

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

SPECIALTY HOSPITAL OF WASHINGTON
– HADLEY, LLC,

Respondent

Case 5-CA-33522

and

1199 SEIU, UNITED HEALTHCARE
WORKERS EAST, MD/DC DIVISION,

Charging Party/Union

**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Submitted November 13, 2009 on behalf of:

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**RESPONDENT’S BRIEF IN SUPPORT OF ITS EXCEPTIONS
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Respondent, Specialty Hospital of Washington – Hadley, LLC (“SHW - Hadley”), by and through its undersigned attorneys, hereby submits its Brief in Support of its Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter. As shown below, the Administrative Law Judge (“Judge”) improperly found that SHW - Hadley violated Section 8(a)(5) by refusing to recognize and bargain with the Charging Party, 1199 SEIU, United Healthcare Workers East, MD/DC Division (“Union”), on or after February 1, 2007, as the bargaining representative of an inappropriate bargaining unit that the Union, by the Board’s own finding, “unilaterally created.” Accordingly, the Judge’s Decision should be rejected and the Complaint dismissed.

FACTUAL BACKGROUND

The Facility. The facility at issue is a single building hospital located in Washington, DC that provides in-patient long term acute care services and skilled nursing services. Tr. 93-

95.¹ Long term acute care services are provided on the Hospital's second floor, which has 83 beds and is its own unit. Skilled nursing services are provided on the Hospital's third floor, which has 62 beds and is its own unit. Tr. 95:5-13, 95:22-96:8. The Hospital has only these two units. Tr. 96:16-19. The long term acute care unit's average length of patient stay was 25 days in 2006, and 27 days in 2005. Tr. 97:1-9. The skilled nursing unit's average length of patient stay was 152 in 2006 and 119 in 2005. Tr. 97:10-19. The long term acute care unit admitted 1,005 patients in 2006 and 887 patients in 2005. Tr. 97:20-98:12. The skill nursing unit admitted 158 patients in 2006 and 138 in 2005. Tr. 98:7-15. The long term acute care unit generated 81% of the Hospital's revenue in 2006 and 82% of its revenues in 2005. Tr. 99:24-100:11.

The Doctors Community Healthcare Corporation Period. On November 14, 2005, the predecessor employer, Doctors Community Healthcare Corporation ("Doctors"), voluntarily recognized the Union as the bargaining representative of the following bargaining unit (hereinafter, "the Doctors Unit"):

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S., E.S. Aides, E.S. Floor Techs, Engineer IIIs, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painter, pharmacy techs, pharmacists, phlebotomists, P.T. care techs, rehab techs, security guards, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aides.

Answer to Am. Compl. ¶ 5; Summary Judgment Order at 3. The parties have stipulated that, at the time of this recognition, this bargaining unit contained 169 employees, 10 of whom were security guards and 5 of whom were pharmacists. Tr. at 213:4-23. This recognition occurred pursuant to a card check conducted by Arbitrator Barry Shapiro, rather than a Board-conducted

¹ Citations to the May 12-13, 2009 hearing before an administrative law judge in this matter are cited herein as, "Tr. ____," and citations to the Judge's Decision are cited herein as, "JD p. ____."

secret ballot election. General Counsel (“GC”) Ex. 1 (GC 4/30/09 Motion in Limine, Ex. 1).

There is no evidence in the record regarding the extent of the Union’s support in this bargaining unit.² The Union and Doctors engaged in minimal collective bargaining and never reached agreement on a collective bargaining agreement.

The SHW – Hadley Period. SHW - Hadley purchased the assets of Doctors in October 2006, began operating it on November 13, 2006, has continued to operate the Hospital in basically unchanged form, and employed in the 2/1/07 Unit (described below) a majority of the employees previously employed by Doctors. Answer to Am. Compl. ¶ 8(b); Summary Judgment

² SHW – Hadley issued a subpoena to the Union on April 23, 2009 seeking the following documents:

- (1) the authorization cards and any other documents submitted to and/or reviewed by Barry E. Shapiro in connection with the card check; (2) all written communications with Barry E. Shapiro or the Hospital regarding the card check; (3) all written communications with the Hospital that refer, reflect or relate to the Hospital granting recognition to the Union as the bargaining representative of Hospital employees; and (4) the "Agreement" between Service Employees International Union, AFL-CIO and Doctors Community Healthcare Corporation, with a term of June 2, 2005 through June 2, 2008, executed on or about June 2, 2005 by each of the aforementioned parties that, among other provisions, contained a ‘Neutrality and Election Process Agreement’ as Exhibit B.

Following the Union’s petition to revoke the subpoena and the General Counsel’s Motion in Limine to preclude the production or use at hearing of any of the above documents, the Judge revoked the subpoena and granted the General Counsel’s motion even though the Union acknowledged that it has the authorization cards used for the November 14, 2005 card check. Tr. at 18:5-20:6. The Judge incorrectly based his ruling (to which SHW-Hadley has excepted) on the expiration of the Act’s six-month statute of limitations for challenging the November 14, 2005 Doctors recognition of the Union, because SHW – Hadley was not asking the Judge to “recount the cards, or to revisit the initial recognition” JD p. 15 n.11.

Order at 3-4. As of November 13, 2006, the Doctors Unit had 169 employees, 12 of whom were security guards and 5 of whom were pharmacists. Joint Exs. 1 and 2.³

Following their November 9, 2006 telephone call, SHW – Hadley’s counsel sent the Union’s counsel a November 17, 2006 letter stating that SHW – Hadley would not recognize the Union as the bargaining representative of the Doctors Unit because that unit was inappropriate due to, at a minimum, its inclusion of security guards and professional employees (pharmacists). Tr. 85:13-86:19; GC Ex. 26. The Union did not respond until February 1, 2007, at which time it sent a letter to SHW – Hadley disclaiming interest in SHW - Hadley’s security guards and pharmacists, thereby leaving the following 148-employee unit (the 2/1/07 Unit):

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S., E.S. Aides, E.S. Floor Techs, Engineer IIIs, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painter, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aides.

Joint Ex. 1.⁴ GC Ex. 27. At that time, SHW - Hadley also employed 27 respiratory therapists and five recreation technicians. Joint Exs. 1 and 2. There is no evidence of the Union’s extent of support in the 2/1/07 Unit.

By letter dated February 8, 2007, SHW – Hadley declined to recognize the Union as the bargaining representative in the 2/1/07 Unit. GC Ex. 28. Shortly thereafter, the Union filed the

³ Joint Exs. 1 and 2 also contain the number of employees in each job classification within the Doctors Unit, plus the number of respiratory therapists (33) and recreation technicians (5) in those classifications, as of November 13, 2006.

⁴ The number of employees in each job classification within the 2/1/07 Unit, plus the respiratory therapist, recreation technician, security guard and pharmacist classifications, as of February 1, 2007 are contained in Joint Exs. 1 and 2.

instant unfair labor practice charge alleging that SHW – Hadley violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the representative of the 2/1/07 Unit.

As of February 1, 2007, all SHW – Hadley employees received the same benefits, all were covered by the same employment policies, procedures, rules and employee handbook, and all had the same bi-weekly pay period. Tr. 148:3-16.

The Current SHW – Hadley Workforce. As of April 30, 2009, there were 178 employees in the classifications comprising the 2/1/07 Unit, as well as 35 respiratory therapists and 3 recreation technicians employed at SHW – Hadley. Joint Exs. 1 and 2. Of those 178 employees, 108 were employed by Doctors. Joint Ex. 1.

THE BOARD’S ORDER DENYING SUMMARY JUDGMENT

In response to SHW – Hadley’s December 3, 2007 Motion for Summary Judgment, the parties’ briefing on that motion and the Board’s January 17, 2008 Notice to Show Cause Why the Motion Should Not be Granted, the Board issued a November 25, 2008 Order denying the motion. The Board’s Summary Judgment Order identifies several areas of agreement among the parties, including (i) the inappropriateness of the Doctors Unit; (ii) the lack of any bargaining obligation by SHW – Hadley toward the Union concerning the Doctors Unit; and (iii) the “substantial continuity” between Doctors and SHW – Hadley’s “enterprise.” Summary Judgment Order at 5-6.

The Summary Judgment Order went on to find that the instant case presents an issue of first impression, which it described as follows:

[W]hether a *Burns*-successorship bargaining obligation can attach under the circumstances represented here: a successor employer has lawfully refused the union’s initial demand for bargaining in a unit that was inappropriate both before and after the change of ownership; and the union later demands bargaining in a unit that the union unilaterally created disclaiming interest in certain unit employees, and that it now claims is appropriate.

Id. at 7. It also found that:

[d]espite the parties' agreement on a number of issues, they contest the appropriateness of the new unit and the degree to which the new unit has been altered by the exclusion of employees. Until these issues are resolved, addressing the novel successorship issue presented by Respondent's motion would be premature, as resolution of the disputed factual issues will either ripen or moot the successorship question. If the evidence adduced at hearing establishes that the new unit is appropriate for bargaining and that the alternations in the unit were not sufficient to render a bargaining obligation inappropriate, then the novel successorship issue may be ripe for consideration. By contrast, if the evidence adduced at hearing establishes that the new unit is not appropriate for bargaining or that the unit has been altered so significantly that there is insufficient continuity between the original unit and the new unit, the case *can* be resolved without reaching the issue of first impression raised by Respondent's motion.

Id. at 7-8 (emphasis added).⁵

Accordingly, the Judge was not required to reach the "issue of first impression" if he concluded that the 2/1/07 Unit is inappropriate.⁶

⁵ The Board's denial of SHW – Hadley's motion was "without prejudice to [SHW – Hadley's] right to renew its arguments to the administrative law judge or to the Board on any exceptions that may be filed to the judge's decision." *Id.* at 8 n.6.

