United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 3, 2015

TO: Rhonda P. Ley, Regional Director
Region 3

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Brooks Memorial Hospital 177-1650-0100
Case 03-CA-148201 530-4825-5000

The Region submitted this case for advice as to whether a hospital and the company that manages its onsite pharmacy are joint employers of the pharmacy technicians who work there; whether the Union waived its right to bargain with the hospital when it entered into a collective-bargaining agreement with the pharmacy management company; and whether it would effectuate the purposes of the Act to proceed against the hospital given that the Union has already reached a collective-bargaining agreement with the pharmacy management company.

We conclude that, under *BFI Newby Island Recyclery*,[1] the hospital and the pharmacy management company are joint employers of the pharmacy technicians because, among other things, the agreement between the entities grants the hospital the right to end the pharmacy technicians' employment. We also conclude that the Union has not waived its right to bargain with the hospital regarding the pharmacy technicians merely because it has entered into a collective-bargaining agreement with the pharmacy management company. Finally, we conclude that issuing complaint over the hospital's general refusal to bargain over the pharmacy technicians will effectuate the policies and purposes of the Act.

FACTS

Background

Brooks Memorial Hospital ("Brooks" or "the hospital") is an acute care hospital located in Dunkirk, New York. Since 2001, Nash Pharmacy Services, PC ("Nash") has

[1] 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015).

managed the hospital's pharmacy department. Prior to March 2014, Nash employed a pharmacy director and staff pharmacists and supervised four pharmacy technicians who were directly employed by Brooks. The pharmacy technicians assist the staff pharmacists by dispensing medications for the hospital's patients and deliver medication throughout the hospital. On March 1, 2014, pursuant to a new pharmacy service agreement with Brooks, Nash became responsible for providing pharmacy technicians to the hospital, along with the pharmacy director and staff pharmacists. Around this time, Nash hired the four existing pharmacy technicians to continue working at the hospital's pharmacy.

Historically, 1199 SEIU United Healthcare Workers East ("the Union") has represented a unit of approximately 180 Brooks employees, including the pharmacy technicians. In the spring of 2014, Brooks and the Union entered into negotiations for a successor collective-bargaining agreement. The parties agreed that the position of pharmacy technician would be listed as an "inactive classification," along with other job titles included in an addendum to the agreement. Around August 2014, the Union and Brooks reached agreement on a successor contract.

In the fall of 2014, Nash recognized the Union as the bargaining representative of the pharmacy technicians, and, in early 2015, the Union and Nash began bargaining for an initial CBA. On February 1, 2015,[2] while these negotiations were underway, the Union told Brooks that it should join the negotiations as a joint employer of the pharmacy technicians. Brooks denied that it was a joint employer and declined the Union's invitation to join the negotiations. On March 16, the Union filed the instant charge alleging that Brooks, as a joint employer of the pharmacy technicians, failed and refused to bargain with the Union. On April 15, Nash and the Union finalized a collective-bargaining agreement covering the pharmacy technicians.

The Pharmacy Agreement and Current Pharmacy Operations

The current pharmacy service agreement between Nash and Brooks states that Nash agrees to provide four pharmacy technicians "who will each work 40 hours per week during such operating hours [as specified in an appendix] and in such numbers as required by" the hospital. Nash is responsible for scheduling the technicians' days and hours within these parameters.

The pharmacy agreement allows Brooks to order the removal of a pharmacy technician if, "in the sole discretion of" Brooks, (1) the technician "poses a risk to the health, safety or medication condition of any employee, patient, or patron of" the hospital; (2) Brooks "reasonably disapproves of the conduct of"a pharmacy technician; or (3) Brooks "believes any [pharmacy technician] interferes with the business or

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[2] All dates *infra* are 2015 unless otherwise noted.

operations of" the hospital. The agreement is silent as to whether Brooks may impose discipline but, on at least one occasion, a hospital vice president requested that Nash discipline a technician for violating a procedure and the pharmacy complied with that request. Nash is also permitted to discharge, suspend or terminate any pharmacy technician provided that it gives Brooks "prompt written notice."

When the pharmacy technicians are physically working in the pharmacy, they are directed by the pharmacy director or the staff pharmacists. When the technicians are delivering medication throughout the hospital, they interact with hospital supervisors and managers. According to Nash, Brooks personnel do not regularly direct the pharmacy technicians while they are delivering medication because all of the technicians are familiar with their duties. However, the pharmacy technicians report that the pharmacy director regularly receives emails from Brooks regarding the technicians' performance and relays those comments and concerns to the technicians. And on at least one occasion, a hospital manager directly addressed pharmacy technicians' work performance: the manager verbally rebuked a group of technicians after observing that a technician had left a medication cart unattended in a hospital elevator.

