

LABOR RELATION CONNECTION

In the Matter of the Arbitration

LRC # 228-23
Brockton Campus Nurses
Recognition

Between

1199 SEIU/UNITED HEALTHCARE
WORKERS EAST

And

BOSTON MEDICAL CENTER

AWARD

The Employer did violate the Parties' Collective Bargaining Agreement when it refused to apply Appendix B to the Brockton Behavioral Health Center.

Upon verification from the Union that it had achieved a majority showing through employee card authorizations from Nurses at Brockton Behavioral Health Center in or around late 2022 or early 2023, the Employer must recognize the union as the exclusive bargaining representative of the Nurses at BBHC and shall retroactively apply all the appropriate terms of the Collective bargaining Agreement to them.

The Arbitrator retains jurisdiction over this matter for ninety (90) days from the date of this Award for the sole purpose of resolving any disputes between the parties regarding the remedy ordered herein.

A rectangular box containing a handwritten signature in black ink. The signature appears to read "Sarah Kerr Garryaty" in a cursive script.

Sarah Kerr Garryaty, Arbitrator

February 26, 2024

Labor Relations Connection

In the Matter of the Arbitration

LRC # 228-23
Brockton Campus Nurses-
Recognition

Between

1199 SEIU/UNITED HEALTHCARE
WORKERS EAST

And

BOSTON MEDICAL CENTER

AWARD

Before: Sarah Kerr Garraty, Esq.
Arbitrator

Appearances: For the Union
James Hykel, Esq.

For the Employer
Matthew D. Freeman, Esq.
Katherine S. Lam, Esq

Hearing Date: November 20, 2023

Briefs Received: January 26, 2024

THE ISSUES

The parties stipulated to the following statement of the issues:

Did the Employer violate the Parties' Collective Bargaining Agreement when it refused to apply Appendix B to the Brockton Behavioral Center.

If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

Article 1 – Employee Representative Recognition

BMC recognizes the 1199SEIU United Healthcare Workers East (1199SEIU), as the exclusive representative for the purposes of collective bargaining with respect to the rates of pay, wages, hours of employment and other conditions of employment for all regular full-time and regular part-time Registered Nurses and all regular full-time and regular part-time advanced practice nurses, per diem nurses and new graduate trainee nurses employed by BMC at its 818 Harrison Avenue, Boston Massachusetts, location, but excluding all licenses practical nurses, physicians, technical employees, skilled maintenance employees, business office clerical employees, non-professional employees, students, temporary employees, casual employees, other professional employees, confidential employees, managerial employees, guards and supervisors, as defined in the National Labor Relations Act, and all other employees.

Appendix B – Side Letter Agreement – Accretion to the Bargaining Unit

Where the Union can demonstrate that employees of a new unit or site constitute a proper accretion to the existing bargaining unit, or where the Union can demonstrate a majority showing in such new unit or site, BMC shall recognize the Union as the exclusive bargaining representative of such employees and shall apply all the appropriate terms of the Collective bargaining Agreement to them.

BACKGROUND

United Healthcare Workers East, 1199 SEIU (Union) has represented the bargaining unit described above since 1996. The Nurses in this bargaining unit have traditionally all worked in various sites and medical units at the Boston Medical Center Campus in the South End of Boston. Originally this campus was made up of two distinct Hospitals: Boston City Hospital and Boston University Medical Center. Traditionally, nurses working within Boston City Hospital have been represented by the United Healthcare Workers East 1199SEIU whereas nurses working within Boston University Medical Center have been represented by the Massachusetts Nurses Association (MNA).

In 1996, when the two hospitals merged to become Boston Medical Center, the lines between these two Unions were defined geographically, based on whether Nurses worked in an historically 1199SEIU represented building or an historically MNA represented building. These two sets of buildings were referred to as the Harrison Avenue Campus (1199) and the East Newton Campus (MNA), respectively. ¹

This arrangement has been dynamic, because over the years, the overall BMC campus has undergone several major expansions, including both unit relocations and major construction of new buildings. At present, 1199SEIU bargaining unit members are mostly assigned to the Yawkey, Menino, Shapiro, and Crosstown buildings whereas MNA represents nurses assigned primarily to the Moakley and Preston buildings. Ironically, 818 Harrison Avenue is no longer occupied by BMC medical units. That address represents the vestigial address of Boston City Hospital before the merger and continues to be referenced in Article 1 of the CBA. It is uncontested that BMC has not previously opened medical units or sites outside of South End Campus.