⁶ Therefore, with respect to the Judge's request during the hearing that the parties brief the issue of whether the Union would be entitled to recognition in the bargaining unit that SHW – Hadley contends is the only appropriate unit, should he find that this to be so, it is SHW – Hadley's position that the Union absolutely is not entitled to representation in this unit. For one thing, the Board's Summary Judgment Order prohibits this result by making the appropriateness of the 2/1/07 Unit a threshold determination. If the 2/1/07 Unit is not appropriate, then the Amended Complaint must be dismissed. There also is no basis in the record to presume, must less conclude, that the Union has or ever had majority status in this much larger (an extra 32 employees as of 2/1/07) unit. Finally, the 32 respiratory therapists and recreation technicians at issue have never had any opportunity to decide whether they want to be represented by the Union, not to mention be part of the 2/1/07 Unit.

ARGUMENT

I. THE JUDGE INCORRECTLY FOUND THAT THE 2/1/07 UNIT WAS AN APPROPRIATE BARGAINING UNIT

The Judge mistakenly held that the 2/1/07 Unit was an appropriate bargaining unit.⁷

A. The General Counsel Had The Burden Of Proving That The 2/1/07 Unit Is Appropriate

The Judge failed to find that the specific allegations pled in the Amended Complaint, applicable Board precedent and the unique facts and novel legal question presented by this case required the General Counsel to bear the burden of proving that the 2/1/07 Unit was an appropriate one. A plain reading of the Amended Complaint reveals that even the General Counsel recognizes that it must establish the appropriateness of the 2/1/07 Unit as an essential element of its 8(a)(5) refusal to bargain case.

It is undisputed that the General Counsel has the ultimate burden of proving the 8(a)(5) allegation alleged in Paragraph 10 of the Amended Complaint. *See* 29 C.F.R. pt. 101.10(b). In order to do so, it must establish the supporting allegations, one of which is that the employees comprising the 2/1/07 Unit “constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.” Am. Compl. ¶ 8(a). This same allegation was made in *Northern Montana Health Care Center*, 324 N.L.R.B. 752, 760 (1997), where the Board required the General Counsel to “establish” the appropriateness of the bargaining unit alleged in the complaint to be appropriate (which, unlike the instant case, was the same as the predecessor employer’s unit), in a case involving an alleged successor’s refusal to

⁷ The Judge’s gratuitous finding that SHW – Hadley’s filing of a RM Petition evidences its willingness “to concede the appropriateness of the currently disputed unit when it suited its purposes to do so” (JD p. 3 n.4) is both legally irrelevant and wrong. Not only has SHW – Hadley disputed the appropriateness of the 2/1/07 Unit throughout this litigation, but it hardly can be faulted for trying to afford its employees the ability to exercise their Section 7 rights that the Union has for so long denied them.

bargain with the union. Therefore, just as the General Counsel had to prove the appropriateness of the predecessor's bargaining unit in *Northern Montana Health Care Center*, it must likewise prove the appropriateness of the brand new 2/1/07 Unit unilaterally crafted by the Union after SHW – Hadley became the employer.

Further, the General Counsel surely would not have made the 2/1/07 Unit's appropriateness a specific allegation in the Amended Complaint if it did not recognize that it was required to establish its appropriateness as part of its case.⁸ Ignoring the Amended Complaint and requiring SHW – Hadley to show that the 2/1/07 Unit is an inappropriate unit would have the untenable result of requiring SHW – Hadley to *disprove* an essential element of the General Counsel's own case. In short, the Amended Complaint itself belies any argument that SHW – Hadley somehow bears the burden of establishing the inappropriateness of a "unilaterally created" bargaining unit dreamt that the Union now is trying to foist upon SHW – Hadley without even a showing of majority support in that unit.

Placing this burden on the General Counsel also is consistent with other Board precedent regarding allocation of the burden of proof in analogous Section 8(a)(5) refusal to bargain cases. For example, parties seeking to alter existing bargaining units by operation of legal doctrines such as accretion, or by arguing that union-represented employees should be removed from the bargaining unit due to operational changes, bear a "heavy burden" in demonstrating that the existing unit should be altered. *See, e.g., Rice Food Markets, Inc.*, 255 N.L.R.B. 884, 887 (1981) (employer had burden of establishing that sub-group of existing unit no longer had to be recognized due to employer's reorganization). Likewise, where a union seeks to expand an

⁸ Notably, there is no "appropriate unit" allegation regarding the Doctors Unit. *See Am. Compl.* ¶ 5.

existing bargaining unit to another entity via the single employer doctrine, it bears the burden of establishing not only single employer status, but that the new bargaining unit is an appropriate one. *See Northern Montana Health Care Center, supra*. Finally, in seeking a *Gissel* bargaining order, the General Counsel bears the burden of establishing when an authorization card was signed as part of its burden of proving majority support at the relevant time. *See Fort Smith Outerwear*, 205 N.L.R.B. 592, 594 (1973).

The common thread running through these cases is that they all involve a party seeking to impose (or take away) union representation on employees while denying them their Section 7 rights to make that decision themselves. That is precisely what the Union is trying to do here. In fact, what the Union is trying to do here is even more extreme than what the unions or employers in the above cases sought. The only bargaining unit in which any SHW – Hadley employees were ever arguably afforded the right to decide on union representation -- the Doctors Unit -- was undisputedly inappropriate. Accordingly, the Union and General Counsel must at a minimum bear the burden of establishing that the unit the Union has unilaterally created is appropriate, in order to ultimately show that SHW – Hadley was required to bargain with the Union on or after February 1, 2007.

Finally, the Summary Judgment Order expressly states that this is a case of first impression. In other words, it is unlike other successorship cases decided by the Board. Consequently, the General Counsel cannot rely on prior successorship decisions that required the new employer bear the burden of establishing that the predecessor's historical bargaining unit was no longer appropriate in light of the new employer's operational changes. *See, e.g., NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 279 (1972). In particular, there is no historical predecessor bargaining unit in which the Union currently seeks representation and bargaining.

The Doctors Unit that existed at the time SHW – Hadley took over the facility from Doctors was undeniably inappropriate, the Union expressly disclaimed interest in it, and neither the Union nor the General Counsel contend that SHW – Hadley was obligated to recognize or bargain with the Union in this unit. Therefore, because the only arguable “historical unit” was inappropriate, the *Burns* allocation of the burden of proof is inapplicable.

Further, the changes in the alleged “historical unit” in this case were solely the doing of the Union which, recognizing the inappropriateness of the Doctors Unit, came up with a brand new unit (the 2/1/07 Unit) in a desperate attempt to create a bargaining obligation with SHW – Hadley. This situation is in marked contrast to cases where it was the *employer’s* supposed operational changes that the employer alleged rendered the historical unit inappropriate. Here, not only is there no appropriate historical unit, but it is undisputed that there was substantial continuity between Doctors’ enterprise and that of SHW – Hadley.

Thus, while it certainly makes sense for a new employer to bear the burden of proving that its *own* alleged changes now render the predecessor’s *appropriate* bargaining unit inappropriate, it makes no sense to impose such a burden on the new employer when the predecessor’s *inappropriate* unit no longer exists, and the union is attempting to substitute a unilaterally created brand new unit for the old one (some two-and-one-half months after the new employer took over operations).

For all of these reasons, it is the General Counsel that had the burden of proving that the 2/1/07 Unit is appropriate which, as now shown, it did not do.⁹

⁹ Even assuming, *arguendo*, that SHW – Hadley did have the burden to establish the inappropriateness of the 2/1/07 Unit, it has more than met that burden for the reasons discussed immediately below in Sections I.B. and I.C.

B. The 2/1/07 Unit Is Inappropriate Under The Board's Healthcare Rule

1. The Healthcare Rule Governs The Instant Case

The Judge erroneously held that the Healthcare Rule does not apply to this case because SHW – Hadley is not an acute care hospital pursuant to *Child's Hosp.*, 307 N.L.R.B. 90 (1992), and, even if the HealthCare Rule did apply, the 2/1/07 Unit is an “existing non-conforming unit.”¹⁰ These conclusions contradict the undisputed record evidence, the express provisions of the Healthcare Rule and the applicable Board precedent.

Regarding the initial question of the Healthcare Rule's applicability to this unfair labor practice proceeding, this determination should not turn on how the Union has framed this case. Indeed, there is every reason to apply the Healthcare Rule to this unfair labor practice case given that the Board expressly directed the Judge to ascertain the appropriateness of the 2/1/07 Unit, and SHW – Hadley is an acute care hospital. Nor is there anything in the Healthcare Rule, its rulemaking history or Board precedent prohibiting its application to the instant case simply because it is an unfair labor practice proceeding.

Most obviously, the Healthcare Rule's eight mandatory bargaining units are the Board's determination of what specific units are best suited for acute care hospitals, and SHW – Hadley is an acute care hospital as shown in Section I.B.2 below. Applying any standard other than the Healthcare Rule to the instant bargaining unit determination would not only ignore the Board's in-depth analysis of appropriate bargaining units in acute care hospitals that culminated in the Healthcare Rule, but would necessarily require the Judge to apply an analytical framework never intended to apply to acute care hospitals. This surely is a result to be avoided.

¹⁰ It is unclear whether the Judge concluded that the Healthcare Rule was inapplicable in the instant case merely because it is an unfair labor practice case rather than a representation case involving an initial petition. However, given the Judge's discussion of *Pathology Institute, Inc.* (JD p. 20), SHW – Hadley will address this issue in its Brief.

Regarding the Healthcare Rule's focus on RC and RM petitions (as opposed to subsequent representation matters), that was intended to further the Board's interest in the stability of healthcare labor relations, reducing unnecessary litigation and expeditiously proceeding with elections. *See Kaiser Found. Hospitals*, 312 N.L.R.B. 933, 934-35 n.12 (1993) (quoting preamble to Healthcare Rule). These interests are not compromised in the instant case, where (i) the Union is seeking a newly created bargaining unit whose appropriateness has never been litigated or even agreed to by an employer, (ii) SHW – Hadley filed a RM petition back in June 2007 (only to have it be dismissed by the Region), and (iii) there is no established bargaining relationship to stabilize (and no bargaining relationship whatsoever in the 2/1/07 Unit). In other words, there is no election to delay despite SHW – Hadley's RM petition, no unnecessary litigation to avoid and no bargaining relationship to stabilize.

