NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BETH ISRAEL MEDICAL CENTER
Respondent,

and

Case Nos. 02-CA-039486
02-CA-039574

LOCAL 814, IBT
Charging Party,

and

LOUIS GUGLIOTTA, AN INDIVIDUAL
Charging Party

AFFIDAVIT OF SERVICE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated below I filed the Acting General Counsel's OPPOSITION TO RESPONDENT'S MOTION TO AMEND THE RECORD BEFORE THE BOARD ON THE ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT electronically through the NLRB E-File system and served that document to the following persons at the following addresses by the methods indicated following each individual's name:

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Subscribed and Sworn to this
21st day of February 2012

Designated Agent:

National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BETH ISRAEL MEDICAL CENTER
Respondent,

and

Case Nos. 02-CA-039486
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LOCAL 814, IBT
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OPPOSITION TO RESPONDENT'S MOTION TO AMEND THE RECORD BEFORE THE BOARD ON THE ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

Counsel for the Acting General Counsel submits this opposition to Respondent's request to amend the record before the Board on the Acting General Counsels' Motion for Summary Judgment ("the Motion") in this matter. Respondent's request should be denied because the proposed addition to the record is (1) irrelevant to the pending motion and (2) a disguised sur-reply.

1. Case History

On September 15, 2009, Local 814, International Brotherhood of Teamsters ("the Union") filed its charge in this matter, alleging that Beth Israel Medical Center ("Respondent") had ceased making contributions to certain benefit funds without

first reaching impasse in negotiations. (Motion, Exh. C.1.) In its initial submission in response to the charge, Respondent admitted that, despite having been in contract negotiations with the Union starting in mid-February 2009, (Motion, Exh. E, p.4), in "late April of this year [2009], BIMC [Respondent] ceased contributing to the Pension Fund...At around the same time, BIMC ceased contributing to the Local 814 Welfare Fund," (*id.* at pp.4-5). Respondent defended its actions on legal grounds, while again admitting the unilateral change in the absence of overall bargaining impasse, contending it had "the right under Section 9(b)(3) to take less drastic action *i.e.*, modification of the *status quo* while continuing to discuss the possibility of a new agreement with the mixed guard union, as happened here." (*Id.* at p.6 (underlining added).)

Investigation, analysis, and discussion of the case continued, with Respondent and the Regional office spending nearly a year attempting to negotiate a settlement of this case. Even as those negotiations came to a close, Respondent repeated its admission that it had ceased contributing to the benefit funds while contract negotiations with the Union were ongoing. In an October 21, 2011 letter from Respondent's Vice President for Labor and Employee Relations, Respondent stated, "Despite the withdrawal from the Funds, we did bargain with Local 814 for many months after the expiration of the contract" on March 15, 2009. (A copy of the letter is attached hereto as Exhibit A.)

Unfortunately, settlement efforts were unsuccessful. An Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing ("the Complaint") issued October 31, 2011. Respondent filed its Answer two weeks later, November 14, 2011. Respondent again admitted that it had ceased contributing to the various Union benefit funds without first reaching overall impasse. (Motion, Exh. B, ¶ 6.) Following attempts to submit this matter to an Administrative Law Judge (or directly to the Board) on a stipulated record, Counsel for the Acting General Counsel filed the Motion on December 22, 2011. The Acting General Counsel's brief in support of the Motion specifically and repeatedly noted Respondent's admission that "it had not reached a good-faith overall impasse in its negotiations with the Union" prior to ceasing to make contributions to the Union benefit funds. (Brf. in Support, p. 12.)

Respondent filed its opposition to the Motion on February 6, 2012.[1] Notably, that opposition failed to claim that Respondent and the Union had reached an overall impasse in their contract negotiations prior to Respondent's admitted unilateral cessation of contributions to the benefit funds. Four days later, on February 10, 2012, the Acting General Counsel submitted it reply memorandum in support of the Motion.

[1] At Respondent's request, the hearing in the matter, then-scheduled for January 23, 2012, was adjourned for more than month to allow Respondent time to take a previously scheduled holiday and explore settlement. (A copy of Respondent's December 23, 2011 postponement request is attached hereto as Exhibit B.)

On February 15, 2012, nearly two and a half years after the charge was first filed, three and a half months after the Complaint issued, and nearly two months after the Motion was filed, and despite its repeated admissions, Respondent amended its Answer to claim some sort of impasse in negotiations had occurred somewhere around the time Respondent unilaterally ceased making contributions to the Union benefits funds.

