

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SCHUYLKILL MEDICAL CENTER
SOUTH JACKSON STREET d/b/a LEHIGH
VALLEY HOSPITAL SCHUYLKILL –
SOUTH JACKSON STREET

and

SCHUYLKILL MEDICAL CENTER –
EAST NORWEGIAN STREET d/b/a
LEHIGH VALLEY HOSPITAL
SCHUYLKILL – EAST NORWEGIAN
STREET,

Employer,

and

SEIU HEALTHCARE
PENNSYLVANIA,

Petitioner.

Case Nos. 4-UC-200537
4-UC-200541

**EMPLOYER’S BRIEF IN SUPPORT OF REQUEST FOR REVIEW
OF REGIONAL DIRECTOR’S DECISION**

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In this unit clarification case, the Board has granted the Employer’s Request for Review of the Regional Director’s Decision, Order, and Clarification of Bargaining Unit (“Decision”) on the issue of whether the Regional Director’s finding of an accretion is consistent with the standard set out in *Safeway Stores, Inc.*, 256 NLRB 918 (1981). It is not. The Regional Director, relying on *Gitano Group, Inc.*, 308 NLRB 1172 (1992), found that rebuttal of the single-unit presumption at a facility to which represented employees had been transferred was alone sufficient to authorize accretion. This finding ignores *Safeway Stores*, both the first prong, which poses the question of whether the unrepresented employees could constitute a separate

appropriate unit, and the second, which asks whether the unrepresented employees “share an overwhelming community of interest” with the bargaining unit to which they would be accreted. These are critical questions because they are the means by which the Board assures a restrictive approach to accretion, so as not to deprive employees of their right to select their own bargaining representative. The Regional Director’s accretion finding fails the *Safeway Stores* test.

I. FACTS

A. Background

Before 2008, Pottsville, Pennsylvania had two independent hospitals a half mile apart – one at 420 South Jackson Street (“South”) and the other at 700 East Norwegian Street (“East”). Since 1974, SEIU Healthcare Pennsylvania (“SEIU”) has represented a unit of technical employees, LPNs, and service and maintenance employees at South. East employees have not been represented. (Jt. Ex. 2 at ¶¶ 2-5, 13-14)¹

In 2008, the two hospitals continued to operate independently, but merged to form Schuylkill Health System (“SHS”). (*Id.* at ¶¶ 6-7) In late 2014, because of their poor financial performance, SHS developed a plan to integrate the two hospitals. (Jt. Ex. 2 at ¶ 8; Tr. 71-72) SEIU and South were then party to a collective bargaining agreement with a term, July 1, 2012 - June 30, 2015 (“2012 CBA”). (Jt. Ex. 2 at ¶ 15)

In April 2015, SHS and SEIU started to negotiate an agreement to address the effects of integration on the SEIU bargaining unit at South. While doing so, they put aside negotiating a new agreement to succeed the 2012 CBA. (Tr. 73) In the integration agreement negotiations, SHS rejected SEIU proposals to accrete East employees into the South bargaining unit. (Tr. 22-23, 26-28, 74, 107) SEIU withdrew any accretion proposal after SHS told the union that it would

¹ Citations to pages of the hearing transcript are in the form of “Tr. ___”. Citations to hearing exhibits are in the form of “SEIU Ex. __,” “Er. Ex. __,” and “Jt. Ex. ___”.

not take away the right of East employees to vote on union representation and that it could integrate the two hospitals without an integration agreement by applying the subcontracting clause in the 2012 CBA to move work to East, by hiring new employees at East and by laying off unit employees at South. (Tr. 22-23, 26-28, 74, 107, 111-12)

SEIU and SHS concluded an Agreement on Integration Guidelines (“Integration Agreement”) in September 2015. (Tr. 31-32; SEIU Ex. 8) Under its terms, represented South employees could move to positions at East and keep their union status and seniority. In pertinent part, the Integration Agreement said:

K. Bargaining unit employees reassigned to work at the East facility will remain part of the bargaining unit represented by the Union at South as more fully described in Subsection 1.2 of the current collective bargaining agreement. Terms of the collective bargaining agreement will apply to bargaining unit employees reassigned to work at the East facility unless superseded by these Guidelines.

