

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

TEMPLE UNIVERSITY HOSPITAL,
Employer,

Case No. 04-RC-162716

and

TEMPLE ALLIED PROFESSIONALS/
PENNSYLVANIA ASSOCIATION OF
STAFF NURSES AND ALLIED
PROFESSIONALS,

Petitioner.

**RESPONSIVE BRIEF OF EMPLOYER TEMPLE UNIVERSITY HOSPITAL IN
FURTHER SUPPORT OF ITS BRIEF ON REVIEW OF THE ACTING REGIONAL
DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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I. INTRODUCTION

Temple University Hospital (“TUH”) submits this response to the Brief on Review of Petitioner Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (“the Union” or “PASNAP”) and amicus AFL-CIO.¹ As set forth below, neither PASNAP nor the amicus have brought into question the compelling reasons that exist for the National Labor Relations Board (“NLRB” or “Board”) to exercise its discretion to decline jurisdiction here and to decline comity over the underlying TAP bargaining unit. In fact, PASNAP’s Brief resorts to misstating the record and mischaracterizing TUH’s arguments. Accordingly, the Board should decline jurisdiction over TUH. Failing that, the Board should decline to grant comity and dismiss the Petition.

In its Brief, PASNAP claims that “TUH’s proposed policy” is “that the Board would use its discretion to decline jurisdiction to effectively cede jurisdiction to a state agency any time state law would cover the employees in question.” (Pet’r’s Br. at 12-13). To the contrary, the Board should exercise its discretion to decline jurisdiction in this particular case because it is faced with a unique situation, not present in any of the cases cited by PASNAP or by the Acting Regional Director.

The unique situation here weighs against the Board asserting jurisdiction over TUH because jurisdiction would not meaningfully advance the goals of the Act. Asserting jurisdiction would instead create labor relations chaos because of the substantial extent to which TU and TUH are intertwined on an operational level – facts not present in the cases relied upon by the Union. Indeed, rather than effectuating the policies of the Act, asserting Board jurisdiction over TUH would undermine labor stability and uniformity because TU and TUH

¹ TUH cites to the Union’s Brief on Review as “Pet’r’s Br.” and TUH’s Brief on Review as “TUH’s Br.”

employees working side-by-side would be subject to different legal regimes. Beyond the parties themselves, this situation also risks disrupting the settled expectations and bargaining relationships of employees in other unions at TUH and TUHS who are accustomed to operating under Pennsylvania's Public Employee Relations Act, 43 P.S. § 1101.101, et seq. ("PERA")² and could bring the validity of the certifications of 10 other bargaining units representing thousands of employees into question under Summer's Living Systems. The current Petition of 11 employees simply does not justify this wholesale departure from the status quo and decades of labor-management relationships at TU, TUHS, and TUH without any new or changed circumstances justifying this reversal. Accordingly, the Board should exercise its discretion to decline jurisdiction over TUH.

Additionally, the Union provided no basis for the Board to grant comity to the nonconforming TAP bargaining unit. What the Union cannot dispute is that this nonconforming unit was certified in a non-profit acute care hospital in 2006, long after the 1974 Health Care Amendments and 1989 Health Care Rule, as well as the Board's 1995 Management Training decision, which expanded Board jurisdiction over certain private employers with close ties to exempt government entities. It would therefore be repugnant to the policies of the NLRA and inconsistent with Board precedent to extend comity to the TAP unit because it was both certified after Management Training and fails to comply with the Board's Health Care Rule. Not surprisingly, the Union failed to cite any authority to the contrary.

² PERA is also referred to as Act 195.

