

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FALLBROOK HOSPITAL CORPORATION	:	Case Nos: 21-CA-090211
D/B/A FALLBROOK HOSPITAL	:	21-CA-096065
and	:	
CALIFORNIA NURSES ASSOCIATION /	:	
NATIONAL NURSES ORGANIZING	:	
COMMITTEE	:	

**RESPONDENT’S REPLY BRIEF TO COUNSEL FOR THE ACTING
GENERAL COUNSEL’S ANSWERING BRIEF**

For the reasons set forth below, the Board should reject the arguments set forth by the Answering Brief filed by the General Counsel in response to the Exceptions and Brief in Support of Exceptions filed by Fallbrook in response to the Decision issued by the Judge.¹

1.) The General Counsel’s Efforts to Sweep the LRA Under the Rug

As explained by Fallbrook before, the question of whether or not the LRA is a “collective bargaining agreement” is essentially an academic question. The more important question is whether or not the LRA included an agreement whereby the allegations decided by the Judge should have been decided by the parties’ arbitrator. See BSE, page 17. The General Counsel attempts to discredit Fallbrook by referring to the Hospital’s

¹ For purposes of this Reply Brief, Fallbrook shall employ the very same

shifting versions of the LRA, which include an agreement to take election-related disputes to an arbitrator **or** an agreement to take bargaining-related disputes to an arbitrator, as though the two agreements must be mutually exclusive. See AB, pages 33-34. If given the opportunity, Fallbrook would prove that the LRA housed both agreements. Though the General Counsel would prefer simply to credit the Union's representation that no such agreement existed (see AB, pages 33-34), Fallbrook is entitled, of course, to an opportunity to prove such an agreement did, in fact, exist.

In terms of whether the Board should defer to the LRA, the General Counsel argues that Fallbrook has taken inconsistent positions on the application of Collier. See AB, page 33. At the hearing before the Judge, the Hospital referred to Collier, but was not afforded an opportunity to explain fully the Hospital's position. See Tr. 364 (Judge: "that's my ruling and we're going to move on"). The reasons why the Board should defer to the LRA are fully set forth by Fallbrook's Brief in Support of the Exceptions. See BSE, pages 13-19. The General Counsel denies that the Second Affirmative Defense presents novel questions of law (see AB, page 33), but does not care to cite to a single case in which the Board addressed, let alone resolved such questions. Finally, upon careful review, the Board will see that the General Counsel's efforts to defend the Judge's analysis in

terms of why the Board should not defer to the LRA is comprised of nothing more than the regurgitation of the Judge's analysis. See AB, page 34.

2.) A Loan of More Than Four Million Dollars Is Hardly a “Scrap of Fact”

The General Counsel goes through a laundry list of what did not change as a result of the CNA's affiliation with the NUHW (see AB, pages 35-36), but the test applied by the Board is not simply quantitative in nature. In fact, the Board's test is whether, by virtue of one change, or dozens of changes, an affiliation has brought about a change to the labor organization's identity. The evidence now before the Board shows that the CNA has loaned the NUHW millions of dollars over a short period of time, without, incidentally, a single penny yet repaid. And so, Fallbrook has not relied upon any “speculation” (see AB, page 36), but rather, what is clearly demonstrated by the record – to wit, the CNA's affiliation with the NUHW has led to an enormous reduction in the CNA's assets. In the process, the identity of the CNA has changed, for, whereas the CNA was previously only the representative of RNs, the CNA now acts as the private financier of other labor organizations, including those which do not even represent RNs. Contrary to the General Counsel's assertion (see AB, pages 36-37), Fallbrook never contended that, by virtue of the affiliation, the CNA's members and the NUHW's members have been funneled into one, single

bargaining unit. Instead, Fallbrook's contention is that the pairing of a labor organization that represents RNs with a labor organization that represents non-professional workers in the acute care industry is extraordinary, given the differences between their interests, as recognized by Section 9(b)(1) of the Act, and as demonstrated by their history of separate organization.