L. Following integration, future job openings at the East facility will be posted at East and South If the successful bidder is a bargaining-unit employee, he/she will continue to be represented by the Union as more fully detailed in Subsection K, above and the collective bargaining agreement then in effect will continue to apply to bargaining-unit employees so long as they work in a job classification covered by the collective bargaining agreement.

. . . .

N. While the collective bargaining agreement continues to apply to bargaining-unit employees working at either facility, it does not apply to East except by virtue of this Agreement

(SEIU Ex. 8) As explained by SHS’s negotiator, the parties agreed “South employees would be assigned to East and they would be covered by the terms and conditions of their contract, but the contract itself would not apply to East employees at all.” (Tr. 106)

While the Integration Agreement was negotiated, the 2012 CBA was extended through at least November 2015. (Tr. 68-69) On September 16, 2016, Lehigh Valley Health Network

(“LVHN”) acquired SHS. (Jt. Ex. 1 at ¶ 1) In December 2016 bargaining for a new collective bargaining agreement for South resumed and LVHN rejected another SEIU demand to accrete East employees into the South bargaining unit. (Tr. 44-47, 80) A new collective bargaining agreement was concluded in April 2017 (“2017 CBA”). It included no accretion provision and continued the Integration Agreement until March 31, 2019. (Tr. 32, 51, 56; SEIU Ex. 18) The integration process for South and East has continued, but is not complete. (Tr. 328) South and East continue as fully-functioning hospitals with consolidated senior administrative leadership. (Jt. Ex. 1 at A; Tr. 304)

B. UC Petitions

The SEIU filed the two UC petitions herein on June 12, 2017, seeking to extend the non-conforming unit at South to unrepresented employees at East in two conforming units – a service and maintenance unit and a technical unit.

C. Proposed Accreted Units

As of June 23, 2017, the SEIU bargaining unit at South had 220 employees - 124 in the proposed service and maintenance unit, and 96 in the proposed technical unit. By its petitions, SEIU sought to accrete 94 East employees to the 124 South employees in service and maintenance positions and 66 East employees to the 96 South employees in technical positions. All of the employees sought to be accreted worked at East, but the situation for the South bargaining unit employees was different. Of the 124 South employees in service and maintenance positions, 70 worked only at South, 41 had transferred to East (keeping their unit status based on the Integration Agreement), and the remaining 13 worked at both South and East.

Of the 96 South employees in technical positions, 25 worked only at South, 27 had moved to East, and 29 worked at both South and East.²

The connection of East employees to South bargaining unit employees was and is through South employees working full-time or part-time at East. There is no contact between South unit employees still working at South and East employees sought to be accreted.

D. Employment Structure at South and East

The distribution of South and East employees in departments in which technical and service and maintenance employees work in the two hospitals is not uniform.

Because no East employees have moved to South, the clinical departments at South in which proposed unit employees work are staffed *only* by South employees:³

- Adolescent/Adult Behavioral Health at South has 21 pre-existing SEIU unit employees, 7 technical and 14 service and maintenance, none of whom ever works at East;
- Obstetrics/Pediatrics at South has five pre-existing SEIU unit employees, four technical and one in a service and maintenance position, and these employees never work at East (Tr. 296-297);
- the Medical Surgical unit at South is staffed by three SEIU unit employees, one technical and two service and maintenance, and they never work at East;
- Home Health at South is staffed by two SEIU unit nurse aides in service and maintenance positions who work only at South;
- Emergency Medicine at South has seven SEIU unit employees, all in service and maintenance positions and, other than one employee who worked one half-shift at East, they all work exclusively at South (Tr. 398-99); and
- South Pharmacy has two preexisting SEIU unit pharmacy techs, technical positions, both of whom work full time at South.

