

LAW OFFICES
ABATO, RUBENSTEIN AND ABATO, P.A.

H. Victoria Hedian
Kimberly L. Bradley
James R. Rosenberg •
Paul D. Starr •
Corey Smith Bott
Brian G. Esders
Meghan E. Ritson
Meghan C. Horn

809 Gleneagles Court
Suite 320
Baltimore, Maryland 21286
(410) 321-0990
(410) 321-1419 Fax
www.abato.com

Cosimo C. Abato
(1930 - 1995)
Bernard W. Rubenstein
(1920 - 2009)

Of Counsel
Anthony A. Abato, Jr.
Stephen W. Godoff •

• Also admitted in DC



January 22, 2010

Via Electronic Submission via NLRB Online

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

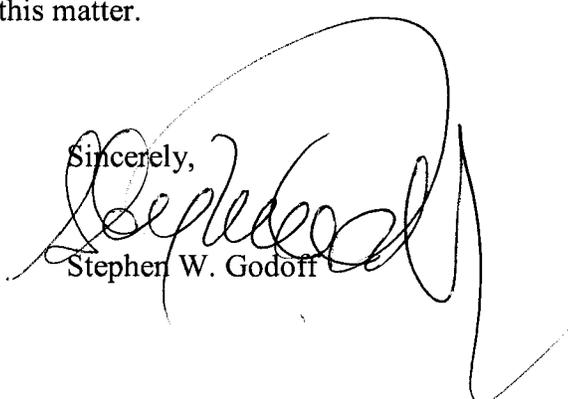
Re: NLRB Case No. 5-CA-33522
Specialty Hospital of Washington – Hadley

Dear Mr. Heltzer:

Enclosed here, please find the Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision in the above-captioned case; and its Motion to File Untimely Its Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.

Thank you for your attention to this matter.

Sincerely,


Stephen W. Godoff

SWG:jml

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Specialty Hospital of Washington
Hadley,
Respondent

*

*

and

Case: 5-CA-33522

*

*

1199 SEIU, United Healthcare Workers
East, MD/DC Division,
Charging Party

*

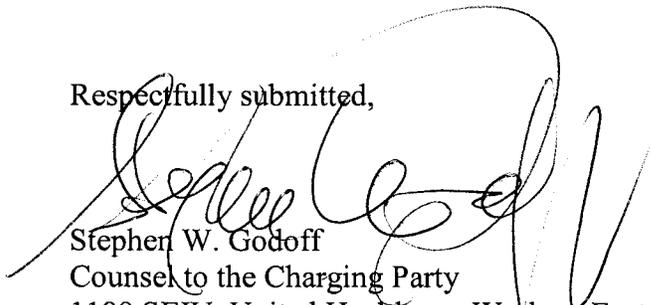
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**CHARGING PARTY'S MOTION TO FILE UNTIMELY ITS
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.111 of the National Labor Relations Board Rules and Regulations, 1199 SEIU, United Healthcare Workers East, MD/DC Division, Charging Party, by and through its undersigned counsel, hereby files this Motion to File Untimely Its Answering Brief to The Administrative Law Judge's Decision. For the reasons set forth in the accompanying Affidavit of undersigned counsel, there is good cause to grant this Motion based on excusable neglect; and because no party hereto will be prejudiced in the event this Motion is granted.

Respectfully submitted,



Stephen W. Godoff
Counsel to the Charging Party
1199 SEIU, United Healthcare Workers East,
MD/DC Division

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Specialty Hospital of Washington Hadley, Respondent	*	
and	*	Case: 5-CA-33522
1199 SEIU, United Healthcare Workers East, MD/DC Division, Charging Party	*	

* * * * *

AFFIDAVIT OF STEPHEN W. GODOFF

I, Stephen W. Godoff, declare as follows:

1. I am counsel to Charging Party, 1199 SEIU, United Healthcare Workers East. I am employed at Abato, Rubenstein and Abato, P.A. I am over the age of 18 years. I have personal knowledge of, and I am competent to testify as to, the facts and matters recited herein.
2. By letter of December 17, 2009, the Board's Associate Executive Secretary advised that the due date for receipt of answering briefs to the Respondent's exceptions to the administrative law judge's decision in the above-captioned case was January 8, 2010.
3. On January 8, 2010, I caused to be served, by email and by first class mail, on Respondent's counsel and counsel to the Board's General Counsel, a copy of Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.