Respondent then sought to have the Amended Answer made part of the record before the Board on the Motion, though it did so without explicitly moving before the Board, styling its motion instead as a "Notice," a copy of which is attached hereto as Exhibit C.

2. Argument

Respondent's proposed addition to the record before the Board on the Motion should be rejected.

First, it is irrelevant because the amended answer still fails to contend that the parties had reached an overall impasse in negotiations prior to Respondent's unilateral cessation of contributions to the Union benefit funds. In light of the history of this case, including Respondent's repeated admissions, Respondent's Amended Answer cannot be reasonably construed as claiming an overall impasse in negotiations existed at the time Respondent ceased making contributions to the Union benefit funds.[2] In the absence of such overall impasse, the rule of

[2] If Respondent counsel can now in good faith reverse position from the past two plus years and specifically and explicitly represent that Respondent and the Union had reached overall impasse in contract

Bottom Line Enterprises, 302 NLRB 373 (1991), remained applicable to the negotiations between Respondent and the Union, thereby precluding Respondent from legally making unilateral changes in terms and conditions of employment.

Second, Respondent's "Notice" is really nothing more than a prohibited sur-reply to the Motion, a belated attempt to make an argument Respondent failed to raise previously. Respondent was specifically on notice that the Acting General Counsel was arguing Respondent and the Union had not reached overall impasse in contract negotiations, (Brf. In Support, p. 12), yet in its response to the Motion, Respondent failed to argue to the contrary. Having made that decision---for presumably good reasons---Respondent cannot now change its mind.

Respondent's Amended Answer simply moves the claims Respondent had previously made in its affirmative defenses regarding the Union's purported intransigence as to fund contribution rates into paragraph 6(c) of its answer. In its initial answer, Respondent claimed in its second and third affirmative defenses that (i) the Union was unable to bargain regarding the contribution rates to the benefit funds and (ii) that inability made bargaining about that topic futile. Respondent has now shifted that assertion into its response to a specific paragraph of the Complaint, *viz.*, paragraph 6(c), but does not thereby make any new claim. Because Respondent has not

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negotiations prior to (and at the time of) Respondent's cessation of contributions to the various Union benefit funds, counsel for the Acting General Counsel will withdraw the Motion, without prejudice.

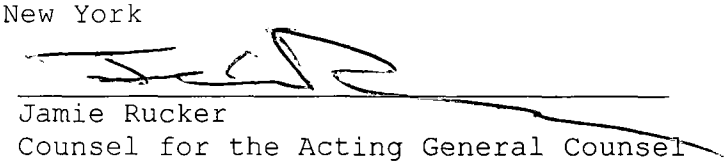
made any new factual claim, it is simply redrafting its earlier argument.

Absent special circumstances, not shown or argued by Respondent here, sur-replies are not permitted. *Baker Electric*, 330 NLRB 521, 521 n.4 (2000) ("In consideration of the need for administrative finality, however, surreply briefs are generally not permitted, except by special leave of the Board. Here, no circumstances were presented warranting special leave, and the Respondents' motion to file a surreply brief is therefore denied" (internal citation and quotation marks omitted)).

3. Conclusion

For the foregoing reasons, Respondent's motion to amend the record before the Board should be denied.

Dated: February 21, 2012
New York, New York



Jamie Rucker
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National Labor Relations Board, Region 2
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October 21, 2011

To: Karen Fernbach, Acting Regional Director
David Leach, Acting Regional Attorney
Elbert F. Tellem, Assistant Regional Director
Jamie Rucker, Supervising Attorney
Nicole Buffalano, Field Attorney

From: Carmen Suardy

Re: NLRB case

I have reviewed the proposed settlement forwarded to Mr. Conrad. Without prejudice to any arguments we could make if no agreement is reached, I want to have a discussion on the pension issue. It is BIMC's position that we correctly withdrew from the pension fund effective March 15, 2009. Below are the reasons:

Beth Israel Medical Center received a letter from the Local 814 Pension Fund dated December 19, 2008. (Attached)

In this letter the fund informs BIMC of the fund's funded status under the Pension Protection Act of 2006 ("PPA"). The letter is signed by George Daniello as Union Trustee. Mr. Daniello was the President and one of the negotiators of the collective bargaining agreement with BIMC. Jim Grisi was the counsel to Local 814 then and also on the negotiations committee.

