

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

SPECIALTY HOSPITAL OF WASHINGTON  
– HADLEY, LLC,

Respondent

and

Case 5-CA-33522

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

Charging Party/Union

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

Respondent, Specialty Hospital of Washington – Hadley, LLC (“SHW - Hadley”), by and through its undersigned attorneys, hereby submits its Reply Brief in Support of its Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter. As shown below, the General Counsel’s Answering Brief<sup>1</sup> does nothing to negate the fact that 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 Amended Complaint dismissed.

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<sup>1</sup> Pursuant to the Associate Executive Secretary’s January 12, 2010 letter, the Union’s Answering Brief was not properly filed and thus not transmitted to the Board. In the event the Union’s brief is subsequently transmitted to the Board, SHW – Hadley reserves the right to file a reply to that brief.

## ARGUMENT

### **I. THE 2/1/07 UNIT IS NOT AN APPROPRIATE BARGAINING UNIT UNDER ANY STANDARD**

The General Counsel's Answering Brief fails to rebut SHW – Hadley's arguments on the threshold issue of whether the 2/1/07 Unit is an appropriate bargaining unit. Most obviously, the General Counsel devotes only one cursory paragraph to its contention that the Board's Healthcare Rule should not govern this case. However, for the reasons discussed in SHW – Hadley's Brief in Support of its Exceptions ("Exceptions Brief"), the Healthcare Rule most certainly governs this case and renders the 2/107 Unit inappropriate; thus requiring dismissal of the Amended Complaint pursuant to the Board's Summary Judgment Order. *See* SHW – Hadley Exceptions Brief at 11-13.

Likewise, the General Counsel's one paragraph argument regarding why *Park Manor Care Center, Inc.*, 305 N.L.R.B. 872 (1991) – the established analytical framework for appropriate bargaining unit determinations in non-acute care hospitals – would not govern the instant case in the absence of the Healthcare Rule also is wholly unconvincing. Regardless of whether *Park Manor* involves "different facts" than those at hand, it is the applicable legal framework if SHW – Hadley is not an acute care hospital (which presumably is the General Counsel's position). And, as explained in the Exceptions Brief (pp. 25-31), the 2/1/07 Unit is inappropriate under *Park Manor*. On the other hand, if the General Counsel is conceding that SHW – Hadley *is* an acute care hospital, then the Healthcare Rule should apply for the reasons stated in SHW – Hadley's Exceptions Brief (pp. 17-25), and the 2/1/07 Unit is inappropriate. Either way, the 2/1/07 Unit is inappropriate, thereby dooming the General Counsel's case.

The General Counsel devotes the remainder of its appropriate bargaining unit argument to discussing factually inapposite cases involving "historical units" that have been unilaterally

altered by the successor employer (and often to the surprise of the involved union), in the apparent hope of requiring SHW – Hadley to prove the inappropriateness of the 2/1/07 Unit. It is undisputed, however, that the Union – not SHW – Hadley – “unilaterally created” the 2/1/07 Unit long after SHW- Hadley became the employer. And the Union did so months after SHW – Hadley lawfully refused to recognize the Union in the patently uncertifiable Doctors Unit; an important fact the General Counsel continues to ignore. These critical factual differences make all the difference in this case, and readily distinguish the cases relied on by the General Counsel from the case at hand (which, no doubt, is why the Board’s Summary Judgment Order deemed this case one of “first impression”).<sup>2</sup>

In fact, the very case law cited by the General Counsel underscores why there is no “historical unit” here that SHW – Hadley must prove is inappropriate due to “compelling circumstances.” As the Board emphasized in *Trident Seafoods, Inc.*, 318 N.L.R.B. 738, 738 (1995) (citing *Fall River Dying v. NLRB*, 482 U.S. 27 (1987)), there is no successor bargaining obligation unless the involved employees view their new employment situation as essentially unaltered from their prior employer.<sup>3</sup> Here, unlike in the cases cited by the General Counsel, the fact that the Union, and not SHW- Hadley, “unilaterally created” a new bargaining unit lacking the important guard and pharmacist classifications evidences a marked change in the employees’

