

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**SPECIALTY HOSPITAL
OF WASHINGTON - HADLEY**

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Case No. 5-CA-33522

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Respondent

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v.

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

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Charging Party

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**CHARGING PARTY'S RESPONSE TO THE
BOARD'S SHOW CAUSE ORDER**

Stephen W. Godoff

Abato, Rubenstein and Abato, P.A.

809 Gleneagles Court, Suite 320

Baltimore, Maryland 21286

(410) 321-0990

Pursuant to Section 102.24 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, as amended, by and through its undersigned counsel, 1199 SEIU, United Healthcare Workers East, MD/DC Division (hereinafter the "Union"), hereby responds to the Board's Show Cause Order with this, its request that the Board deny the Motion for Summary Judgment filed by Specialty Hospital of Washington - Hadley (hereinafter "Hadley"), because Hadley's Motion raises issues of material fact as to which there is genuine dispute and because Hadley is not entitled to judgment as a matter of law.

I. STATEMENT OF FACT

In the instant case, there have been no factual stipulations. Along with its Motion for Summary Judgment, Hadley has filed no affidavits. On the basis of a review of the pleadings and affidavits prepared by the Board's Fifth Region in the course of its investigation in this case, there does appear to be concurrence as to the following matters of fact.

On November 14, 2005, the Union and the former owner of the health care facility now owned by Hadley, Doctors Community Health Care Corporation (hereinafter "Doctors"), under the auspices of a jointly selected neutral, conducted a card check election with respect to an agreed-upon bargaining unit. That unit included:

Baker, cashier, certified pharmacy tech, C.N.A., cook, dietary clerk, E.S., E.S. Aide, E.S. Floor Tech, Engineer III, food service worker, LPN, maintenance helper, maintenance mechanic, med lab tech, medical records clerk, medical records tech, painter, **pharmacist**, pharmacy tech, phlebotomist, P.T. Care tech, rehab tech, **security guard**, senior medical records tech, stock clerk, stock room coordinator, trayline checker, unit secretary, and utility aid.

[Emphasis added.]

On November 14, 2005, the neutral sent a letter to the parties. In his letter, he advised the parties that he had compared the signatures on the authorization cards provided him by the Union, with the signatures of eligible voters provided him by Hadley. On the basis of that comparison, he wrote, he certified that a majority of eligible employees "signed cards authorizing the Union to represent them for purposes of collective bargaining."

On or about March 30, 2006, Doctors commenced collective bargaining with the Union. At this time, the Union proffered its initial contract proposals. On May 12, 2006, Doctors provided the Union with its counter-proposals. Between March 30, 2006 and July 17, 2006, when Doctors and the Union met again, they reached tentative agreement on a number of issues. They were not able to reach a complete agreement, however. And, between July 17, 2006 and September 2006, the parties did not return to the bargaining table, largely because of the unavailability of Doctors' lead negotiator.

In September 2006 Doctors informed the Union that it was in the process of selling stock in its health care facility. Doctors assured the Union that it would return to the table just as soon as this sale was transacted.

On November 6, 2006, Doctors notified the Union that it had sold, not its stock, but its assets; and it advised the Union that any further collective bargaining would be with Hadley, the facility's new owner.

On November 9, 2006, Hadley's attorney contacted the undersigned counsel by telephone. He advised the undersigned counsel that he represented Hadley, that he looked forward to negotiating with undersigned toward a collective bargaining agreement, and

that he would confer with his principals and offer bargaining dates.

The sale of Doctors' health care facility to Hadley occasioned no cessation of operations. Without any hiatus, Hadley assumed operational control of the facility on or about November 13, 2006.

Doctors' patients became Hadley's patients. Almost all of Doctors' employees were made Hadley's employees. And, Hadley made no change of any kind either in the nature or the quality of care that the facility offered, which was discernible by its new employees.

On November 17, 2006, Hadley's counsel sent a letter to the undersigned. In that letter, Hadley's counsel advised that it had come to Hadley's attention that the bargaining unit whose representative the Union had been recognized as by its predecessor "appears to be inappropriate under the NLRA in at least two respects." First, he pointed out that the unit included "guards (in addition to non-guards)". Second, he asserted that it included "professional employees - pharmacists - who were not afforded their NLRA § 9(b)(1) right to decide on inclusion in the unit." Accordingly, Hadley's counsel stated, Hadley would not recognize the Union "as the bargaining representative of this inappropriate unit."

By letter dated February 1, 2007, the Union responded to Hadley's "two objections to the bargaining unit as to which the [Union] requests your client's recognition." The Union advised Hadley that the Union was "willing to allay both of [Hadley's] concerns":

...Thus, [the Union] is ready to disclaim any interest in representing [Hadley's] security guards. [the Union] is ready, as well, to disclaim any interest in representing [Hadley's] pharmacists and /or to afford those pharmacists a right to decide for or against bargaining unit inclusion.

