

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

MONTEFIORE MEDICAL CENTER

Employer

And

Case 02-RC-185370

**1199SEIU UNITED HEALTHCARE WORKERS
EAST**

Petitioner

And

**PHYSICAL THERAPY COLLECTIVE
NEGOTIATIONS COMMITTEE**

Intervenor

DECISION AND DIRECTION OF ELECTION

Montefiore Medical Center (the Employer) is a healthcare institution engaged in providing acute health care services in New York City. 1199SEIU United Healthcare Workers East (the Petitioner) filed a petition seeking to represent a unit of physical therapists, staff physical therapists, staff physical therapy assistants, senior physical therapists, and senior II physical therapists, who work at the Employer's Moses campus, located at 111 E. 210th Street in the Bronx, NY.

The Physical Therapy Collective Negotiations Committee (the Intervenor) motioned to intervene. At the hearing, the Regional Director granted the motion based on the Intervenor's contentions that it represents the employees in the petitioned-for unit pursuant to the Employer's voluntary recognition, and that they are currently engaged in bargaining for a successor contract.

The Petitioner contends that in July 2016, in addition to a recognition agreement, the Employer and the Intervenor simultaneously agreed to be bound by and signed the predecessor Union's collective-bargaining agreement, which was not due to expire for another 5 months.¹ The Petitioner argues that the Intervenor chose to step into the shoes of the predecessor Union. In doing so, it affirmatively adopted and agreed to be bound by the terms and conditions of the 2014-2016 CBA. Under these circumstances, the Petitioner argues that the recognition bar doctrine is inapposite. Instead, the 2014-2016 CBA has bar quality as it meets the basic requirements of the contract-bar doctrine, i.e., it is a written collective agreement, signed by the parties, containing substantial terms and conditions of employment, covering an appropriate unit.

¹ The contract in issue in this matter is an Extension Memorandum of Agreement which is effective by its terms from January 1, 2014, to December 31, 2016 (herein, 2014-2016 CBA).

Accordingly, the instant petition should be processed because it was timely filed during the open period.²

The Intervenor contends that the 2014-2016 CBA does not have bar quality because it was negotiated between the Employer and the predecessor Union, the New York Physical Therapist Association (NYPTA). The Intervenor and the Employer did not begin to negotiate an initial contract until August 25, 2016. Accordingly, the Intervenor argues that the instant petition should be dismissed because it was filed within the insulated period that is afforded to a newly recognized Union. Moreover, the Intervenor contends that the petitioned-for unit is inappropriate because it fractures the historical unit. Specifically, in addition to the employees at the Moses campus, the historical unit includes employees in the petitioned-for job classifications who work out of the Home Health Agency (HHA) and the Children's Evaluation and Rehabilitation Center (CERC), located at 1225 Morris Park Avenue, Bronx, New York.³ Finally, the Intervenor seems to argue that because the historical unit shares a community of interest with the physical therapy units that it represents at other hospitals, a multi-employer unit is appropriate.

The Employer does not take any position with regard to whether the recognition bar applies or whether the petitioned-for unit is appropriate, other than to note that the historical unit is likely a mixed professional/non-professional unit.

A hearing was held before Hearing Officer Rhonda Gottlieb during which the parties were given the opportunity to present evidence on the issues raised by the petition and to examine and cross-examine witnesses. Both parties submitted written statements of position prior to the hearing which have been fully considered. I find that the Employer's voluntary recognition of the Intervenor does not bar an election and will therefore direct an election in the appropriate unit, upon a proper showing of interest, as set forth more fully below.

STATEMENT OF FACTS

The Historical Unit

For the past 40 years, the Employer and the predecessor Union, the New York Physical Therapist Association (NYPTA) have had successive collective-bargaining agreements, covering a unit of all physical therapists and other physical therapy classifications working at the Moses Campus, the HHA, and CERC.