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<sup>2</sup> The Union’s actions in unilaterally changing the Doctors Unit after SHW – Hadley became the employer also defeats the General Counsel’s summary contention that the 2/1/07 Unit is an existing non-conforming unit under the Healthcare Rule. There is nothing in the Healthcare Rule or caselaw interpreting it that allows a union to change the prior employer’s bargaining unit to suit its own institutional needs and thereby defeat application of the Healthcare Rule.

<sup>3</sup> *Trident* and the other similar cases relied on by the General Counsel also demonstrate the fundamental fiction in treating the “unilaterally created” 2/1/07 Unit as a “historical unit,” given the General Counsel’s own acknowledgement that a historical unit must be “established by collective bargaining . . . .” Answering Brief at 13. The 2/1/07 Unit was created solely by the Union to serve its institutional interests, with no collective bargaining whatsoever.

actual and perceived employment situation. There simply is no comparison between employees' bargaining representative unilaterally diminishing the size, scope and power of the employees' bargaining unit (our case), and the situation wherein a new employer acquires only a portion of the predecessor's workforce or makes operational changes that alter the prior bargaining unit (the General Counsel's cases). This, no doubt, is why the General Counsel falsely states that the 2/1/07 Unit was created "at the insistence of [SHW – Hadley]" despite the overwhelming evidence to the contrary. Were the Union's actions truly supported by applicable law, the General Counsel would not be straining to justify them.

Therefore, the instant facts and the case law relied on by SHW – Hadley in its Exceptions Brief clearly show that the General Counsel has failed to meet its burden of proving the appropriateness of the 2/1/07 Unit, thereby requiring dismissal of the Amended Complaint.

## **II. THERE IS NO SUCCESSOR BARGAINING OBLIGATION**

The General Counsel's successor argument ignores the basic requirement in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), that the predecessor's bargaining unit be an appropriate one, and it ignores the fact that the predecessor's bargaining unit in *Fall River Dyeing* had been certified by the Board (which, of course, the Doctors Unit could not have been). These omissions are telling, to say the least. Also telling is the lack of any case law involving the sort of minimal collective bargaining relationship that existed between the Union and the prior employer (Doctors). There simply is no factual or legal basis for deeming two bargaining sessions yielding agreement on only three routine non-economic terms over the course of 11 months, the sort of established collective bargaining relationship in need of stabilizing under the Board's successorship doctrine. And, as discussed above (p. 3), the 2/1/07 Unit employees had no reasonable expectation of continued union representation given the Union's failure to demand recognition in the manufactured 2/1/07 Unit until many months after the change in ownership

and many months after SHW –Hadley lawfully refused to recognize the Doctors Unit, along with the Union’s unilateral weakening of the Doctors Unit. Consequently, the Board’s successorship doctrine does not warrant imposition of a bargaining obligation on SHW – Hadley.<sup>4</sup>

**III. THERE CAN BE NO PRESUMPTION OF MAJORITY SUPPORT IN THE UNILATERALLY CREATED 2/1/07 UNIT; ONLY A QUESTION CONCERNING REPRESENTATION THAT WAS IGNORED BY THE JUDGE**

