UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In a Matter Between:	)	
	)	
FALLBROOK HOSPITAL CORPORATION, d/b/a FALLBROOK HOSPITAL	)	Cases 21-CA-090211 21-CA-096065
	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC)	)	

REPLY BRIEF BY CHARGING PARTY TO RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO THE DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE ELEANOR LAWS

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I. INTRODUCTION

Charging Party CNA/NNOC files this reply brief in support of its Exceptions to the Decision of the Administrative Law Judge. On June 13, 2013, CNA/NNOC filed five exceptions to the Administrative Law Judge's Decision (ALJD) in this matter. All of CNA/NNOC's exceptions related to the ALJ's declining to recommend certain remedies. On June 27, 2013 Respondent Fallbrook Hospital filed an Answering Brief to Charging Party's Exceptions. The arguments raised in Respondent's Answering Brief are meritless, and CNA/NNOC maintains that the remedies sought in its exceptions are warranted.

II. ARGUMENT

A. Exception No. 1: A Notice Reading is Proper

Notwithstanding Respondent's citation to the dissent, in *Federated Logistics & Operations,* 340 NLRB 255, (2003), affd. 400 F.3d 920 (D.C. Cir. 2005), the Board held that it "has broad discretion to fashion a just remedy to fit the circumstances of each case it decides."*Id.* at 258. Extraordinary remedies may be ordered when they "are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Id.* at 256. Specifically, a notice reading, while 'extraordinary,' is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Id.* (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969). This is because a notice reading ensures that bargaining unit members "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Id.* Indeed, the Board has ordered a notice reading on facts similar to the facts found by the ALJ in this case. For instance, where the employer "bargained with the union with no intention of reaching an agreement," the Board ordered a Notice reading. *HTH Corp.,* 356 NLRB No. 182,

slip op. at 20 (2011). Similarly, in this case, the ALJ concluded that "it is clear. . . that there was no intent to bargain" by Respondent. (ALJD 21:31)

Respondent conclusorily states that it has "committed no conduct so pervasive or outrageous as to require additional remedies." (Answering Brief at 5) To the contrary, however, the ALJ found that at almost every single bargaining session, Fallbrook conditioned bargaining on either the Union's providing a complete set of its proposals, or on RN's ceasing to use Assignment Despite Objection (ADO) forms. (ALJD 4:32-33, 4:39-5:1, 5:7-8, 6:4, 7:18-19, 7:31-33) Thus, the conditional bargaining was pervasive. As noted, the ALJ also concluded that Fallbrook had no intent to bargain. Such a lack of intent to bargain flies in the face of Fallbrook's obligations under the Act, and is outrageous.

Moreover, this pervasive and outrageous conditional bargaining was not isolated conduct. During the same period in which Fallbrook was engaged in bad faith bargaining at the table, Fallbrook terminated two unit employees without notice to the Union or an opportunity to bargain, and refused to provide information relevant to the terminations. Termination is the ultimate change in working conditions, and Fallbrook's refusal to bargain with the Union sent a powerfully destructive message to the bargaining unit.

Accordingly, a notice reading is an entirely appropriate remedy in this case.[1]

[1] As further argument for the necessity for a notice reading, CNA/NNOC directs the Board's attention to Fallbrook's conduct in the Section 10(j) proceedings related to this unfair labor practice case, *Garcia v. Fallbrook*, 13-cv-01159 (S.D. Cal). In that case, the District Court Judge ordered Fallbrook, *inter alia*, to post a copy of the 10(j) Injunction "where notices to employees are customarily posted." ECF No. 19, ¶ 2(d). In a sworn declaration setting forth Fallbrook's efforts to comply with the Injunction, Fallbrook's representative Don Carmody asserted that Fallbrook complied with this requirement by posting the Injunction in one single location—the bulletin board in the Human Resources Department. ECF No. 20, ¶ 7 of Carmody Decl. Notices to Employees are customarily posted on bulletin boards in break rooms throughout the hospital. A notice reading to assembled employees will prevent Fallbrook from continuing with these antics, which leave bargaining unit members with the impression that Fallbrook is above the law.