This grievance arose when BMC opened a new facility known as the Brockton Behavioral Health Center (BBHC) in Brockton, Massachusetts. [REDACTED] is the Director of BBHC. She described it as 64,000 square foot building that employs about 55 RNs. It is designed to provide long-term residency for behavioral health patients on the South Shore of Massachusetts. ² The Center provides treatment to patients who are a danger to themselves or others. It utilizes what is referred to as a congregate setting; patients interact with each other and staff in shared bedrooms, group rooms and dining rooms, and an open

¹ Citing to 2006 NLRB Clarification of Bargaining Unit – 1-UC-839, 2006 BL 1890022.

² Long term means no less than 72 hours, with an average stay of 13 days.

nursing station. The goal is to teach these patients to develop strategies that will allow them to safely leave BBHC. There is some interaction between BMC's South End campus and BBHC, in that there is shared access to the EPIC medical records system and about half of the patients at BBHC are referred by the Emergency Department at BMC. Although BMC has posted openings at BBHC both externally and internally, a very few nurses have transferred there. Due to the unique milieu at BBHC, nurses there must undergo 30-day program-specific program specific training. As a result, South End BMC nurses do not pick up shifts at BBHC.

Patients are referred to BBHC from various sources including the Emergency Rooms at various Hospitals. There is no Emergency Room at BBHC; all patients arrive by referral.

SEIU Co-Chapter Chair [REDACTED] works in the South End BMC's Psychiatric Emergency Department (Psych ED). She testified that patients there generally stay for a short duration, measured in hours rather than days, before they are referred to other facilities with available outpatient beds.³ During these relatively short stays, patients occupy single rooms and do not interact with each other. There are no group therapy sessions; the goal is to keep these patients safe.

The BMC Psych ED is characterized by short stays because BMC is a "safety net" Hospital; many patients are admitted involuntarily based on their mental health challenges that render them a risk to themselves or others. As a result, longer stays for behavioral health patients outside of the psych ED are not common.

When the BBHC was opened, the Union consulted the CBA, and based on the language of Appendix B, it set out to attain majority support among the nurses in the new facility. In

³ One patient stayed for as long as 107 hours, when no bed could be located more quickly.

late 2022 Union Vice President Dana Atlas informed BMC's Director of Labor Relations [REDACTED] that the Union had amassed majority support among the RNs at BBHS. Despite the tender of majority support in the unit, [REDACTED] responded to Atlas that BMC would not recognize the Union. Rather, the BMC asserted that Appendix B only applies to accretions within the main campus. Thus, in its Step 3 Grievance Decision, the BMC stated that the BMC RN CBA

... is exclusive to 818 Harrison Avenue, as stated in the Recognition Clause of the CBA. The rights and privileges of the CBA do not extend to any location that the hospital retains the right to open. In 2022, BMC opened a behavioral Healthcare facility in Brockton MA. The work that happened in Brockton is different from any work that exists at BMC presently; BMC does not have an inpatient psychiatric Unit.

The Union feels the intent of the language in Appendix B is to include the unknown and there is no mention of 818 Harrison Ave in it. After hearing all the parties, I have determined that the Union has not substantiated a contractual violation; therefore, the grievance is respectfully denied.

The Union submitted a third step grievance on March 8, 2023 and the BMC denied that grievance on April 10, 2023. The Union advanced the matter to this arbitration

POSITIONS OF THE PARTIES

The Union

The Union maintains that it has “demonstrated a majority showing in (a) new unit or site” and that, upon verification of that showing, is entitled to recognition as the exclusive bargaining representative of the Nurses at the BBHC. It is undisputed that BBHC is a Boston Medical Center facility, despite its status as the first site located outside of its Main Campus in the South End of Boston.

The Union insists that Appendix B is clear and unambiguous. It refers to “a new unit **or site** (that can) constitute a proper accretion to the existing bargaining unit **or where the**

Union can demonstrate a majority showing in such unit or site.” In either of those situations, Appendix B mandates that the BMC “**shall recognize** the Union as the exclusive bargaining representative of such employees...”