3.) The General Counsel Has Failed to Cast any Dark Shadow Over Fallbrook's Conduct at the Bargaining Table

Just like the Judge, the General Counsel effectively asserts that, by pressing for the Union's proposals before submitting any of the Hospital's own, Fallbrook committed a *per se* violation of Section 8(a)(5). Contrary to the General Counsel's position that the Judge's review of the facts should extend up to, but cease upon, the moment Fallbrook began to offer no fewer than seventeen (17) proposals, the Judge was obligated to consider, as her own Decision confirms, the "totality of the conduct." See Decision, page 9. The General Counsel does not even endeavor to argue that the Judge did, in fact, decide the allegation set forth by Paragraph 8(b) of the Complaint in the necessary context of the parties' negotiations as a whole.²

² Even as to the 3 ½ month period of time upon which the General Counsel focuses, the General Counsel does not address the totality of the conduct. Specifically, the General Counsel does not confront Mr. Matthew's attempts to weasel out of the parties' prior agreements, Fallbrook's counter-proposal on union security, or Fallbrook's acceptance of the Union's proposal on

Even upon the presumption, solely for the sake of argument, Fallbrook's actions should be analyzed in the context of a *per se* violation, the General's Counsel's efforts to supply, as though acting as the Judge's surrogate, supporting case law falls well short of the mark. The General Counsel cites to Federal Mogul Corporation, 212 NLRB 950 (1974), and asserts, categorically, that a party may not place any conditions on the party's willingness to engage in further negotiations. See AB, pages 19-20. Federal Mogul, however, does not proclaim or refer to any such "bright-line" rule, but simply addresses the facts of the case, which involved an employer that conditioned further negotiations on the union's acceptance of the employer's proposals on several mandatory subjects of bargaining. Similarly, Ardsley Bus Corporation, Inc., 357 NLRB No. 85 (2011), involved the Board's application of preexisting precedent in the specific context of an employer who, seeking to elevate form over substance, conditioned further negotiations on the union's submission of their proposals in a written format. Vanguard Fire & Supply, 345 NLRB 1016 (2005), involved an employer who conditioned further negotiations on the union's

recognition, which was not amongst the subjects on which the parties had reached previous agreement. See BSE, page 32.

submission of a bargaining agenda, which is not a mandatory subject of bargaining.

Here, unlike Federal Mogul, Fallbrook did not require, as a condition on further negotiations, the Union to accept the Hospital's proposal on any mandatory subject of bargaining. In fact, even after the Union rejected some of the Hospital's proposals, Fallbrook continued to negotiate with the Union. Similarly, unlike Ardsley, the record does not include any evidence that Fallbrook even expressed a preference, much less imposed any demand, as to whether the Union's proposals should be conveyed by Mr. Matthew's words or the ink of a document. Nor did Fallbrook demand the Union's production of any bargaining agenda, as was the case in Vanguard. None of the above-referenced cases, therefore, support the legal theory prosecuted by the General Counsel or the conclusion reached by the Judge. In the end, these cases only underscore the fact that, to the extent the Board has ruled that a party may violate Section 8(a)(5) by placing conditions on negotiations, the cases have been confined to their own set of facts.

Taking a step back from her own theory, the General Counsel contends that, at the very least, Fallbrook's refusal to present any proposals as part of the parties' early negotiations should serve as "indicia" of the Hospital's bad faith. See AB, page 19. And yet, neither case cited by the

Answering Brief supports the General Counsel's contention. In United Technologies, though the Board noted that the employer refused to submit any counterproposals before the employer had reviewed the union's proposals, the Board's determination that the employer violated Section 8(a)(5) was based upon entirely independent grounds, namely: (1) the employer made a unilateral change, (2) the employer's statement that a contract would be proposed to the union on a "take-it-or-leave-it" basis, and (3) the employer's delaying tactics. 296 NLRB 571, 572 (1989). In MRA Associates, Inc., the Board adopted the Judge's determination that the "entire record" showed that the employer had negotiated with the union in bad faith. Though the employer had not provided the union with any proposals for a period of time, the Board did not give any indication that such a fact, specifically, served as evidence of the employer's bad faith.