The fact of the matter is that the Union's demand for recognition and bargaining in the 2/1/07 Unit is effectively an initial bargaining demand in a brand new unit, and thus there is no reason to deny the parties and the involved employees the benefit of the Board's collective wisdom and experience concerning appropriate bargaining units at acute care hospitals like SHW - Hadley. In fact, by requiring the Judge to determine the appropriateness of the 2/1/07 Unit as a threshold matter, the Board's Summary Judgment recognized that this case is, at least in part, a representation proceeding. And because this representation proceeding involves an acute care hospital, it should be governed by the Healthcare Rule.

Rather than address the larger issue of the Healthcare Rule's applicability to an unfair labor practice proceeding, the Judge chose instead to focus on SHW – Hadley's status as an acute care hospital (which he found it was not) and, even assuming *arguendo* that it was an acute

care hospital, whether the 2/1/07 Unit violated the Healthcare Rule (which he found it did not).

The Judge's conclusions on these two threshold questions cannot stand.

2. The Hospital Is An Acute Care Hospital Under The Healthcare Rule

The Healthcare Rule defines an acute care hospital as

either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term 'acute care hospital' shall include those hospitals operating as acute care facilities even if those hospitals provide such services as. For example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals.

29 CFR pt. 103.30(e)(2).

SHW – Hadley clearly is an acute care hospital under the Healthcare Rule because the undisputed evidence offered at the hearing established that it is a hospital at which more than 50% of all of its patients were admitted to a unit (the LTAC) that had an average length of patient stay of less than 30 days during both of the years (2005 and 2006) immediately preceding the Union's February 1, 2007 recognition and bargaining demand. Tr. 95-98. Thus, SHW – Hadley meets the specific definition of "acute care hospital" under the Healthcare Rule.¹¹

Notwithstanding this unrebutted evidence, the Judge concluded that SHW – Hadley was not an acute care hospital under *Child's Hospital*. However, *Child's Hospital* is inapposite to the case at hand because it involved an all-RN unit at a multi-department acute care hospital that was deemed to be a single employer with a separate (albeit physically contiguous) nursing home and

¹¹ The Judge also erroneously failed to apply the acute care hospital presumption that is called for in General Counsel Memorandum 91-3, Section III.C.2.a(4) where, as here, the General Counsel fails to introduce evidence allowing the Board to determine acute care hospital status.

a third entity that provided services to both the hospital and the nursing home. The separate nursing home generated more than half as much revenue as the hospital, thus leading the Board to conclude that “[t]his is not a case where a predominantly acute care hospital has merely established an area for long-term nursing beds, or a nursing ‘wing.’” *Id.* at 92 n.13.

SHW – Hadley, on the other hand, is readily subject to – and meets – the Healthcare Rule’s express acute care hospital test. As the Judge found, SHW – Hadley has only two units, one of which (the LTAC) undisputedly has an average patient stay length of less than 30 days, admitted more than 86% of SHW – Hadley’s total patients during the relevant time period, and generated more than 80% of SHW – Hadley’s revenue during the relevant time period. JD pp. 8-9. This, by definition, is an acute care hospital under the Healthcare Rule, and *Child’s Hospital* (which did not even apply the aforementioned acute care hospital test) does not alter this conclusion.

3. The 2/1/07 Unit Is Not An Existing Non-Conforming Unit¹²

The Judge’s conclusion that the 2/1/07 Unit is an existing non-conforming unit under the Healthcare Rule must be rejected for the obvious (yet apparently unrecognized by the Judge) reason that this unit was unilaterally created by the Union *after* SHW – Hadley became these employees’ employer. There simply is no existing or “historical” unit in this case, as born out by the Board decisions relied on by the Judge. In *Pathology Institute, Inc.*, 320 N.L.R.B. 1050

¹² The Healthcare Rule’s existing non-conforming unit provision states as follows:

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

29 CFR pt. 103.30(c).

(1996), the union had represented a group of Pathology Institute's medical laboratory technologists since 1986. In 1992, Alta Bates Medical Center took over Pathology Institute's operations and closed a number of Pathology Institute's non-acute care facilities, thereby reducing the number of technologists and leaving all such technologists at acute care facilities. Citing the Healthcare Rule, Alta Bates Medical Center then refused to recognize the Union as the representative of the technologists.

The Board, "[a]ssuming the Healthcare Rule is applicable in ULP cases," held that regardless of whether the Healthcare Rule applied, the unit of technologists was an "existing" unit because it was "essentially the same unit of medical laboratory technologists that existed prior to closing the non-acute care facilities." *Id.* In contrast, the Union has not sought representation of an existing non-conforming unit (*i.e.*, the Doctors Unit) but has, instead, demanded recognition in a substantially different, non-conforming bargaining unit that was created after SHW – Hadley became the employer, and that has never been recognized, voted on, certified or found appropriate by the Board.

In *Hartford Hosp.*, 318 N.L.R.B. 183 (1995), the Board-certified bargaining unit at issue was a 14-year old technical employee unit of mostly psychiatric technicians from a private psychiatric hospital that then merged with a large acute care hospital at another location via a stock transfer. The merged entity, which was deemed a successor, argued that only a unit of all technical employees at the two facilities comprising the new entity would be appropriate. The Board rejected this argument, holding that "a single facility unit geographically separate and distinct from Respondent's main facility is appropriate because of the unique community of interest shared among the psychiatric technicians (and other bargaining unit personnel) formerly employed by the [private psychiatric hospital]." *Id.* at 191. Therefore, the Board once again

relied on the continued existence of the predecessor's bargaining unit (which was Board-certified, something the Doctors Unit could never have been, and geographically separate) to reject a challenge to that same unit's appropriateness by the successor employer. These underlying facts simply do not exist in our case given that the Doctors Unit admittedly was an inappropriate unit that was unilaterally changed by *the Union after SHW – Hadley* became the employer.

Kaiser Foundation, supra, also is readily distinguishable from the instant case. There, the Board rejected a new union's attempt to use the Healthcare Rule to carve out the relatively few skilled maintenance employees from the Steelworkers' larger, decades-old unit by arguing that the Healthcare Rule required severance of skilled maintenance employees from the preexisting non-conforming unit to create a new unit of the same employees that conformed to the Healthcare Rule. In so doing, the Board found that the Healthcare Rule's existing non-conforming unit provision covered only petitions for additional units, not petitions to sever part of an existing unit. It also emphasized the Healthcare Rule's specific language regarding petitions involving existing non-conforming units, and Board policy requiring "great deference" to the more than 40-year collective bargaining history in the non-conforming unit. *Id.* at 934-35.

In stark contrast, the current case involves an issue of first impression that simply is not covered by any specific Healthcare Rule provision, and there certainly is nothing here resembling the sort of 40-year plus bargaining relationship seen in *Kaiser Foundation* that so obviously influenced the Board in that case. Nor is there any non-conforming existing unit involved here, as the undisputedly inappropriate Doctors Unit no longer exists, and the 2/1/07 Unit has never "existed" under the Healthcare Rule. In sum, *Kaiser Foundation's* holding is limited to the aforementioned facts and circumstances, and it does not instruct the case at hand.

The Judge's reliance on *Crittenton Hospital*, 328 N.L.R.B. 879 (1999), also is wholly unavailing. There, the incumbent union that had represented an existing non-conforming unit of less than all of the hospital's RNs since 1969, argued that a rival union's petition for this same unit must be dismissed because the unit did not conform to the Healthcare Rule. In other words, the employer argued that the mere implementation of the Healthcare Rule now rendered the existing RN unit inappropriate. Much like in *Kaiser Foundation*, the Board relied on the Healthcare Rule's specific existing non-conforming unit provision to find that the Healthcare Rule did not preclude a petition for that same existing non-conforming unit. *Id.* at 880. The instant case, however, does not even involve an existing non-conforming unit, and there is no *unchanged* decades-old unit that SHW – Hadley is contending suddenly is inappropriate merely by virtue of the Healthcare Rule.¹³

4. The 2/1/07 Unit Contravenes The Healthcare Rule By Not Including All Technicals And All Non-Professionals

The Healthcare Rule. The Board's Healthcare Rule provides as follows in pertinent part:

Appropriate bargaining units in the health care industry. (a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

- (1) All registered nurses.
- (2) All physicians.
- (3) All professionals except for registered nurse and physicians.
- (4) All technical employees.
- (5) All skilled maintenance employees.

¹³ For the same reasons, the Judge's reliance on *St. Mary's Duluth Clinic*, 332 N.L.R.B. 1419 (2000), also is misplaced.

- (6) All business office clerical employees.
- (7) All guards.
- (8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

29 CFR pt. 103.30(a).

General Counsel Memorandum GC 91-3 (Guidelines Concerning Application of Health Care Rule) requires that “combined units” must involve combinations of the eight appropriate units specified in Section (a). *See* General Counsel Memorandum 91-3, Section II.C.1. As such, an appropriate combined unit necessarily requires that all employees falling within a particular classification be included in the combined unit.

It is undisputed that the 2/1/07 Unit includes some non-professional employees (at a minimum, the stock clerks, stock room coordinators and utility aides) and some technical employees (at a minimum, LPNs). Tr. 202:2-15, 256:3-11, 297:4-12. Therefore, under the Healthcare Rule, it must also include all non-professionals and all technical employees to be appropriate. As now shown, the respiratory therapists and recreation technicians are technicals and non-professionals, respectively, whose exclusion from the 2/1/07 Unit renders it inappropriate and thereby requires that the Judge’s Decision be overturned and the Amended Complaint dismissed.

Board Precedent Involving Respiratory Therapists and Recreation Technicians.