The pharmacy agreement requires that all pharmacy personnel participate in a "quality assurance program," including continuing education programs. The agreement further requires that pharmacy technicians shall be licensed in accordance with New York law and that Nash will ensure that the technicians comply with all of Brooks's policies and procedures. When the pharmacy technicians were hired by Nash, they were required to take a certification test for the first time, and Brooks reimbursed the technicians for the cost of the test. According to the pharmacy technicians, they also participate in required continuing education programs held at the hospital for Brooks staff.

Pharmacy technicians' day-to-day tasks depend in part on the needs of the hospital and its patients. For example, when Brooks instituted a new system for dispensing medication to surgical patients, the pharmacy technicians became responsible for servicing the new machines. And, in at least one instance, a pharmacy technician had to adjust (b) (6), (b) (7) hours of work in order to service the machines before surgeries began.

Pharmacy technicians wear Brooks identification badges and participate in hospital-sponsored employee social events such as holiday parties and summer picnics. The pharmacy technicians use Brooks email accounts, and the pharmacy's computer systems are maintained by the hospital. Brooks also provides all of the pharmacy's equipment and supplies.

Finally, the pharmacy service agreement may be terminated by either party upon 180 days' notice, with or without cause. Brooks may also, "in its sole discretion,"

terminate the contract immediately if, among other reasons, Brooks determines that Nash has "jeopardized or disrupted" the well-being of any patient or hospital operations.

ACTION

We conclude that Brooks and Nash are joint employers of the pharmacy technicians because, among other things, the pharmacy service agreement grants Brooks the right to end the pharmacy technicians' employment. We also conclude that the Union has not waived its right to bargain with Brooks regarding the pharmacy technicians merely because it has entered into a collective-bargaining agreement with Nash. Finally, we conclude that issuing complaint over the hospital's general refusal to bargain over the pharmacy technicians will effectuate the policies and purposes of the Act.

In *BFI Newby Island Recyclery*, the Board reaffirmed that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."[3] The Board determines if a common law employment relationship exists by examining whether the employees perform services for the putative employer and are subject to the putative employer's control or right to control how those services are conducted.[4] If the common-law test is satisfied, the Board then determines whether the putative employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective-bargaining."[5] In this regard, the Board held that it would no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."[6] Rather, the Board concluded, it would also find joint employer status where the putative employer has the *right* to control, in the common-law sense, "the means or manner of employees' work and terms of employment," or actually exercises such control, "either directly or [indirectly]

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[3] 362 NLRB No. 186, slip op. at 15.

[4] *Id.*, slip op. at 12-17, 18 n.96.

[5] *Id.*, slip op. at 2.

[6] *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984)).

through an intermediary."[7] However, if a putative employer's control over terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining, the Board stated that it may decline to find a joint employer relationship.[8]

Here, Brooks meets the common law definition of an employer of the pharmacy technicians. Pharmacy technicians are employed solely to perform services on behalf of the hospital, including dispensing medication and delivering medication to Brooks patients.[9] Also, Brooks controls many aspects of the pharmacy technicians' services, including dictating that the technicians will work forty hours a week during specific operating hours and requiring that the technicians follow all hospital policies and procedures.[10] Therefore, the evidence demonstrates that Brooks is a common-law employer of the pharmacy technicians and satisfies the first step of the Board's joint employer standard.

Under the second step of the joint employer test, we find that Brooks possesses significant control over the pharmacy technicians' essential terms and conditions of employment. First, the hospital, "in its sole discretion," can require that Nash remove pharmacy technicians from the hospital, effectively ending their employment.[11] Thus, like the user employer in *BFI Newby Island Recyclery*, Brooks has a "virtually

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[7] *Id.*, slip op. at 2, 3-6, 15-16, 18-20 (finding that two statutory employers were joint employers of a single workforce where, per their agreement, the supplier employer recruited, selected, and hired employees for the user employer which could, in turn, reject and discharge employees and exert control over their wages, work shifts, and productivity and safety standards, even though the agreement specified that the supplier was the sole employer).

[8] *Id.*, slip op. at 16.

[9] *See id.*, slip op. at 18 n.96 (citing Restatement (Second) of Agency §220 cmt. 1 (1958) (where "work is done upon the premises of the employer with his machinery by workmen who agreed to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are servants of the [employer]")).