In summary, the record now before the Board does not establish Fallbrook engaged in any bad faith. To the extent the Judge saw any doors that Fallbrook locked as part of the parties' negotiations, she overlooked the fact that the Union always held the key. Upon receipt of the Union's proposals, as promised, the Hospital's proposals were immediately submitted, as the Union went on to report to the RNs "**progress at the bargaining table.**" See Respondent's Ex. 3.

4.) The General Counsel Has Done Nothing to Disprove the Malfeasance and Danger Associated with the ADOs

Fallbrook's assertion that the Union injected the ADOs into the parties' negotiations is not based upon any "campaign literature" (see AB, page 30), but rather, upon the Union's bargaining updates, which, unless the CNA was systematically lying to the RNs, prove that the ADOs were very much at the center of the parties' negotiations.

The fact the Hospital did not file a charge in response to the Union's bad faith, but raised the issue in an amendment to the Answer, is of no legal consequence, as a party's bad faith at the bargaining table may be pursued offensively in the context of a charge or defensively in the context of an affirmative defense, and similarly, under Section 102.23 of the Board's Rules, a respondent's answer may be amended any time prior to the hearing. Though the General Counsel attempts to defend the Union's conduct (i.e., Mr. Matthews offered to negotiate over the ADOs), the General Counsel misses the point entirely. See AB, page 29. The ADOs, seeking to seize control over Fallbrook's provision of patient care, as they do, had no place in the negotiations, period. The ADOs were neither a mandatory nor permissive subject of bargaining, and yet, the Union polluted the parties' negotiations on account of these forms. Notably, the General Counsel opted not to address the fact that, as the record makes clear, the CNA also injected

the ADOs directly into Fallbrook's risk management system, a prominent example of the bad faith the Union brought to the bargaining table. See United Technologies, 296 NLRB at 572 (“[t]he Board examines not only the parties’ behavior at the bargaining table, but also conduct away from the table that may affect the negotiations”).

The General Counsel’s observation that patient care is the “very core work that RNs perform” proves too much. See AB, page 30. Patient care is also, of course, the core of Fallbrook’s business. For that reason, under First National Maintenance (which, incidentally, the General Counsel did not even attempt to distinguish), Fallbrook has every right to require any RN who has a concern about patient safety to report her concern only by resort to Fallbrook’s risk management system. As made clear by First National Maintenance, the fact that such a requirement may have an effect on the employment relationship is irrelevant, because, for matters lying at the core of an employer’s business, the autonomy of the employer’s decision-making authority is supreme.

The General Counsel follows up on the Judge’s citation to Valley Hospital with two other cases in which the Board ruled on whether the employees’ conduct equated to protected concerted activity. See AB, page 31. The Judge, however, expressly eschewed any consideration of whether

RNs' use of ADOs constitutes protected concerted activity. See Decision, page 13. Accordingly, every one of these cases is an "apple" that ought not be commingled with the "orange" now in the Board's basket.

Contrary to the General Counsel's impression (see AB, page 32), Fallbrook's attack on the ADO does not arise from any competitive urge to prove that, through Fallbrook's risk management system, the Hospital has constructed the superior product. Instead, Fallbrook's point is that ADOs are, in a word, dangerous. Preferring to make irresponsible accusations against Fallbrook, the General Counsel simply refused to acknowledge that, by the express direction of the ADO form, RNs are supposed to **not** report their concerns to their immediate supervisor, i.e., the Charge Nurse. Furthermore, the serious worry detailed by Ms. Maxwell's testimony went unchallenged by the Answering Brief.

CONCLUSION

For all the reasons set forth above, Fallbrook respectfully requests that the Board reject the arguments set forth by the Answering Brief and deny the relief requested by the General Counsel.

Dated: Glastonbury, Connecticut
 July 11, 2013

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent’s Reply Brief to the Acting General Counsel’s Answering Brief to Respondent’s Exceptions to the Decision Issued by Administrative Law Judge Eleanor Laws was served on Thursday, July 11, 2013 upon the following:

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July 11, 2013

Respectfully submitted,

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