4. On January 8, 2010, I also made certain that a complete filing of Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, as well as all necessary certifications of service, were ready to be electronically filed and mailed first class to the Board.

5. Because I had arranged to leave the country on January 9, 2010, and had to ensure that my visa and other papers were in order, I left the office in haste on January 8, 2010.

6. As a consequence, I failed to notice that my secretary had prepared to transmit the Board's copy of Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, by first class mail and by facsimile, rather than by electronic filing through the Board's website.

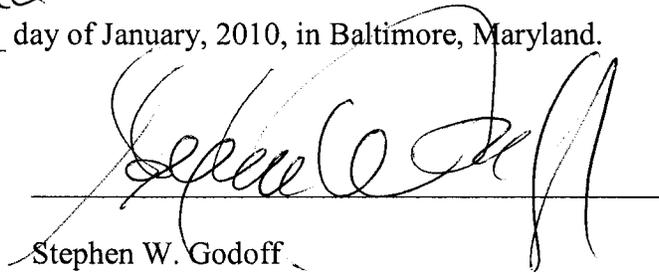
7. When I returned from abroad on January 19, 2010, I received from the Board's Associate Executive Secretary notification that the Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was received by the Board "by facsimile transmission on January 8, 2010"; and that it was, therefore, "not properly filed."

8. I have confirmed that Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision were served upon counsel to Respondent and counsel to the General Counsel by electronic transmission on January 8, 2010, and that a copy was also sent by first class mail to counsel to Respondent and counsel to the General Counsel on January 8, 2010, as well.

9. I have confirmed that a copy of Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was sent to the Board by first class mail on January 8, 2010.

I swear under the penalties of perjury that the foregoing Affidavit is true and correct.

Executed this 22nd day of January, 2010, in Baltimore, Maryland.



Stephen W. Godoff

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

Specialty Hospital	*	
of Washington – Hadley, LLC,	*	
Respondent	*	
and	*	Case 5-CA-33522
	*	
1199 SEIU, United Healthcare	*	
Workers East, MD/DC Division,	*	
Charging Party	*	

**CHARGING PARTY’S ANSWERING BRIEF TO RESPONDENT’S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

Charging Party, 1199 SEIU, United Healthcare Workers East, MD/DC Division (the “Union”), by and through its undersigned attorneys, hereby submits its Answering Brief to the Brief of Respondent, Specialty Hospital of Washington – Hadley (“SHW – Hadley”), in support of its Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter. As set forth below, the Administrative Law Judge (“Judge”) properly found that SHW – Hadley violated Section 8(a)(5) of the National Labor Relations Act, as amended, by refusing to recognize and bargain with the Union on or after February 1, 2007. Accordingly, the Judge’s Decision should be adopted, and the Order that he recommended issued, by the National Labor Relations Board.

I. STATEMENT OF FACTS

The facility involved in this proceeding, provides, in a single building, both in-patient long term care and skilled nursing services. Long term acute care services are provided on the facility’s second floor. Skilled nursing services are provided on its third

floor. And, on its first floor, are housed the offices of SHW – Hadley’s Chief Executive Officer, who is responsible for the day-to-day operation of the entire facility, including its marketing, finance, quality control and labor relations functions; and, to whom all of the facilities’ employees ultimately report.