² The parties stipulated to these numbers, and they are contained in the spreadsheets marked as Exhibit B to Joint Exhibit 2.

³ Except where otherwise noted, the information in this Section can be found in Exhibit B to Joint Exhibit 2.

Some East clinical departments in which proposed unit employees work have no South employees, *only* East employees:

- East Senior Behavioral Health is staffed by four East nursing assistants, service and maintenance positions; and
- East Acute Rehabilitation Unit/Stine has eight East employees in service and maintenance positions and one in a technical position.

Other East clinical units have East employees with a smaller number of South employees:

- 5 North, a Medical/Surgical unit, has 16 technical employees, 10 East employees plus six South employees, and 15 service and maintenance employees, nine East and six South;
- 6 North, another Medical Surgical unit has 17 technical employees, 11 East employees plus six South employees, and 18 service and maintenance employees, 11 East employees plus seven South employees;
- Critical Care has three service and maintenance employees, two East employees and one South employee;
- East Emergency Medicine has 13 service and maintenance employees, eight East employees, four former South employees and one more former South employee who rotates from East to South;
- East Pharmacy has seven technical employees, four East employees and three South employees; and
- East Central Supply at East has four service and maintenance employees - three East employees and one South employee.

Pool nursing is similarly configured to the units above. East has six East employees in the Pool, five in service and maintenance positions and one in a technical position. South has seven SEIU unit members in the Pool, four in service and maintenance positions and three in technical. Three more South employees work at South, two in service and maintenance positions and one in a technical position, but rotate to East.

Distribution of proposed unit employees in Surgery is more scrambled. South Ambulatory Surgery has two preexisting SEIU unit employees in service and maintenance

positions. East Surgery has eight employees, two East employees (one technical and one service and maintenance) and six SEIU unit employees from South, all in service and maintenance positions. Another 10 South employees now work at both South and East - two are service and maintenance employees who work at South but rotate to East, and eight are technical employees who work mainly at East but rotate back to South.

The clinical support departments - Laboratory, Radiology, Respiratory, Cardio-pulmonary, CAT Scan/EEG & EKG, and Ultrasound - operate at both South and East. East departments have East employees plus some South employees; the South departments are just South employees; some South employees rotate back and forth between South and East; and East employees do not rotate to South:

- Laboratory - the East Laboratory has 20 employees, 16 East (four in service and maintenance and 12 in technical) and four South (one in service and maintenance and three in technical); the South Laboratory has three South employees in technical positions; and eight South employees work at both South and East, six in service and maintenance positions (two splitting time evenly and four assigned at South who rotate to East) and two technical employees (one assigned at South who rotates to East and one vice versa);
- Radiology – East Radiology has 18 employees, 11 East (nine technical and two service and maintenance) and seven South (all technical); South Radiology has two South employees in technical positions, and another 17 South employees, all technical, who work at both South and East (four splitting time evenly, seven at East rotating to South, and six at South rotating to East);
- Respiratory – East Respiratory has nine East employees; South Respiratory has one South employee, and another seven South employees who work at both hospitals - two primarily assigned to South, but sometimes rotating to East, and five primarily at East, sometimes rotating to South - all in technical positions;
- Cardio-Pulmonary – East Cardio-Pulmonary has three East employees and two South employees; South Cardio-Pulmonary has South employee who sometimes rotates to East; and all these employees are in technical positions;
- CAT Scan/EEG & EKG - East has two East employees; South has three South employees, plus three more South employees who rotate to East; and all are technical; and

- Ultrasound employees - East has three East employees plus two former South employees who rotate to South; South has two South employees who now split their time evenly between East and South; all are in technical positions.