[10] *Cf. id.*, slip op. at 18-19 (user firm specified productivity standards and timing of shifts for supplier firm's employees).

[11] There is no evidence to suggest that Nash operates pharmacies at any other location where it might be able to transfer the technician but, even if it did, effectively forcing a transfer to another location would significantly impact the affected employee's terms and conditions of employment.

unqualified right to request the removal" of a pharmacy technician.[12] The hospital also has the right to terminate Nash's service agreement if it determines that Nash has interfered with the hospital's operations.[13]

Second, Brooks "dictate[s] the number of workers to be supplied" by specifying in the service agreement that Nash provide four pharmacy technicians.[14] Furthermore, Brooks places restrictions on Nash's selection of pharmacy technicians because the agreement imposes a new requirement that pharmacy technicians have or obtain state certification.[15]

Third, Brooks also exercises control over the pharmacy technicians' hours of work because Brooks dictates the pharmacy's operating hours and requires that the technicians work a forty-hour week.[16] Although Nash is responsible for determining which pharmacy technicians will work various shifts, in some instances, the hospital has required modifications to employees' hours, such as when Brooks required

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[12] *See id.*, slip op. at 18 & n.101 (citing *Ref-Chem Co.*, 169 NLRB 376, 379 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969)).

[13] *Cf. id.*, slip op. at 3, 18 (contract between user and supplier firm terminable at will); *see also Thriftown, Inc.*, 161 NLRB 603, 607 (1966) (finding user firm's right to terminate contract at will as evidence of control of supplier firm's labor policies).

[14] *See BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 19 (finding joint employer status, in part, because user firm specified number of workers it required from supplier firm).

[15] *See generally, Hamburg Industries*, 193 NLRB 67, 67-68 (1971) (finding joint employer relationship because, among other things, user firm required supplier firm's employees to follow its plant safety rules and regulations); *see also BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 18 (finding joint employer status, in part, because user firm required that supplier "meet or exceed" user firm's selection procedures and tests, including drug tests).

[16] *See id.*, slip op. at 19 (finding joint employer status, in part, because user employer determined when overtime is necessary and employees were required to obtain signature of user employer representative confirming hours worked); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966) (finding joint employer status, in part, because license agreements required licensees to abide by licensor's policies regarding work hours, holidays, and vacations).

pharmacy technicians to service new surgical equipment before their scheduled shifts.[17]

Fourth, Brooks exercises both direct and indirect supervision of pharmacy technicians. Brooks provides feedback on a regular basis to Nash regarding technicians' performance, and Nash relays that feedback to the technicians.[18] There have also been instances where hospital supervisors directly addressed the pharmacy technicians' job performance, such as the example of the hospital supervisor rebuking the technicians when one of the technicians left a medication cart unattended. Brooks also plays a significant role in how pharmacy technicians conduct their work by requiring technicians to follow all hospital policies and procedures and participate in its continuing education and in-service training programs.[19]

Fifth, there are additional indicia of control that further demonstrate that Brooks is a joint employer of the pharmacy technicians. Specifically, Brooks holds out the pharmacy technicians to the public as its own employees and considers them to be working for the hospital.[20] Thus, pharmacy technicians must wear Brooks identification badges and have hospital email addresses. In addition, all the supplies and equipment that the technicians use to perform their jobs is provided by Brooks, and Brooks is also responsible for servicing the equipment.

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[17] *See Sun-Maid Growers of California*, 239 NLRB 346, 350-351 (1978) (finding joint employer status where user firm's production schedule controlled supplier firm's employees' schedules and user firm required employees to change their schedules when its production schedule so required), *enforced per curiam*, 618 F.2d 56, 59 (9th Cir. 1980).

[18] *See BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 16, 19 (user firm communicated feedback and direction of employee performance through supplier's supervisors).

[19] *See, e.g., Thriftown, Inc.*, 161 NLRB at 607 (joint employer finding supported by user firm's requirement that supplier and supplier's employees conform to all practices and policies dictated by user firm).

[20] *See, e.g., CNN America, Inc.*, 361 NLRB No. 47, slip op. at 7 (Sept. 15, 2014) (finding user firm to be joint employer, in part, because it provided virtually all equipment and required supplier's employees to use its badges and credentials); *see also Thriftown, Inc.*, 161 NLRB at 605, 607 (user firm's requirement that supplier's employees wear a common uniform supported joint employer finding).