Although the Union admittedly referred to both accretion and majority showing in the initial steps of the grievance procedure, in the context of this arbitration, it has dropped the allegation that BBHC is a “proper accretion.” It now relies solely on its representation that it informed the employer that it could demonstrate a majority showing and that the employer is refusing to permit the Union to do so, because it contends that the standards governing a proper accretion have not been met.

The Union points out that the word “or” unambiguously means either accretion **or** recognition based on a majority showing. If the “majority showing” is not acknowledged as a separate route to recognition, its inclusion in Appendix B would be meaningless. The accretion standards are entirely different from the standards for majority showing (most typically in the form of a card check that demonstrates that majority status). Whereas accretion “forecloses the employees’ right to select their bargaining representative, majority support is focused on honoring that right.”

The Union points out that when it conceded that the BBHC was not a candidate for accretion, the Employer persisted in highlighting accretion standards. Thus, at the hearing the Employer focused on evidence of distance between the South Boston Campus and Brockton; lack of common supervision; and dissimilar conditions of employment. None of these issues touch on whether the RN’s at BBHC want to be represented by the Union.

The Union argues that the Employer’s interpretation of the term “majority showing” is also skewed. Because it had no reason to doubt that the Union had acquired the most

common form of “majority showing,” which is union membership cards, the Employer focused on the “spin off” doctrine, an alternative road to recognition. Rejecting the most common road to recognition, the BMC insists that “majority status” only refers to a “spinoff,” in which a majority of employees from a unionized location moves to a new location. When this occurs the “spinoff” employees are assumed to continue to support representation by the Union that had represented it before the relocation. There is no mention of spinoff in Appendix B.

For this reason, the Union argues that the test articulated in *Gitano Distribution Center*⁴ is not dispositive. Had the parties intended that outcome, they could have used the terms “proper spinoff or relocation.” Instead, they used the term, “majority showing.” As noted above, that term is most frequently associated with a majority showing obtained through authorization cards.

The Employer

The Employer points out that BBHC is separate operation in a standalone facility located 20 miles from the South End of Boston. Only two of its RNs have ever worked at BMC’s South End campus. There is no overlap in supervision. The nursing milieu at BBHS is completely different from the one at BMC; patients there receive long-term mental health care in a congregate setting unlike that delivered in Boston. Thus, accretion into the 1199 SEIU United Healthcare East bargaining unit would conflict with the fundamental principles of the National Labor Relations Act.

The Employer suggests that after initially seeking recognition through accretion, the Union has realized that this is not a proper accretion. At the eleventh hour, it now asks the

⁴ 308 NLRB 1172 (1992).

the Arbitrator to re-write the “Accretion Side Letter,” to transform it into a “card-check agreement.” The Employer insists that such an interpretation is inconsistent with the plain language of the of Appendix B, the “Accretion Side Letter.” The Union position ignores the provision’s title and is inconsistent with the Recognition Clause of the CBA.

The Employer asks the Arbitrator to reject the Union’s proposed interpretation in favor of the Hospital’s. The Accretion Appendix must be read as applying only to new units and sites on the South End Campus. Historically, it has been applied to two situations: 1) a proper accretion by virtue of a set of overlapping features that amount to a community of interest, and 2) a “majority showing” based on a showing that a majority of the nurses working in the new unit or site are transferees from an MNA or SEIU unit.

The Employer suggests that even if the Union has the majority of signatures among the nurses employed at the BBHC, the proper road to recognition is through the NLRB’s processes – not through a contortion of the Accretion Side Letter. In this regard, the Employer offers an alternative reading of the “majority showing” language, and one that it insists reflects the structural history of bargaining between these parties.

The Union’s “nonsensical interpretation” would allow it to claim representation of any Boston Medical Center facility, anywhere in the world, just by obtaining a majority of authorization signatures. In contrast, the Employer’s interpretation adheres to the plain language of Appendix B, is contextually logical, and is within the Arbitrator’s authority.

Unlike the Union’s interpretation, the Employer’s position is consistent with the language of the Recognition Clause of the CBA. That Clause is geographically defined as 818 Harrison Avenue an address associated with Boston City Hospital prior to the merger, just as the Recognition Clause of the MNA CBA is described 88 East Newton Street, an address

previously associated with Boston University Medical Center. Since the merger, there have been many new units and new sites, but all have been located on the BMC Campus in Boston.