The letter includes an attachment dated November 20, 2008 entitled "Funding Improvement Plan." The first page of the November 20, 2008 document under the heading "Schedules" contains the following sentence:

"Accordingly, both the default schedule (the schedule that would be applicable should a schedule not be adopted in collective bargaining on a timely basis as described below) and the alternative schedules are as shown on the attached Exhibits."

The second page of the document under the heading "Automatic Implementation of FIP Default Schedule"states:

"If a collective bargaining agreement providing for contributions under the fund that was in effect on January 1, 2008 expires, and after receiving these FIP schedules the bargaining parties fail to adopt a collective bargaining agreement that provides for contributions at the scheduled rates, the default schedule will be implemented automatically on the earlier of the date (1) on which the Secretary of labor certifies that the parties are at an impasse, or (2) which is 180 days after the

GOVERNMENT EXHIBIT A

(718) 768-9834

date on which the collective bargaining agreement expires, provided the employer has NOT withdrawn from the Fund." (emphasis added).

Our agreement with Local 814 expired March 15, 2009. Our contribution to the pension fund was $2.65 per hour under the agreement. Under the **default** schedule, the contribution would have gone to $5.65 per hour effective 180 days from the expiration of the agreement--September 15, 2009, UNLESS we had withdrawn by then.

It is for this reason that BIMC requested, via letter dated January 1, 2009 that the withdrawal liability be calculated. The Fund's instructions were very clear.

Despite the withdrawal from the Funds, we did bargain with Local 814 for many months after the expiration of the contract. In each proposal the union president indicated that he had a problem with the rates but that he had NO ability to change the rates. Instead, all of their proposals consisted of REDUCING the wages and benefits of the employees in order to reduce the costs. The employees were not happy with that. We could not agree because even with steep reductions in wages and benefits the increases could not be funded.

I am not going to argue the welfare or annuity issues at this time because they are in a separate category. These other Funds COULD NOT and were not planning to impose a new, different and HIGHER rate as of a certain time even in the absence of an agreement.. In the case of the PENSION, the ONLY way to avoid the $5.65 per hour was to WITHDRAW and the Fund told us that. In the initial withdrawal liability letter sent to us by Jim Grisi the fund acknowledged that our obligation to contribute ended as of March 15, 2009. This was repeated in the November letter in which the withdrawal liability calculations were finalized. (documents attached).

For this reason, I respectfully submit that the pension should be treated differently. There should not be a remedy applicable for the Pension fund. We complied with their directions and we have been paying withdrawal liability since January 1, 2010. They accepted our payments..

Proskauer Rose LLP Eleven Times Square New York, NY 10036-8299

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December 23, 2011

By E-Mail

Karen P. Fernbach, Esq.
Acting Regional Director
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Region 2
26 Federal Plaza, Rm 3614
New York, NY 10278

Re: Beth Israel Medical Center
Case Nos. 02-CA-039486
02-CA-039574

Dear Ms. Fernbach:

As you know, this firm represents Beth Israel Medical Center in the unfair labor practice cases identified above, which are scheduled for hearing before an Administrative Law Judge of the Board beginning on January 23, 2012.

Yesterday, we received Counsel for the General Counsel's motion for summary judgment. Mr. Rucker did not advise us beforehand that he intended to make this motion. By all appearances, this case was proceeding to hearing on January 23. A subpoena duces tecum was served by Mr. Rucker on December 6. We petitioned to revoke that subpoena on December 14 and Mr. Rucker filed an opposition the following day. All this made the pending motion that much more surprising to us.

As I mentioned yesterday, I have long-standing vacation plans in Europe beginning on December 26 and running through January 1, 2012. By my calculation, our opposition to the motion would be due no later than January 3 (January 2 being a holiday). In the circumstances, it is necessary for us to request an adjournment of the January 23 hearing to a later date to afford us sufficient time to prepare and file our opposition to the motion for summary judgment. (The Board's rules require that motions for summary judgment be filed no later than 28 days prior to the scheduled hearing date; opposition papers are due no later than 21 days prior to the hearing. (See Sec. 102.24 of the Board's Rules and Regulations.)