The Board has universally found respiratory therapists and recreation technicians to be either technical or non-professional employees. *See St. Anthony Hosp. Sys., Inc.*, 884 F.2d 518 (10th Cir. 1989) (affirming Board order finding that respiratory therapists properly belonged in the technical, rather than professional, unit); *Meriter Hosp., Inc.*, 306 N.L.R.B. 598 (1992) (respiratory therapists included in unit of technical employees at acute care hospital); *Samaritan Health Services, Inc.*, 238 N.L.R.B. 629 (1978) (respiratory therapists that were required to have

completed an approved 2-year academic program in respiratory therapy and be at least eligible for the American Registry of Inhalation Therapists, found to be technical employees rather than professionals); *Children's Hosp. of Pittsburgh*, 222 N.L.R.B. 588 (1976) (including respiratory therapists in technical unit where they had to complete a 2-year training program and pass an examination to be certified by the National Board of Respiratory Therapists, used various equipment that required technical training to operate, and received training and performed work similar to that of the respiratory care technicians found in other cases to be technical employees); *The Jewish Hosp. Ass'n of Cincinnati*, 223 N.L.R.B. 614 (1976) (certified and non-certified respiratory therapy technicians deemed technical employees where they administered pulmonary therapy pursuant to specific doctors' orders, including installing oxygen equipment in the patients' rooms, attaching oxygen-dispensing devices to patients, monitoring the oxygen flow to the patient, and setting up and operating breathing machines by adding medications, fluids, and gases); *St. Elizabeth's Hosp. of Boston*, 220 N.L.R.B. 325 (1975) (Pulmonary function therapist found to be technical position where it required knowledge of inhalation therapy, testing equipment, and lab procedures, this knowledge was equivalent to a high school education plus additional specialized training, and an employee performing this job had to have one to two years of experience); *William W. Backus*, 220 N.L.R.B. 414 (1975) (respiratory therapists held to be technical employees where they had either a combined hospital and associate degree, or college program of respiratory therapy approved by the American Medical Association, and were required to take a national registration examination in order to practice; they spent 90% of their time on various patient care floors throughout the hospital administering such therapy as carbon dioxide treatment, oxygen therapy, postural drainage, and nebulizer treatment as prescribed by physicians; and they took their orders directly from patients' charts and worked closely with

RNs, particularly in critical cases); *Barnert Mem. Hosp. Ctr.*, 217 N.L.R.B. 775, 779 (1975) (respiratory care technicians who had to be registered with National Board of Respiratory Therapy and have a two-year degree in respiratory therapy or 64 hours of college credit, plus clinical work, found to be technical employees); *Charter Hosp. of St. Louis*, 313 N.L.R.B. 951 (1994) (including in non-professional unit activities therapist assistant who was not licensed or formally trained and did not need a degree for position, and who helped with and encouraged activities and game-playing in the gym and elsewhere); *Lincoln Park Nursing & Convalescent Home, Inc.*, 318 N.L.R.B. 1160 (1995) (dietary aides and recreation therapists included in nonprofessional service and maintenance unit at intermediate care center/nursing home employer).

The Board's Healthcare Rule comments also expressly acknowledges respiratory therapists as technical, rather than professional, employees. *See* 53 Fed. Reg. 33900, reprinted at 284 N.L.R.B. 1516, 1553 (1987). Likewise, General Counsel Memorandum GC 91-4 (Health Care Unit Placement Issues) expressly references "respiratory therapy technicians (pulmonary function therapist)" as a position that has been deemed as belonging in an all-technical employee unit. *See* General Counsel Memorandum 91-4 at 3-4.¹⁴ In contrast, respiratory therapists are not cited among the various job classifications deemed professionals. *Id.*

¹⁴ In fact, General Counsel Memorandum 91-4 also cites respiratory and pulmonary department employees as examples of employees who have been deemed non-professionals under Board precedent; thus further negating any argument that SHW – Hadley's respiratory therapists are professionals. *Id.* at 10.

SHW – Hadley’s Recreation Technicians.¹⁵ The recreation technicians, like the activities therapy assistants in *Charter Hosp. of St. Louis, supra*, do not require a license or formal training (other than basic CPR certification that even SHW – Hadley’s non-medical personnel receive), and they plan and help carry out patient recreation activities. Tr. 154:15-155:6, 158:22-160:6; GC Ex. 33. The General Counsel and Union did not introduce or elicit any evidence to the contrary.¹⁶ As such, the recreation technicians are non-professional employees who must thereby be included in the 2/1/07 Unit that includes other non-professionals, for this unit to be appropriate under the Healthcare Rule. Their exclusion, in and of itself, required dismissal of the Amended Complaint.

SHW – Hadley’s Respiratory Therapists. The same is true regarding the respiratory therapists’ exclusion from the 2/1/07 Unit. Although the Judge ultimately did not reach the question of whether its respiratory therapists were professionals under the Act, SHW – Hadley will address this issue in light of the Judge’s failure to expressly find them to be technical employees in the face of the General Counsel’s and Union’s arguments to the contrary.

Under the Act, technical employees “are those employees who do not meet the strict requirements of the term professional employee as defined in the Act but whose work is of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses.” *Meriter Hosp., Inc.*, 306 N.L.R.B. at 599 (quoting *Barnett Mem. Hosp Center*, 217 N.L.R.B. 775 (1975)).

¹⁵ Unless otherwise stated in this Brief, the discussion of SHW – Hadley’s respiratory therapists’ and recreation technicians’ job duties and other terms and conditions is as of 2/1/07 – the date the Union sought recognition in the 2/1/07 Unit.

¹⁶ The Judge rejected the contention that Susan Harris, a recreation technician II, was a statutory supervisor. *See* JD p. 28 n.21.

In contract, a professional employee is expressly defined in the Act as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the course of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12).

The record evidence in this case overwhelmingly shows that SHW – Hadley’s respiratory therapists are technical employees, not professionals. For one thing, the respiratory therapists always perform their job duties in accordance with physician orders – something the Judge failed to recognize. As Wade Swilling testified, “[e]verything’s done on their [physicians] orders.” Tr. 267:11-2. Thus, they perform mechanical ventilation as ordered by physician and maintain that order. Tr. 245:12-20. They change a tracheotomy tube at a physician’s instruction. Tr. 273:8-14. Continuous oxygen therapy, drug administration, and compressor treatment all follow a physician’s order. Tr. 245:21-246:17, 266:22-24, 267:10-12. As Mr. Swilling further testified, “the physicians, they’re always in control of all procedures ordered for the patient.” Tr. 277:4-5.

A respiratory therapist’s work also is performed pursuant to his or her daily assignments, which the Judge again failed to recognize. Tr. 243:3. The pulmonary function studies they perform document patient activity undertaken based on pre-established norms, for physicians to interpret. Tr. 244:25-245:11. When it comes to their monitoring of the equipment they use, this monitoring is akin to making sure to wear gowns and gloves, and washing hands. Tr. 243:18-21.

In short, respiratory therapists “implement the physician’s orders” consistent with prior Board cases finding them to be technical employees (see cases cited at pp. 19-21 above). Tr. 268:1-3.

A respiratory therapist’s independent judgment is tempered not only by his or her adherence to physician orders, but by their having to follow a detailed “policy and procedure manual” that specifically details the procedures comprising a treatment and, as such, circumscribes what the respiratory therapist can do. Tr. 290-92. These employees’ technical status is further confirmed by their using many of the same forms, performing the same job duties and using the same equipment (*e.g.*, suctioning, nebulization treatments, use of compressor, remove patients from a ventilator, cannula, venturi mask, and ultrasonic nebulizer) as LPNs, whom the parties have stipulated are technical employees. Tr. 258:15-261:7, 266:18-267:4; 274:7-276:21.

SHW – Hadley’s respiratory therapists are not required to have a bachelor’s degree, but instead, need only to have completed an approved respiratory program, have basic CPR certification (like other employees who clearly are not professionals), have 6 to 12 months experience, and be licensed by the District of Columbia (meaning they have obtained either the necessary prior registration or certification with the relevant national organization). Tr. 246:18-247:3; GC Ex. 33. These requirements are completely consistent with those previously relied on by the Board in finding such employees to be technicals. *See* cases cited at pp. 18-20 above.

Those rare instances in which a respiratory therapist may act without first immediately checking with a physician are limited to stopping a treatment that is harming a patient, and even this is done in consultation with, among others, LPNs. Tr. 293:7-294:18. Such obvious treatment actions, done in consultation with employees who are not professionals, do not suddenly render respiratory therapists professionals. Although respiratory therapists can make

recommendations to physicians with respect to one of their many job duties (taking blood gas sample), the physicians need not, and do not always, accept those recommendations. Tr. 299:25-300:15; 311:19-25. Further, even though a respiratory therapist has the theoretical ability to intubate a patient, Mr. Swilling has never even seen it done in his more than 30-year career. Tr. 304-06. In all, the above job functions simply do not rise to the level of a professional, but are instead, wholly consistent with those of a technical employee.

With respect to the evidence adduced by the General Counsel and Union to seemingly try to show that registered respiratory therapists, but not certified respiratory therapists, are professionals, this result still would not alter the fact that the 2/1/07 Unit still excludes a significant number of technical employees (*i.e.*, the certified respiratory therapists) in contravention of the Healthcare Rule.¹⁷ Regardless, there is no factual or legal basis to find that the registered respiratory therapists, alone, are professionals given the lack of any evidence that their duties are different than those of certified respiratory therapists.

Further, SHW – Hadley does not have a separate job classification or job description for registered respiratory therapists. GC Ex. 33, Respondent Ex. 80. Nor is there any evidence that registered respiratory therapists earned any more, or were entitled to any greater employment benefits or privileges, than those who were certified. Also, Mr. Swilling testified that it took only four two-day seminars to become a registered, as opposed to certified, respiratory therapist. Tr. 269:25-270:2. And, certified respiratory therapists could and did learn through experience what a registered respiratory therapist would have learned during his or her short time in the classroom. Tr. 271:23-25. In fact, both types of respiratory therapists assess patients in exactly the same way. Tr. 272:15-22.

¹⁷ Mr. Swilling testified that one-third to one-half of SHW – Hadley’s respiratory therapists were registered as of 2/1/07. Tr. 271:7-11.

Finally, not only is there no Board precedent supporting the distinction sought by the General Counsel and Union, but the Board has always found registered respiratory therapists to be technical employees when analyzing their status under the Act. *See, e.g., Children's Hosp. of Pittsburgh, supra; Barnert Mem. Hosp. Ctr., supra.* Consequently, there is no basis to conclude that registered respiratory therapists are professionals under the Act, just as there is no basis to find that SHW – Hadley's respiratory therapists are so different from those who have come before them in the annals of Board precedent that they must be deemed professionals under the Act. To the contrary, SHW – Hadley's respiratory therapists carefully follow physician orders, their daily assignments and SHW – Hadley's policy and procedure manual, share equipment, forms and duties with LPNs, and otherwise perform the same work and have the same job qualifications as other respiratory therapists whom the Board has always found to be technical employees.

