UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

MULTICARE HEALTH SYSTEM d/b/a INDIGO URGENT CARE CLINICS, Employer, And UNION OF AMERICAN PHYSICIANS AND DENTISTS, Petitioner.	Case No. 19-RC-221006 **EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE**

I. INTRODUCTION

MultiCare Health System ("MultiCare" or "Employer") operates urgent care clinics under three different brand names: Indigo Urgent Care ("Indigo"); Immediate Clinic ("IC"); and MultiCare Urgent Care ("MUCC"). The Union of American Physicians and Dentists ("Union") represents certain providers at the MUCC-branded clinics, and recently prevailed in its efforts to represent a similar group of providers from the Indigo clinics in a separate bargaining unit. The Regional Director overruled three different sets of objections that MultiCare filed regarding the election, each of which the Board should review and reject. The three sets of objections are:

(1) That the Regional Director improperly concluded in his Decision and Direction of Election ("DD & E") that the Indigo providers could be organized in a standalone "fractured" unit rather than in a larger unit consisting of the MUCC, Indigo and IC providers. This is a threshold issue that, if the Board decides in MultiCare's favor (as it should), eliminates any need to consider the second and third issues.

(2) That the Regional Director improperly denied MultiCare's request for a hearing under 29 C.F.R. § 102.69(c)(ii) to present additional evidence showing that the certified standalone unit is improper.

(3) Finally, that the Union destroyed the laboratory conditions necessary for a fair vote in

the Indigo unit by its conduct in the MUCC unit. Specifically, the Union negotiated in bad faith by reaching a tentative agreement on a new collective bargaining agreement for the MUCC unit by withdrawing or dramatically weakening previously high-priority bargaining positions, anticipating or planning that the MUCC unit would not ratify the tentative agreement, so as to persuade Indigo voters that UAPD would be able to quickly negotiate a collective bargaining agreement for them.

Respectfully, the Board should accept review and correct the Regional Director's errors.

II. BACKGROUND

A. MultiCare's Common Operation of Urgent Care Clinics Under The Indigo, Immediate Clinic and MultiCare Urgent Care Brand Names.

MultiCare is a non-profit health care organization that operates in the Puget Sound and Spokane regions of the State of Washington. DD & E p. 1.[1] As relevant here, MultiCare operates urgent care clinics under three different "brands" or "platforms," which are essentially trade names. *Id.* The three "brands" are Indigo, Immediate Clinic, and MUCC. *Id.* The Indigo clinics "are spread out along the Interstate 5 axis from Marysville south to Olympia, a distance of about 100 miles." *Id.* p. 6. With one exception, the IC clinics are located in the greater Seattle area. *Id.*

MultiCare has operated the MUCC clinics for a significant period of time and thus refers to them as its "Legacy" clinics. *Id.* The IC and Indigo brands have a more recent history: MultiCare established the Indigo brand in 2016 and acquired the IC clinics from another health system in December 2016. *Id.* pp. 1-2. Regardless of brand name, the clinics employ three categories of employees who are relevant to this case: Physicians, Physician Assistants ("PAs"), and Advanced Registered Nurse Practitioners ("ARNPs"). *Id.* p. 1. These employees are collectively referred to as "providers." DD & E pg. 2.

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[1] This Request generally cites the Regional Director's Decision and Direction of Election, dated June 22, 2018, for the relevant factual and procedural background.

B. The Union Files, and The Regional Director Approves, A Petition Seeking To Represent The Indigo Providers Only.

On May 29, 2018, the Union filed an RC petition ("the Petition") seeking to represent the Indigo practitioners only. MultiCare opposed the Petition on the grounds that a unit consisting solely of the Indigo providers was too small and that "the unit must also include the same classifications at its [IC] facilities." (DD & E pg. 1.) The parties were unable to reach agreement on the scope of the unit, so the Region conducted a hearing beginning on June 6, 2018.

The Regional Director decided the petition in a DD & E dated June 22, 2018. Applying the six-factor test under cases like *Clarian Health Partners, Inc.*, 344 NLRB 332, 334 (2005),[2] he concluded that three of the six factors in the community-of-interest analysis weighed against the Petition's request for a standalone unit: the providers' skills, duties and working conditions; centralized control of management and supervision between the IC and Indigo clinics; and the providers' geographic proximity to one another. The Regional Director correctly acknowledged that the terms and conditions of the IC and Indigo providers' employment were overwhelmingly similar. The Regional Director also acknowledged the common organizational structure the IC and Indigo clinics share. Finally, the Regional Director correctly described why the geographic distances between the various IC and Indigo clinics weighed against the petitioned-for unit.

