UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TEMPLE UNIVERSITY HOSPITAL, INC.
Employer

and Case 04-RC-162716

TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS, (PASNAP)
Petitioner.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits this *amicus curiae* brief in response to the Board's Order Granting Review in Part and Invitation to File Briefs. The Board presented two questions, and we address those in turn.

1. Should the Board exercise its discretion to decline jurisdiction over the Employer Temple University Hospital, Inc.?

The Employer argues that the Board should exercise its discretion to decline jurisdiction over it because of its close relationship with Temple University, over whom the Board declined to exercise its jurisdiction in *Temple University*, 194 NLRB 1160 (1972). Employer RFR 18 ("[I]t is precisely the interrelationship and interconnectedness between [Temple University] and [Temple University Hospital] which makes exercising jurisdiction over [Temple University Hospital] inconsistent with the policies of the Act."). The Assistant Regional Director, in his Decision and Direction of Election (DDE), and the Union, in its Opposition to Employer's Request for Review, aptly demonstrate that the particular facts of this case do not warrant declining jurisdiction. As the ARD and Union have thoroughly addressed this issue, we simply write to add our agreement with their analyses.

2. Should the Board extend comity to the unit of the Employer's professional and technical employees certified by the Pennsylvania Labor Relations Board (PLRB) in 2006?

The ARD in the instant case directed an *Armour-Globe* self-determination election to determine whether the two voting groups – professional medical interpreters and transplant financial coordinators – desired to join the Union's existing bargaining unit. Following the election, the Region certified the Union as the exclusive bargaining representative for the two voting groups. The issue of extending comity to the PLRB's initial certification of the existing bargaining unit is not relevant to this process.

An *Armour-Globe* election permits employees sharing a community of interest with an already represented unit of employees to vote whether to join that unit. *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942). *See also NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). "[T]he Board has held that a self-determination election is the proper method by which an incumbent union… may add unrepresented employees to its existing unit, if the employees sought to be included share a community of interest with unit employees and constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *St. Vincent Charity Med. Center*, 357 NLRB 854, 855 (2011)(quotations and citation omitted).

The Region's charge when presented with a petition for an *Armour-Globe* election is to determine i) whether the petitioned-for employees share a community of interest with the employees in the existing unit; and ii) whether those employees constitute an identifiable, distinct segment so as to constitute an appropriate voting group. If the petitioned-for employees choose to join the existing unit, the Board certifies the union as exclusive bargaining representative of the appropriate voting group. Nothing in the procedure for an *Armour-Globe*

election requires the Board to examine the origins or the appropriateness of the existing unit. All that is necessary is that a unit exists, and that the petitioned for employees constitute an appropriate voting group. *See, e.g., St. Vincent*, 357 NLRB at 854 (states that existing unit "was formed in the 1960s," with not examination of its origins), *Syracuse University*, 325 NLRB 162, 163 fn. 3 (1997)(union sought *Armour-Globe* election to add certain employees into existing unit that included employees union was certified to represent by state agency; Regional Director did not examine state agency's procedure for certification or make comity finding); *see also, Lincoln Park Zoological Society*, 322 NLRB 263, 264 (1996)(applying presumption of majority status in successorship situation where predecessor was a public employer).

There is no dispute that the bargaining unit was an existing unit at the time the petition was filed. In 2006, the PLRB certified a unit of the Hospital's "full-time and regular part-time professional and technical employees; and excluding physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined by the Pennsylvania Public Relations Act." DDE 7. Since then, the Union and Employer have bargained at least three collective bargaining agreements in which the Employer explicitly recognized the Union as exclusive representative of the employees in the professional and technical unit. DDE 7, Pet. Opp. To Employer's RFR 7.

The Union represents an existing unit of employees. The Employer did not contest that the petitioned-for employees share a community of interest with employees of the existing unit, or that they are an identifiable, distinct segment of the workforce. DDE 16-17. Nor did it object to the addition of the employees through a self-determination election. *Id.* at 17. Therefore, the Regional Director properly directed the election.

The fact that the existing unit is a nonconforming unit under the Board's Health Care Rule is not an issue. By it terms, the Health Care Rule, which prescribes eight appropriate bargaining units for acute health care facilities, does not apply to "existing non-conforming units." 29 C.F.R. § 103.30(a). While § 103.30(c) of the Rule provides that "[w]here there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed . . ., the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in [the Rule]," a petition for an *Armour-Globe* self-determination election is *not* "a petition for additional units" within the meaning of § 103.30(c). *St. Vincent*, 357 NLRB at 855 & fn. 8. That conclusion is consistent with the Board's long-established understanding of § 103.30(c) and is virtually dictated by the language of the rule.

