms and conditions of employment. In addition, applying superseniority ensured that Hartman would retain her access to managers and to a majority of members in the unit and in her

department for representational purposes. It also ensured that the radiology department retained its much needed steward and had “continuity of representation” at a time of some uncertainty with regard to the status quo, and at a time when employees particularly needed the expertise of the person selected to represent them. Providing Hartman superseniority ensured that a union official with steward duties and knowledge of the radiology department remained on her shift, and that enhanced her ability to perform her representational duties, and it was clearly beneficial and necessary to Respondent IAM’s ability to represent the employees.

The well established case law discussed above thus supports finding that the granting of superseniority to Hartman was defensive in nature and constituted the minimum exercise of protection that was necessary to keep the union steward in her representational area and on her shift. As discussed above, the credible evidence demonstrates that if the superseniority protection was not provided to Hartman, she would have either transferred out of the bargaining unit with her work, bumped into the second shift where she would not have been able to effectively represent the unit employees in her department, or been laid off. Thus, the record establishes that the Respondents’ use of the superseniority provision was defensive and the minimal extent necessary to allow Hartman to perform her representational duties for Respondent IAM.

Based on the above, I find that Respondent MHP’s application of the superseniority provision to Hartman, with the approval of Respondents NUHW and IAM, to prevent her from having her position eliminated and having to either transfer out of the bargaining unit, bump to a different shift, or be laid off, served the legitimate statutory purpose of furthering the effective administration of the Implemented Terms and enhanced Respondent IAM’s ability to represent the unit employees, and that such actions did not violate the Act. See *Dairylea Cooperative*, supra at 658; *Joy Technologies*, supra at 2; *Consolidated Freightways*, supra at 985; *Good Year*, supra at 1008. Thus, I find that Respondent MHP has not violated Section 8(a)(3) and (1) of the Act, and Respondents NUHW and IAM have not violated Section 8(b)(2) and 8(b)(1)(A) of the Act as alleged. Accordingly, I will dismiss the second consolidated complaint in its entirety.

CONCLUSIONS OF LAW

1. Respondent Mercy Health Partners (MHP) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent National Union of Healthcare Workers (NUHW) and the Respondent District Lodge 60, International Association of Machinists and Aerospace Workers (IAM), AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.
3. Respondent MHP has not violated Section 8(a)(3) and (1) of the Act as alleged in the second consolidated complaint.
4. Respondent NUHW and Respondent IAM have not violated Section 8(b)(2) and 8(b)(1)(A) of the Act as alleged in the second consolidated complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:¹⁴

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ORDER

The second consolidated complaint is dismissed in its entirety.

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Dated, Washington, D.C. May 8, 2015.

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Thomas M. Randazzo
Administrative Law Judge

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¹⁴ 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.