Despite these findings, the Regional Director approved the petitioned-for unit for an election on the basis of the remaining three factors: employee contact and interchange; functional integration; and bargaining history.[3] The Regional Director acknowledged that an equal number of the community-of-interest factors weighed against and in favor of allowing an Indigo-only

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[2] Under that test "the Board focuses on (1) similarity in skills, duties, and working conditions, (2) functional integration, (3) employee contact and interchange, (4) centralized control of management and supervision, (5) geographic proximity, and (6) bargaining history." *Id.*

[3] The MUCC providers have been represented by the Union since April 2017.

unit. *Id.* p. 11. However, he approved the petitioned-for unit based on his conclusion that the distinctions between the IC clinics and the Indigo clinics represented "genuine Employer administrative units" that warranted separating the two groups for purposes of collective bargaining. *Id.* He concluded "two of the factors that favor finding the petitioned-for unit appropriate, functional integration and interchange, are ones the Board considers more important." *Id.*

The Regional Director's decision to certify the petitioned-for unit is the subject of MultiCare's first Request For Review, filed and served on July 26, 2018, which remains pending before the Board.

C. The Union Wins The Election and MultiCare Files Objections.

Region 19 sent mail ballots to members of the voting unit on or about July 9, 2018. The Region counted the ballots on July 30, 2018, with the Union prevailing by a vote of 26 to 15. MultiCare filed objections to the election on August 6, 2018. The objections fell into three categories, each of which MultiCare supported with an accompanying Offer of Proof.[4]

First, MultiCare restated the threshold objection contained in its first Request For Review: that the Indigo, and IC providers should have been required to vote, if at all, as a single unit rather than in the fractured unit the Union sought and the Regional Director approved.

Second, and relatedly, MultiCare requested a hearing under 29 C.F.R. § 102.69(c)(ii) for the purpose of offering further evidence of the functional integration of the IC and Indigo clinics, including the evidence addressed by MultiCare's Motion of June 11, 2018 to Supplement the Record or in the Alternative Reopen the Hearing, which the Regional Director denied on June 12, 2018.[5] MultiCare also requested the opportunity to present evidence regarding the

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[4] The Offer of Proof has been filed, but not served, along with this Request For Review.

[5] The Motion sought to introduce evidence that MultiCare issues the same identification badges to MUCC, Indigo and IC providers, regardless of which brand they work under.

bargaining history factor of the *Clarian Health Partners* test, including the history of and course of bargaining at the MUCC brand that the Regional Director found so influential in his DD & E.

Finally, MultiCare objected to the election on the grounds that the Union destroyed laboratory conditions in the voting unit by its conduct in the MUCC unit. Specifically, the Union negotiated in bad faith by reaching a tentative agreement on a new collective bargaining agreement for the MUCC unit by withdrawing or dramatically weakening previously high-priority bargaining positions, anticipating or planning that the MUCC unit would not ratify the tentative agreement, so as to persuade Indigo voters that UAPD would be able to quickly negotiate a collective bargaining agreement for them.

D. The Regional Director Overrules MultiCare's Objections.

The Regional Director denied MultiCare's Objections in a Supplemental Decision and Certification of Representative ("Supp. Dec. and Cert.") dated August 16, 2018. Regarding MultiCare's objections to his decision to separate the Indigo providers from the MUCC and IC providers, the Regional Director held:

> I find the scope of unit issue raised by the Employer in Objection 1 inappropriate for determination in the instant post-election objections proceeding. Unit scope issues do not constitute the required "conduct of an election" or "conduct affecting the results of an election" standard for a valid objection to election. NLRB Casehandling Manual (Part Two) Sec. 11392.1. As indicated in §102.63(b)(1) and 102.66 (a), (b), and (d), of the Board's Rules and Regulations, unit scope issues are to be raised in the statement of position and litigated in the pre-election hearing. Indeed, the question as to whether or not IC providers should have been included in the Indigo unit was fully litigated in the pre-election hearing, and addressed in the subsequent Decision and Direction of Election. I further note that the question of unit scope is presently before the Board via the Employer's Request for Review, the appropriate vehicle to address this issue.

(Supp. Dec. and Cert. pg. 3.)

The Regional Director denied MultiCare's second objection for similar reasons:

> Similar to my finding regarding Objection 1, I also find Objection 2 inappropriate for determination in the instant post-election objections proceeding. First, evidence of integration goes to unit scope, not to conduct of an election or conduct that affects the results of an election. Second, as I previously explained in my July 12, 2018, Order Denying Motion to Supplement the Record or in the

> Alternative Reopen the Hearing, §102.65 (e)(1) of the Board's Rules and Regulations only permits 'reopening of the record for newly discovered evidence or evidence which should have been taken at the hearing. The evidence described in Objection 2 and supporting proffer does not meet the newly discovered standard, as it would have been available to the Employer prior to the close of the hearing. I would also point out that the Employer was not prevented from putting this evidence on the record due to an erroneous objections ruling. It simply was not presented, and that is not cause for reopening the record under any circumstance.