II. ARGUMENT

A. The Board Should Exercise Its Discretion to Decline Jurisdiction Over TUH.

According to the Union, “to decline jurisdiction over TUH on a discretionary basis, the Board would have to conclude that it effectuates national labor policy to assert jurisdiction over every private, nonprofit hospital except one: TUH.” (Pet’r’s Br. at 6). This blatantly mischaracterizes the standard for the Board to decline jurisdiction. Rather, the Board has the authority to decline jurisdiction over TUH if it concludes, in its discretion, that asserting jurisdiction *in this case* would not effectuate the policies of the Act. NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 684 (1951) (even when the Board has statutory authority to act, “the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case”); see, e.g., Northwestern Univ., 362 N.L.R.B. No. 167 (2015); Temple Univ., 194 N.L.R.B. 1160 (1972). This discretion to decline to exercise its jurisdiction in a particular case for policy reasons is distinct from the Board’s discretion under Section 14(c)(1) of the Act to “decline to assert jurisdiction over any labor dispute involving any class or category of employers” that has an insufficiently substantial effect on commerce. See Northwestern Univ., 362 N.L.R.B. No. 167, slip op. at 6 n.28 (2015) (describing both); see also Pennsylvania Virtual Charter Sch., 364 N.L.R.B. No. 87, slip op. at 13 n.13 (2016) (Member Miscimarra, dissenting) (“It has never been questioned that the Board has the separate authority to decline to exercise jurisdiction *in particular cases* when exercising jurisdiction would not effectuate the policies of the Act.”) (emphasis in original). Just as the Board could, and did, exercise its discretion to decline to assert jurisdiction over TU more than 40 years ago without making any determination about whether jurisdiction should be declined over other universities that were closely tied to their respective states, the Board can and should exercise its discretion here to decline to exercise jurisdiction over TUH.

The Union claims that TUH “is not distinguishable from any other large, non-profit hospital over which the Board routinely exercises jurisdiction” and that TUH’s ties to TU (an exempt entity) and its historical coverage by the PLRB are not compelling reasons to decline jurisdiction.³ (See Pet’r’s Br. at 2). The Union’s arguments fail on the facts and law. TUH’s operations and workforce are substantially intertwined with the operations and workforce of TU, an exempt entity, in ways which are wholly different than those which existed in the cases on which the Union relies. In addition, the impact on the settled expectations of the parties and thousands of non-parties here weighs in favor of declining jurisdiction and there is no compelling contrary benefit to be gained from the Board’s assertion of jurisdiction. Accordingly, the Board should exercise its discretion to decline jurisdiction over TUH.

1. The Close Relationship Between TU, TUHS, and TUH – Including Their Entangled Operations and Workforces – Means That Asserting NLRB Jurisdiction Over TUH Will Not Effectuate the Policies of the Act.

The Union’s reliance on Management Training Corp., 317 N.L.R.B. 1355 (1995), and two recent charter school cases, Pennsylvania Virtual Charter School, 364 N.L.R.B. No. 87 (2016) and Hyde Leadership Charter School, 364 N.L.R.B. No. 88 (2016), to argue that TUH’s close ties to TU are not grounds for declining jurisdiction is misplaced because the facts in all three cases are readily distinguishable from the facts of this case.

In making its argument, the Union implies that TU and TUH are merely tied together through “layers of bylaws.” (Pet’r’s Br. at 5). The record is replete, however, with evidence that TU exerts control over TUHS and TUH, that the three entities have close ties to

³ The Acting Regional Director likewise failed to afford appropriate weight to the unique relationship between TU, TUHS, and TUH, concluding that “[a]part from its relationship with [TU], [TUH] is not significantly different from any other comparably-sized nonprofit acute-care hospital.” (Decision at 15).

one another, and that the daily operations of TU, TUHS and TUH are substantially intertwined, a combination of facts that set this case apart from Management Training and the charter school cases cited by the Union.⁴ In those cases, the Board focused on the types and extent of control exempt government entities exercised over the employers and/or the structural or financial support provided by the government entities. Similar ties exist between TU and TUH,⁵ but their relationship extends far beyond control and corporate structure and includes day-to-day entanglements of TU and TUH's operations, a fact the Union ignores in its Brief on Review.⁶

Unlike the employers at issue in Management Training or the Board's recent charter school cases, TUH is substantially intertwined with TU and TUHS on an operational level.⁷ Indeed, based on the significant interrelated services these entities provide one another,

⁴ As the Board declined review of the Acting Regional Director's finding that TUH is an employer under Section 2(2) of the Act, TUH does not argue here that the interconnectedness of TU, TUHS, and TUH operations is a basis to find that jurisdiction over TUH does not exist. Rather, as explained in Section II.A, the highly unique relationship between the three entities and their respective employees, along with other historical and equitable considerations present in this case, weighs in favor of the Board declining to exercise jurisdiction over TUH.

