

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DHSC, LLC, D/B/A AFFINITY	:	Case Nos.	08-CA-090083
MEDICAL CENTER	:		08-CA-090193
	:		08-CA-093035
<i>and</i>	:		08-CA-095833
	:		
NATIONAL NURSES	:		
ORGANIZING COMMITTEE	:		

**RESPONDENT'S REPLY BRIEF TO CHARGING PARTY NNOC'S AMENDED
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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For the reasons set forth below, the Board should reject the arguments set forth by the Amended Answering Brief filed by the Union in response to the Exceptions and Brief in Support of Exceptions filed by the Hospital in response to the Decision.¹

1.) Affinity's Refusal to Bargain

A.) The Third Affirmative Defense

In seeking to defend the Judge's ruling as to the 3rd Affirmative Defense, the Union expresses no disagreement that in granting the Motion *In Limine*, the Judge made no distinction between the 2nd Affirmative Defense and the 3rd Affirmative Defense, nor does the Union dispute that the Judge offered inconsistent reasons as to why the Hospital should be deprived of an opportunity to pursue these Defenses. Furthermore, as to the 3rd Affirmative Defense specifically, the Union makes no effort to defend the fact the Judge's ruling was largely, and wholly illogically, based upon the fact that the Hospital did not apprise the Region of the Agreement. Though the Union contends the Judge's ruling is supported by Board precedent, the Union does not even refer to, let alone endeavor to establish the applicability of, the authority on which the Judge relied. Instead, without saying so, the Union asks the Board to simply replace the Judge's inapposite legal authority with other cases, which, by the Union's mistaken view, justify the wholesale rejection of the parties' agreement to arbitrate the disputes making up the Complaint. Aside from the obvious impropriety associated with the Union's request for a *post hoc* swapping of authority, the cases on which the Union relies arise from factual patterns that do not resemble the factual pattern now before the Board. Had the Judge permitted the Hospital to pursue the 3rd Affirmative Defense, Affinity would have been able to show that, while not a

¹ For purposes of this Reply Brief, Affinity shall employ the very same shorthand references used by the Hospital's Brief in Support of Exceptions. The Hospital shall also cite to the Union's Answering Brief as "AB," and Affinity's Brief in Support of Exceptions as "BSE."

relationship of any lengthy duration, the relationship demonstrates not only the parties' commitment to, but the efficacy of, the arbitration available under the Agreement. In particular, the Hospital would have proved that, throughout the course of the campaign that preceded the Election, both parties regularly took advantage of the arbitration available under the Agreement. Similarly, Affinity would have demonstrated that, in the course of resolving the parties' disputes, the Arbitrator interpreted the Agreement, making him eminently "well-suited" to resolve the controversy over Affinity's refusal to bargain.

B.) Second Affirmative Defense

Tellingly, the Union does not dispute that the Agreement prohibited the Hospital from providing the Region with any evidence in support of the Objections, or even disclosing the fact that the Hospital's failure to do so was a result of the Agreement's restrictions. The Union's tact to simply recount **what** events took place, as opposed to address the key question of **why** these events took place, shows the Union continues to hide from the truth.

The Union invokes the Board's policy against the re-litigation of representation issues in the context of an unfair labor practice proceeding (see AB, pages 39-40), but ignores the fact that the Objections were not, nor could they under the Agreement, be the subject of litigation before the Board as part of the representation proceedings. Furthermore, given the special circumstances of the case at bar, the Board should not conclude that, by virtue of the CEA, the Regional Director's dismissal of the Objections is unreviewable. At the end of the day, the fact of the matter is that, due to the NNOC's refusal to honor the parties' commitment to arbitration, and more recently, due to the NNOC's legal maneuvers in the proceedings now before the Board, the Objections have never been resolved. Had the Union agreed to arbitrate the Objections, they would have been resolved a year ago. The fact the Union hopes to avoid any

resolution of the Objections, whether before the Arbitrator or before the Board, nearly equates to an admission that, as the Objections allege, the Union broke nearly every rule of campaign conduct. In these circumstances, the Board has little evidence that the Election, which was decided by only a margin of six votes, was the result of a free and fair election. See Sub-Zero Freezer Co., 271 NLRB 47 (1984).

