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| **From:** | (b) (6), (b) (7)(C) |
| **To:** | Hamada, Angie C.; Greenhill, Jay B.; Hitterman, Paul; Nelson, Daniel N.; Prokop, Paul |
| **Cc:** | Bock, Richard; Lussier, Richard; Compton, Kayce R.; Dodds, Amy L.; Ghatan, Jeanette; Shorter, LaDonna; Fowlkes, Kimberly |
| **Subject:** | Ascension St. Joseph Hospital - Joliet, Case 13-CA-317434 (case-closing email) |
| **Date:** | Wednesday, October 30, 2024 5:08:48 PM |

The Region submitted this case for advice as to whether the Board's *Federal-Mogul* doctrine applies where a fringe group of employees joined a bargaining unit following an *Armour-Globe* self-determination election, but the Employer subsequently assigned them temporary duties in the main hospital alongside employees covered by an existing collective-bargaining agreement ("CBA"). *Federal-Mogul Corp.*, 209 NLRB 343 (1974). We conclude that *Federal-Mogul* does not control whether the Employer must apply existing contract terms to temporarily transferred employees; instead, such a duty arises if the fringe employees were transferred to unit positions already covered by the collective-bargaining agreement. Since the evidence does not so establish, we find that the Employer did not unlawfully fail or refuse to apply the terms of the CBA to these employees.

The Illinois Nurses Association ("INA") represents registered nurses ("RNs") at Ascension St. Joseph - Joliet's ("Employer") main hospital, covered by a CBA effective July 19, 2020 through July 19, 2023. The unit, as described in the CBA recognition clause, includes "[a]ll full-time and regular part-time registered nurses who hold the position description titles of staff registered nurse, and In House Registry Nurses who worked more than 130 hours in the preceding six (6) months (to be determined following the first payroll in January and July)" and excludes "all other persons including but not limited to physicians, all other professionals, technical associates, maintenance associates, business office associates, clerical associates, other staff associates, members of religious orders, supervisors, managers, and guards as defined in the Act." The unit has a bargaining history dating back to 1991.

In February 2023 (all dates hereafter are in 2023), INA petitioned under *Armour-Globe* to represent seven RNs ("Center nurses") in the Employer's Ambulatory Surgery Center ("the Center"). The Center is in the Employer's Medical Office Building on its hospital campus but separate from the main hospital. INA won the election, but in the time between the filing of its petition and the certification on April 13, (b) (6), (b) Center nurses resigned, which left the Center short-staffed. Consequently, the Employer temporarily halted scheduling surgeries in the Center and assigned the remaining Center nurses temporarily to the main hospital.[1]

On April 25, the Employer and INA commenced bargaining for a successor agreement, with the Employer proposing to include the Center nurses in that agreement. However, the next day, INA demanded that the Employer also apply the terms and conditions of the existing CBA to the Center nurses. The Employer refused to do so, asserting that employees in a fringe group who are added to a historic unit through a self-determination election are not automatically brought under the terms of an agreement that preceded the fringe group's inclusion in the unit, citing *Federal-Mogul*. The Employer offered to bargain for an interim agreement covering the terms and conditions of the Center nurses, but INA declined. In contemporaneous negotiations for the successor agreement to the 2020 CBA, INA proposed to keep Center nurses in a separate service area for the purpose of temporary

assignments.

While the Center remained closed, the Employer assigned Center nurses to work shifts at the main hospital as "functional nurses." [2] This work differs from the work performed by bargaining unit nurses. An RN working as a functional nurse picks up shifts in a manner similar to that of an on-call nurse. Consequently, a functional nurse works outside their normally assigned area. According to the Union, when an RN works as a functional nurse, they perform the work of a nurse's aide or a patient care tech, both non-bargaining unit positions. Although an RN who works as a functional nurse might be able to perform certain functions that an aide could not, such as administering medication, the functional nurse does not work in the capacity of an RN. According to the Employer, it applied the CBA to employees in the historic unit when they worked shifts as functional nurses, but it did not apply the CBA to non-unit employees who worked as functional nurses. The Union has not presented any evidence to the contrary.

The Center remains closed, and Center nurses have either left their employment with the Employer or transferred to bargaining unit positions in other departments at the Employer's main hospital. The Employer and INA have tentatively agreed to the terms for a successor CBA that includes the remaining Center nurses.

We conclude that the Employer did not violate Section 8(a)(5) of the Act when it refused to apply the terms of the 2020 CBA to the newly included Center nurses. Under *Federal-Mogul*, when an unrepresented "fringe group" of employees has voted to join an existing bargaining unit through an *Armour-Globe* self-determination election, the Board applies a dual-phase framework of bargaining obligations. 209 NLRB at 344. During the first phase, the employer must maintain any existing collective-bargaining agreement covering the historic unit and negotiate interim separate terms for the Globed-in employees. *Id*. The Board does not require application of the existing agreement to the Globed-in employees, since that "would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the *H.K. Porter* doctrine." *Id*. (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)). During the second phase of *Federal-Mogul* bargaining, which occurs upon expiration of the historical unit's contract, the parties must bargain over a single agreement for the newly enlarged unit. *Id*. With respect to such "phase two" bargaining, the Board stated that neither party could insist to impasse on a separate contract for the newly added employees because that would "effectively destroy the basic oneness of the unit." *Id*. at 345. Unit clarification procedures already provide an avenue for a union to accrete employees to an existing unit. A self-determination election, by contrast, requires that the sought-after group of employees share a community of interest with the existing unit but also constitute a distinct, identifiable segment of the unit. *Cf. Baltimore Sun Co*., 335 NLRB 163, 169 (2001) (discussing obligation to apply terms of existing CBA to employees accreted to a unit via unit clarification as opposed to employees added via self-determination election). Thus, the law is clear that an employer may not unilaterally apply the terms of an existing contract to a group of employees who are added to the unit through a self-determination, i.e., *Armour-Globe* election, nor may a union insist thereon. *See UMass Memorial Medical Center*, 349 NLRB 369, 370–71 (2007); *Wells Fargo Armored Service Corp*., 300 NLRB 1104, 1104 (1990); *Federal Mogul*, 209 NLRB at 343–44.

As an initial matter, we find that the Center nurses are a distinct, identifiable segment. They worked in a separate office from the RNs in the historic unit and had no functional integration with other nurses. INA tacitly concedes to their distinct group identity, both in stipulating to a self-determination election (as opposed to filing for a unit clarification) and in proposing that the Center nurses be designated a separate service area under the successor CBA for the purpose of temporary shift reassignments.

We further conclude that the Employer did not violate 8(a)(5) by failing to apply the terms of the 2020 CBA to the Center nurses while they were temporarily assigned to perform work as functional nurses. Center nurses were not performing the same work as bargaining unit members when working as functional nurses given that their work was more akin to that of a nurse's aide or a patient care tech. Although nurses in the historical unit also worked as functional nurses from time to time, so did non-unit employees, who were not covered by the CBA's terms during the time of that work. In other words, working as a functional nurse did not automatically confer unit status or application of the CBA. Thus, the fact that employees in the existing unit performed work as functional nurses is insufficient to establish that the Center nurses had transferred to bargaining unit positions recognized under the 2020 CBA. Accordingly, we find that the Employer was not required to apply the terms of the 2020 agreement to the Center employees while working as functional nurses in the main hospital.

This email closes this case in Advice. Please contact us with any questions or concerns.

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[1] The Region has already concluded that this closure was not discriminatory and did not submit that issue for advice.

2 There is no allegation that the Employer refused to bargain over this assignment.

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