From on or about November 14, 2005 until late October or early November of 2006, the Union was recognized by Doctors Community Healthcare Corporation d/b/a Hadley Memorial Hospital (“Doctors”), as the exclusive collective bargaining representative of the following bargaining unit:

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacists, pharmacy techs, phlebotomists, P.T. care techs, rehab techs, security guards, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Hadley Memorial Hospital at its Washington, D.C. facility.

Between November 14, 2005 and early November 2006, Doctors permitted the Union to hold weekly membership meetings in its cafeteria. Doctors furnished the Union with such information as the Union requested. And, at sessions conducted in March and again in July of 2006, Doctors collectively bargained with the Union, exchanging with the Union proposals and counterproposals and even reaching with the Union certain tentative agreements.

In September 2006, Doctors requested Union agreement to a suspension of collective bargaining, while it attempted to transact what it initially anticipated to be a stock sale. To this request, the Union acceded.

On November 6, 2006, Doctors advised the Union that it had sold to Respondent not just its stock, but its assets as well.

On November 9, 2006, Respondent's counsel contacted the undersigned. He identified himself as counsel to Respondent and, in response to the Union demand for recognition and bargaining indicated that Respondent looked forward to bargaining with the Union toward a new labor agreement

On November 13, 2006, Respondent assumed full control of the facility that it had acquired from Doctors. And, with employees, a majority of whom had been employees of Doctors, Respondent operated the facility just as had its predecessor.

On November 17, 2006, counsel to Respondent sent a letter to undersigned counsel. In that letter, counsel to Respondent stated that Respondent stated that Respondent would not recognize the Union, because the unit as to which the Union sought recognition included: (a) guards and non-guards and; (b) pharmacists, "professional" employees who had not afforded their Section 9(b)(1) right to decide whether they wanted to be included in a unit that also included nonprofessionals.

On February 17, 2007, the Union responded by letter to Respondent's letter of November 17, 2006. In its letter, the Union again requested recognition and bargaining, this time in the following unit, which excluded both guards and pharmacists, or, in the alternative, excluded guards but afforded pharmacists the right to vote for or against unit inclusion:

All bakers, cashiers, certified pharmacy techs, C.N.A.s, cooks, dietary clerks, E.S. employees, E.S. Aides, E.S. Floor Techs, Engineers III, food service workers, LPNs, maintenance helpers, maintenance mechanics, med lab techs, medical records clerks, medical records techs, painters, pharmacy techs, phlebotomists, P.T. care techs,

rehab techs, senior medical records techs, stock clerks, stock room coordinators, trayline checkers, unit secretaries, and utility aids, employed by Respondent at its Washington D.C. facility; but excluding professional employees, guards and supervisors as defined in the National Labor Relations Act.

By letter February 8, 2007, Respondent's counsel advised the Union that Respondent would not recognize the Union as representative of the Doctors unit as modified, because the Doctors unit was inappropriate as a matter of law.

On June 29, 2007, the Regional Director issued a Complaint in this case. In the Complaint, the Regional Director alleged, inter alia, that the Respondent is a Burns successor; and that the Respondent failed and refused to bargain with the Respondent, the collective bargaining representative of an appropriate bargaining unit.

The Respondent filed its Answer on July 13, 2007. In that Answer, Respondent denied, inter alia, that it is a Burns successor; that it had any obligation to bargain collectively with the Respondent; and that the unit, which the Regional Director alleged to be appropriate, is appropriate in fact.

On December 3, 2007, Respondent moved for summary judgment. On November 25, 2008, the Board denied that motion and remanded the case to the Regional Director for Region 5, for the purpose of scheduling a hearing before a administrative law judge, on issues of fact raised by Respondent. In this connection, the Board stated as follows:

Despite 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... If the evidence adduced at hearing establishes that the new unit is appropriate for bargaining and that the alterations 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.

Unpublished Board Order of November 25, 2008 at pp. 7-8

On December 19, 2008, Respondent filed with the Board a Motion for Reconsideration and Motion to Stay Hearing. By unpublished Order, on January 26, 2009, the Board denied these motions.