C.) The Fourth Affirmative Defense

The Union contends the affiliation took place after Affinity's refusal to bargain because the Affiliation Agreement states its effective date is January 1, 2013. See AB, pages 40-41. However, the point at which the affiliation began is a question of fact that is not resolved simply by the Union's declaration that the Affiliation Agreement (which is not even in the present record) is dispositive of the question. In any case, the Union has not confronted the Hospital's assertion that, irrespective of the date on which the affiliation took place, the affiliation is still germane to the question of remedy.

The Union does no better in identifying the merit in the Judge's determination that Affinity should be entitled to litigate the 4th Affirmative Defense, but only to the extent of offering any evidence already in the Hospital's possession. The Union does not dispute that, by virtue of Judge Laws' Protective Order, Affinity was precluded from offering any evidence in the Hospital's possession. Likewise, the Union expresses no disagreement over the fact that, given the nature of the issue, the NNOC was obviously in possession of the key evidence.

Lastly, the Union's narrow review of Sonotone, as playing a role only in the context of a bargaining unit determination, ignores the big picture. The concern, which comes from both Congress as reflected by Section 9(b)(1), as well as the Board as reflected by Sonotone, arises from compelling professional and non-professional employees to come together for purposes of

labor relations. Whether the backdrop is the combination of professional and non-professional employees for the sake of forming a single bargaining unit (i.e., Sonotone), or the provision of resources from one side to the other (i.e., an affiliation), the change is drastic, especially in the specific case of RNs, who historically have stood alone and acted independent of any their co-workers for purposes of labor relations.

2.) Ms. Wayt's Termination

A.) The General Counsel's *Prima Facie* Case

The Union points to other evidence (specifically, only Ms. Wayt's own, self-serving testimony) that her union support stretched beyond her one-time appearance in one of the NNOC's flyers. See AB, page 42. The Judge, however, did not state any finding that Ms. Wayt's union support consisted of any other activity, let alone that management was aware of such activity.² The fact remains, therefore, that Ms. Wayt's union support was meager.

The Union acknowledges the record includes no evidence that Ms. Boyle was aware of Ms. Wayt's union support, but attempts to marginalize her from the termination (see AB, page 4), even though Ms. Boyle's unchallenged testimony confirmed that, given her role – Vice President of Human Resources – she “need[s] to approve every suspension or termination.” See Tr. 1052-53. Indeed, Ms. Boyle's authority was so substantial that she put a stop to the original decision to terminate Ms. Wayt in order for more investigation to take place. In terms of the question of whether Ms. Zinsmeister was aware of Ms. Wayt's union support, the vague remark that Ms. Wayt attributed to Ms. Zinsmeister does not show in any clear or reliable way that she was aware of Ms. Wayt's union support. In the last analysis, the fact remains that Ms.

² The Union's attempt to portray Affinity's review of the flyer as reflective of some target-ready state of mind is disingenuous. As the NNOC's attorney confirmed through her own witness, as part of the Agreement, the Hospital's management had the right to pre-screen campaign literature prior to distribution to the RNs. See Tr. 1272-73.

Zinsmeister was subpoenaed to testify as part of the General Counsel's case in chief, and neither the General Counsel nor the Union questioned Ms. Zinsmeister directly on her knowledge of Ms. Wayt's union support.

Contrary to the Union's suggestion (see AB, page 43), employers' challenges to certifications do not arise solely from arguments presented as part of pre-election proceedings. Frequently, the challenges also arise from post-election proceedings, such as objections that are overruled by the Region and / or the Board. The fact that Affinity was a party to a CEA did not take away Affinity's right to file the Objections and the reasons why the Hospital did not pursue the Objections has been addressed elsewhere. Additionally, the Union's representation that Judge Laws found no agreement between Fallbrook and the NNOC is a falsehood. See AB, page 43. Judge Laws expressly denied Fallbrook the right to offer any evidence to prove any agreement between Fallbrook and the NNOC. The Union has also misconstrued Judge Amchan's footnote (see AB, page 43), which addresses not the Agreement between Affinity and the NNOC, but rather, the Affiliation Agreement between the NNOC and the NUHW.

While the Union styles Affinity's response to the ADOs as "hysterical," and Ms. Kress' comments as a threat of "physical violence" against the RNs (see AB, page 43)³, the Union does not contest the fact that Affinity's refusal to accept the ADOs arose from legitimate business reasons. See BSE, page 24. Similarly, the record includes no evidence that, as part of her phone call with Ms. Wayt on August 28th, Ms. Kress engaged in any "outburst." See AB, pages 43-44. Instead, Ms. Kress simply relayed to Ms. Wayt the information that she had received from Ms.