B. Exception No. 2: A One-Year Extension of the Certification Year is Appropriate

This case fits precisely into the Board's formula for imposition of an extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1967). The ALJ found that "the totality of the circumstances indicates that Respondent operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining." (ALJD 9:11-12) The ALJ found that Respondent engaged in this conduct for nearly the entire certification year:

> From July [2012] to October [2012]. . . the Hospital would not submit any new proposals or counter-proposals, arguing that it was not going to bargain with the Union until it received all of the Union's proposals. By the October 11, 2012 bargaining session, the Union had prepared its wage proposal, which was the only proposal left to submit. Having met the Respondent's initial demands, the Union offered to discuss the proposal. The Hospital negotiating team walked out, however, asserting [Rebecca] Ojala. . . was now management. Only after a mediator was engaged did the Hospital come forward with any new proposals. A little more than a month later, with no bargaining sessions in the interim, [Donald] Carmody announced, during a bargaining session involving Barstow Hospital, that Respondent would not bargain with the Union at Barstow or Fallbrook Hospitals if the nurses continued to use ADO forms. He declared that they were at impasse at both places. Thereafter. . . the Hospital insisted that it was at impasse, and ultimately stopped responding to the Union's requests to bargain.

(Id. 9:11-25) Thus, for the entire one-year period following the May 24, 2012 certification, Fallbrook refused to bargain in good faith with CNA/NNOC. Respondent argues that it submitted seventeen proposals to the CNA/NNOC. Respondent cannot deny, however, that it only submitted these proposals after the Union complied, under protest, with Respondent's first unlawful condition. Such coercive conduct can hardly be characterized as good faith bargaining. Indeed, the ALJ found that "the circumstances of this case present inequities similar to those in *Mar-Jac*." (ALJD 21:28) Accordingly, CNA/NNOC maintains that an order granting the Union a one-year extension of the certification year is entirely appropriate.

C. Exception No. 3: CNA/NNOC Should be Awarded Litigation Costs

The Board has the authority to award litigation costs. *See Heck's Inc.*, 215 NLRB 765, 767-768 (1974) (Board noting "Congress has invested us, and not the courts, with broad discretion in the exercise of our remedial powers," and setting forth a standard for the award of litigation costs); *Tiidee Products, Inc.*, 194 NLRB 1234 (1972) (Board may order payment of attorney's fees if it determine that a party has engaged in frivolous litigation); *Teamsters Local 122*, 334 NLRB 1190 (2001) (awarding litigation costs where respondent engaged in bad faith in the actions that led to the lawsuit and in the conduct of the litigation); and *Unbelievable, Inc.*, 318 NLRB 857, 858 (1995), *enforcement denied in part,* 118 F.3d 795 (D.C. Cir. 1997).

Perhaps as an illustration of the types of frivolous arguments raised throughout this proceeding, Respondent now argues that "the question of the Board's authority to order payment of litigation expenses is an open question of federal law" (Answering Brief at 9), and cites to a footnote in *Alwin Mfg. Co. v. NLRB,* 192 F.2d 133 (D.C. Cir. 1999), for that proposition. The court's discussion of litigation costs in that case, however, focused on whether the employer "sufficiently brought to the attention of the Board its objections to the remedy proposed by the Administrative Law Judge, which is a prerequisite to judicial review under section 10(c) of the Act." *Id.* at 135. The court then concluded that it would not review the award of litigation costs because the employer had not properly excepted to the remedy proposed by the ALJ, which included litigation costs. In so holding, the court addressed whether any extraordinary circumstances were present in the case would warrant the court to review the award of litigation costs, even

though the employer had not excepted to the remedy before the Board. In Footnote 13[2], cited by Respondent, the court noted that it "could review the remedy if [the court] believed it was patently in excess of the Board's authority," but concluded specifically that the award of litigation costs was "not obviously *ultra vires.*" *Id.*

The Board should order litigation costs in this case because all of the defenses raised by Respondent were frivolous and not even debatable. Respondent asserts that its *First National Maintenance* defense regarding ADO forms is "a case of first impression." (Answering Brief at 10) However, whether or not Respondent has a duty to bargain over ADO forms is completely irrelevant to the allegations in the complaint and the evidence in the record. As the ALJ concluded, "the ADO form is not mentioned in any of the proposals or counter-proposals the parties exchanged." (ALJD 11:25-26) She further found that "there is no evidence that the Union ever insisted that Respondent recognize the [ADO] form." *Id.* 13:7-8. The ALJ concluded that "*First National Maintenance* and its progeny are not on point," and that Respondent's other arguments related to ADO forms also "miss the point." (ALJD 13:2-7) Even if defenses raised by Respondent are issues of first impression, they remain frivolous if they, as the ALJ concluded, completely miss the point.