The Board has consistently understood "that Section 103.30(c) is not applicable to petitions which seek to [alter] an existing unit, whether or not that unit conforms to those established by the Rule." *Kaiser Foundation Hospitals*, 312 NLRB 933, 934 (1993). "By its terms, Section 103.30(c) applies only to petitions for 'additional units,' that is, petitions to represent a *new* unit of previously unrepresented employees, which would be *an addition to the existing units* at a facility." *Ibid.* (emphasis added). The language used in §103.30(c) reflects that "the Board contemplated that the Rule would apply only with respect to petitions for new units" and that "the Board understood the phrase 'new units' to mean those sought in addition to any existing nonconforming units." *Id.* at 934 & fn. 9. In other words, "the Rule applies only" in two "situations": first, "to initial organizing attempts," where there is no existing nonconforming unit and the Rule directly controls the scope of the unit; and second, "where there are existing nonconforming units" and the "petition [is] for *a new unit of previously unrepresented employees*, which would be *an addition to the existing units* at the Employer's

facility," where the Rule indirectly controls the scope of the new unit. *Crittenton Hospital*, 328 NLRB 879, 880 (1999) (emphasis added).

In *St. Vincent*, the Board specifically held that § 103.30(c) does not apply to petitions for *Armour-Globe* self-determination elections. The Board noted that "the plain language of that section only provides that the Board must make th[e] determination [that a unit comports 'insofar as practicable' with the rule] when the petitioner seeks an *additional* unit, a situation which is not present here." 357 NLRB at 855 fn. 8 (emphasis in original). That situation is not present, the Board explained, "where the Petitioner is seeking a self-determination election to determine whether the Employer's [unrepresented employees] desire to be included in its existing unit," because the petitioner "is *not* seeking to represent them in a separate, residual unit." *Id*. at 2 (emphasis in original). In other words, the petitioner is not seeking to represent a "new unit[]" that would exist "in addition to any existing, nonconforming units." *Kaiser Foundation Hospitals*, 312 NLRB at 934 fn. 9.

As this discussion demonstrates, comity is not an issue in this case. There is no dispute that a bargaining unit existed at the time the petition was filed, and the Board does not probe the origins of existing units when petitioned for an *Armour-Globe* election. Nor is comity necessary to resolve any issues raised by the existing unit being a nonconforming unit under the Health Care Rule, as the Rule does not apply in an *Armour-Globe* situation.

The Board only addresses comity to state agency certifications and determinations where that issue is relevant to resolve the matter before it. *Allegheny General Hospital*, 230 NLRB 954 (1977), provides an example of a situation where the comity issue commonly arises. There, the union petitioned with the state agency for a unit of engineering and maintenance employees at an acute hospital; the union won the election and the state agency certified the results. The

company refused to bargain, and appealed the certification through the state courts. In the meantime, the 1974 health care amendments to the Act brought the hospital under the jurisdiction of the Board, and the union filed a refusal to bargain charge at the Board. The company defended against the charge, in part, by alleging that the state agency certified unit was inappropriate, and therefore the company did not have a duty to bargain. 230 NLRB at 954. Thus, the question of comity was relevant to determining whether the company had a duty to bargain with the union. *See also, e.g.*, *Standby One Assoc.*, 274 NLRB 952 (1985)(comity to state agency's certification relevant to company's claim that it has no duty to bargain); *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000)(comity to state agency's certifications relevant to determine whether company unlawfully refused to bargain); *West Indian Co., Ltd.*, 129 NLRB 1203 (1961)(comity to state agency's certification relevant to determine whether certification bar exists). Comity to the PLRB's certification is simply not relevant to determine whether the petitioned-for employees may vote in an *Armour-Globe* self-determination election to join the existing unit.

If the Board, however, does decide that comity is relevant to this case, we agree with the ARD's and Union's position on that issue.

Conclusion

For the reasons stated above, the AFL-CIO urges the Board to dismiss the Employer's Request for Review

Respectfully Submitted,

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Date: January 26, 2017

CERTIFICATE OF SERVICE

I, Maneesh Sharma, hereby certify that on January 26, 2017, I caused to be served a copy of the foregoing Brief on behalf of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Temple University Hospital, Inc., Case 04-RC-162716, by electronic and First Class mail on the following:

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