The BMC points out that the parties could have negotiated a broad “after acquired” clause that read, for example, “all present and future locations, buildings, or facilities, under the principal direction of the employer,” But instead, it used first the word “unit,” conveying a medical unit in the existing hospital and then “site,” in recognition of the fact that the merger would predictably bring about shifting and new locations. Likewise, the NLRB habitually uses the term “majority showing” in the context of determining whether a majority of employees “spun off” from one unit to another, triggering a presumption that these employees would favor the bargaining representative it had previously approved. In contrast, card check recognition cases tend use the term “majority status.”

For all these reasons, the Employer asks the Arbitrator to deny the grievance. If the Union seeks to represent the RNs at BBHS, it should petition the NLRB for recognition of a new and separate bargaining unit.

DISCUSSION

This case turns on the interpretation of a very few words contained in Appendix B of the CBA.

Where the Union can demonstrate that employees of a new unit or site constitute a proper accretion to the existing bargaining unit, or where the Union can demonstrate a majority showing in such new unit or site, BMC shall recognize the Union as the exclusive bargaining representative of such employees and shall apply all the appropriate terms of the Collective bargaining Agreement to them. (Emphasis added.)

The parties have vastly different views of this seemingly simple language. The Union claims that its simplicity renders the provision clear and unambiguous; if the Employer

creates a new medical unit or opens a new site, the Union can seek to achieve a majority showing in that unit or site, and if it does so, the appropriate terms of the CBA will be applied.

The Employer counters that these words cannot be understood outside their contractual context or the representational history between the parties since the merger. Relying on the Recognition Clause, the Employer argues that it limits the reach of the CBA and the Union's role as exclusive bargaining representative to RNs located on its South End Campus. Thus, BMC asserts, Appendix B has no relevance at all to BBHC.

The Employer has not previously opened a "new site" outside of BMC's main campus. Thus, the reach of Appendix B is untested. Nonetheless, it is the Employer that faces the uphill battle, because Appendix B casts a wide net.⁵ Clearly, it applies to an accretion "or" to a demonstration that the Union can establish a "majority showing in such new unit or site." BBHC is unquestionably a "new site" on which BMC employs about 55 RNs. The Union has asserted, and BMC has not denied, that in late 2022 or early 2023 the Union: 1) informed the employer that it had attained majority support pursuant to Appendix B, it therefore sought recognition as bargaining agent for the BBHC RNs; and 2) it offered to make that showing to the Employer.⁶ The Union was intentionally ambiguous about employee identities at this juncture in order to avoid retaliation against employees who supported the Union.

⁵ Although the title of Appendix B is "Accretion to the Bargaining Unit," it is the entire language of the paragraph, which is much broader than an accretion, which is legally significant.

⁶ The Union has suggested that should it prevail, the Arbitrator should retain jurisdiction, potentially to assess the Union's claimed majority showing if BMC refuses recognition.

The Board addressed an analogous situation in *Snow & Sons*, 134 NLRB 709 (1961) In that case, the Union claimed that it had achieved a majority status. The Company denied that status because two employees had reported that they had been pressured to sign.

The Board found:

... When initially faced with a demand for recognition, the Respondent refused to recognize the Union's claimed majority status (because two employees had reported that they had been induced to sign cards.) Later the same day, however, the Respondent, through one of its partners, agreed to check the signatures ... which check indicated a majority of Respondent's employees had applied for union membership. The Respondent nevertheless continued in its refusal to recognize the Union and bargain with it and insisted on a Board election even though it did not question the accuracy or propriety of the card check, asserting, in that connection, that it never considered the card check binding on it. As of the latter, we see no warrant of invalidating the card check and therefore find that Respondent had no reasonable doubt as to the Union's majority status ...⁷

In asserting that BBHC cannot be considered a new unit or site within the meaning of Appendix B, the Employer relies on a Recognition Clause that described the bargaining unit as it existed in 1996. At that time the parties were necessarily focused on describing the former campuses of the just-merged hospitals that designated 1199SEIU as the exclusive bargaining representative of RNs employed by the former Boston City Hospital Campus and the MNA as the exclusive bargaining representative of the RNs employed by the former Boston University Medical Center Campus. Both Recognition Clauses used single addresses to describe these campuses, although these addresses have become irrelevant as each Campus has grown with new or relocated units and sites. Not surprisingly, the disputes that have since arisen have involved overlapping claimed representation in response to these changes. Thus, the BMC is likely right in arguing that the intent of the parties in negotiating

⁷ *Snow and Sons*, at 710

the Recognition Clause was focused on the South End Campus and particularly on identifying which Union should represent which units and sites.