Therefore, because SHW- Hadley is an acute care hospital and because the 2/1/07 Unit includes some but not all technical and/or non-professional employees, the 2/1/07 Unit is not an appropriate unit and, consistent with the Board's Summary Judgment Order, the Judge should have dismissed the Amended Complaint.

C. The 2/1/07 Unit Is Inappropriate Under *Park Manor*, Which The Judge Mistakenly Failed To Apply To This Case

Even assuming, *arguendo*, that the Judge correctly found that the Healthcare Rule does not apply to this case, the 2/1/07 Unit still was inappropriate under the Board's *Park Manor Care Center, Inc.*, 305 N.L.R.B. 872 (1991), standard that should govern this case if SHW – Hadley is not an acute care hospital. Incredibly, the Judge did not even apply *Park Manor* after concluding that SHW – Hadley was not an acute care hospital covered by the Healthcare Rule. His failure to

apply *Park Manor* and his conclusion that the 2/1/07 Unit was appropriate without the inclusion of respiratory therapists and recreation technicians, are legally and factually incorrect.¹⁸

Under *Park Manor*, the Board examines (1) community-of-interest factors; (2) evidence presented and factors deemed relevant by the Board in its rulemaking proceedings; and (3) prior precedent in making appropriate bargaining unit determinations in the non-acute care hospital setting. As the Board expressly noted in *Park Manor*, if the employees to be excluded from the proffered unit would not themselves be an appropriate bargaining unit, they need to be included in the proffered unit. *Id.* at 875 n.18.

For the reasons discussed in Section I.B above, Board precedent and the considerations underlying the Healthcare Rule easily render the 148-employee 2/1/07 Unit inappropriate by virtue of it excluding the 32 respiratory therapists and recreation technicians. As an acute care hospital, the only combined unit that could be appropriate at SHW – Hadley is one that includes *all* employees in each of the individual units; which the 2/1/07 Unit most certainly does not. This is the outcome reached by the Board in crafting the Healthcare Rule following its lengthy rulemaking process and accompanying consideration of Board precedent involving bargaining unit determinations in acute care hospitals, and the Judge should draw the same conclusion.

In addition, finding the 2/1/07 Unit appropriate would contravene the Board's primary reason behind promulgating the Healthcare Rule – ending the proliferation of disjointed bargaining units within this nation's acute care hospitals. As the Board explained in its Second Notice of Proposed Rulemaking comments:

we intend at all times to be mindful of avoiding undue proliferation, not only because this desire was expressed in the legislative history, but also because it accords with our own view of what is appropriate in the health care industry. It

¹⁸ Even under his makeshift analytical framework, the Judge still should have found the 2/1/07 Unit inappropriate given the record evidence.

would be most undesirable to create or permit a large-scale splintering of the workforce into the numerous trades, technical disciplines, and professions typically found in health care institutions. To give each such grouping a separate voice for organizing and negotiating would create a never-ending round of bargaining sessions and individualized demands not conducive to stability, industrial peace, or the smooth delivery of services to the public. We have entered the rulemaking endeavor with an intention to create a reasonable number of units that will realistically reflect pronounced natural groupings to be found in health care facilities[.]

53 Fed. Reg. 33900, 33905.

Here, if the 2/1/07 Unit was deemed appropriate, it would unnecessarily stratify technical (respiratory therapists) and non-professional (recreation technicians) positions at SHW - Hadley. The Board should not accept such a result given that a new bargaining unit at an acute care hospital, like the 2/1/07 Unit, should conform to the strict unit rules set forth in the Healthcare Rule. Consequently, the Judge should have applied the Healthcare Rule and the Board's rationale behind it, and rejected the Union and General Counsel's demand that SHW - Hadley bargain with an inappropriate unit.

As for the Board's traditional community of interest factors, they strongly bolster the conclusion that the 2/1/07 Unit is inappropriate. The Board's community of interest factors include the degree of functional integration between employees, common supervision, employee skills and job functions, contact and interchange among employees, transfers, employee skills and training, fringe benefits, bargaining history,¹⁹ and similarities in wages, hours, benefits, and

¹⁹ There is no bargaining history to inform the community of interest analysis in this instance, given that the only known bargaining involves a different employer (Doctors) and a different, and inappropriate, bargaining unit (the Doctors Unit). As such, the Judge's reliance on the Doctors' mid-2006 collective bargaining proposal that included a proposed unit definition excluding respiratory therapists and recreation technicians (and many other job classifications) as support for his appropriate bargaining unit determination, is truly perplexing. See JD p. 26, 28-29. Most obviously, the Judge, the Board and the parties all agree that SHW - Hadley's bargaining obligation toward the Union is to be determined as of February 1, 2007; thus rendering Doctors' mid-2006 proposal irrelevant. Nor does Board precedent make a

other terms and conditions of employment. *Kalamazoo Paper Box Co.*, 136 N.L.R.B. 134, 137 (1962).

Here, all SHW – Hadley employees receive the same benefits, are covered by the same employment policies, procedures, rules and employee handbook, and have the same bi-weekly pay period. Tr. 148:3-16. With respect to the recreation technicians, they are very much functionally integrated with other 2/1/07 Unit employees when it comes to caring for SHW – Hadley patients. They create and carry out weekly patient care plans as part of an interdisciplinary team, and take part in patient care-related meetings with other employees, including LPNs. Tr. 154:15-156:10, 162:11-163:3. They also (i) work with LPNs on a daily basis to obtain patient information regarding a patient’s ability to participate in therapy provided by the recreation technician; (ii) interact with CNAs on a daily basis to obtain patient care information; and (iii) regularly work with unit secretaries and food service employees, including sharing information, to coordinate patient outings and events that recreation technicians oversee. Tr. 160:10-161:5, 161:9-162:5, 175. And they, along with CNAs and LPNs, use the same resident medical chart to track each patient’s progress. Tr. 165:4-25.

The recreation technicians work from 9 a.m. to 5:30 p.m. and work throughout the Hospital. Tr. 160:7-10, 162:6-10. At least two CNAs have transferred into recreation technician positions. Tr. 170-73. Recreation technicians do not have any unique job qualifications, and they participate in the same basic CPR training as other SHW – Hadley employees. Tr. 158-60; GC Ex. 33. Their wage rates range from \$11.61 and \$13.65 per hour, which is very much in line with the wages of other 2/1/07 Unit employees, such as pharmacy techs, rehab techs, medical

predecessor’s bargaining unit proposal relevant in determining whether the new employer’s bargaining unit – unilaterally created by the Union – is an appropriate one. This lack of relevance is particularly obvious here, given that Doctors blithely recognized the Union as the representative of a blatantly impermissible bargaining unit containing guards and professionals.

records clerks and techs, cooks, diet clerks, environmental service aides, food service workers, CNAs and others. *See* Joint Ex. 3. In all, the recreation technicians' strong community of interest with the 2/1/07 Unit employees render that unit inappropriate without their inclusion, and the Judge's finding to the contrary – which seemingly turned on the fact that there were only four recreation technicians at the time – was wrong.

SHW – Hadley's respiratory therapists similarly share an overwhelming community of interest with 2/1/07 Unit employees. As discussed above in Section I.B, respiratory therapists share equipment, forms and duties with LPNs. They participate in patient care plan meetings and meetings with patient families with LPNs and other employees who are providing treatment to the patient. Tr. 155-56, 162-63. They work throughout the Hospital, interacting and sharing critical patient information with LPNs two to three times per shift to coordinate the care of their common patients, interacting and exchanging information with CNAs at least two to three times per shift, and receiving physician orders from unit secretaries. Tr. 254-56. In fact, it was stipulated that “respiratory therapists interact with a range of service and maintenance and technical employees in the bargaining unit for which we [the Union] sought recognition.” Tr. 256:3-11.

They wear the same scrub outfit as nurses, and they and other 2/1/07 Unit employees receive the same lifting and annual CPR training together. Tr. 256:12-257:16. Their hourly wage rates (range: \$20.66 - \$28.08/hr.) are on par with those of other employees in the 2/1/07 Unit, including LPNs (range: \$19.75 - \$28/hr.), Engineer (\$22.80 per hour) and Painter (\$21.31/hr.). *See* Joint Ex. 3. And while respiratory therapists are required to be licensed, so are other classifications in the 2/1/07 Unit, such as Engineers and LPNs. GC Ex. 32.

In finding the 2/1/07 Unit appropriate even absent the respiratory therapists, the Judge not only failed to give proper weight to the above evidence, but he also gave undue weight to “the historical nature of the unit” in reaching this conclusion. *See* JD p. 26. In particular, he required the admitted “contact” between respiratory therapists and other 2/1/07 Unit employees to “override,” *inter alia*, “the historical nature of the unit.” *Id.* However, the Board’s Summary Judgment Order requires, and the parties have agreed, that the appropriate bargaining unit determination be based on the circumstances existing as of February 1, 2007. As such, the “historical nature of the unit” has no bearing on the appropriateness of the 2/1/07 Unit. Moreover, there is nothing “historical” about the “unilaterally created” 2/1/07 Unit. Therefore, the Judge’s conclusion on this outcome-determinative issue cannot stand.

The need to include respiratory therapists and recreation technicians in the 2/1/07 Unit for it to be appropriate is further evidenced by Board precedent involving improperly narrow proposed bargaining units under *Park Manor*. *See, e.g., Brattleboro Retreat*, 310 N.L.R.B. 615 (1993) (finding broader unit, rather than narrower petitioned-for unit, appropriate based on shared benefits, policies and working conditions, functional integration of employer, similarity of wages, attending common in-service programs, permanent employee transfers and similar or common job duties, and limited differences in skills, qualifications and training).