On May 7, 2009, Respondent filed a Second Motion for Reconsideration and Motion for Stay. This motion, too, was denied by the Board

On May 12 and 13, 2009, hearing in this case was conducted.

On August 26, 2009, the Judge issued his Decision.

II. ARGUMENT

I. The Judge Correctly Found That The February 1, 2007 Unit Was An Appropriate Bargaining Unit.

A. Respondent Had The Burden of Proving That The February 1, 2007 Unit Is Inappropriate.

In his Decision, the Judge quoted, with approval, the following passage from the Board's decision in Trident Seafoods, Inc., 318 NLRB 738 (1995), enfd. in part. 101 F.3d 111 (D.C. Cir. 1996):

Regarding the appropriateness of historical units, the Board's longstanding policy is that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales*, 288 NLRB 1123 fn.5 (1988). The Party challenging a historical unit

bears the burden of showing that the unit is no longer appropriate. *id.* The evidentiary burden is a heavy one. See, e.g., *Children's Hospital*, 312 NLRB 920, 929 (1993) (“compelling circumstances; are required to overcome the significance of bargaining history”); *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988) (“units with extensive bargaining history remain intact unless repugnant to Board policy”).

And, the Judge noted that, in Trident Seafoods, the Board had stated that:

By requiring the party challenging a historical unit to show the unit is no longer appropriate, the Board recognizes the importance Fall River places on employees' perspective in a successorship analysis.

Judge's Decision (hereinafter “JD p. ____”) at p.18. That is, the Judge noted in his Decision that the Board in Trident Seafoods ruled that the party challenging a historical unit had to prove that historical unit was not an appropriate unit for purposes of collective bargaining; and that the Board so ruled in acknowledgment of the Supreme Court's recognition that “industrial peace,” is “[t]he overriding policy of the NLRB” and that:

...If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen representative, they may feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace.

Fall River Dyeing & Finishing v. NLRB, 482 U.S. 27, 38 (1987). *Id.*

In its brief, Respondent contends that the Judge should not have followed Trident Seafoods and allocated to Respondent the burden of showing that the February 1, 2007 Unit was not appropriate. It contends that the Judge, instead, should have ruled that the Board General Counsel had the burden of showing that the unit was appropriate. And, in support of this contention, Respondent advances a number of propositions.

First, Respondent proposes that, in Northern Montana Health Care Center, 324 NLRB, 752, 760 (1997), the Board required the General Counsel to “establish” the appropriateness of the bargaining unit alleged in a complaint to be appropriate, in a case involving an alleged successor’s refusal to bargain with a union. Just as the General Counsel had to “establish” the appropriateness of the unit in Northern Montana Health Care, Respondent proposes, it should have been the General Counsel that was required to “establish” the appropriateness of the February 1, 2007 Unit in the case.

The proposition that Respondent advances, however, is without merit. Thus, review of the Board’s Decision in Northern Montana Health Care Center reveals neither the word “establish” – which Respondent seems to have lifted out of its context in the administrative law judge’s decision in that case – nor any other word or words of the Board that can be construed as apportioning burdens of proof in the manner Respondent here espouses.

Second, Respondent points out that the Amended Complaint contains the allegation that the February 1, 2007, Unit is an appropriate unit for purposes of collective bargaining. And, it proposes that the inclusion of this allegation in the Amended Complaint somehow belies any argument that Respondent had the burden of proving the February 1, 2007 Unit to be appropriate.

But, this proposition, too, lacks merit. To be sure, there is an allegation in the Amended Complaint that the February 1, 2007 Unit is an appropriate unit for purposes of collective bargaining. But, Respondent has suggested no earthly reason why the inclusion of this allegation should have precluded the Judge from requiring Respondent to overcome a burden-shifting presumption as to the appropriateness of historical units,

which the Board has fashioned to ensure that employees did not feel “subject to the vagaries of an enterprise’s transformation.” Fall River Dyeing & Finishing, supra.