The non-clinical departments have service and maintenance positions, operate independently of each other without employees rotating back and forth, and with only South employees at South and more East than South employees at East:

- Maintenance - South has five prior unit employees, East has five East employees, the two departments do not interact and are separately supervised;
- Dietary - South has 15 prior unit employees, East has 22 employees, 17 of whom are East employees and five of whom are South employees who moved to East, and the two departments are separately supervised and operate independently;
- Housekeeping - South has 18 unit employees, East has 15 East employees and nine South employees who have moved to East and they work under the direction of East's Lead Housekeeper (Tr. 375); the East and South housekeeping employees were traditionally supervised separately during the day but, because of turnover, the supervision fell to one person (Tr. 371-72); and
- Laundry - East has two prior SEIU unit employees who have moved to East and South has one unit employee who remains at South.

E. Differing Terms and Conditions of Employment

SEIU-represented South employees, whether they work at South, East or rotate back and forth, have different terms and conditions of employment than East employees. They are covered by 2017 CBA, the South handbook and HR policies. East employees work under East policies, procedures and handbooks. (Tr. 357-358) South and East employees are managed differently even when one manager has responsibility for employees in each group. (Tr. 382-387) The differences include:

- (a) different wage scales (Tr. 402);
- (b) different health, dental and prescription plans in that the two groups of employees have different premium sharing standards, different deductibles, and different out-of-pocket maximums (Tr. 403-406);

- (c) East employees receive long-term disability benefits, but South employees do not (Tr. 403-406);
- (d) East employees may elect vision insurance benefits, but South employees may not (Tr. 403-406);
- (e) East employees receive a life insurance benefit of one-times annual salary, but South employees' life insurance benefit is capped at \$50,000 (Er. Ex. 9 & 10; Tr. 403-06);
- (f) East employees earn 10 sick days per year and they can bank a maximum of 60 days, while South employees earn 12 sick days per year bank a maximum of 90 days paid time off; similarly, South and East employees accrue vacation days at different rates (Tr. 406);
- (g) holidays are assigned differently in that South employees select holidays based on seniority while East employees use a rotation system to assign holidays (Tr. 406-07);
- (h) attendance policies are different in that South employees are held to a strict, no-fault attendance standard while managers of East employees have discretion to set attendance standards for their individual groups of employees and are permitted to take relevant circumstances into consideration when deciding if poor attendance warrants discipline (Tr. 383-86, 396);
- (i) work schedules and hours (7.5 hour shifts versus 8 hour shifts), break times (two breaks per day versus one break per day), overtime pay rights (daily overtime for hours worked over 7.5 versus weekly overtime for hours worked over 40), and scheduling of overtime (South employees are subject to mandatory overtime per the CBA, while East employees are not) differ for South and East employees (Tr. 245-48, 319, 393, 402-03, 407);
- (j) East employees have bumping rights in a layoff while South employees do not (Tr. 386, 428-29);
- (k) post-call days off are different for South surgical techs than for East surgical techs (Tr. 316-17);
- (l) uniforms are provided for East employees, but South employees buy their own uniforms (Tr. 317); and
- (m) South employees work rotating shifts, meaning that an individual is assigned a primary shift, e.g., day shift as a primary, but is subject to rotation to either evening or night shift, but most East employees work steady shifts and do not rotate (Tr. 303, 309-10).

F. Effect of RD's Decision

The Regional Director has accreted 66 technical employees at East to the 96 SEIU-represented South unit employees in technical positions, creating a unit of 162.⁴ (Jt. Ex. 2 at ¶¶ 24, 25) Of the 96 represented South employees, 27 have moved to East on full-time basis and 44 spend part of their scheduled working time at South and part at East, and 25 work only at South and have no contact with the accreted employees. (SEIU Ex. 23)

In the proposed service and maintenance unit, the Regional Director has accreted 94 employees at East to 124 SEIU bargaining unit employees in service and maintenance positions, creating a unit of 218. (Jt. Ex. 2 at ¶¶ 24-25) Of the 124 represented South employees, 41 have moved to East full-time, 13 spend working time at both South and East, and 70 work only at South and have no contact with the 94 accreted employees. (SEIU Ex. 24)

II. ISSUE

Was the Regional Director's finding of an accretion consistent with the standard articulated in *Safeway Stores, Inc.*, 256 NLRB 918 (1981)?