⁵ For instance, charter school employees in Pennsylvania Virtual were required under state law to be enrolled in the retirement plan for the public schools. 364 N.L.R.B. No. 87, slip op. at 1 (2016); see also Hyde, 364 N.L.R.B. No. 88, slip op. at 2 (2016) (charter employees may be deemed employees of local school district for retirement benefits). Here, TU and TUHS system have joint pension and post-retirement health benefit plans with assets totaling more than \$450 million which cover employees of TU, TUH and TUHS. (See E-4).

⁶ As the Acting Regional Director noted, "there is no doubt that [TU] exerts significant control over [TUHS] and [TUH] in various ways." (Decision at 15). The Acting Regional Director also acknowledged "the multiple close connections" between the entities. (Id.) (citing "the interlocking boards of directors, corporate control by [TU] over [TUHS] and [TUH], overlap of employees across the entities, sharing of key infrastructure systems, and ownership of property by [TU] and the Commonwealth").

⁷ Contrary to the Union's claim that D & T Limousine involves an exempt entity having a contractual right to control the terms and conditions of an employer's workforce, the Board determined that the employer retained control over essential terms and conditions

TU, TUH and TUHS allocate more than \$100 million in funds to each other annually. (Tr. 12/16/15 at 98-99, 149; E-4 at 27). This annual stream of funds between TU, TUHS, and TUH, which flows in all directions between the three related entities, further emphasizes how different TUH's relationship with TU is from a charter school's financial relationship with government entities, in which funds only flow from the government to the charter school. See, e.g., Pennsylvania Virtual, 364 N.L.R.B. No. 87, slip op. at 3 (2016) (noting 97 percent of the charter's operating budget comes from local school districts and the remaining 3 percent from federal programs); Hyde, 364 N.L.R.B. No. 88, slip op. at 3 (2016) (99 percent of the charter's annual revenue came from government sources). But what really sets the interdependency between TU and TUH apart from the relationships in the cases the Union cites is the extent to which TU, TUHS, and TUH's workforces are entangled. As the parties stipulated: "Employees of TU, TUH and TUHS work side-by-side on a daily basis at TUH, TUP and TPI across a variety of positions."⁸ This includes both medical personnel and other types of personnel, including maintenance and finance and non-employee contracts administration as TU employees are responsible for maintenance of TUH facilities and management of infrastructure projects." (See B-7, ¶ 18). That simply is not the case in Management Training and the charter school cases where the control comes solely from funding and oversight, not operational involvement in key, in fact critical, aspects of daily operations.

of employment (although its employees were required to abide by railroad rules). D & T Limousine Serv., Inc., 320 N.L.R.B. 859, 860 n.3 (1996).

⁸ TUP is the physician practice plan of TU which provides services at TUH and other TUHS facilities staffed by employees of TU, TUH and other TUHS entities. TPI is a subsidiary of TUHS in which many physicians who are employed by TU provide outpatient medical services. Many of the physicians who provide services through TPI also practice at TUP facilities. (B-7, ¶ 4; Tr. 12/16/15 at 105-06).

Indeed, as outlined more fully in TUH's Brief on Review, the day-to-day operations of TU, TUHS, and TUH demonstrate significant interrelatedness, spanning from the leadership of all three organizations down to hourly employees. Notably, Larry Kaiser, the Dean of TU's School of Medicine ("TUSM") and TU's Senior Executive Vice President of Health Affairs, and TU's highest paid employee, is the Chief Executive Officer of TUHS. (Tr. 12/16/15 at 92, 111-12; P-9 at 176). Similarly, Verdi DiSesa is the Chief Operating Officer of TUHS and the Chief Executive Officer of TUH, but is employed by TU. (Tr. 12/16/15 at 103-05; Verdi J. DiSesa, MD, MBA, to become President and CEO of Temple University Hospital, Lewis Katz Sch. of Med. (Jan. 26, 2016), <https://medicine.temple.edu/news/verdi-j-disesa-md-mba-become-president-and-ceo-temple-university-hospital>).