The General Counsel has failed to rebut SHW- Hadley’s arguments that there can be no presumption of majority support in this matter. It has not meaningfully distinguished the court of appeals decisions relied on by SHW – Hadley to show the unacceptable modification of the Doctors Unit resulting from the Judge’s Decision. Nor can the General Counsel credibly accuse SHW – Hadley of asking the Board to “discard” its vote-under-challenge election procedure, given that it is the Union’s conduct in this matter that is anathema to the Board’s election procedures and principles. The General Counsel also cannot avoid the holdings in *Mental Health Center of Boulder*, 222 N.L.R.B. 901 (1976), *Sunrise, A Community for the Retarded*, 282 N.L.R.B. 252 (1986), *Russelton Medical Group, Inc.*, 302 N.L.R.B. 718 (1991) and *Field Bridge Associates*, 306 N.L.R.B. 322 (1992), by disingenuously trying to place responsibility for the post-recognition change in the bargaining unit on SHW – Hadley. As is clear from the undisputed facts in this case, it was the Union’s initial 2005 decision to seek recognition in the gerrymandered Doctors Unit that caused it to unilaterally modify this unit in 2007 in the hope of creating an appropriate unit. This determinative factual difference cannot be explained away by the General Counsel.

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<sup>4</sup> The General Counsel’s reliance on the cases cited at pp. 15-18 of its Answering Brief is misplaced for many of the same reasons discussed at pp. 32-37 of Exceptions Brief.

Finally, the General Counsel is unable to supply the necessary explanation for why an affirmative bargaining order (rather than an election) is appropriate in this instance notwithstanding the Order's attendant destruction of the 2/1/07 Unit employees' Section 7 rights. As the General Counsel is forced to acknowledge, the D.C. Circuit requires "detailed findings" (including balancing employees' Section 7 rights) to support an order, like the one issued here, to bargain with an incumbent union.<sup>5</sup> See Answering Brief at 22. The Judge made no such findings. Of course, there are no findings that could conceivably support denying the 2/1/07 Unit (barely half of whom ever worked for Doctors) the right to decide whether they want to be represented by the Union in a brand new, significantly diminished bargaining unit; having never had the chance to vote on the original Doctors Unit.

Further, the D.C. Circuit's dictates should not be ignored simply because there are no known employee petitions evidencing dissatisfaction with the Union, like there were in *Sullivan Indus. v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992). Evidence of employee dissatisfaction was but one factor in that case. Regardless, a lack of employee dissatisfaction could only change the degree of the harm to employees' Section 7 rights inherent in the Judge's Order, not the fact that this harm is unacceptable. Likewise, *Cogburn Health Center, Inc. v. NLRB*, 437 F3d 1266 (D.C. Cir. 2006) does not help the General Counsel's arguments given that it was a *Gissel* bargaining order case that, the General Counsel contends, is not applicable to the instant case. In any event, *Cogburn Health Center* does not establish any sort of threshold for employee turnover when it

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<sup>5</sup> The General Counsel acknowledges this requirement despite mistakenly asserting that the cases relied on by SHW – Hadley are inapplicable to the instant case because they involve either *Gissel* bargaining orders or initial recognition situations. Not only did both *Sullivan Indus. v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992) and *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980) involve orders addressing withdrawing recognition from incumbent unions, rather than *Gissel* bargaining orders, but the case at hand absolutely is an "initial recognition" situation given the undisputed lack of any bargaining obligation regarding the Doctors Unit.

comes to determining the propriety of an affirmative bargaining order. In fact, the degree of employee turnover was at most one fact that led the D.C. Circuit to reject the Board's unreasoned *Gissel* bargaining order in that case.

In sum, the undisputed facts and applicable law lead overwhelmingly to the conclusion that SHW – Hadley was not required to bargain with the Union in the “unilaterally created” 2/1/07 Unit, even if this bargaining unit somehow is found to be an appropriate one.

**CONCLUSION**

For the reasons stated herein, and in SHW – Hadley's Exceptions Brief, the Amended Complaint should be dismissed.

Respectfully submitted,

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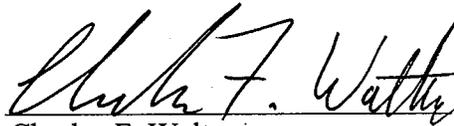
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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of Respondent's Reply Brief in Support of its Exceptions to the Decision of the Administrative Law Judge was served via email and Federal Express overnight delivery this 22<sup>nd</sup> day of January, 2010 upon:

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