(*Id.*)

Finally, the Regional Director denied MultiCare's third objection (that the Union reached a tentative agreement in the MUCC bargaining unit that it knew would fail in order to influence the election in the Indigo unit) for three separate reasons:

> First, the proffer lacks the specificity required in order to support an objection. Not only does it fail to explain how employees voting in the election learned of this alleged conduct, it does not explain what the Union did or said to provide the inference that affecting the vote was the Union's true intention in reaching the tentative agreement. Moreover, it fails to explain how these assertions could amount to objectionable conduct.
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> Second, it appears that the Employer is asserting that the Union engaged in bad-faith bargaining in reaching a tentative agreement covering a separate unit of employees, and somehow that action results in conduct affecting the results of the instant election. However, there is no unfair labor practice charge before me alleging bad-faith bargaining. Board law is clear, no consideration will be given to an election objection "where the gravamen of the objection is an unfair labor practice, and sustaining the objection would require a finding that alleged objectionable conduct violated the Act." *In re Virginia Concrete Corp.*, 338 NLRB 1182, 1185 (2003). As this objection would require a finding of bad-faith bargaining in violation of §8(a)(5) in order to conceivably have merit, it cannot be heard.
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> Third, and perhaps most importantly, the actions described by the Employer as objectionable conduct are too attenuated to the actual vote. Tellingly, although requested to do so, the Employer provided no case law whereby a union's actions with respect to a different unit were found to unlawfully affect the results of election in the voting unit. Hence, assuming without deciding that the Union agreed to a tentative agreement that it believed would be rejected by employees in order to influence the vote of a separate unit of employees, I would still be unable to find that action to unlawfully affect the vote in a wholly separate unit.

(*Id.* pgs. 4-5.)

III. ARGUMENT

A. The Regional Director Erred When He Certified The Indigo Providers as a Standalone Unit.

The Regional Director's conclusion that MultiCare's Indigo-branded providers should be organized in a standalone unit remains fundamentally flawed, for the reasons set out in MultiCare's first Request For Review filed on July 26, 2018, and incorporated herein. Regardless of which Request For Review the Board relies upon to reach the issue, the Board should conclude the Regional Director erred in this respect.

B. The Regional Director Erred When He Declined To Conduct A Hearing To Consider Additional Evidence Regarding His Certification Decision.

The Regional Director compounded his erroneous decision to certify the Indigo-branded providers in a standalone unit by denying MultiCare the opportunity to present additional, relevant evidence regarding two key points under the *Clarian Health Partners* test: (1) whether the fact that MultiCare issues the same identification badges to its MUCC, Indigo and IC providers supports a finding that the providers are functionally integrated; and (2) whether the historical and more recent pattern of bargaining between MultiCare and the Union regarding the MUCC-branded providers weighs against the certification decision. This evidence is highly relevant to the underlying conclusion in the DD & E and must be considered.

Moreover, to the degree that the Regional Director rejected some of this evidence under the standards of §102.65 (e)(1) of the Board's Rules and Regulations (on the grounds that it existed prior to the original hearing), he erred to reject all of this evidence on that basis. The Regional Director's error arose for a straightforward reason he did not address: the evidence of the difficulties in bargaining for the MUCC unit did not fully exist at the time of the June 6 hearing. Regardless of the Union's bad faith in entering into a sham tentative agreement, the ongoing difficulty[6] in bargaining for the MUCC unit would undercut any suggestion that yet

[6] If the Regional Director had conducted a timely hearing, evidence would have been received that the sham tentative agreement was indeed voted down by the MUCC unit sometime (continued . . .)

another fractured unit is appropriate. The original DD & E was a close issue, even by the Regional Director's analysis: three factors favored the unit sought by the Union, and three did not. Additional evidence regarding one of those factors favoring the targeted unit -- bargaining history -- would have led to a different result. The Regional Director erred in not even holding a hearing.

C. The Regional Director Erred When He Concluded That MultiCare Did Not Present Proof That the Union's Conduct In the MUCC Bargaining Unlawfully Influenced The Indigo Election.

Each of the three reasons the Regional Director cited in denying MultiCare's third objection is flawed.