III. ARGUMENT

A. The Regional Director's Decision Misapplies *Gitano* and Fails to Take Account of the Standard in *Safeway Stores*

The Regional Director's Decision does not even mention the *Safeway Stores* standard under which the Board will find "a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Safeway Stores, Inc.*, 256 NLRB 918 (1981).

⁴ The only exception is an East laboratory employee scheduled to work every other weekend at South. (Tr. 354.)

Instead of looking to this standard, the Regional Director applies *Gitano Group*, 308 NLRB 1172 (1992), to find an accretion. *See* Decision, pp. 14-21. This analysis is erroneous.

Gitano holds that, when an employer transfers a group of represented employees to a new location, the move will not be treated as a spinoff or partial relocation of the employer's operations, but will give rise to a rebuttable presumption that the unit at the new facility is separate. If that presumption is not rebutted and if a majority of employees at the new facility are transferees from the original unit, then employees at the new facility in the new unit will be presumed to support the union and the employer will have to recognize and bargain with respect to that unit. 308 NLRB at 1175.

This rule announced in *Gitano* on how to analyze an employer transfer of represented employees to a new location was not an accretion issue. Nonetheless, after quoting the *Gitano* rule, the Regional Director in his Decision says that, if the presumption of a separate unit at the new facility is overcome, then "the Board will . . . accrete the employees involved to the existing bargaining unit." Decision, p. 14 (internal quotations omitted) (quoting *Mercy Health Services North*, 311 NLRB 367 (1993)). In other words, according to the Regional Director, where an employer transfers represented employees, rebuttal of the separate unit presumption under *Gitano* results in an automatic finding of accretion without more analysis. In the rest of his Decision the Regional Director undertakes to analyze whether the separate unit presumption is overcome, finds that it is, and finds an accretion. Decision, p. 20. This is a flawed analysis and contrary to the Board's longstanding principles relating to accretion.

First, *Mercy Health Services* does not support the Regional Director's finding. In *Mercy Health Services* the Board affirmed an accretion after concluding that the *Gitano* separate unit presumption at a new facility was rebutted. But, in that case, a hospital with a dialysis unit

staffed by 110 union-represented RNs moved some dialysis work to a new dialysis center in a new location, and staffed the new location with two RNs from the first location. The Regional Director and Board acknowledged that “the concern expressed by the Board in accretion situations not to preclude the employees’ free choice as to union representation is mitigated here, since the grouping employed in [the new facility] was part of a unit constituency which had selected the union as their bargaining representative.” *Id.* So, the Board said that “if the Board finds that the presumption has been overcome – that the unit at the new facility does not constitute a separate appropriate unit – then the Board will (*absent other facts not here relevant*) accrete the employees involved to the existing unit.” *Id.* (italics added). The Regional Director in his Decision does not reference the *Mercy Health Service* facts and deletes the parenthetical (italicized) in the above quote, obscuring the fact that, where the employees to be accreted are substantial in number and unrepresented, which is the case here, concerns about foreclosing employee choice are critical so *Mercy Health Services* has no bearing.

Second, the decisions in *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000), and *Armco Steel Company, L.P.*, 312 NLRB 257 (1993), which the Regional Director also cites, Decision, p.14, do not assist. *Tsubaki* rejected a union contention that *Gitano* was limited to merger of represented and unrepresented employees, and *Armco* rejected an argument that *Gitano* limited unit clarification proceedings to determinations of inclusion or exclusion of relocated employees in relation to the unit from which they came. Neither decision held that rebuttal of the separate site unit presumption was sufficient to find accretion. Nor does *Deaconess Medical Center*, 314 NLRB 677 (1994), cited by the Regional Director at the end of his Decision, support his analysis. In *Deaconess*, the employer asserted accretion as a defense to a separate bargaining obligation at an acute care hospital converted to a rehabilitation hospital. But as in *Mercy Health*

Services, the employees claimed to be accreted had been members of the union before the hospital conversion, so no concern existed about precluding employee choice as to union representation.