GOVERNMENT EXHIBIT
B

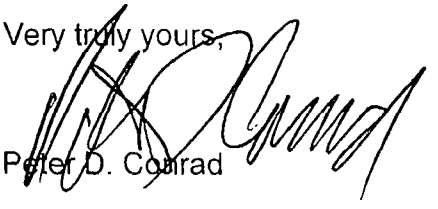
Accordingly, we respectfully request that the hearing be adjourned to February 27, 2012, making our opposition to the motion for summary judgment due no later than February 6. There have been no other adjournments of the hearing on the complaint issued by you on October 31, 2011. I note that this matter initially was filed with the Board more than two years ago, on September 15, 2009.

This adjournment also is required because the Medical Center's Vice President for Labor and Employee Relations, whose assistance would be needed to prepare our response to the motion, is deeply involved in collective bargaining with the New York State Nurses Association. As you may have heard on the news, NYSNA has served an 8(g) notice to strike on January 3. As a result, Ms. Suardy is unavailable to assist me.

The requested adjournment also will enable us to continue exploration of settlement, which has been under serious discussion for some time. As I informed Mr. Leach yesterday, I believe that there may still be a basis to resolve this matter without the need for any formal proceedings.

Thank you very much for your consideration of this application.

Very truly yours,



Peter D. Conrad

cc: David E. Leach, Esq.
Jamie Rucker, Esq.
Joseph Vitale, Esq.
Jani Rachelson, Esq.
Beth Essig, Esq.
Ms. Carmen Suardy

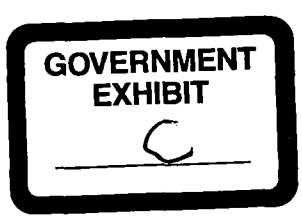
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BETH ISRAEL MEDICAL CENTER,	:	
Respondent,	:	
-and-	:	Case Nos. 02-CA-039486 02-CA-039574
LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	:	
Charging Party,	:	
-and-	:	
LOUIS GUGLIOTTA, AN INDIVIDUAL,	:	
Charging Party.	:	

NOTICE OF FILING OF FIRST AMENDED ANSWER

On December 22, 2011, Counsel for the Acting General Counsel moved for Summary Judgment and Issuance of a Decision and Order in the above-captioned unfair labor practice case, which is scheduled for hearing before an administrative law judge of the National Labor Relations Board in New York City beginning on February 27, 2012.

On February 6, 2012, Respondent filed a Brief in Opposition to the motion and on February 10, 2012, Counsel for the Acting General Counsel filed a reply. The motion is still pending before the Board.



On February 15, 2012, pursuant to Section 102.23 of the Board's Rules and Regulations, Respondent e-filed with the Regional Director a First Amended Answer to the Consolidated Complaint herein, copies of which were served on the same date on all parties to this proceeding. (A copy of Respondent's First Amended Answer is attached.)

Respondent respectfully submits that the Board should make the First Amended Answer part of the record on the pending motion and deny summary judgment for the Acting General Counsel, allowing the February 27, 2012 hearing to proceed.

Dated: February 15, 2012
New York, New York

Respectfully submitted,

PROSKAUER ROSE LLP

By: _____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BETH ISRAEL MEDICAL CENTER,	:	
Respondent,	:	Case Nos. 02-CA-039486
-and-	:	02-CA-039574
LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	:	FIRST AMENDED ANSWER
Charging Party,	:	
-and-	:	
LOUIS GUGLIOTTA, AN INDIVIDUAL,	:	
Charging Party.	:	

Respondent, Beth Israel Medical Center, by its attorneys Proskauer Rose LLP, answers the Consolidated Complaint herein as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1(a) and (b) of the Consolidated Complaint, except admits that the unfair labor practice charges referred to therein were received by Respondent by regular mail after the alleged dates of service.

2. Admits the allegations of paragraph 2(a), (b) and (c) of the Consolidated Complaint.

3. Respondent declines to answer the allegations of paragraph 3 of the Consolidated Complaint, on the grounds that it states a legal conclusion to which no responsive pleading is required.

4. Respondent declines to answer the allegations of paragraph 4 of the Consolidated Complaint, on the grounds that it states a legal conclusion to which no responsive pleading is required, but avers that the Union admits non-guards to membership and, therefore, is not qualified to represent guards as defined in Section 9(b)(3) of the Act, and further avers that by reason of that disqualification the Board may not find any violation of Section 8(a)(5) and 8(d) of the Act based upon the actions alleged in paragraph 6 of the Consolidated Complaint.