First, the Regional Director overstated what a party must present in its offer of proof in order to be entitled to a hearing. (Supp. Dec. and Cert. pg. 3.) The Board's rules provide that an offer of proof must "take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony." 29 C.F.R. §102.66(c). *See also Rhone-Poulenc, Inc.,* 271 NLRB 1008 (1984) (offer of proof must provide a list of witnesses, a brief description of their testimony, and explain the nature of the conduct that the party's objections are based upon).

MultiCare's Offer of Proof did just that. It identified three separate witnesses who would testify to: (1) the scope of the bargaining between MultiCare and the Union regarding the MUCC providers; (2) the Union's about-face on several key issues in the midst of the vote in the Indigo unit, which led to a failed (and predictable) ratification vote on the tentative agreement; and (3) the fact that the tentative agreement quickly became common knowledge within the small universe of the certified Indigo-only unit. This is more than sufficient to satisfy MultiCare's burden under Section 102.66(c), which at bottom only requires enough information to notify a

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(. . . continued)
during the week of August 6, 2018. As of the filing of this Request for Review, no agreement has been reached.

regional director that a party can present an issue worthy of a hearing. Here, in contrast, the Regional Director essentially concluded that MultiCare had to prove its case definitively at the pleadings stage. This is not the appropriate standard.

Second, a party need not present evidence that the opponent engaged in an unfair labor practice to prove that it upset laboratory conditions and thus necessitated a second election. (Supp. Dec. and Cert. pg. 4.) *See NVF Co. Hartwell Division*, 210 NLRB 663 (1974) ("The Board's responsibility is to establish standards for the conduct of elections. Where the standards drop too low, the Board will set aside an election even though the conduct does not constitute an unfair labor practice."). MultiCare can present evidence that the Union's conduct interfered with the laboratory conditions necessary for a fair vote in the Indigo-only unit; whether the Union's conduct also constituted an unfair labor practice is beside the point.

Finally, it is of no moment that MultiCare "provided no case law whereby a union's actions with respect to a different unit were found to unlawfully affect the results of election in the voting unit." (Supp. Dec. and Cert. pgs. 4-5.) The laboratory conditions standard is necessarily flexible, allowing the Board to examine potentially disruptive conduct of a kind and form that it had perhaps not previously considered but that nonetheless qualifies as "[c]onduct that creates an atmosphere which renders improbable a free choice." *General Shoe Corp.*, 77 NLRB 124 (1948). *See also* The Developing Labor Law Ch. 9.II ("A wide assortment of traditional and imaginative techniques have been employed both to frustrate and to further union organizational efforts.").

For that matter, the Board has observed in other circumstances that a union violates its good-faith bargaining obligations by deceiving an employer regarding a ratification vote. *See Teamsters Local 287 (Granite Rock Co.),* 347 NLRB No. 32 (2006) ("[I]n certain circumstances a union, which deceives an employer about its efforts to fairly and timely conduct a ratification vote, may breach an implied covenant of good faith and fair dealing, and be in violation of Sec. 8(b)(3) of the Act."). It represents no great leap of Board law to apply that same rationale to the

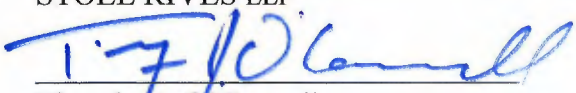
Union's conduct here.

IV. CONCLUSION

For the reasons stated above, and in its first Request For Review filed on July 26, 2018, the Board should accept review and reverse the Regional Director's conclusions in this case.

Respectfully submitted this 30th day of August, 2018.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I, Debbie Dern, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On August 30, 2018, I caused a copy of the foregoing document to be served upon the following individual(s) in the manner indicated below:

Executive Secretary National Labor Relations Board 1015 Half Street SE Washington, D.C. 20570-0001	☐ hand delivery ☐ facsimile transmission ☐ overnight delivery ☐ first class mail ☒ e-filing
Ronald K. Hooks, Regional Director National Labor Relations Board Region 19 2948 Jackson Federal Building 915 Second Avenue Seattle, WA 98174-1978 Email: Mary.Hermosillo@nlrb.gov	☐ hand delivery ☐ facsimile transmission ☐ overnight delivery ☐ first class mail ☒ e-mail delivery
Robert H. Lavitt Schwerin Campbell Barnard Iglitzin & Lavitt LLP 18 West Mercer Street, Suite 400 Seattle, WA 98119-3971 Tel: (206) 257-6006 Fax: (206) 257-6041 Email: lavitt@workerlaw.com	☐ hand delivery ☐ facsimile transmission ☐ overnight delivery ☒ first class mail ☒ e-mail delivery

Executed on August 30, 2018, at Seattle, Washington.

Debbie Dern, Legal Practice Assistant