Respondent attempts to distinguish *Unbelievable Inc.* by explaining that in that case, the Board found that the employer's negotiator adopted a "pugnacious and obstructive stance to bargaining." (Answering Brief at 11) Given that the ALJ found Fallbrook's bargaining agent's conduct to be "obstinate and pugnacious" (ALJD 10:31), this is a distinction without significance. Respondent's best argument in favor of

[2] erroneously cited in Respondent's Answering Brief as FN 3.

distinguishing its conduct from conduct in cases where litigation costs have been awarded appears to rest upon a distinction between 'obstructive' and 'obstinate,' conduct.[3] In any event in this case, as in *Unbelievable,* the employer's agent's pugnaciousness was accompanied by "other indicia of bad faith" (ALJD 10:31-35), warranting an award of litigation costs.

For the foregoing reasons an award of litigation costs is appropriate in this case.

D. Exception No. 4: CNA/NNOC Should be Awarded Negotiation Costs

CNA/NNOC maintains that an award of negotiation costs is necessary in this case in order to restore the Union to it position prior to the futile negotiations and ensure meaningful future bargaining. Fallbrook's conduct here falls squarely within the type of conduct for which negotiation costs are appropriate. The Board has awarded negotiation costs where the employer's conduct was "calculated to thwart the entire collective-bargaining process and forestall the possibility of the Respondent ever reaching agreement with the chosen representative of its employees.'" *Unbelievable, Inc.,* 318 NLRB at 858 (quoting *Harowe Servo Controls*, 250 NLRB 958 (1980)). Here, the ALJ concluded that "the totality of the conduct indicated the Respondent operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining." (ALJD 9:11-12) The ALJ acknowledged that whether to impose negotiation costs on Fallbrook was "a close call." (ALJD 21:43)

Respondent claims that negotiation costs are inappropriate because "progress was indeed made during a number of sessions." (Answering Brief at 12) As explained above, any 'progress' at the bargaining table was made only after CNA/NNOC met Fallbrook's unlawfully-imposed

[3] This argument serves as another illustration of the frivolous nature of Respondent's arguments raised throughout this matter, which have served only to complicate and delay the proceedings.

conditions on bargaining. Respondent cannot claim credit for the Union's extraordinary efforts to reach a collective bargaining agreement in the face Fallbrook's bad faith conduct.

Accordingly, negotiation costs are appropriate here.

E. Exception No. 5: A Meaningful Remedy for the Unilateral Terminations Should be Awarded

Respondent's arguments against a meaningful remedy for the terminations have no merit. First, the General Counsel in this case never "affirmatively disclaimed any intent to seek reinstatement" of the terminated nurses, as alleged by Respondent. (Answering Brief 13). Accordingly, this case is entirely distinct from *Holder Construction Co.* and *HTH Corp.*, cited by Respondent, both of which hinged on an affirmative disclaimer at hearing of any remedy for terminated employees.

Moreover, the ALJ's decision is not limited to an obligation to bargain with CNA/NNOC over the effects of the terminations, as asserted by Respondent. This is illustrated in the very section of the decision quoted by Respondent in its Answering Brief: "The question before me is whether the Respondent had a duty to bargain over the terminations *and* their effects after they had already been implemented. The answer is yes." ALJD 15:8-10 (emphasis added); quoted in Respondent's Answering Brief at 15. Thus, the ALJ concluded that Respondent had a duty to bargain over the terminations themselves, as well as their effects.

The fact remains that the record is entirely devoid of any evidence that Sandwell and Robinson were terminated for misconduct, or pursuant to any exception to an employer's duty to bargain over changes in terms and conditions of work. Accordingly, the appropriate remedy is an order for Respondent to rescind the unilateral terminations by reinstating the employees with back pay, and to bargain with CNA/NNOC over the terminations, as set forth in CNA/NNOC's Brief in Support of Exceptions to the ALJD.

III. CONCLUSION

For the foregoing reasons, the Board should modify the ALJ's recommended order consistent with CNA/NNOC's exceptions.

Dated: July 11, 2013

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING
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PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

REPLY BRIEF BY CHARGING PARTY TO RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO THE DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE ELEANOR LAWS
[Case Nos. 21-CA-090211 and 21-CA-096065]

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 11, 2013

Rob Craven

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