Physical therapists (PTs) and physical therapist assistants (PTAs) perform the same essential duties and are subject to the same education and licensing requirements whether they work at Moses, HHA, or CERC. Additionally, PTs and PTAs can treat the same patients as inpatients at Moses, then at home by HHA, and then again at Moses as outpatients and/or again

² There is no dispute that the Petition was filed between 120 and 90 days before December 31, 2016, the date the current collective-bargaining agreement expires.

³ During the hearing, the Petitioner stated that it was willing to proceed in any unit found appropriate by the Regional Director.

as inpatients. The only record evidence adduced to support smaller units is that each division - Moses, HHA, and CERC - is separately supervised.

The record shows, and the parties stipulated, that PTs are professional employees. Whether they are working at Moses, CERC, or the HHA, the PTs perform intellectual work that requires discretion and judgment with respect to the design and implementation of a patient's plan of care. PTs possess advanced knowledge in a field of science acquired through a prolonged course of specialized intellectual study. All PTs employed by the Employer are licensed and possess a minimum of a bachelor's degree. Today, the Employer and the licensing authorities require PTs to have doctorate of physical therapy, which requires four years of undergraduate study and three years of post-graduate work.

Further, the record demonstrates, and the parties stipulated, that PTAs at all three divisions work under the supervision of PTs and are not professional employees under the Act. PTAs implement, but do not design a plan of care for patients. A two year associate degree is required for licensing as a PTA and to work for the Employer.

The Relationship between the Predecessor Union, the Intervenor, and the Employer

The Employer and the predecessor Union, NYPTA⁴, had a CBA which was effective by its terms from January 1, 2011, through December 31, 2013. Thereafter, NYPTA and the Employer entered into an Extension Memorandum of Agreement amending portions and extending all other terms of the CBA through December 31, 2016 (the 2014-2016 CBA).

The sole witness, Robin Winn, testified that she had served as the chairperson for NYPTA's Collective Negotiation Committee. Winn stated that, in January 2014, NYPTA decided to cease functioning as a labor organization. No record evidence was adduced regarding the specific steps, if any, that NYPTA undertook regarding cessation of operations, or whether, in fact, it is defunct.

About one year later, in early 2015, the Intervenor was formed. The record did not disclose the specific steps undertaken in the formation process. However, the record does reflect some continuity between the leadership of NYPTA and the Intervenor. As an example, Winn became the Intervenor's president; the former Secretary of NYPTA, Paul McNamara, is now the Intervenor's vice-president; and, the former Treasurer of NYPTA, Patricia Murphy, is now the Intervenor's treasurer.

⁴ The predecessor union was referred to as the New York Chapter of the American Physical Therapy Association (NYCAPTA). The July 2016 Memorandum of Agreement discussed in further detail below, corrected the name from NYCAPTA to NYPTA.

Winn testified that the Intervenor approached the employers that had collective-bargaining agreements with NYPTA, in the order in which the agreements were set to expire, in order to “transition the units” from NYPTA to the Intervenor.⁵

In about July 2016, the Employer, the NYPTA and the Intervenor signed a Memorandum of Agreement (Transition Agreement), which set forth the terms of the transition. Specifically, the Transition Agreement provides that NYPTA disclaims its status as the collective-bargaining representative for the historical unit and relinquishes all rights and duties, including collection of membership dues, to the Intervenor, simultaneous with the Employer’s recognition of the Intervenor as the new bargaining representative. No record evidence indicates that NYPTA acted in a manner inconsistent with the disclaimer at any time thereafter.

The Transition Agreement also states that the Employer was presented with representation cards signed by a majority of the bargaining unit members and, by executing the agreement, it “voluntarily recognizes the [Intervenor] as the exclusive bargaining representative” of the historical unit. Although Winn testified that a majority of the unit employees signed authorization cards, the cards were not offered in evidence and no testimony was adduced regarding the language on the cards or what was said to employees when obtaining their signatures, or when the signatures were obtained, or when the authorization cards were presented to the Employer.