Third, Respondent maintains that, in this case there is no “historical unit,” because the unit, whose exclusive representative Doctors recognized the Union to be, was “indisputably inappropriate” for purposes of collective bargaining. And, Respondent proposes that the Judge, therefore, improperly allocated the burden of proof in this case in accordance with Trident Seafoods.

As the Judge pointed out, however, in this regard Respondent is simply incorrect, if Respondent means to suggest that a historical unit did not exist in this case, because employees in the Doctors Unit did not enjoy the basic protections of Section 8 of the Act, enforcing the rights of employees both to join unions and to bargain collectively. In fact, he noted, the Board has enforced bargaining orders pertaining to mixed units of professionals and non-professionals. J.D. at p. 18 fn 12. And, of course, the Board has enforced bargaining orders pertaining to mixed units of guards and non-guards, as well. See, Temple Security, Inc., 337 NLRB No. 26 (2001).

B. The February 1, 2007 Unit Is Not Inappropriate Under The Board’s Health Care Industry Rule.

In its Brief, Respondent maintains that that Judge erroneously concluded that the February 1, 2007 Unit is inappropriate under the Board’s health care industry Rule. And in this connection, Respondent advances a series of arguments.

First, Respondent claims that it is an acute care hospital under the health care industry Rule, because it meets the standards for an “acute care hospital” set forth in that Rule. And, Respondent argues that the Judge was compelled, therefore, conclude that the

Board's bargaining unit delineations for acute care institutions had to apply in the instant case.

But, the Respondent's argument must be rejected. To begin with, the Judge pointed out that, as in Child's Hospital, 307 NLRB 90 (1992), testimony adduced at the hearing in this case indicated physical joinder of the facility's nursing and acute care operations, the substantial nature of both these operations, and the fact that the facility was "centrally managed" and that "the first floor administration unit serviced both the acute care and long term care units." J.D. at p. 19 fn 14. And, he pointed out that, in similarly "extraordinary circumstances", the Board in Child's Hospital had ruled inapplicable to an institution, either the acute care hospital standards or the bargaining unit delineations set forth in the Board's health care industry Rule.

In its Brief, the respondent also takes issue with the Judge's conclusion that the health care industry Rule is not applicable here, even if Respondent does qualify under the Rule as an acute care hospital. That is, it takes issue with the Judge's conclusion that the Rule is inapplicable here, because, as the Board stated in Crittendon Hospital, 328 NLRB 879, 880 (1999):

By its own terms, the Rule applies only to initial organizing attempts, or, where there are existing units, to a petition for a new unit of previously unrepresented employees, which would be an addition to the existing units...

See, J.D. at p. 21.

Thus, Respondent would have it that the instant case really does not involve an existing non-conforming unit. For, according to Respondent, for purposes of the health

care industry Rule, the historical unit ceased to exist and a new unit was created, when that historical unit was amended to exclude guards and pharmacists.

But of course, Respondent may not have it so. As the Judge pointed out in his Decision, in Pathology Institute, 320 NLRB 1050 (1996), enfd. 116 F.3d 482 (9th Cir. 1997), cert. denied, 522 U.S. 1028 (1997), the Board stated:

Moreover, nothing in Section 103.30 suggests that an employer in the health care industry may cease recognizing a union as the representative of its employees in an existing unit merely because of a reduction in the number of unit employees or because of a closure of the nonacute care portion of an employer's facilities. On the contrary, permitting an employer to withdraw recognition under such circumstances would be inconsistent "with the design and purpose of our decision to engage in rulemaking – to further the long-standing policy of promoting industrial and labor stability." (fn 3).

Id. at 1057. And, as the Judge also pointed out, the Board has never acceded to the argument that a successor may cease to recognize a union, simply because it has taken over "only a discrete portion of its predecessor's heterogeneous bargaining unit. Van Lear Equipment, 336 NLRB 1059, 1063 (2001). J.D. at p. 12.