Finally, because the respiratory therapists and recreation technicians clearly would not themselves constitute an appropriate unit, their exclusion from the 2/1/07 Unit renders that unit inappropriate under *Park Manor*. The respiratory therapists are technical employees, whereas the recreation technicians are non-professionals, and these two positions have vastly different wage rates, job qualifications and duties, and are not at all functionally integrated. There is no common supervision of these classifications, nor any evidence of temporary or permanent

interchange between them. In short, these two classifications simply could not be their own appropriate bargaining unit.

Therefore, under either the Healthcare Rule or *Park Manor*, the 2/1/07 Unit is inappropriate and, as dictated by the Summary Judgment Order, the Amended Complaint should have been dismissed by the Judge on this basis.

II. SHW – HADLEY WAS NOT OBLIGATED TO RECOGNIZE AND BARGAIN WITH THE UNION EVEN IF THE 2/1/07 UNIT IS DEEMED APPROPRIATE

Even assuming, *arguendo*, that the 2/1/07 Unit was appropriate under the Act, well-established case law and labor law principles still require dismissal of the Amended Complaint because SHW – Hadley had no successor-created bargaining obligation toward the Union. The Judge’s Decision, however, disregards these cases and bedrock principles, along with key facts, and should thereby be rejected.

A. SHW – Hadley Does Not Have Any Successor Bargaining Obligation

As a threshold matter, the Act’s successorship doctrine is based on the underlying principle that once employees demonstrate majority support in *an appropriate bargaining unit*, they should not lose the benefits of union representation merely because of a change in the employing entity. *See Burns*, 406 U.S. at 281. Indeed, *Burns* and its progeny make clear that a prerequisite to a successorship finding is the successor inheriting an appropriate bargaining unit in which majority support had been shown. This did not happen here, and the Judge’s failure to recognize this missing prerequisite – not to mention the absence of a showing of majority support in any appropriate bargaining unit – requires that the Decision be overturned.

The seminal *Burns* decision expressly noted that, “where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent, there is little basis for faulting the Board’s implementation of

the express mandates of Section 8(a)(5) and Section 9(a) by ordering the employer to bargain with the incumbent union.” *Id.* This critical language contains three distinct requirements that are not satisfied in the instant case and, as a result, preclude any finding that SHW - Hadley is a *Burns* successor. Specifically,

1. There is no underlying Board certification (recent or otherwise) in an appropriate unit; rather, there is only a card check in an inappropriate unit.
2. The 2/1/07 Unit is not “unchanged” but, in fact, is significantly altered in size, scope and character from the Doctors Unit.
3. The mandates of Section 8(a)(5) and Section 9(a) preclude a finding of successorship.

The Summary Judgment Order confirms that the Doctors Unit obviously never was, and never could be, certified by the Board as an appropriate unit. It is critical, however, to understand how flagrantly inappropriate the Doctors Unit was under the Act. This unit blatantly contravened Section 9(b)(3) of the Act, which prohibits Board certification of units containing both guards and non-guards, and Section 9(b)(1), which prohibits certification of a unit containing professionals and non-professionals where the former have not expressly voted for unit inclusion. Further, the inclusion of guards and professionals in the Doctors Unit is not merely a matter of employee eligibility but, instead, directly affected the scope and character of the unit. The Doctors Unit was so inappropriate that, as a matter of law, the Board could not have used Section 8(a)(5) to require Doctors or SHW - Hadley to bargain with the Union in this inappropriate unit. *See Field Bridge Associates*, 306 N.L.R.B. 322, 323 n.3 (1992); *Russelton Medical Group, Inc.*, 302 N.L.R.B. 718, 718 (1991).

Likewise, although Section 9(a) of the Act expressly requires that a union be chosen “by the majority of the employees in a unit *appropriate* for [bargaining]” (emphasis added) to become the exclusive bargaining representative of that unit’s employees, this obviously never

happened in the instant case given the undisputed inappropriateness of the Doctors Unit. Even had this unit been appropriate, it obviously did not remain “unchanged” after SHW - Hadley became the employer, given the Union’s unilateral removal of 15 employees in two important job classifications from the Doctors Unit. In short, none of the fundamental prerequisites to *Burns* successorship exist here.

Nor are the two primary interests served by the Board’s successorship doctrine furthered by finding SHW - Hadley to be a *Burns* successor to Doctors. The successorship doctrine seeks to (1) stabilize established collective bargaining relationships based on a presumption of majority support and (2) fulfill employee expectations that the union is still their majority representative. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987). Here, there is no meaningful collective bargaining relationship to stabilize. There have been no collective bargaining agreements or ratification votes involving Doctors on which to premise such an argument, let alone any evidence that even one employee expressly or tacitly approved of the 2/1/07 Unit.²⁰ In fact, the Union and Doctors reached agreement on only three inconsequential bargaining topics during their collective bargaining: union security, dues check-off and “some definition of part-time employees.” Tr. 65:11-15.²¹

Thus, not only is there no meaningful collective bargaining relationship to stabilize, there is no collective bargaining history upon which to premise a finding that employees in the 2/1/07

²⁰ As discussed in greater detail below, the fact that only 108 of the 178 employees currently in the 2/1/07 Unit were employed by Doctors at the time SHW – Hadley became their employer further belies any claim that employees in the 2/1/07 Unit expect the Union to be their bargaining representative.

²¹ Any argument that the SHW – Hadley purchase of Doctors somehow caused the parties’ minimal bargaining is easily rejected, as Doctors did not inform the Union of this concern until September 14, 2006. *See* GC Ex. 21.

Unit (only 60% of whom are former Doctors employees) support this brand new unit. See *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996) (“In deciding whether established business units remain appropriate, the Board ‘has long given substantial weight to prior bargaining history’”) (citations omitted); *Barrington Plaza*, 185 N.L.R.B. 962, 963 (1970) (relying on three successive CBAs with predecessor employers to find continued majority support).

As to employee expectations concerning union representation, the Doctors Unit employees fully expected to be part of a bargaining unit that included both pharmacists and guards, but are now excluded from any such unit. These employees also went more than two-and-one-half months with their supposed union making no effort to represent them.²² All of this, plus the absence of a meaningful bargaining history on which to premise a “finding” of employee expectation of continued representation, and the nearly four years that have elapsed since the November 2005 card check, clearly demonstrates the lack of any employee expectation of continued representation in the 2/1/07 Unit.

Incredibly, however, the Decision failed to acknowledge key undisputed facts regarding employee expectations concerning continued Union representation. In particular, the Judge ignored the Union’s undisputed actions to unilaterally modify the Doctors Unit in the hopes of

²² As a matter of federal labor law policy, a union should not be allowed to sit idly by for two-and-one-half months before demanding recognition from an alleged successor employer; leaving the new employer to rightfully conclude that the union is not interested in recognition and that it can run its business without having to fear a belated recognition demand. Were this to be allowed, what is to stop a union from waiting six months, a full year or even longer, before suddenly deciding that it wants the new employer to recognize and bargain with it? The only way to avoid this absurd result is to require a prompt recognition demand of an alleged *Burns* successor, which the Union clearly did not do in the instant case when it waited more than two-and-one-half months – without explanation and knowing the inappropriateness of the Doctors Unit – to demand recognition in the 2/1/07 Unit.

manufacturing a bargaining obligation by SHW – Hadley.²³ For one, he has refused to acknowledge that it was the Union that unilaterally sought to alter the Doctors Unit, despite quoting the Board’s Summary Judgment Order’s express finding that “the union later demands bargaining in a unit *that the union unilaterally created . . .*” JD p. 4. Instead, he repeatedly characterizes the Union as merely “acquiescing” to SHW – Hadley’s “objections” to this unit. *See* JD pp. 12, 14 n.11, 15 and 16. This gross distortion of the facts is telling, to say the least.

The Judge also erroneously equated the Union’s two-and-one-half-month delay in seeking recognition in the 2/1/07 Unit with the seven-month operational hiatus cause by the successor employer in *Fall River Dyeing*. JD p. 18. And, he likened the Union “voluntarily drop[ing] some positions from a predecessor’s unit based on statutory exclusions,” with a bargaining unit diminution caused by an employer acquiring only a portion of the predecessor’s operations. *See* JD pp. 14-15 nn.10-11. Finally, the Judge misstated SHW – Hadley’s unit “objections” as being limited to the inclusion of guards and pharmacists in the unit when, in fact, Mr. Damato’s November 17, 2007 letter expressly stated that the unit was inappropriate due to, “at a minimum,” its inclusion of guards and pharmacists. *See* JD pp. 17-18 n.13.

This unabashed recasting of the undisputed facts led directly to the Judge improperly finding that (i) the change in the bargaining unit and the Union’s two-and-one-half-month delay in seeking recognition did not “impact” the employees in the 2/1/07 Unit or “the bonafides of the

²³ The Judge also gave undue weight to SHW – Hadley’s alleged knowledge of the Union’s representation of some Doctors’ employees at the time of purchase. *See* JD p. 17. Even overlooking the lack of evidence supporting the Judge’s conclusion that SHW – Hadley knew of the precise scope of the inappropriate Doctors Unit at the time of purchase, there is nothing in the Board’s successorship case law allowing the successorship determination to turn in whole or in part on this mere knowledge. Indeed, the Judge appears to have gone out of his way to try to find evidence of union animus despite the lack of any such evidence, and despite the irrelevance of this inquiry in a case limited to deciding whether SHW- Hadley had a bargaining obligation toward the Union as of February 1, 2007.

Union's representation status;" and (ii) "as viewed by a reasonable employee, Respondent's refusal to honor its predecessor's recognition of the Union could only be viewed as subjecting their rights to union representation based on the whims of ownership of the facility." JD pp. 18, 30. Consequently, these findings must be rejected.

The Decision also mistakenly relies on several inapplicable Board and administrative law judge (ALJ) decisions concerning union attempts to modify a bargaining unit in the successorship context. The non-binding ALJ decision in *Northern Montana, supra* is not at all "instructive" in the instant case, because the primary difference between the predecessor and successor units there was one of eligibility (*i.e.*, the inclusion of LPNs), and the unit already excluded supervisors. Hence, the ALJ found the unit changes to be inconsequential. In marked contrast, the Act and the Board have never treated unit composition issues regarding guards or professionals as inconsequential.