³ The record includes zero evidence that any RN interpreted Ms. Kress' remark as a threat to actually take violent action, as opposed to an expression of frustration out of a supervisor who had sacrificed nearly the entirety of her own Christmas holiday to work side-by-side with the RNs in taking care of the ICU's patient. See Tr. 682-83.

Varner, i.e., that Ms. Wayt would not accept the patient unless a sitter was present.⁴ Lastly, the Union, here as well, seeks to marginalize the fact that Affinity honored Ms. Wayt's request for Weingarten representation. See AB, page 44. The notion that Affinity was seeking to comply with the law, only to then turn around and terminate Ms. Wayt because of her union support, makes no sense whatsoever.

(1) Timing of Ms. Wayt's Termination

Affinity took no action to induce Ms. Wayt to engage in her misconduct on August 28th. That was her choice. Furthermore, while the Union views Affinity's arguments as "hypertechnical" (see AB, page 44), the Judge's analysis of animus was based upon the circumstances, which include the fact the outcome of the Election was unknown at the time the decision was made to terminate Ms. Wayt. The Union attributed to Affinity the foresight to know that, in spite of the Challenges and the Objections, and the slim margin of election votes, the Union was certain to enjoy a decisive victory. Lest the Union forget, the Election was by secret ballot, and as the case of Ms. Blair shows, the mere fact that employees may have at one time expressed support for the Union does not mean that their support is set in stone, never to change again.

(2) Ms. Kress' Preliminary Investigation

The Union comes up empty in terms of any legal authority or logic as to why Ms. Kress' reaction to the ADOs ought to serve as evidence of some animus she possessed several months before when she conducted her preliminary investigation of Ms. Wayt, who did not even work under Ms. Kress' supervision. Splitting hairs, the Union argues that Ms. Smith's concerns should have led Ms. Kress to question Ms. Wayt, as opposed to review the patient's chart. See

⁴ Ms. Mahon's letter confirmed that, given the unavailability of a sitter, Ms. Wayt did, in fact, refuse the patient's admission. See Respondent's Ex. 19, page 2.

AB, page 44. The simple fact of the matter is that Ms. Smith expressed concern about the care Ms. Wayt's patient had received. Ms. Kress electing to review the objective documentation making up the patient's chart was a reasonable decision, and of course, upon her review of the chart, Ms. Kress had ample reason to believe that Ms. Wayt may have engaged in misconduct. Blinded by zeal, the Union is simply unable to see that Affinity's determination to provide Ms. Wayt with an opportunity, even one that may have been slightly belated, to present an explanation shows an employer trying to be fair, not an employer seeking to remove an employee from the workplace.

(3) Disparate Treatment

As before, the Union makes no attempt to explain why the November 2012 and March 2013 disciplinary actions should be considered as disparate treatment evidence in the context of Wayt's termination, which occurred in September 2012. In addition, as part of the 2012 discipline, Ms. Blair had no reason to mention whether the rounds were performed by one of her colleagues. See AB, page 45. Ms. Blair was disciplined because, by putting her initials on the rounding log, she represented that she had rounded on the patient, which was not accurate. The Union's suggestion that the Judge could reasonably infer that Ms. Blair did not perform the assessment also lacks merit. Id. Affinity, as the party who conducted the investigation into Ms. Blair's misconduct, was the party in the best position to determine what care Ms. Blair did or did not provide. Lastly, Ms. Wayt should not be rewarded for the fact that she was able to conceal her neglect of the patient, so that the patient's family did not complain. Id. Furthermore, just as an intoxicated pilot would not be spared of termination because he lands the plane safely, Ms. Wayt was not immune from termination because the patient was not harmed.