Here, the East employees sought to be accreted are all unrepresented, which means the Board's traditional concern about denying employees their statutory right to vote for or against representation is very much at issue. See *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005). The Regional Director's analysis results in a disregard of *Safeway Stores'* traditional accretion standards which protect the rights of unrepresented employees. *Gitano* itself lends no support to this approach. In *Gitano*, citing *Safeway Stores* and other decisions, the Board said:

. . . we emphasize that the Board has followed a restrictive policy in finding accretion because it is reluctant to deprive employees of their basic right to select their own bargaining representative. Consequently, we will find a valid accretion "only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted

(internal citations omitted) 308 NLRB at 1174 and n.12, 13. Later, in explaining its new rule on unit employee transfers, the Board said:

As the Board said in the context of accretion, 'The Board's fundamental concern . . . is to insure that in cases where such an issue is raised the right of interested employees to determine their own bargaining representative will not be thwarted.' *Safeway Stores*, 256 NLRB 918 (1981).

Id. at n.23

In summary, the Regional Director's Decision fails to apply the Board's longstanding principles for accreting groups of new employees into existing bargaining units. Here, the represented South employees who have moved full time to East are not a majority of the

employees in either a proposed technical or a proposed service and maintenance unit at East, so *Gitano* provides no guidance. Whether accretion is appropriate depends on meeting the standard in *Safeway Stores* and the UC petitions filed by SEIU fail to do that.

B. The East Employees Retain a Separate Identity and Both a Technical Unit and a Service and Maintenance Unit at East Could Be Appropriate

The two prongs of the *Safeway Stores* standard are stated in the conjunctive, so they impose independent requirements. The first step of the *Safeway Stores* standard in this case involves determining whether the East employees in the proposed units have so little separate group identity from the South employees that they could not alone be considered an appropriate unit. Said differently: do the East employees have insufficient group identity to function as a separate unit or units? The answer is that East employees have kept a separate identity and could be represented in stand-alone technical and service and maintenance units. Therefore, accretion is improper.

The Board has given weight to a variety of factors in assessing community of interest, including integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective bargaining history, degree of separate daily supervision and degree of employee interchange. *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 3 (2015); *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). The Board has held that the “two most important factors – indeed, the two factors that have been identified as critical to an accretion finding – are employee interchange and common day-to-day supervision,” and therefore “the absence of these two factors ordinarily will defeat a claim of lawful accretion.” *Frontier Telephone*, 344 NLRB at 1271 and n.7 (2005) (quoting *E. I. Du Pont, Inc.*, 341 NLRB 607, 608 (2004)). Analyzing these factors demonstrates that East employees could constitute a separate technical unit and a

separate service and maintenance unit.⁵ See *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969) (stating the Board will not “under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election”).

1. Proposed Technical Unit

Certain of the relevant factors do favor accretion – similarity in kind of work performed, similarity in qualifications, skills and training, geographic proximity and relationship to senior management. However, other factors – most particularly, frequency of interchange and contact among employees, and common supervision – compel the conclusion that East employees have not lost their identity and could be in a separate technical unit.

First, East employees are paid on a different wage scale, work different shifts, and have different benefits, overtime and layoff rights than South employees, including those who may work alongside them. (Section I.E)

Second, East employees have no history of collective bargaining, while South employees have been represented for over 40 years. Based on the Integration Agreement, collective bargaining agreement terms apply to South employees who work at East. (Section I.A) East employees have resisted being organized and indicated no desire for accretion. (Tr. 96-97)

Third, although some operational integration of South and East has occurred, it is limited. Both hospitals continue to function independently. It also is clear that the integration process undertaken first by SHS and now LVHN will leave the two hospitals performing mostly different functions, so it is a process more oriented toward avoiding duplication than integrating specific functions across hospital lines. (Section I.A)

⁵ The two “critical” factors identified may be particularly critical on the second prong of *Safeway Stores* having to do with whether the employees to be accreted share an overwhelming community of interest with the preexisting unit.