Also, the *Northern Montana, supra* ALJ premised his finding on his belief that unions in successor situations are reacting to changes in the unit made by the successor. *See* 324 N.L.R.B. at 767. Here, on the other hand, there are no such changes because it is the Union seeking to change the predecessor unit for reasons having nothing to do with SHW – Hadley's operations, but everything to do with the Union's belated unilateral attempt to reconstruct a fatally flawed unit.

Similarly, the non-binding ALJ decision in *Concord Associates*, Case No. 3-CA-21909, 1999 WL 3345473 (12/3/99), does not support the Judge's Decision. The original bargaining unit there was a Board-certified appropriate unit that did not include any guards. At some point during the parties' 40-year bargaining relationship they apparently included a very small number of guards under the CBA's coverage – approximately 10-15 guards in a unit of 400-500 –

immediately prior to the new employer taking over from the predecessor. It was these facts that led the ALJ to find a presumption of continued majority support in the successor's bargaining unit once the union indicated to the new employer that it would exclude the guards from the unit.

In stark contrast, the instant case involves a voluntarily recognized unit that was inappropriate *ab initio* because, at a minimum, 9% of the unit was comprised of statutorily excluded employees (professionals and/or guards) in contravention of Board precedent. There also is a lack of any bargaining history resembling the parties' 40-year relationship in *Concord Associates*. As such, there simply is no basis to presume majority status in the 2/1/07 Unit.

Also inapposite is *Libby-Owens-Ford Glass Co.*, 169 N.L.R.B. 126 (1968), in which the Board considered a union's unit clarification petition seeking to add two existing single plant bargaining units to a nearly 30-year old eight-plant bargaining unit. The Board, emphasizing its "authority to police its certifications," excluded guards from one of the single plant units and the eight-plant unit.²⁴ *Id.* at 127 n.14. Nor does *Briggs Mfg. Co.*, 101 N.L.R.B. 74 (1952), support the Judge's successor finding given that the Board was policing its prior certification of a 184-employee guard unit that turned out to have 9 non-guard fire inspectors when it dismissed a decertification petition for contract bar reasons due to the "unusual circumstances of this case." *Id.* at 76 & n.4. And, *Atlanta Hilton & Towers*, 278 N.L.R.B. 474 (1986), a non-successorship context withdrawal of recognition case, and *Control Services, Inc.*, 303 N.L.R.B. 481 (1991), a non-successorship context refusal to bargain case, certainly did not involve situations where a union sought to impose a "unilaterally created" unit on a new employer with whom it had no bargaining relationship.

²⁴ Interestingly, the Judge cited no unit clarification petition cases, or cases discussing the appropriateness of such a petition, involving professionals.

B. There Can Be No Presumption Of Majority Support In The 2/1/07 Unit

In addition to the Union never having demonstrated majority support in the 2/1/07 Unit, there is no legal basis to presume such support in this unit. The courts and the Board have uniformly rejected attempts to modify the bargaining unit on which employees based their representation decision, where that modification significantly alters the unit's scope and character. See *Hamilton Test Sys. v. NLRB*, 743 F.2d 136, 140 (2d Cir. 1984); *NLRB v. Lorimar Productions*, 771 F.2d 1294, 1298 (9th Cir. 1985); *NLRB v. Beverly Health and Rehab. Servs., Inc.*, 120 F.3d 262, 1997 WL 457524 (No. 96-2195; 4th Cir. 8/12/97); see also *IGWU v. NLRB*, 339 F.2d 116, 125 (2d Cir. 1964) (stating, in an opinion by then Judge Thurgood Marshall, that the Board does not have “the power to change the boundaries of [a] unit after the election”). In fact, this is exactly the policy followed by Board Region 5 in its Decision and Direction of Election in *Rental Uniform Service, Inc.*, 5-CA-14628 (1/3/00), where it held that the demonstration of majority status in the original unit is no longer valid when the Board creates a new unit that is “significantly different in character” than the original unit.²⁵

The rationale behind the above decisions is that forcing upon employees a different bargaining unit than what they initially voted on or otherwise selected deprives them of their right to make an informed decision about union representation. See *Beverly Health*, *4; *Hamilton Test Sys.*, 743 F.2d 136 at 140-42; *Lorimar Productions*, 771 F.2d at 1301-02; *NLRB v. Parsons Sch. Of Design*, 793 F.2d 503, 506-08 (2d Cir. 1986). In other words, the Board cannot change the bargaining unit on which employees based their decision regarding union

²⁵ It is axiomatic that a single party cannot unilaterally modify a bargaining unit. See *Howard Electrical & Mechanical*, 293 N.L.R.B. 472, 475 (1989) (holding that “when a party unilaterally changes the scope of the unit, there is no obligation to bargain unless the other party has consented to the change”). Here, not only has SHW – Hadley never agreed to the changed unit, but there is not a scintilla of evidence suggesting that the employees in the 2/1/07 Unit (only 60% of whom worked for Doctors) support this unilaterally created unit.

representation – particularly where, as here, the character of the new unit is dramatically different.²⁶ These concerns are greatly magnified here because there was no policing of the process through which representation was obtained back in November 2005 – which explains how the Union could have been recognized in a unit that the Board could not certify.

Nonetheless, the Judge cursorily dismissed this case law, relying on the purportedly “historical” nature of the 2/1/07 Unit and “the attendant presumptions applicable to successor employers,” and wrongly placing responsibility for the 2/1/07 Unit composition on SHW – Hadley and equating its new composition with units reduced in scope by operational changes. *See* JD p. 14 n.11. The brand new 2/1/07 Unit cannot credibly be deemed a “historical” unit given its significant differences with the Doctors Unit, just as the established successorship presumptions cannot be applied here for the reasons discussed immediately above in Section II.A. And, as also discussed in Section II.A, there simply is no factual or legal basis for the Judge’s findings that SHW – Hadley effectively created the significantly reduced 2/1/07 Unit under circumstances analogous to a successor-initiated reduction in the scope of operations.

The Judge also improperly relied on *Fall River Dyeing, supra* to support his successorship finding (*see* JD p.10, 14), given that the predecessor bargaining unit in *Fall River Dyeing* (like the unit in *Burns*) had been certified by the Board. *See* 482 U.S. at 30, 38-41. In fact, the Judge cited *Fall River* for the proposition that, “a union that has previously been recognized through *an NLRB certification* is entitled to a rebuttable presumption of majority support.” JD p. 10 (emphasis added). However, the Doctors’ Unit was never certified, and

²⁶ The right to make a fully informed decision regarding union representation is evidenced elsewhere in Board precedent and procedures, including but not limited to the *Excelsior* List requirement, the requirement that election notices (which describe the bargaining unit) be posted for three full days prior to an election, the Board’s *Globe* and *Sonatone* election procedures and the requirements of the recent *Dana Corp.*, 351 N.L.R.B. 434 (2007), decision.

could not have been certified, by the Board, thereby rendering *Fall River Dyeing* inapposite to the instant case.

In determining when an employee's right to make a fully informed representation decision has been compromised by the later modification of the bargaining unit, the following factors have been considered:

1. The difference in the size of the two units;
2. The character and scope of the two units; and
3. The closeness of the election results.

There can be no doubt in this instance that these factors preclude any presumption that a majority of employees in the newly proffered unit support union representation in that unit.²⁷

For one thing, the more than 9% reduction in the size of the Doctors Unit based on the Union's attempt to unilaterally modify that unit is substantial and on par with that seen in other cases precluding bargaining unit modification. *See Parsons Sch. Of Design*, 793 F.2d at 507-08 (less than 10% reduction in the size of a faculty member bargaining unit). The reduced size of the unit alone also makes it less attractive to employees. *See Hamilton Test Sys.*, 743 F.2d at 141 (recognizing that smaller units are less attractive to employees due to their relative lack of bargaining power, the increased likelihood of leadership disputes and personality conflicts in a smaller unit, and the lack of a unified workforce when a unit is smaller rather than larger); *Lorimar Productions*, 771 F.2d at 1302 (relying on and reaching the same result as *Hamilton Test Sys.* where revised unit at movie and television production studio included only estimators

²⁷ In making this determination, particularly in the successor context, the bargaining unit changes must be considered from the employees' perspective, taking into account the totality of the circumstances. *Fall River Dyeing*, 482 U.S. at 43; *Beverly Health*, *4; *Hamilton Test Sys.*, 743 F.2d 136 at 140-42; *Lorimar Productions*, 771 F.2d at 1301-02; *Parsons Sch. Of Design*, 793 F.2d at 506-08.

as opposed to both estimators and production coordinators who voted in the election); *Beverly Health*, *4 (removal of LPNs from ten-classification bargaining unit sufficient to negate majority presumption); *Parsons Sch. Of Design*, 793 F.2d at 507-08 (removal of 20 full-time faculty from unit of 220 full- and part-time faculty precluded presumption of continued majority support).

Second, the removal of the guards and pharmacists from the Doctors Unit significantly altered that unit's character and scope in such a way that the 2/1/07 Unit is far weaker than the Doctors Unit, and naturally would be perceived that way by employees. The 2/1/07 Unit no longer includes two occupations which clearly gave it more "muscle" – (1) the pharmacists who, as licensed and highly compensated and sought after health care professionals, gave the original unit increased bargaining leverage; and (2) the guards, who provide the basic security without which a hospital cannot safely function, and thereby gave the Doctors Unit increased bargaining leverage. The absence of guards and pharmacists necessarily renders the 2/1/07 Unit less attractive to the remaining employees. *See Hamilton Test Sys.*, 743 F.2d at 141 (recognizing that unit with "lower tier of employees in terms of pay and opportunities for advancement" was less desirable than unit with "better paid and perhaps more attractive positions"); *Parsons Sch. Of Design*, 793 F.2d at 507-08 (discussing why part-time faculty should be presumed to have voted differently had full-time faculty originally been excluded from unit).