Finally, Respondent noted that the February 1, 2007 Unit includes some stipulated technical employees. It notes, as well, that the Board, on many occasions, has deemed respiratory therapists to be technical employees. And, Respondent contends that the Judge could not properly conclude that the February 1, 2007 Unit was an appropriate unit, because that unit does not include Respondent's respiratory therapists.

In his Decision, the Judge certainly did cite cases in which the Board had found respiratory therapists to be properly classified as professional, rather than technical employees. J.D. at pp. 21-22; p. 26. And, he did call attention to the fact that, in cases

like St. Anthony Hospital Systems, Inc. 884 F.2d 518, 523 (10th Cir. 1989), it has been held that the status of respiratory therapists as technical or professional employees “may shift based on their actual job functions and requirements at a particular employer.

The Judge, however, neither concluded that Respondent’s respiratory therapists were professional nor that they were technical employees. What he did conclude was that Respondent’s respiratory therapists:

...have a separate and distinct community of interest from the bargaining unit employees. The RTS are separately supervised from the unit employees, and they are higher paid. They have unique training and skills from the remainder of the bargaining unit. Their accreditation labels them as professional employees. They are required to receive training in ethics, and to take continuing education courses specific to their specialty in order to retain their licenses. They operate sophisticated equipment and are required to make patient assessments based on their testing, and to make recommendations to doctors concerning patient care. There is no history of interchange between the RTS and the bargaining unit positions. While they have daily contact with some of the bargaining unit employees, they also have frequent contact with RNs and doctors, but there is no contention that the latter should be in the unit. I find the nature of the contact of the RTS with unit classifications is not sufficient to override both the historical nature of the unit, as well as the unique status and separate community of interest of the highly skilled and specialized RTS whether they are labeled technical or professional employees. See, *Hartford Hospital*, 318 NLRB 183 (1995), *enfd.* 101 F.3d 108 (2nd Cir. 1996); *New Orleans Public Services*, 215 NLRB 834, 836 (1974);¹⁹ and *Ochsner Clinic*, 192 NLRB 1059 (1971) (radiological techs were found to constitute a separate bargaining history). While respondent has cited several cases where RTS were found to be technical employees, there have been other instances where the Board has approved bargaining units labeling them as professional employees, or at a minimum excluding them from units of technical employees. See, *Alta Vista Regional Hospital*, 352 NLRB No. 100, (2008); *Kentucky River Medical Center*, 333 NLRB No. 29, (2001); *Lakeside Community Hospital, Inc.*

307 NLRB No. 189 (1992); and *Presbyterian/St. Luke's Medical Center*, 289 NLRB 249,250 (1988).

J.D. at p. 26. On the basis of these considerations he decided that “the unit requested on February 1, 2007, is an appropriate unit, although it excluded respiratory therapists.” *Id.*

And, in its Brief, Respondent does not dispute the accuracy of the Judge’s findings of fact in this regard. Nor does it take issue with the precedential value of any of the cases upon which he relied.

II. The Judge Correctly Found That Respondent Was A Successor Obligated To Recognize and Bargain With The Union.

In its Brief, Respondent takes the position that it has no bargaining obligation as a successor, even if the Judge correctly decided that the February 1, 2007 Unit is an appropriate unit. And, in support of this position, Respondent presents a series of contentions.

As an initial matter, Respondent points out that the Doctors Unit could not have been certified by the Board as an appropriate unit. And, Respondent argues that it, therefore, is not obligated to bargain with the Union that represented the Doctors Unit.

In his Decision, however, the Judge notes that two administrative law judges have addressed the issue:

...of whether a union can retain representational status when it agrees to amend an agreed upon bargaining unit of a predecessor employer, to exclude statutorily excluded positions, to perfect the unit for its bargaining demand to the successor employer.