By letter dated February 3, 2007, Hadley, through counsel, responded to the Union's letter of February 1, 2007. In this letter, Hadley's counsel notified the Union that it would not "recognize a modified bargaining unit"; i.e., the unit recognized by its predecessor, absent guards and pharmacists.

In response to Hadley's letter of February 3, 2007, refusing to recognize or bargain with the Union, the Union filed unfair labor practice charges against Hadley.

II. STATEMENT OF THE ISSUE

Did Hadley violate the Act when it refused on February 3, 2007, to recognize and bargain with the Union?

III. ARGUMENT

Hadley's Refusal Violated The Act.

In Fall River Dyeing and Finishing Corp. v. NLRB, 42 U.S. 27, 41 (1987), the Supreme Court enunciated the standard for determining the bargaining obligation of an employer, which acquires the assets of another whose employees are represented. In this connection, the Court stated:

"...If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of 8 (a)5 is activated."

And, in the present instance Hadley has admitted that it has maintained generally the same health care facility, with the same patients and the same method of operating as did Doctors and that a majority of its employees were employees of Doctors.

Nevertheless, Hadley contends that "the bargaining obligation of 8 (a)(5) ought

not to have been activated in this case. In this regard, Hadley advances a series of arguments.

As an initial matter, Hadley points out that Section 9 (b)(3) of the Act prohibits the Board from certifying bargaining units that include both guards and non-guards. Hadley also points out that Section 9 (b)(1) of the Act prohibits the Board from certifying bargaining units that include both non-professionals and professionals, if the non-professionals have not voted for a unit inclusion. Hadley insists that under Sections 9 (b)(1) and (3) of the Act, Doctors' voluntary recognition was, therefore, void ab initio, because the bargaining unit, to which Doctors and the Union agreed, included both guards and non-guards and both non-professionals and professionals, who had not voted to be included. And, Hadley contends that the Union's February 1, 2007 demand for recognition is, then, just a demand with respect to an unrepresented unit that raises a question concerning representation.

Hadley's contention in this regard, however, is wholly without merit. For, the contention rests upon the erroneous assumption that Sections 9(b)(1) and (3) of the Act prohibited Doctors from voluntarily recognizing the Union as representative of a mixed guard/non-guard unit, or a unit including non-professionals and professionals who had voted for unit inclusion, or both.

As the Board stated in Retail Clerks Union No. 324 (Vincent Drugs No. 3), 144 NLRB 1247 (1963), there is nothing in Section 9 (b)(1) or its legislative history to suggest that Congress intended that Section "to invalidate as inappropriate a historically established contract unit simply because of a joinder of professional and non-professional employees." Id. at 1252. As the Board stated in Westinghouse Electric

Corp., 115 NLRB 530, 532-533 (1956), “That section...only circumscribes the Board’s discretion to determine the appropriate unit, when an election is being sought in a unit including professional employees.” (Emphasis added.) And, as the Seventh Circuit noted in General Serv. Employees Local 73 v. NLRB, 230 F3d. 909, (2000), Section 9 (b)(3) of the Act was intended only to preclude mixed guard unions from claiming those “special privileges” which flow from Board certification. The Section’s directive not to certify mixed guard unions did not mean that voluntarily recognized mixed guard unions were not just as entitled to “the basic protections of the Act” as unions certifiable by the Board. Id. at 913.

To put it succinctly, then, Hadley is plainly wrong. Nothing in Section 9(b)(1) or 9 (b)(3) invalidates Doctors’ voluntary recognition of the Union. And, the Union’s February 1, 2007 demand for recognition, then, assuredly is not tantamount to an initial demand for recognition in a heretofore unrepresented unit, that gives rise to a question concerning representation.

Secondly, Hadley calls the Board’s attention to the fact that the Union demanded recognition from Hadley on February 1, 2007, as representative of a bargaining unit that differs from the unit the Union represented previously; i.e., that the unit did not include guards or pharmacists. And, Hadley argues that the Union, therefore, is not entitled to an irrebuttable presumption of continuing majority status, even if the Union did represent a majority in the Doctors bargaining unit.

But this argument, too, must be rejected. There is, of course ample precedent for the Board’s position that a mere diminution in size or alteration in the character of a unit is insufficient to rebut the presumption of a union’s continued majority status. See,

e.g. Tree-Fiber Co., 328 NLRB 389 (1999) (holding that employer's successorship obligation was not defeated simply because the new unit was substantially smaller and very different – only 50, rather than the predecessor's 500); Bronx Health Plan, 326 NLRB 810 (1998), enf'd 203 F.3d 51 (D.C. Cir. 1999)(only 17, rather than the predecessor's 3500). And, Hadley has not even suggested that there are compelling reasons to reconsider this line of cases.