Fourth, the frequency of contact and interchange of East employees with South employees is limited. The number of East technical employees sought to be accreted is 66. None has moved to South. In terms of South employees working at East in technical positions, 27 have moved to East full-time, and 44 spend some work time at East. So interchange is one way only. Two East departments with technical employees have no South employees - Senior Behavioral Health and Acute Rehabilitation. Two others either have very few South employees or South employees who work at East only part of the time – Laboratory and Respiratory. In a number of East departments, the East employees outnumber South employees by roughly two to one. In no department at East does the number of South technical employees exceed the number of East technical employees. In terms of full-time positions, the number of South technical employees working at East is less than half the number of East employees. (Jt. Ex. 2, Ex. B)

Fifth, the extent of shared supervision is inconsistent throughout the proposed unit. East technical employees share daily supervision with South employees that have transferred or been reassigned to East or work part-time there. However, more than half of the 25 technical employees who remain at South have separate daily supervision. (Jt. Ex. 2, Ex. B)

What the foregoing reflects is that the East technical employees still have their own identity. The proposed technical unit is a balkanized group. It is comprised of a large group of East employees who have no connection with SEIU unit employees still working at South, a group of unit employees working at South who similarly have no connection with East employees, and an in-between size group of South employees who either now work at East or split time between South and East, have different terms and conditions of employment than East employees because of the Integration Agreement, and are outnumbered by East employees in every department at East other than two (Pool Nursing and Cardiopulmonary) in which the

numbers are equal (if South rotating employees are included), and three small departments (Surgical Services, Radiology and Ultrasound) in which SEIU-represented employees have a small majority (if South rotating employees are included).⁶ East employees could be in their own technical unit. On that basis alone, they cannot be accreted to a South unit.

2. Proposed Service and Maintenance Unit

Again, certain factors favor accretion – similar work performed, similar qualifications, skills and training, the geographic proximity of the two facilities and relationship to senior hospital administration. But other factors, including frequency of interchange and contact, and shared supervision, point the other way.

First, like the technical employees, East service and maintenance employees are paid on a different compensation schedule, work different shifts, have different benefits, and have different overtime and layoff rights than South employees. (Section I.E)

Second, as with the technical employees, East service and maintenance employees have no history of union representation or bargaining, and have resisted union organization. South employees have been represented by SEIU since 1974, and those working at East are covered by the 2017 CBA based on the Integration Agreement. (Section I.A)

Third, as explained with respect to the technical employees, the operational integration of the two hospitals is limited because it is aimed more at eliminating duplication than at integrating departments across hospital lines. East and South provide and will provide different, specific services. (Section I.A)

Fourth, frequency of employee contact and interchange is limited, and more so than with the technical employees. The number of East service and maintenance employees proposed to be

⁶ Every department at East has more East employees than South if only counting permanent assignments. (Jt. Ex. 2, Ex. B)

accreted is 94. None has moved to South. In terms of interchange from South to East, 41 South service and maintenance employees have moved to East and 13 other South employees spend part of their work time at East. So interchange is again only one way, and the number of South service and maintenance employees working at East is much smaller than the total of East service and maintenance employees. East employees in service and maintenance positions in some clinical departments work with very few South employees - Senior Behavioral Health, Acute Rehabilitation, Central Supply, Radiology. Outside the clinical area, Maintenance at East has only East employees and operates completely separately from Maintenance at South. Dietary at East has 22 service and maintenance employees, 17 East employees and just five South employees, and is separately supervised. Housekeeping at East works under the direction of a Lead Housekeeper and has 15 employees proposed to be accreted who work with nine South employees who have moved over. In the vast majority of departments at East, South service and maintenance employees are out-numbered by East employees. The 94 East employees have no contact with the 70 South employees who continue to work at South in service and maintenance positions. The maximum number of South employees who *ever* work at East is less than half the number sought to be accreted. (Jt. Ex. 2, Ex. B)