As described above, Brooks determines or has the right to determine many of the pharmacy technicians' terms and conditions of employment, both directly and indirectly, which therefore satisfies the second step of the Board's joint employer test. As joint employers, the hospital and Nash both have a duty to bargain over mandatory subjects of bargaining. In this regard, although the hospital is not a party to the collective-bargaining agreement that the Union reached with Nash and is not bound to that agreement, nonetheless, it has a duty to bargain with the Union when employee matters arise during the life of the agreement with respect to terms and conditions which Brooks "possesses the authority to control."[21]

Brooks argues, however, that the Union waived its right to bargain by first, agreeing to place the pharmacy technicians on a list of inactive classifications during bargaining for the larger hospital agreement and, second, by subsequently reaching agreement with Nash on a contract covering the pharmacy technicians. We reject both of these waiver arguments. First, during bargaining for the larger hospital agreement, the Union did not "clearly and unmistakably" waive its future bargaining rights vis-à-vis the hospital with respect to the pharmacy technicians.[22] The larger hospital agreement's listing of pharmacy technicians as an "inactive classification" can reasonably be construed as reflecting the Union's consent that the technicians—who had theretofore been included in the hospital-wide unit—would not be covered by the larger hospital agreement while their work was being contracted out to Nash. In the absence of bargaining history (or other evidence of the parties' intent) to the contrary, the Employer cannot demonstrate a "clear and unmistakable" waiver of the right to bargain with Brooks over the pharmacy technicians altogether.[23] In rejecting Brooks's second waiver argument, we emphasize that the Union invited Brooks to join its negotiations with Nash and therefore asserted its interest in bargaining with

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[21] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 16.

[22] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983) (holding that waiver of right to bargain must be "clear and unmistakable"); *Provena St. Joseph Medical Center*, 350 NLRB 808, 811, 821 (2007) (reaffirming that Board will apply "clear and unmistakable" standard for finding contractual waiver; Board considers wording of pertinent contract provisions, bargaining history, past practice, and other contractual provisions that might shed light on parties' intent).

[23] *See, e.g., KIRO, Inc.*, 317 NLRB 1325, 1327-28 (1995) (finding union did not waive right to bargain over effects of employer decision to produce additional news segment where agreement only gave employer general right to schedule and assign work and no other evidence supported employer's interpretation); *cf. NLRB v. Henry Vogt Mach. Co.*, 718 F.2d 802, 806-08 (6th Cir. 1983) (finding waiver where union had clear and unequivocal notice that certain employees were going to lose cafeteria privilege by joining the unit but the union failed to raise the issue during bargaining).

Brooks over the technicians. Although a contract was ultimately reached without Brooks's participation, this was not the Union's doing; it was due to Brooks's flat refusal to bargain.[24] Moreover, in *BFI Newby Island Recyclery*, the Board explicitly stated that joint employer status may still be found even if meaningful bargaining can occur without the participation of the putative joint employer, notwithstanding that certain terms controlled by that employer would be excluded from bargaining.[25]

We also would reject an argument that Brooks's control over pharmacy technicians' terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining. As detailed above, Brooks controls the numbers of technicians employed, their hours of work, the rules they must follow, and their required skills and ongoing training. Furthermore, Brooks directly and indirectly supervises the technicians' performance and even has the right to effectively end their employment. Brooks's control over these areas, among others listed above, is more than sufficient to permit the Union and Brooks to engage in meaningful bargaining regarding the technicians' terms and conditions of employment.

In sum, we conclude that Brooks is a joint employer of the pharmacy technicians and, therefore, has a duty to bargain with the Union in regards to terms and conditions which it possesses the authority to control, even during the term of the Union's agreement with Nash.[26] Indeed, the Union may need to include Brooks in negotiations in order to meaningfully address employee matters directly or indirectly controlled by Brooks as they arise. Under these circumstances, we conclude that it would effectuate the purposes and policies of the Act to proceed in this case. Therefore, the Region should issue complaint, absent settlement, alleging that Brooks, as a joint employer, violated Section 8(a)(5) by refusing to bargain with the Union over the pharmacy technicians.

/s/
B.J.K.

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[24] *Cf. CNN America*, 361 NLRB No. 47, slip op. at 8 (finding user firm was a joint employer despite lengthy prior bargaining history between union and supplier firms, which had never included the user firm).

[25] 362 NLRB No. 186, slip op. at 13 n.68.

[26] *See Columbia University*, 298 NLRB 941, 945 (1990) ("[T]he duty to bargain does not end with the reaching of an agreement; it is a duty that continues throughout the term of the agreement.").