Instead, Hadley calls the Board's attention to cases like Rental Uniform Service, Inc. 5-CA-14628 and Parsons Sch. Of Design, 763 F2d.503 (2d Circuit 1986.) In these cases, Hadley notes, new elections have been required when, after a Board election, upon a petition for certification of a representative of a unit formerly unrepresented employees, new elections were ordered when post-election proceedings resulted in significant unit changes. And, Hadley maintains, the same considerations that led the Board to set aside elections in these cases should lead to the Board to require an election in the instant case.

Hadley's position in this regard, however, is based upon a presupposition. That is, Hadley presupposes that, there are no circumstances in which the Board may "fail to give expression to the immediate desires of employees with regard to representation." Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131 (7th Cir. 1974), enforcing sub nom. Parkwood IGA, 201 NLRB 905 (1973), cert. denied sub nom. Zim's IGA Foodliner v. NLRB, 419 U.S. 838 (1974).

This presupposition, of course, is altogether erroneous. To be sure, in cases like those Hadley cites, in which a union seeks certification as representative of a formerly unrepresented unit, the Board may well have no other real concern than the accurate

expression of employees' immanent wishes regarding representation. In situations like the present, however, the Board has other, equally pressing concerns.

In Burns International Security Services, Inc. 406 U.S. 272 (1972), the Supreme Court approved a Board bargaining order against a successor employer where 27 of the 42 employees in its work force had been employed by its predecessor in a represented bargaining unit. It was not demonstrable mathematically that the incumbent union was the choice of a majority of the successor's 42 employees. Nor was there a finding that all 27 former employees had voted for the incumbent union. Nevertheless, the Court decided that it was not unreasonable for the Board to conclude that the incumbent union "still represented a majority of the employees and that Burns could not reasonably have entertained a good faith doubt about that fact." Id. at p. 278. As the Seventh Circuit noted, in Zim's Foodliner, Inc., supra:

Burns thus recognizes that in at least some circumstances, the democratic principle embodied in §9 of the National Labor Relations Act is not offended by procedures which leave some doubt as to the actual, immediate desires of employees with regard to representation.

Id. at p. 1138. Also see, Fall River Dyeing & Finishing Corp. 482 U.S. 27, 37 (1987).

In cases where the Board invokes successorship to impose a bargaining obligation, the Seventh Circuit further noted, a tension may arise "between democracy and stability." Id. And in such cases, the courts have granted to the Board "some measure of discretion in achieving a fair balance" between the two. Id.

In Levitz, supra, the Board has indicated just how it has exercised its discretion, to achieve this balance between the goals of employee free choice, on the one hand; and

stability in collective bargaining relationships, on the other. In this connection the Board stated:

Absent specific statutory direction, the Board has been guided by the Act's clear mandate to give effect to employees' free choice of bargaining representatives. The Board has also recognized that, for employees' choices to be meaningful, collective bargaining relationships must be given a chance to bear fruit and so must not be subjected to constant challenges. Therefore, from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status. Except at certain times, however, that presumption is rebuttable.

Id. at 720.

Thirdly, in support of its Motion, Hadley cites Mental Health Center of Boulder, 222 NLRB 901 (1976). In that case, the Board invalidated, under Section 9 (b)(1), a state-conducted election, because the election resulted in certification of a representative of a unit that included non-professionals who had not voted for unit inclusion. And, Hadley would have it that this case is somehow controlling here.

Hadley is, however, plainly wrong. As we have previously indicated, Section 9 (b)(1) of the Act prohibits the Board from itself certifying, or accepting as its own a state's certification of a representative of a unit that includes non-professionals and professionals, who have not voted to be included. Section 9 (b)(1) does not prohibit an employer from extending the Act's coverage to its relationship with a union representing a majority of a group of its employees by voluntarily recognizing the union – even if that group includes both non-professionals and professionals who have not been accorded Section 9 (b)(1) rights.

Fourthly, Hadley alleges that the Region relied on the non-precedential Advice Memorandum issued with respect to, and the ALJ Decision issued in Concord Associates,

LP, JD-157-99 (White Plains, N.Y.) And, Hadley further alleges, the Board's reliance thereupon was in error.

The Union is in no position to know the degree to which the Board relied upon the decision in Concord Associates or the advice memorandum with respect thereto, in deciding to issue a complaint in this case. But, there is no basis for Hadley's inference that Board reliance upon the reasoning set forth in either would be erroneous.

In Concord Associates, a union had been certified in an appropriate unit. Thereafter, the union and its employer counterpart agreed to include guards in the unit; and to a collective bargaining agreement with respect to the mixed unit. The employer who acquired its predecessor's assets refused the union's first request for recognition because the unit was mixed. In response, the union made a second request, this time for a unit that excluded guards. But, the employer denied this second request, as well.