The physicians who provide the patient care at TUH are employees of TU, not TUH or TUHS. (B-7, ¶ 18). In their clinical practices at TUH and other facilities of TUHS, these physicians work with nurses and other clinical staff employed by TU, as well as staff employed by TUH and other TUHS facilities. (Id.). Finance and contracts administration personnel from TU also provide services to TUH. (Id.). The legal staffs of TU and TUHS are intertwined as well, with the General Counsel of TUHS serving as counsel to TUSM and attorneys in TU's Office of University Counsel representing TUHS.⁹ (Tr. 12/16/15 at 74, 98; E-7). TU personnel manage infrastructure projects for TUH on TUH facilities (which are owned by TU and the Commonwealth). (B-7, ¶ 18; B-2, ¶ 4). TU police patrol and respond to incidents at TUH, which state law considers part of TU's campus for purposes of TU police jurisdiction. (B-7, ¶ 22). Even the maintenance work at TUH is done by TU employees in a bargaining unit

⁹ TUH relies on TUHS for legal and human resources functions. (Tr. 12/15/15 at 96-99).

that solely services the TU health sciences facilities, which includes TUH and the TU medical school and dental school facilities.¹⁰ (B-2, ¶ 5; Tr. 12/16/15 at 104-06, 115-18; B-7, ¶ 18).

None of these facts existed in Management Training or the charter school cases. Yet, it is these facts, not just the oversight at the governance level, which make the exercise of NLRB jurisdiction over TUH wholly unworkable. The result of Board jurisdiction, which the Union fails to acknowledge in its Brief on Review, would be a patchwork of federal and state labor laws applying to employees working hand in glove on a daily basis with often complex and interrelated reporting relationships at all levels of authority. People working for two different employers – TU and TUH – could be working in the same location, at the same time, taking direction from the same manager, indefinitely, yet be subject to two different statutory labor schemes that have different rules for things like managerial rights and mandatory subjects of bargaining. Both the long-term practical difficulties of such a situation and the likelihood of creating employee disruption should be obvious.

Thus, the Board should exercise its discretion to decline jurisdiction here, as it did in Northwestern, when faced with analogous concerns that some of the football players in the same division would be subject to the NLRA while others would be subject to state labor laws. 362 N.L.R.B. No. 167, slip op. at 5 (2015) (declining to exercise jurisdiction, in part, due to the prospect of creating an unworkable “asymmetry of the labor relations regulatory regimes”).

¹⁰ Indeed, when TU reports the salary and benefits of its employees to the Commonwealth annually, as it is required by law to do, it includes employees of TU who do their work at TUH, from Dr. Kaiser down to the maintenance staff.

2. Asserting Jurisdiction Over TUH Could Negatively Impact Thousands of Other Unionized TUH and TUHS Employees Historically Subject to PERA and Result in a Waste of Resources.

The Union argues that the parties' long-standing bargaining history under the jurisdiction of the PLRB is not a compelling reason for the Board to decline jurisdiction. Pointing to three factually disparate cases in which the Board extended jurisdiction to parties previously covered by state labor laws, the Union claims these cases represent the Board's determination that creation of a "paramount and uniform Federal policy' in the field of labor relations outweighed any inconvenience to the stakeholders of having to adjust to a new statutory framework—which inconvenience would be relatively minor and pose no threat to the continuance of the existing bargaining relationships." (Pet'r's Br. at 15-16). The Union's argument ignores the thousands of unionized TUH and TUHS employees outside of the TAP unit who will be affected by the Board's assertion of jurisdiction, who are not parties to the present action and who have not sought the NLRB's jurisdiction. Contrary to the Union's assertion, the impact on these other employees will be more than a "relatively minor" "inconvenience" and may indeed pose a threat to the continuation of their bargaining relationships with TUH/TUHS.

The cases cited by the Union do not assuage these concerns. In St. Joseph's Hospital, 221 N.L.R.B. 1253 (1976) and MCAR, Inc., 333 N.L.R.B. 1098 (2001), the Board/Region asserted federal jurisdiction over an employer despite the long-standing stable bargaining relationships that had developed between the parties under state law. However, the Union admits that neither party in St. Joseph's Hospital argued the Board should decline jurisdiction. In MCAR, the employer did argue under the underlying case that the parties had a stable bargaining relationship and that jurisdiction should remain with the state, but the Region's

decision to extend federal jurisdiction there only impacted two bargaining units and both were parties in that case.¹¹ 333 N.L.R.B. at 1107 n.12 (2001).