The Transition Agreement further provides that:

the “[Intervenor] assumes, adopts and shall hereafter be bound by all terms of the Collective Bargaining Agreement and agrees to administer the Collective Bargaining Agreement, bargain in good faith with the Employer for a successor agreement and otherwise fully and fairly represent the Bargaining Unit Employees in all respects. All references to the New York Chapter of the American Physical Therapy Association, the APTA, the Association and/or other names for the NYPTA, in the Collective Bargaining Agreement and Memorandum of Agreement are deemed amended to refer to the [Intervenor]. The NYPTA shall have no further duty to represent the Bargaining Unit Employees. The Employer and the [Intervenor] agree that the current Collective Bargaining Agreement between the Employer and the NYPTA will remain in full force and effect until its expiration pursuant to its terms and pursuant to applicable law, and the [Intervenor] will substitute for and replace the NYPTA as the labor organization party to the Collective Bargaining Agreement and assumes all rights and duties thereunder.”

No substantive changes to the 2014-2016 CBA were made by any party. The terms of the Transition Agreement were “effective upon execution by all parties,” which was July 22, 2016.

Negotiations for a successor agreement began on August 25, 2016.

⁵ The Intervenor represents approximately ten bargaining units in various hospitals in New York City, though the record does not reflect whether they are all prior NYPTA units or some are the result of new organizational effort by the Intervenor.

ANALYSIS

I. The Instant Petition was Timely Filed

As a general rule, during the term of a collective-bargaining agreement, the contracting union has an irrebuttable presumption of majority status and the Board will not entertain a petition for decertification or election of a new union. *Samaritan Health Center, Deaconess Hospital Unit, A Division Of The Sisters Of Mercy Health Corporation, Inc.*, 277 NLRB 1353, 1353 (1985) citing *Hexton Furniture Co.*, 111 NLRB 342 (1955).

One exception is where the contracting union has properly disclaimed interest in further representing the unit. As long as the disclaimer is clear, unequivocal, and made in good faith, the contract will no longer constitute a bar to an election, and the employer may withdraw recognition. *Id.* at 1354. *VFL Technology Corp.*, 332 NLRB 1443, 1443 (2000) citing *American Sunroof*, 243 NLRB 1128 (1979); see also *Mack Trucks, Inc.*, 209 NLRB 1003 (1974) (Board will not accept disclaimer made in order to avoid terms of CBA or as result of collusion with another union).

As a corollary to the employer's valid withdrawal of recognition, after a union disclaims interest, a new union may seek to represent the unit by filing a petition for representation with the Board and the predecessor union's contract is not a bar to an election. *VFL Technology*, 332 NLRB at 1443. As when an employer transfers a business to a successor employer, a successor union selected as the new representative of the bargaining unit is not bound by and has no obligation to administer the old contract. *American Sunroof*, 243 NLRB at 1130.

Alternatively, a new union is also free to seek voluntary recognition after demonstrating majority support in the unit. The new union is free to bargain with the Employer without the threat of challenge to their majority status for a reasonable period of time until a contract is reached, commonly referred to as a recognition bar. *Lamon's Gasket Co.*, 357 NLRB 739, 744 (2011). A reasonable period of time is defined as six months to one year after bargaining begins. *Americold Logistics LLC*, 362 NLRB No. 58 (2015). After a contract is signed, a new union can only petition the Board for an election during the open window, which in the healthcare industry is more than 90 days but not over 120 days before the expiration of the contract. *Trinity Lutheran Hospital, Menorah Medical Center, St. Joseph Hospital and Research Hospital & Medical Center*, 218 NLRB 199 (1975).

In the instant case, the NYPTA had an irrebuttable presumption of majority status during the effective term of the contract. The record demonstrates that NYPTA validly disclaimed interest in representing the historical unit. In that regard, the Transition Agreement specifically states that NYPTA relinquishes "all rights and duties, including collection of membership dues" in relation to the historical unit. The record contains no evidence that NYPTA ever acted in contradiction to those declarations. Accordingly, the Employer could lawfully withdraw recognition and the Intervenor could seek to represent the unit through voluntary recognition or a representation petition with the Board.