Yet that that history must still be reconciled with Appendix B, which by its very nature is aimed at addressing future events that could not be anticipated during collective bargaining. In the previously cited 2006 NLRB “Clarification of Bargaining Unit Decision,” the NLRB referred to Appendix B as an “After Acquired” provision; it functions to address potential future accretions “... or where the “Union can demonstrate a majority showing in such new unit or site....” The BMC took an action that was not anticipated till it occurred. It opened a new site located in Brockton rather than the South End. On its face, Appendix B opened the door for the Union to “demonstrate a majority showing” among the BBHC Nurses in the new unit at the new site.

The BMC insists that when the parties referred to a “majority showing,” they did not mean a “majority showing through authorization signatures.” I disagree. The BMC’s insistence that the term “majority showing” cannot include authorization cards but has to refer to “spin-off” situations is not persuasive. When a “spin off “occurs, the Board will “apply a simple fact-based majority test to determine whether there is an obligation to “recognize and bargain with the union as the representative of the union at a new facility....” While suggesting a “majority showing” can only be meant to relate to a “spin off,” the Employer also argues that the specific term “majority showing” implies that it is a reference to spinoff cases and not in reference to card check recognition. *Gitano Group, Inc.* 308 NLRB 1172, 1175 (1992).⁹ I note, however, that the Board in *Gitano* references a “spinoff” as one in which the

⁹ The Union points to two cases in which this exact wording has been used to describe card check recognition. *Comex Constructional Materials Pacific, LLC* 372 NLRB No. 130 (2023); *Windsor Castle Health Care Facilities*, 310 NLRB 579-584 (1993).

“employer transfers a portion of its employees ...” That is not what happened here. Instead, what happened was that the employer created a “new site” as the term is used in Appendix B. Moreover, I find no basis to distinguish between majority status and majority showing. Both terms apply to whether a majority of employees have demonstrated their support for a union. Finally, the Employer has produced no evidence that “spin off” recognition has occurred at BMC with any frequency, or at all.

Both parties have indicated that “majority showing” in Appendix B would have been defined specifically had the other party’s definition been intended. It is true that Appendix B does not mention either card checks or spin offs. The logical reading, though, is not that silence about one represents approval of the other, as each party insists. Rather it appears that the broad description supports a conclusion that *either* method of obtaining majority status could lead to potential recognition under Appendix B.

For all these reasons, I conclude that the Employer violated Appendix B of the CBA when it refused to consider the Union’s claim that it could demonstrate a majority showing among the RNs at Brockton Behavioral Health Center.

The Remedy

The *status quo ante* remedy is to permit the Union to demonstrate its majority showing at the time it claimed to have achieved that status and informed the employer of that claim.¹¹ The Employer may then scrutinize the Union’s showing of majority status and if it was sufficient at the time, it must “recognize the Union as the exclusive representative of such employees and shall “apply all the appropriate terms of the Collective Bargaining

¹¹ The precise date of that refusal is not in evidence.

Agreement to them,” consistent with the mandate established by Appendix B of the Collective bargaining Agreement.

AWARD

The Employer did violate the Parties’ Collective Bargaining Agreement when it refused to apply Appendix B to the Brockton Behavioral Health Center.

Upon verification from the Union that it had achieved a majority showing through employee card authorizations from Nurses at Brockton Behavioral Health Center in or around late 2022 or early 2023, the Employer must recognize the union as the exclusive bargaining representative of the Nurses at BBHC and shall apply all the appropriate terms of the Collective bargaining Agreement to them.

The Arbitrator retains jurisdiction over this matter for ninety (90) days from the date of this Award for the sole purpose of resolving any disputes between the parties regarding the remedy ordered herein.

A rectangular box containing a handwritten signature in black ink. The signature appears to read "Sarah Kerr Garraty" in a cursive script.

Sarah Kerr Garraty, Arbitrator

February 26, 2024