Third, the "closeness of the election" factor is at best neutral in this analysis and, if anything, weighs in SHW - Hadley's favor given that the card check certification states only that "a majority of these 172 employees signed cards authorizing the Union to represent them for the purposes of collective bargaining." General Counsel ("GC") Ex. 1 (GC 4/30/09 Motion in

Limine, Ex. 1).²⁸ There simply is no need in a card check to examine any more than a bare majority of cards to ascertain majority support, which apparently is all that was done in this instance. In other words, the “election” likely was very close (though, of course, we may never know given the Union’s refusal to produce the authorization cards used in the card check despite admittedly having the cards). And, it must not be overlooked that up to 15 cards (10 guards and 5 pharmacists) in the November 2005 card check were improperly included in determining majority status – a very significant number in a unit of 169 employees where only 85 cards would constitute majority support.

Also, as the Board correctly noted in *Dana Corp.*, *supra*, card checks are “inferior” to Board-conducted elections in determining majority support for several reasons, including “misinformation” during the card signing campaign and the inherent inaccuracy of card checks as a measurement of employee sentiment and/or expectations. *Dana Corp.*, 351 N.L.R.B. at 438-39. Here, employees necessarily were “misinformed” about the make-up of the bargaining unit for which they signed authorization cards given the Union’s attempt to unilaterally modify the unit some 16 months after the original card check. And, the inherent inaccuracy of a card check can only be compounded if, like here, the card check is in a unit crafted to be inappropriate on multiple grounds such that a valid election could not have been held. The Judge completely failed to acknowledge these concerns.

Finally, given that the original demonstration of majority support could not have been certified by the Board due to the Doctors Unit’s undisputed flaws, it cannot be used to support a presumption of continued majority support in a different unit now that SHW - Hadley is the new

²⁸ The parties have stipulated that, contrary to card check certification, the Doctors Unit actually has 169 (not 172) employees in it. Tr. at 213:4-23. The inaccuracy of the card check certification is further evidence of the inferiority of card checks to Board-conducted elections.

employer. See *Southern Mouldings Inc.*, 219 N.L.R.B. 119 (1975) (“... in a successor situation a union is not entitled to greater rights with respect to a successor than it had with a predecessor; and it may even have less . . .”). Presuming majority support in the 2/1/07 Unit would impermissibly reward the Union for crafting the inappropriate Doctors Unit (and then refusing to allow consideration of evidence concerning its claimed support in the newly conceived unit).

Therefore, under *Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001), an examination of “all of the evidence which, viewed in its entirety, *might* establish uncertainty as to a union’s continued majority status,” reveals a good faith uncertainty of the Union’s majority status in the newly created 2/1/07 Unit. *Id.* at 728 (emphasis added). This uncertainty entitled SHW – Hadley to file a RM petition, which it filed, only to be rebuffed by Region 5’s dismissal (upheld by the Board) of the petition. The Board should not compound the erroneous dismissal of the RM petition by ignoring this question concerning representation and forcing the Union upon 178 unsuspecting SHW – Hadley employees.

C. The Judge’s Decision Ignored The Existence Of A Question Concerning Representation

The core issue in this case is whether there is a valid question concerning representation, which is an issue to be addressed in the representation case context rather than the unfair labor practice context. However, the Decision avoided altogether the troublesome and heretofore unaddressed representational issues in this matter by ignoring SHW – Hadley’s arguments on this issue and improperly forcing it and 178 of its employees into a collective bargaining relationship with a union that has *never* demonstrated majority status in an appropriate unit.

The instant situation is controlled by *Mental Health Center of Boulder*, 222 N.L.R.B. 901 (1976) (a decision ignored by the Judge). There, the Board declined to grant comity and allowed the employer to challenge a State-issued union certification despite the fact that the certification

was based on a secret ballot election in a unit found to be appropriate by the State. The Board based its decision on the fact that the parties deliberately “opted for state election” rather than utilizing the available Board’s processes, and the unit included both professionals and non-professionals without providing the professionals their Section 9(b)(1) rights. *Id.* at 902. The Board emphasized that “the professional employees were not given a separate vote in the state-conducted election and therefore that election was not a ‘valid’ election within the meaning of the National Labor Relations Act and, hence, we do not accord any weight to the election. Rather we find a question concerning representation....” *Id.* (citations omitted).

The instant facts are even more compelling than those in *Mental Health Center of Boulder* given the existence of a card check in a mixed professional and non-professional unit that was otherwise fatally flawed by including security guards. As such, there simply is no basis to conclude that the Union’s majority status in the 2/1/07 Unit is free from doubt. To the contrary, there exists grave doubts about its majority status that raise, at a minimum, a question concerning representation.

Sunrise, A Community for the Retarded, 282 N.L.R.B. 252 (1986)²⁹ – another decision ignored by the Judge – also is instructive. There, after the union won the election, the region determined that the stipulated unit improperly included professionals (registered nurses). Nonetheless, the region upheld the election results by (i) discounting the registered nurses’ votes and finding that the Union still had sufficient votes to win the election; and (ii) removing the registered nurses from the bargaining unit to be certified. The Board expressly rejected this approach, holding that, “because the election was held in an inappropriate unit, we find that the

²⁹ *Sunrise* was cited with approval in *American Medical Response*, 344 N.L.R.B. 1406 (2005), among other decisions

election must be set aside[,]” vacating the stipulation and remanding the case to the region for the parties to negotiate a new stipulated election agreement or, in the absence of a new stipulation, to hold a unit hearing. *Id.* at 252. Suffice it to say, if a Board-conducted and certified election in an inappropriate unit requires a new showing of majority support, then there is no justifiable basis to conclude that a card check in an inappropriate unit involving an employer other than SHW - Hadley (*i.e.*, Doctors) is entitled to *greater* deference.

Of course, as already discussed, there is no basis to find that the Union had majority support back in November 2005 absent the 10 guards and 5 professionals improperly included in the Doctors Unit. To the contrary, it is entirely possible (if not likely) that the Union would not have achieved majority status without the improper inclusion of the guards and professionals. This hand-picked unit clearly was crafted by the Union (with the blessing of Doctors) to include only those job classifications that would allow the Union to most easily achieve majority status, and with blatant disregard to its appropriateness under the Act. And, it is very likely that Doctors Unit employees signed cards because they were influenced by the fact that professionals and guards were also signing cards. *See NLRB v. Logan Packing Co.*, 386 F.2d 562, 566 (4th Cir. 1967) (“The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees”) (cited with approval in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 n.20 (1969)).

It also is important to understand the impact that finding SHW – Hadley to be a *Burns* successor to Doctors in the 2/1/07 Unit would have on the Section 7 rights of the current 2/1/07 Unit. None of these employees have ever been afforded the right to decide whether they want

union representation in this unit. Forty percent (40%) of these employees have never been employed by Doctors, not to mention never having had any chance to decide on representation by this Union in any bargaining unit. Even with respect to those Doctors employees who still remain, it has been nearly four years since the Union was recognized as the bargaining representative in a dramatically different (and inappropriate) unit, and over three years since any collective bargaining has occurred.³⁰ And, of course, these employees have never been covered by a collective bargaining agreement.

Requiring SHW- Hadley to now bargain with the Union in these circumstances simply is not warranted. *See e.g., Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir.1980) (refusing to require bargaining despite unlawful withdrawal of recognition, given the lack of independent unfair labor practices, no “clear expression” of employee desires and a 5-1/2 year time lag from the withdrawal of recognition to the Board’s order; and emphasizing that a 8(a)(5) violation does “not automatically trigger a bargaining order if there is a substantial possibility that the employees do not want the Union and that a fair election can be held”); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996) (denying enforcement to bargaining order and overturning denial of motion to reopen the record to allow evidence of post-decision bargaining unit changes; and emphasizing circumstances “such as the passage of time or turnover in the work force” are relevant to the bargaining order determination in light of threat that remedy

³⁰ The Judge’s conclusion that SHW – Hadley’s actions in litigating this case “reveal an intent to delay these proceedings in the hope that time will strengthen its argument as to employee turnover” is patently speculative, unsupported and erroneous. *See* JD pp. 29-30. The delays in litigation caused by the 11 months it took for SHW – Hadley’s summary judgment motion to be decided and the General Counsel, and the Union-initiated time extensions, far exceed SHW – Hadley’s relatively few uncontested extension requests. And, SHW – Hadley’s filing of an RM Petition – which sought to allow employees to exercise the Section 7 rights that have thus far been denied them by the Union – caused no delay because it was processed (including the nearly 18 months taken to affirm the Region’s dismissal) concurrently with this case.

poses to current employees' Section 7 rights); *see also Sullivan Indus. v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992) (rejecting Board's apparent *per se* approach of requiring bargaining orders in withdrawal of recognition cases, and rejecting bargaining remedy in that case).

In short, this is at its core a representation case rather than a successor bargaining obligation case, which no doubt is why the Board made the appropriateness of the 2/1/07 Unit – a basic representational issue which is critical to protecting employee Section 7 rights – a threshold determination in this matter. Even if the 2/1/07 Unit was an appropriate bargaining unit, ordering SHW – Hadley to bargain with the Union on behalf 178 employees – only 108 of whom were represented by the Union in the inappropriate Doctors Unit several years ago – would deny these 178 employees any say whatsoever on the important questions of their bargaining representative and their bargaining unit. This would be a patent infringement of these 178 employees' Section 7 right to freely decide on the bargaining representative of their choice in a bargaining unit of their choosing, and the Board should not allow this to happen.

CONCLUSION

The Judge's Decision contradicts established case law and the record evidence. The 2/1/07 Unit is patently inappropriate for an acute care hospital covered by the Healthcare Rule such as SHW – Hadley, and is inappropriate even if SHW – Hadley is deemed not to be an acute care hospital and not covered by the Healthcare Rule. This alone requires dismissal of the Amended Complaint. Even if the 2/1/07 Unit was an appropriate unit, the Union should not be allowed to manipulate the Board's processes by using an inappropriate bargaining unit it crafted with a prior employer outside of the Board's preview, to leverage a brand new unit that it has created out of thin air; and all at the expense of 178 employees' right to make an informed decision on union representation. Accordingly, the Amended Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of Respondent's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge was served via email and Federal Express overnight delivery this 13th day of November, 2009, upon:

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