The Board then issued a complaint against the employer. And, Administrative Law Judge Margaret M. Kern, issued a decision in December 1999, in which she found that the employer had violated its statutory duty when it failed to recognize and to bargain with the union as representative of a unit from which the Union had excised guards.

In its Motion, Hadley certainly does identify certain factual differences between the instant case and Concord Associates. However, Hadley does not offer any reasons why these differences are of any legal significance. Thus, it may well be true that, in Concord Associates, guards constituted a smaller percentage of the predecessor employer's bargaining unit than they did of Doctors'. But, Hadley does not explain why this factual distinction is at all material.

Similarly, it is undeniably true that Judge Kern did not have the benefit of the

argumentation that Hadley offers in its Motion. But surely, Judge Kern's reasoning is not necessarily erroneous as a consequence.

In its Motion, Hadley also notes that, in Concord Associates and in the instant case, at issue are reductions in unit size, which were effectuated by a union not an employer. Hadley notes that the unions that made these reductions made them to cure unit flaws, which their employer counterparts had found objectionable. What Hadley does not do, however, is to furnish any reason why the fact that these unit changes were effectuated by the unions, for such ends, is or ought to be outcome determinative.

Of course, it cannot be denied that the Supreme Court's decisions in NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972) and its progeny all involve unit changes instituted by a successor employer. But, the considerations underlying those decisions, entitling unions to a rebuttable presumption of majority support among a successor's employees, certainly are no less weighty when the unit changes are union-instituted.

Surely, the union in Concord Associates and the Union here are in the same "peculiarly vulnerable position" during the "transition between employers" as the unions in those cases. Fall River Dyeing & Finishing v. NLRB, 482 U.S. 27 at 39 (1987). Surely, they, like the union in Fall River Dyeing, *supra*, have just as much need for "the presumptions of majority status...to safeguard its members' rights and to develop a relationship with the successor." *Id.* And surely, the employees involved in Concord Associates, as well as the Hadley employees involved here, find themselves, as did the employees in those cases "in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a

union is subject to the regains of an enterprise transformation.” Id. at 39-40. And, other than an admonition about manipulation of Board processes, to vital policy concerns such as those expressed by the Court in Fall River Dyeing, Hadley asserts no countervailing concerns at all.

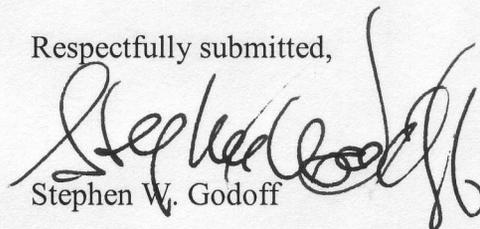
Finally, in its Motion, Hadley raises a number of issues, with respect to whether or not the Union has demanded recognition in an appropriate unit, even if guards and pharmacists have been properly excluded therefrom. As these issues are based upon mixed issues of law and fact as to which there is genuine dispute, they are unsuitable for summary disposition.

IV. CONCLUSION

At the end of the day, there is no disagreement between the parties that there is “substantial continuity” between Doctors’ operation and Hadley’s. There is no disagreement that a majority of Hadley’s employees were formerly Doctors’. There is no disagreement that the unit, for which the Union demanded recognition from Hadley, by letter dated February 1, 2007, no longer includes employees whose presence would entitle Hadley to refuse that demand.

On the basis of these, the undisputed facts in this case, Hadley must be deemed a Burns successor obligated to recognize the Union. And, Hadley’s Motion to Dismiss the complaint, which the Board issued against it for refusing to recognize the Union, must, therefore, be denied.

Respectfully submitted,



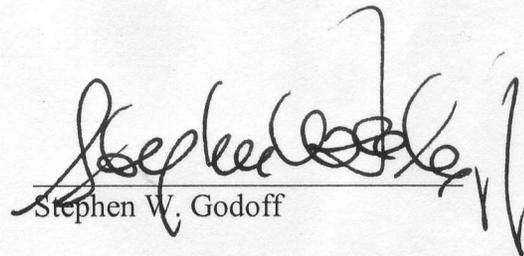
Stephen W. Godoff

CERTIFICATE OF SERVICE

This is to certify that a true test copy of CHARGING PARTY'S RESPONSE TO THE BOARD'S SHOW CAUSE ORDER was served this 28th day of February, 2008, upon:

Wayne R. Gold, Regional Director
Natl. Labor Relations Board, Reg. 5
U.S. Appraisers' Stores Building
103 South Gay St., 8th Floor
Baltimore, MD 21202

John J. Toner, Esquire
Seyfarth Shawe, LLP
815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004


Stephen W. Godoff