Here, by contrast, there are approximately 3,479 unionized employees at TUH and TUHS spanning 11 different bargaining units, 10 of which are not party to these proceedings. (See B-2, ¶ 5; TUH’s Brief at 12-14). For decades, all aspects of the bargaining relationships between TUH/TUHS and their unions have been based on operating under Pennsylvania law and the balance associated with PERA. Switching to federal jurisdiction will inherently disrupt these relationships because PERA has traditionally governed issues like what subjects are included in the collective bargaining agreements, what notice is required for bargaining, what notice is given for a strike, what happens at impasse, what meet-and-discuss obligations apply to various managerial rights and changes to terms and conditions, and what economic weapons are available to each side. The disruptive effect of switching to federal jurisdiction will be magnified 10-fold based on the number of bargaining units involved. This disruption in stable bargaining relationships will not effectuate the policies of the Act and contravenes a main purpose of the NLRA. See Auciello Iron Works, Inc. v. NLRB, 517 U.S.

¹¹ Although the Board extended jurisdiction to multiple unions in State of Minnesota, 219 N.L.R.B. 1095 (1975), that case is readily distinguishable because Minnesota was requesting that the Board cede jurisdiction over nonprofit hospitals within the state. Section 10(a) of the Act permits the Board to cede jurisdiction to a state agency “over any cases in any industry” (other than listed exceptions), but expressly prohibits cession where the applicable state statute is “inconsistent with the corresponding provision of [the NLRA] or has received a construction inconsistent therewith.” 29 U.S.C. § 160(a) (2016). Under that standard, the Board was obligated to extend its jurisdiction to the Minnesota hospitals because central features of the state’s labor laws were inconsistent with the NLRA (e.g., prohibited strikes and lockouts and required compulsory arbitration of labor disputes at impasse). Here, the Board may exercise its discretion to decline jurisdiction over this particular employer without meeting the standard in Section 10(a) because the Board is not ceding jurisdiction to Pennsylvania for labor disputes in a specific industry.

781, 790 (1996) (describing the Act’s goal of “achieving industrial peace by promoting stable collective-bargaining relationships”).

Furthermore, the Union completely ignores that asserting jurisdiction over TUH risks bringing into question the represented status of currently unionized employees in these other bargaining units. See Summer’s Living Sys., Inc., 332 N.L.R.B. 275 (2000), *enforced sub nom. Michigan Cmty. Servs., Inc. v. NLRB*, 309 F.3d 348 (6th Cir. 2002); (see also TUH’s Br. at 14, 20-21). At minimum, the Board, TUH/TUHS, and the various other unions would be forced to waste considerable time and resources adjudicating the existence of these units under Board precedent, furthering justifying the Board’s exercise of its discretion to decline jurisdiction.

3. Declining Jurisdiction Over TUH Will Not Deprive Employees of Important Rights.

In its Brief on Review, the Union argues for the first time that employee rights will be deprived if the Board declines jurisdiction over TUH because housestaff – which it defines as “medical interns, residents, and clinical-fellows” – are not covered by PERA. (See Pet’r’s Br. at 10-11). Although, the Union is correct that, currently, housestaff are permitted to organize under the NLRA and are not recognized as public employees under PERA, its argument is premised on faulty facts and is irrelevant to the question before the Board – namely, whether the Board should exercise its discretion to decline jurisdiction over TUH. See Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999); Phila. Ass’n of Interns & Residents v. Albert Einstein Med. Ctr. (“PAIR”), 369 A.3d 711 (Pa. 1976).¹²

¹² The Pennsylvania Supreme Court concluded that housestaff were not employees under PERA in 1976, a time when housestaff were also not recognized as employees under federal labor law. See PAIR, 369 A.2d at 715 (discussing Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976)). This issue has not come before the Pennsylvania Supreme Court again in the years since the Board recognized housestaff as employees under the NLRA in Boston Medical Center Corp.