Based on this record, it appears that the Employer lawfully voluntarily recognized the Intervenor. Thus, the Intervenor was entitled to a reasonable period of time to conduct negotiations for a successor contract. The Intervenor was not bound by or obligated to administer the 2014-2016 CBA. However, the Intervenor chose to be bound by that contract on the same day that it received recognition. Specifically, the Intervenor and the Employer agreed to continue all the terms and conditions of the 2014-2016 CBA, which expires on December 31, 2016. In so doing, the 2014-2016 CBA operates as a contract bar. The policy reasons underlying the recognition bar doctrine no longer apply where the newly recognized union has an enforceable contract.

Moreover, I would note that some record evidence suggests that the Intervenor and NYPTA are affiliates. In that regard, the Intervenor methodically took over the contracts negotiated by NYTPA as their expiration dates neared. When the successor union steps into the shoes of its predecessor because they are affiliates, the terms of the CBA automatically continue until its expiration. *Gate City Optical Co., 175 NLRB 1059, 1160 (1969)*. (In order to maintain stable labor relations, successor unions bound by predecessor contract). Assuming an affiliation could be shown, the contract bar doctrine would apply because the Intervenor would simply be in the place of NYPTA, enjoying the protections that would have been afforded to NYPTA had they continued to represent the historical unit.

Having found that the contract has bar quality, the Petitioner timely filed within the open window for a contract in the healthcare industry. Pursuant to the Transition Agreement, the 2014-2016 CBA adopted and agreed to by the Employer and the Intervenor, expires December 31, 2016. Therefore, a representation petition challenging the Intervenor's majority status may be brought between September 2 and October 2, 2016. Accordingly, the instant petition was timely filed on September 30, 2016, and should be processed.

II. The Historical Unit is An Appropriate Unit

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in an appropriate unit. *Overnite Transportation Co., 322 NLRB 723 (1996)*. Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83, slip op. at 7 (2011), enfd. 727 F.3d 552 (6th Cir. 2013)*.

Thus, the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group and share a community of interest. In doing so, the Board considers whether the employees sought are organized into a separate department; have distinct skills and

training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002), see also *Specialty Healthcare*, slip op. at 9. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude (the) employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Specialty Healthcare*, slip op. at 11-13, and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip. op. at 3, fn. 8 (2011).

Here, the issue to be decided is whether the community-of-interest factors would reasonably support drawing the unit's boundaries to include the employees sought by Petitioner, but *not* the employees working in the same job classifications at CERC and HHA, whom the Intervenor⁶ would include. *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011). I find that they do not. There is no rational basis to include physical therapy job classifications working at the Moses campus, but not those working at CERC and HHA.

While the employees sought by Petitioner are readily identifiable as a group and share a community of interest, there is an overwhelming community of interest between the employees sought by Petitioner and other employees Petitioner seeks to exclude.⁷ Specifically, I note that the employees in CERC and HHA perform the same functions as included employees, interchange with included employees, have similar skills and perform similar jobs, and require the same degree of qualifications and training.

Moreover, I note that the Board will not normally disturb an historical unit, absent compelling circumstances. *Met Electrical Testing Co. Inc.*, 331 NLRB 872 (2000) (citing *Trident Seafoods*, 318 NLRB 738 (1995), *enf'd in relevant part*, 101 F.3d 111 (D.C. Cir. 1996)). The party challenging an historical unit bears the burden of showing that the unit is no longer appropriate. *Id.* This evidentiary burden is a heavy one. See., e.g., *P.J Dick Contracting*, 290 NLRB 150, 151 (1988).

⁶ The Employer took no position as to whether the unit sought by Petitioner was appropriate. The Intervenor contends that the historical unit, including physical therapy job classifications at Moses, CERC, and HHA is appropriate.

⁷ No record evidence indicates that unrelated entities wish to bargain as a group. Having found that the historical unit is appropriate, I do not reach the issues presented by multi-employer bargaining.