J.D. at p. 12. And, while the Judge acknowledged that the opinions of these judges were not binding, he indicated that he did find them to be “instructive here.” *Id.*

Thus, the Judge pointed out that in Northern Montana Health Care, supra, the judge found that LPNs, who were supervisors, had been included in a predecessor employer's bargaining unit. The Judge also pointed out that the judge in that case found a successorship bargaining obligation, even though he excluded the LPNs from the unit with which he required the successor to bargain. And, the Judge quoted that portion of the judge's opinion in which that judge stated:

I have found no cases which match the precise factual situation presented here, i.e., discussing successorship unit continuity where the new unit differs from the old unit because only a portion of the operations was acquired but rather because the old unit was inappropriate. (fn 15). I am able to perceive no significant difference between a situation where the new bargaining unit arises as a result of a partial assumption of the predecessor's operation or because the appropriate unit simply excluded some of the employees previously included in the predecessor unit. The test of the unit continuity turns on the roots or origins of the predecessors' appropriate unit employee compliment. In both situations discussed in the cases cited, *supra* respecting partial acquisitions and the situation here where licensed practical nurses are excluded from a unit, the new units are both appropriate under Section 9 of the Act and have a direct relationship to a portion of the predecessor unit.

Id. at 767.

In his Decision, the Judge also called attention to the judge's decision in Concord Associates, 1999 WL 3345473. In that case, the Judge noted, a union had been Board certified as representative of a unit that was appropriate for purposes of collective bargaining. But, over time the union and the predecessor employer had agreed to expand the unit to include some guards and supervisors. When the union demanded recognition of the successor employer, that the employer refused to grant it, because the predecessor's unit included guards and supervisors. The union, as did the Union in this

case then, made a second demand for recognition, this time for the predecessor's unit minus guards and supervisors. And, as the Judge noted, the judge in Concord Associates found warranted the issuance a bargaining order for the successor, despite the diminution of the unit resulting from the exclusions.

And, the Judge stated that, like the judges in Northern Montana Health Care and Concord Associates, he, too could find no "significant difference between the situation here, where a union voluntarily drops some positions from a predecessor's unit based on statutory exclusions, and the cases cited above, where an employer only acquired a portion of a predecessor's operation and thereby diminishes the size of the unit." J.D. at p. 13. In his view, the very same considerations that applied in one set of circumstances appeared to be just as applicable in the other.

Moreover, the Judge noted, in the past, the Board had not eliminated historical bargaining units "merely because they include statutorily excluded employees." In those cases, like this case, he further noted, where a union acquiesced in the removal from the unit of statutorily excluded employees, the Board refused to dismantle the bargaining unit involved. And, in this connection, he cited cases like Libby-Owens-Ford Glass Company, 169 NLRB 126 (1968) and Briggs Manufacturing Company, 101 NLRB 74 (1952).

In its Brief, Respondent certainly does draw certain distinctions between the instant case and the cases that the Judge has found instructive. But, Respondent has failed to explain why these distinctions are at all meaningful.

Thus, Respondent points out that the unit at issue in Concord Associates was not inappropriate for Board certification ab initio, as was the unit in this case. But, it neglects

to state why the Judge ought to have found at all significant the fact that statutorily excluded employees were added to the unit over time in Concord Associates, rather than added at the moment of initial recognition as in the instant case.

Similarly, it is quite true that, in Northern Montana Health Care, the primary difference between the predecessor's and the successor's units was the inclusion of statutory supervisors and not guards or professional employees as it is in this case. But, respondent fails to explain why the Judge should have considered this to be a distinction of legal significance.