The issue of housestaff is not properly before the Board in this case. The Petition has nothing to do with housestaff, and material facts about housestaff are not in the record. The Union's claim that the parties stipulated that the individuals filling the positions of housestaff are employed by TUH, not TU is a blatant mischaracterization of the record. (See Pet'r's Br. at 11). Although the parties stipulated that some residents are employed by TUH, the parties never stipulated as to whether medical interns and clinical-fellows are employed by TU, TUHS, TUH, TPI, TUP, or some combination thereof, or whether residents also exist at these other entities.

The Union is essentially asking the Board to ignore the very real impact and disruptive effect that NLRB jurisdiction would have on thousands of currently unionized TUH and TUHS employees for the sake of a hypothetical future unit of housestaff, who may or may not be employed by TUH, who have taken no action to be represented, to TUH's knowledge. Thus, whether housestaff could be recognized as employees under PERA, should they seek to be, is irrelevant to the Board's decision in this case. Instead, the relevant consideration for the Board is that exercising its discretion to decline jurisdiction in this case will protect the rights of the 11 petitioned-for employees (whom TUH offered to add to the existing TAP bargaining unit through the appropriate PLRB procedures), as well as the thousands of other unionized TUH/TUHS employees. Thus, unlike the situation in Howard University, 224 N.L.R.B. 385 (1976), in which all of the university's employees would fall into a "no-man's land" if the Board declined jurisdiction, the Board's declination of jurisdiction over TUH will not deprive the petitioned-for employees or other employees of the essential rights Congress intended to provide employees under the NLRA – namely, the right to organize and bargain collectively for fair wages, benefits, and working conditions.

The Union's assertion that employees will lose specific NLRA rights with respect to strikes if the Board declines jurisdiction over TUH also misses the mark. (See Pet'r's Br. at 12). In particular, the Union claims that employees would lose "the full right to strike that they would have under the [NLRA]" and that the right to strike is "more circumscribed" under PERA because state law allows an employer to seek an injunction where a strike "creates a clear and present danger or threat to the health, safety or welfare of the public." (Pet'r's Br. at 12 n.5 (quoting 43 P.S. § 1101.1003)). In fact, federal law does not give employees of health care employers an unlimited right to strike; rather such employees must provide a minimum of 10 days' notice to their employer pursuant to Section 8(g) of the Act.¹³ 29 U.S.C. § 158(g) (2016). As the Union has been fond of pointing out in the past, there is no corresponding notice period that applies to strikes by TUH employees under PERA. Arguably, the right to strike is actually less circumscribed under state law because an employer will not always seek an injunction and/or be able to meet the high standard for an injunction to issue, while employees must comply with the notice period under federal law as a prerequisite to engaging in a strike. Furthermore, PERA prohibits employers from implementation at impasse in the absence of a work stoppage, thereby giving employees a way to force employers to maintain status quo. By contrast, the NLRA gives employers the right to impose their last best offers at impasse.¹⁴

¹³ In this way, both the NLRA and PERA have mechanisms to help ensure the continued safety of patients in the event of a labor dispute at a hospital like TUH.

¹⁴ Another way unionized employees enjoy broader rights under PERA is that it requires TUH to meet and discuss with its unions certain managerial rights and changes to terms and conditions of employment that it would be permitted to unilaterally impose under the NLRA. In addition, PERA *expands* employee coverage beyond the boundaries of the NLRA with respect to first-level supervisors. See 43 P.S. § 1101.604(5) (2016) (permitting first level supervisors to form separate homogenous units).

Accordingly, declining jurisdiction over TUH in this case would not deprive employees of essential rights guaranteed by the Act.

B. The Board Should Decline to Extend Comity.

As TUH made clear in its Brief on Review, the underlying 2006 PLRB certification of the TAP unit is repugnant to the principles of the NLRA and Board precedent, and therefore not appropriate for comity.¹⁵ The Union's arguments that comity should be extended to the 2006 certification fail on the facts and the law for the following reasons: 1) the Union cites to no authority post-Management Training granting comity over a state certification where the certification proceedings occurred after Management Training, and therefore, after the NLRB had jurisdiction over the employer; and 2) granting comity over the 2006 unit, which has a different certification and different composition than the pre-2006 unit, is contrary to the Health Care Rule and Congressional pronouncement, and would permit collusion and forum shopping. Accordingly, the Board should decline to grant comity over the 2006 nonconforming unit.