Based on balancing the goals of employee free choice and bargaining stability, the burden may be satisfied only where the historical units are repugnant to established Board policy, *Gen. Elec. Co.*, 107 NLRB 70, 72 (1953) (rejecting historical unit which combined office clericals in production and maintenance unit), or no longer conform reasonably well to other standards of appropriateness. *Indianapolis Mack Sales & Serv., Inc.*, 288 NLRB 1123, 1126 (1988) (rejecting historical unit from which another group of employees was arbitrarily excluded), citing *Crown Zellerbach Corp.*, 246 NLRB 202, 204 (1979). In one of the few other cases concluding that a historical unit was no longer appropriate, the Board noted that a unit comprised of 13 plants, in seven different states, was merely “a fortuitous aggregation of distinct groups of employees, not a single appropriate bargaining unit.” *Hy-Grade Food Products Corp.*, 85 NLRB 841, 845, 847 (1949).

Here, I find that Petitioner has failed to demonstrate that compelling circumstances exist for disturbing the historical unit. Instead, based on the record evidence of the community-of-interest factors, including the bargaining history, I find that the appropriate unit includes all of the physical therapy job classifications working at the Moses campus, CERC and HHA.

III. The Appropriate Unit is a Mixed Professional/Non-Professional Unit

Section 2(12) of the Act provides that professional employees are those engaged in work that is, among other things, predominantly intellectual, involves consistent exercise of discretion and judgment, and requires advanced knowledge, usually acquired by a prolonged course of specialized higher education.

Section 9(b)(1) of the Act provides that a unit is not appropriate if it includes both professional and non-professional employees unless a majority of professional employees vote for inclusion in such a unit. Therefore, when a proposed unit consists of professionals and non-professionals, the Board will hold what is now referred to as a Sonotone election. *Sonotone Corp.*, 90 NLRB 1236 (1950). “In a Sonotone election, the ballots for the professionals includes two questions. The first question asks the professional employees if they want to be included in a unit of professional and nonprofessional employees. The second question asks the professional employees if they wish to be represented by the union or unions involved.” *American Medical Response, Inc.*, 344 NLRB 1406, 1408 (2005). If professionals are not given the opportunity to vote on inclusion, the election will be set aside. *Id.*

Here, the parties have stipulated and I find that PTs are professional employees within the meaning of the Act. PTs perform intellectual work that requires discretion and judgment with respect to the design and implementation of a patient’s plan of care, possess advanced knowledge in a field of science acquired through a prolonged course of specialized intellectual study. Today, the Employer and licensing authorities require PTs to hold a doctorate of physical therapy.

The parties have also stipulated, and I find, that that the physical therapist assistants are not professional employees within the meaning of the Act. PTAs work under the supervision of

PTs, implementing, but not designing plans of care for patients. A two year associate degree is required for licensing as a PTA and to work for the Employer.

Based on the foregoing, a Sonotone election is directed.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that Montefiore Medical Center, with a principal place of business located at 111 E. 210th Street, Bronx, NY, is a healthcare institution within the meaning of Section 2(14) of the Act and is engaged in the business of providing acute health care services. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$250,000, and purchases and receives goods and materials valued in excess of \$5,000 directly from suppliers located outside the state of New York.
3. The parties stipulated, and I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All regular full-time and part-time physical therapists, staff physical therapists, staff physical therapy assistants, senior physical therapists, and senior II physical therapists working at the Employer's Moses campus located at 111 210th Street, Bronx, NY, the Children's Evaluation and Rehabilitation Center (CERC), located at 1225 Morris Park Avenue, Bronx, New York, and the Home Health Agency.

Excluded: All other employees, confidential employees, guards, and supervisors as defined in the Act

DIRECTION OF ELECTION

Having concluded that the historically recognized bargaining unit is appropriate, and that the Petitioner has expressed a willingness to proceed to an election in any unit found appropriate, I note that the unit found appropriate herein may be significantly broader than the petitioned-for unit. Accordingly, the Petitioner will be permitted to provide a sufficient showing of interest in this unit within two weeks from issuance of this Decision. In the event a showing of interest is provided, I will issue an Order Directing an Election which will include election details and the voter list will be due two business days after issuance of that Order. Absent a sufficient showing in the larger unit, I will issue an Order dismissing this petition.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated November 4, 2016

 by  ARD

KAREN P. FERNBACH
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