5. (a) Respondent declines to plead in response to paragraph 5(a) of the Consolidated Complaint, on the ground that it states a legal conclusion to which no responsive pleading is required, and refers to the collective bargaining agreement between Respondent and the Union that expired on March ~~1~~ 15, 2009, for the definition of the bargaining unit formerly represented by the Union.

(b) Denies the allegations of paragraph 5(b) of the Consolidated Complaint, but admits that Respondent and the Union were parties to a series of collective bargaining agreements over the years, the last of which expired on or about March 15, 2009, and that on or about August 30, 2010, the Special and Superior Officers Benevolent Association was certified as the exclusive representative of the employees who had been covered by the agreements between the Union and Respondent.

(c) Respondent declines to answer the allegations of paragraph 5(c) of the Consolidated Complaint, on the ground that it states a legal conclusion to which no responsive pleading is required, but admits, as stated above in paragraph 5(b), that Respondent has been party to a series of collective bargaining agreements with the Union.

6. (a) Denies the allegations of paragraph 6(a) of the Consolidated Complaint, except admits that effective on or about March 15, 2009, the expiration date of Respondent's last collective bargaining agreement with the Union, no further contributions to the Teamsters Local 814 Pension, Welfare and Annuity Funds were remitted by Respondent, and avers that payments of withdrawal liability were made to the Teamsters Local 814 Pension Fund by Respondent beginning on or about January 1, 2010, and continuing to date pursuant to a Notice and Demand for Withdrawal Liability dated November ~~9~~4, 2009, which was premised on a finding by the Trustees of the Local 814 Pension Fund that Respondent ~~had no~~"permanently ceased to have an obligation to contribute to ~~said~~the Fund ~~after~~as of March 15, 2009."

(b) Respondent declines to plead in response to paragraph 6(b) of the Consolidated Complaint on the ground that it states a legal conclusion to which no responsive pleading is required, but avers that based on the Union's lack of qualification to represent guards within the meaning and intent of Section 9(b)(3), there were no mandatory subjects of collective bargaining as between Respondent and the Union for the employees in the unit.

(c) ~~Admits~~Denies the allegations contained in paragraph 6(c) of the Consolidated Complaint, ~~but denies~~and avers (i) that Respondent was not under any duty to bargain with the Union effective as of March 15, 2009, ~~and further avers~~(ii) that the Union did not have authority to bargain in good faith with Respondent concerning contributions to the Teamster Local 814 Pension, Welfare and Annuity Funds, ~~and~~(iii) that bargaining with the Union over such terms and conditions of employment (which occurred both before and after expiration of Respondent's last collective bargaining agreement with the Union) was futile because of external contribution requirements imposed on the Union by the Trustees of the Local 814 Funds, (iv) that an impasse arose as a result of the union's inability to negotiate and/or its intransigence with respect to fund contribution rates, and (v) that by reason of all the foregoing, Respondent was privileged to take the action alleged as an unfair labor practice in paragraph 6 of the Complaint.

7. Denies the allegations of paragraph 7 of the Consolidated Complaint.

8. Denies the allegations of paragraph 8 of the Consolidated Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

9. The Consolidated Complaint should be dismissed in whole or part because the Union was and is not qualified to represent a bargaining unit consisting of guards as defined in Section 9(b)(3) of the Act.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

10. The Consolidated Complaint should be dismissed in whole or in part because the Union did not have authority to bargain in good faith with Respondent with respect to rates of contribution to the Teamsters Local 814 Pension, Welfare and Annuity Funds.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

11. The Consolidated Complaint should be dismissed in whole or in part because it was futile for Respondent to engage in good faith collective bargaining with the Union with respect to rates of contribution to the Teamsters Local 814 Pension, Welfare and Annuity Funds, inasmuch as the Union was unable to agree to rates other than as required by the Trustees of the Funds, thereby creating an impasse in negotiations.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

12. The Consolidated Complaint should be dismissed in whole or in part because the claims asserted therein are time-barred by Section 10(b) of the Act.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

13. The Consolidated Complaint should be dismissed in whole or in part for failure to state a claim for relief under the National Labor Relations Act.

WHEREFORE, the Consolidated Complaint should be dismissed in its entirety, together with such other and further relief as may be just and proper in the circumstances.

Dated: New York, ~~NY~~
~~November 14, 2011~~New York
February 15, 2012

Respectfully submitted,

PROSKAUER ROSE LLP

By: _____

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