1. Granting Comity to the PLRB Certification Runs Afoul of Board Precedent Addressing Certifications Post-*Management Training* and the Union Cites No Precedent to the Contrary.

The cases cited by the Union do not support a grant of comity in this case. The Union repeatedly cites to cases that were issued shortly after the 1974 amendments to the NLRA and before the promulgation of the Health Care Rule, which are distinguishable and not controlling here.

¹⁵ On its face, the Petition seeks representation of 11 employees in a stand-alone unit, which is indisputably an inappropriate unit on its own. The Hearing Officer agreed, and as a result, the Acting Regional Director was required to extend comity over the existing TAP unit before ordering an Armour-Globe self-determination election.

Cases where the Board granted comity as a result of the 1974 amendments do not support a grant of comity here. In fact, the opposite is true. In 1974, a new class of employers – health care institutions – was brought within the purview of the Board’s jurisdiction. As a result, the Board granted comity over a number of state certifications, but only where the certification proceedings occurred before the date of the health care amendments at a time when the state board still had jurisdiction.¹⁶

Similarly, after Management Training, another new class of employers – entities with close ties to governmental employers (as the Region found TUH to be) – was brought within the purview of the Act. Following Board precedent, the Board granted comity over state certifications of entities that were now covered by the NLRA, so long as those proceedings occurred before the Management Training decision, thereby ensuring that the state board had jurisdiction at the time its certification proceedings took place.¹⁷ The rationale behind the health care amendments and post-Management Training cases is the same: the Board will grant comity over state certifications where the proceedings occurred prior to the Board obtaining legal jurisdiction over the entities.

The Board’s decision in Summer’s Living Systems is controlling and the Union’s attempt to twist the facts and holding of that case should be rejected. In Summer’s Living

¹⁶ See Taylor Hosp., 249 N.L.R.B. 137 (1980) (extending comity to PLRB certification issued prior to health care amendments); Doctors Osteopathic Hosp., 242 N.L.R.B. 447, 450 (1979) (extending comity when PLRB certification was based on proceedings, including an election, that occurred in 1973, before the health care amendments); St. Joseph’s Hosp., 221 N.L.R.B. 1253 (1976) (granting comity only after noting that the initial certification of the unit, the filing of the petition for the unit, and the hearing related to the unit all took place before the effective date of the amendments); Allegheny Gen. Hosp., 230 N.L.R.B. 954 (1977) (granting comity over PLRB unit certification that was issued prior to health care rules).

¹⁷ Management Training Corp., 317 N.L.R.B. 1355 (1995); Summer’s Living Systems, Inc., 332 N.L.R.B. 275 (2000).

Systems, the Board refused to grant comity over state certifications that were issued after the Board's 1995 decision in Management Training, because the state agency did not have jurisdiction once the Board ruled that the employer at issue was covered by the NLRA. Here, the PLRB's certification of the TAP unit occurred in 2006, long after Management Training. If TUH is an employer today under the NLRA, then it was an employer under the NLRA in 2006.¹⁸ Thus, just like in Summer's Living Systems, comity is not appropriate.¹⁹

2. The Union's Actions Epitomize the Forum Shopping They Claim Is Impermissible and Comity Is Inappropriate Because the Current Nonconforming Unit Is Different Than the Pre-2006 Nonconforming Unit.

Application of Summer's Living Systems is consistent with the purposes of the Act and avoids the very forum shopping about which the Union warns. If the Board has jurisdiction over a type of employer (whether it be because of the 1974 amendments, Management Training, or some other reason), then neither employers nor unions should be able to avoid Board jurisdiction simply by agreeing to go before a state agency to obtain a more favorable result. If that was permissible, as the Union seemingly suggests in its Brief, employers and unions could collude and/or forum shop depending on the unit involved. The Board cannot countenance such a result and should reject the Union's argument that would permit parties to agree to state board jurisdiction and then seek comity from the Board. That is particularly true in

¹⁸ Indeed, the Union claims that TUH's relationship with TU now is similar in crucial respects to what it was in 2006. Relying on that relationship, the Acting Regional Director found that TUH is an employer under the Act because of Management Training. The Board declined review of that finding.