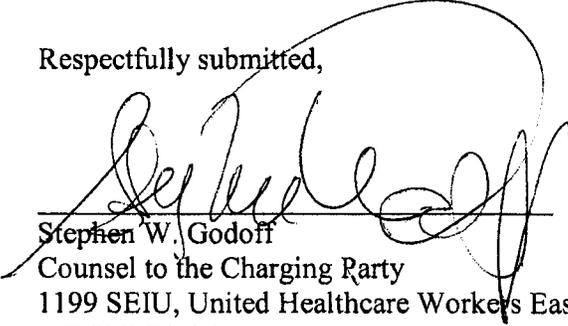
And, it is, of course, also true that, in Libby-Owens-Ford Glass Company, the Board was considering a unit clarification petition; and in Briggs Manufacturing Company a decertification petition. But, Respondent suggests no reason why these cases are, therefore, any the less revealing of the Board's unwillingness to dismantle historical bargaining units merely because they include statutorily excluded employees.

Most importantly, Respondent is undoubtedly right, when it points out that, in this case, the dissimilarity, between the predecessor unit and the unit in which the Union's demands recognition, is the result of the Union voluntarily dropping from the predecessor's unit guards and supervisors. But, Respondent has propounded no reason whatsoever as to why the outcome of this case should, therefore, be any different than it would have been, if the dissimilarity in the two units resulted from a partial assumption by Respondent of its predecessor's operation.

III. CONCLUSION

Based upon the considerations set forth above, the Board should dismiss Respondent's Exceptions to the Administrative Law Judge's Decision in this case.

Respectfully submitted,



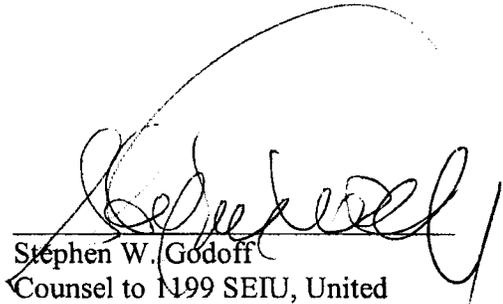
Stephen W. Godoff
Counsel to the Charging Party
1199 SEIU, United Healthcare Workers East,
MD/DC Division

CERTIFICATE OF SERVICE

This is to certify that a true copy of Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was served via email and First Class Mail this 8th day of January 2010.

Thomas J. Murphy
Counsel for General Counsel
National Labor Relations Board
Region 5
The Appraisers' Stores Building
103 S. Gay Street, 8th Floor
Baltimore, Maryland 21202
Email: Thomas.Murphy@NLRB.gov

Charles Walters, Esquire
Seyfarth Shaw
975 F Street, N.W.
Washington, D.C. 20004
Email: CWalters@Seyfarth.com



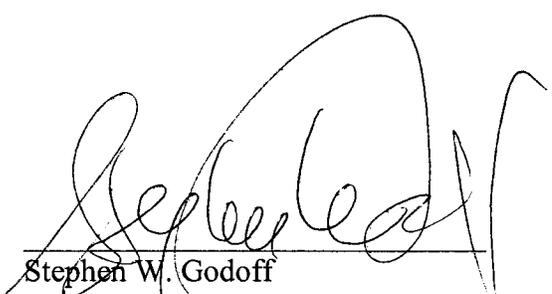
Stephen W. Godoff
Counsel to N199 SEIU, United
Healthcare Workers East,
MD/DC Division

CERTIFICATE OF SERVICE

This is to certify that a true copy of Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Charging Party's Motion to File Untimely its Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision were served via email and First Class Mail this 22nd day of January 2010.

Thomas J. Murphy
Counsel for General Counsel
National Labor Relations Board
Region 5
The Appraisers' Stores Building
103 S. Gay Street, 8th Floor
Baltimore, Maryland 21202
Email: Thomas.Murphy@NLRB.gov

Charles Walters, Esquire
Seyfarth Shaw
975 F Street, N.W.
Washington, D.C. 20004
Email: CWalters@Seyfarth.com



Stephen W. Godoff
Counsel to 1199 SEIU, United
Healthcare Workers East,
MD/DC Division