Fifth, the degree of common supervision among the service and maintenance employees varies based upon work group and location. For example, East service and maintenance employees share daily supervision with South employees who have moved to or work part-time at East in their departments. But over half of the 70 South service and maintenance employees remaining at South have separate daily supervision, including the 18 housekeeping employees who do not report to the Lead supervisor at East. (Jt. Ex. 2, Ex. B; Tr. 375)

The proposed service and maintenance unit is more balkanized than the proposed technical unit. It is comprised of 94 East employees sought to be accreted, who have no connection to 70 SEIU unit employees still working at South, and whose only connection to the SEIU bargaining unit is the 41 South employees who have permanently moved to South plus 13 more who sometimes work at East. Those South employees who work at East do so under different terms and conditions than East employees, are covered by the 2017 CBA and are outnumbered by East employees in all but three departments – Surgical Services, Laboratory, and Laundry. If a petition were filed for representation of East employees in a service and maintenance unit, it would be an appropriate unit. The East employees are therefore not eligible for accretion.

C. The East Employees Do Not Share an Overwhelming Community of Interest with the Preexisting Unit

The second step in applying the *Safeway Stores* standard is to ask whether the community of interest between the East employees sought to be accreted and the South bargaining unit employees is “overwhelming.” *Safeway Stores*, 256 NLRB at 918. Accretion requires not just a community of interest, but an *overwhelming* community of interest because it casts a smaller group of employees into a larger group of represented employees without any right to vote for or against the union. “In accretion cases . . . new employees are added to an existing bargaining unit without a representation election; therefore the showing of shared characteristics must be higher to protect employee interests.” *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995). Thus, accretion applies only if one group of employees has no identity distinct from the other.

That is not the case here. As pointed out, the two groups of employees share some community of interest – similar work, similar qualifications and skills, geographic closeness and

relationship to senior management. However, inherent differences cannot be overlooked. The SEIU-represented employees and East employees have different wages, benefits and terms and conditions of employment. (Section I.E) They have different histories with respect to collective bargaining. (Section I.A) The East employees have resisted union representation. (Tr. 96-97)

Most important, though, is the fact that within the proposed technical and service and maintenance units large portions of the already represented employees work only at South and thus do not have interchange or contact with employees at East and share supervision with them to only a limited extent. In the proposed technical unit, 25 unit employees continue to work only at South, another 44 work some of the time at South and some of the time at East, and the number of South employees working full-time at East is just 27. The proposed accretion of 66 technical employees at East thus depends on their exposure to just 27 unit employees on a full-time basis and another 40+ on a more occasional basis, but they have no contact with 25 unit employees. In the proposed service and maintenance unit, the numbers are more stark – 70 SEIU-represented employees continue to work only at South, 41 now work full-time at East and another 13 work occasionally at East. The number of East employees sought to be accreted is 94. That accretion of more than 90 employees thus depends on exposure to just 54 unit employees, only 41 of whom work exclusively at East.

The foregoing does not reflect an overwhelming community of interest. Instead of two groups of employees whose identities have merged, it reflects a group of South unit employees with no exposure to East or its employees (nor East employees to them), a large group of East employees sought to be accreted whose work situation has not really changed, and a smaller group of South unit employees who now work full or part-time at East and who do interact with East employees, but who are not fully part of East both because many of them work at both

South and East and because, due to the Integration Agreement, the 2017 CBA terms and conditions follow them to East. These facts are not appropriate for accretion and to accrete would be to impose SEIU representation on employees whose retained identity is distinct from that of the South employees.

IV. CONCLUSION

Based on the foregoing, the Regional Director's finding of accretion should be reversed and the UC petitions filed by SEIU dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing *Employer's Brief in Support of Request for Review of Regional Director's Decision* in Case Nos. 4-UC-200537 and 4-UC-200541 was served by electronic mail on February 8, 2018 on the following:

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A copy of this Request is also being filed with the Regional Director for Region 4.

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