¹⁹ Contrary to the Union's unsupported assertion, application of Summer's Living Systems is not limited to cases where the employer contemporaneously objected to state board jurisdiction. Rather, the key to Summer's Living Systems is the Board's conclusion that the state board lacked jurisdiction at the time its certification was issued. Here, if the PLRB lacks jurisdiction over TUH today, it lacked jurisdiction over TUH in 2006 when the unit was certified and there is no basis to grant comity to the TAP unit.

cases like this one where there have been no changed circumstances (e.g., a change in the nature of the employer entity) since the 2006 certification to warrant a change in forum.

The Union's argument that TUH's actions are somehow tantamount to forum shopping is both wrong and ironic. TUH never disputed that it agreed to the jurisdiction of the PLRB in 2006, or that it has done so every day since then. In fact, it still believes that the PLRB should have jurisdiction over the parties. None of that, however, is relevant. What is relevant is that the Union, in 2006, strenuously argued that the PLRB, not the NLRB, had jurisdiction to hear a representation petition covering professional and nonprofessional employees. Now, it is the Union, not TUH, that has chosen to change forums and, as a result, place the status of this unit at issue.

Significantly, and contrary to the Union's factual claims, the current nonconforming TAP unit is not the same unit as the one that existed before the 2006 petition. It is different. First, it is covered by an entirely separate certification that was issued in 2006. Second, the unit composition changed in 2006 as a result of the representation proceedings, as the PLRB noted in its First Order Directing the Submission of the Eligibility List when it dismissed the Union's petition as to employees employed by TU based on an insufficient showing of interest. In the Matter of the Employees of Temple University Health System, 39 PPER ¶ 49, 2006 PA PER LEXIS 69, *4 (PLRB April 21, 2006). As a result, both the unit and the certification over which comity is sought are nonconforming units in an acute care context that did not exist prior to the Health Care Rule. If the Union had gone to the NLRB in 2006, the NLRB would not have ordered an election over this unit, because it would have been a new certification of a new, nonconforming unit and to do so would go against the NLRB's rules and a

Congressional directive.²⁰ 29 C.F.R. § 103.30; American Hosp. Ass'n v. NLRB, 499 U.S. 606, 616-17 (1991). The Union cites no authority to the contrary and TUH is aware of none.

Against this backdrop, the Union went instead to the PLRB and argued that the PLRB had jurisdiction,²¹ knowing that it would not be subject to the NLRA's Health Care Rule restrictions on the sought-after unit in doing so. It is the Union, not TUH, that has now suddenly changed its mind. Just as the Union argues that TUH should not be permitted to agree to PLRB jurisdiction only to turn around and attack the certification, the Union should not be permitted to agree to PLRB jurisdiction in order to avoid an adverse result at the NLRB, only to turn around and ask the NLRB to recognize a bargaining unit that it would not have authorized in the first instance. The Union took advantage of the Pennsylvania forum. It cannot now seek comity from the federal forum that would not have permitted its actions in 2006. The Board must reject the Union's attempt to circumvent the Act or risk setting a dangerous precedent.

²⁰ Indeed, contrary to the Union's argument, the Health Care Rule is a clear regulatory pronouncement by the Board that acute care hospital units "shall" be restricted based on job classification to the eight specific units. 29 C.F.R. § 103.30. While there is an exception in the rule for nonconforming units, that only applies to nonconforming units that "are existing" as of 1989. This one clearly was not.

²¹ The incumbent union, 1199C tried to argue that the NLRB had jurisdiction, but was opposed by both the Union and TUH.

III. CONCLUSION

For the foregoing reasons and the reasons discussed in TUH's Brief on Review, the Board should exercise its discretion to decline jurisdiction over TUH, or, in the alternative, refuse to grant comity over the 2006 state certification and dismiss the Petition.

Dated: February 9, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shannon D. Farmer, hereby certify that on the 9th day of February, 2017, a true and correct copy of the foregoing Responsive Brief of Employer Temple University Hospital in Further Support of Its Brief on Review of the Acting Regional Director's Decision and Direction of Election was filed electronically on the National Labor Relations Board website and served via email on the following:

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