(4) Affinity's Investigation

Notwithstanding the Union's efforts to establish that Affinity was seeking to trick Ms. Wayt (see AB, page 45), the fact remains that, upon receiving and reviewing a copy of the patient's documentation from her managers, Ms. Wayt claimed no lack of comfort with the questions or lack of recall with the facts. Instead, she verified the accuracy of her entries. Similarly, the contention that Ms. Wayt remained in the dark on the "facts that suggested falsification" (see AB, page 45) is disproven by Ms. Mahon's letter, which clearly shows recognition of the specific allegations. Like the Judge, the Union is fixated on the fact that, before Affinity's original decision to terminate Ms. Wayt, management had not spoken to Ms. Lesjak. Id. But prior to Ms. Mahon's letter, Ms. Lesjak was irrelevant to the investigation, as Ms. Wayt had confirmed she performed the assessment at 9:00 am, not to mention hourly rounds at, amongst other hours, 7:00 am, 8:00 am, 9:00 am, and 10:00 am. That was more than enough to call for Ms. Wayt's discharge. Additionally, the Union stresses that Affinity's managers were guilty of an inaccurate tally of the witnesses. Id. In so doing, the Union is merely seeking a diversion from the fact that, however the witnesses are counted and for whatever period of time each is able to cover, Affinity had good reason to conclude that Ms. Wayt had neglected the patient's basic care and made numerous false entries to her chart. In summary, even a "slipshod" investigation, to borrow the Union's uncouth choice of words, is not evidence of an investigation seeking an unlawful end. Put another way, mistakes and motives are separate kettles of fish, and here, the record gave the Judge no reasonable basis to conclude they were swimming in the same stream.

(5) Affinity's Policy

In trying to reconstruct Affinity's policy, common sense has been swallowed by the Union's advocacy. By the Union's view of the policy (see AB, page 46), even for an employee

who comes to work and shoots another employee in the head, Affinity would still be obligated to consider whether, based upon the employee's lack of any disciplinary history, the employee ought not be discharged. In a word, the Union's arguments here are, frankly, nonsense.

B.) Affinity's Defense

One of the Union's clear goals is to persuade the Board that Affinity's focus was on whether, as a general matter, Ms. Wayt entered the patient's room between 9:00 am and 12:00 pm. See AB, page 46. In fact, for obvious reasons, Affinity's focus was not on the question of whether Ms. Wayt stepped foot in the patient's room as a matter of workplace geography, but upon whether Ms. Wayt was providing the requisite care to the patient.

As a result of the Hospital's investigation, Affinity concluded that Ms. Wayt neglected the patient's care, and to a large degree, Affinity's belief was not only reasonable, but consistent with what Ms. Wayt admitted to be true, what the objective medical documentation proves, and what the Judge found to be the fact of the matter. Specifically, Ms. Wayt admitted that she did not perform the skin assessment (which, again, even the General Counsel saw as reason alone for a writing warning)⁵ and the record unquestionably shows that Ms. Wayt did not administer the "now" dosage of Vitamin K ordered by the physician and made no effort to assess the patient's pain level. Even more importantly, and what goes entirely unaddressed by the Union, Affinity clearly had a reasonable belief that Ms. Wayt neglected at least some of her hourly rounds, for the Judge made precisely these findings.

On the question of whether Affinity had a reasonable basis to believe that Ms. Wayt failed to perform the assessment, tossing logic for the sake of shielding Ms. Wayt from the

⁵ Contrary to the Union's suggestion (see AB, page 47), and the Union offers no citation to Affinity's Brief, the Hospital did not argue that Ms. Wayt's failure to perform the skin assessment showed that she falsified the entirety of the patient's chart.

determination, the Union suggests there was no need for the Judge to make a finding as to whether or not, in fact, Ms. Wayt performed the assessment. See AB, page 46. The Judge, so the theory goes, needed only to look to the fact that, as of September 11th, “no one had even interviewed one of the sitters at that point.” Id. Sometimes, a book can be told in a single page. Contrary to the Union’s representation of the record, and as the Judge expressly found, well before September 11th, Ms. Kress had interviewed Ms. Smith, who confirmed that she did not observe Ms. Wayt perform the assessment. As of September 11th, Ms. Wayt’s story had not yet changed, as she verified to Ms. Zinsmeister and Mr. McDonald that she had performed the assessment at 9:00 am, i.e., before the patient had even left the ED. The Judge found that Ms. Smith was with the patient from the point of admission (i.e., 9:15 am) through the point at which she took her lunch break (i.e., 11:00 am). Even giving Ms. Wayt the benefit of supposing that her entry was slightly off, she clearly represented that she performed the assessment relatively early on in the patient’s admission to Orthopedics. Given the information provided by Ms. Smith, at the very least, Affinity had a reasonable belief that Ms. Wayt did not perform the assessment, and as a related matter, deliberately falsified the patient’s chart.

CONCLUSION

For all the reasons set forth above, Affinity respectfully requests that the Board reject the arguments set forth by the Union’s Amended Answering Brief, sustain the entirety of the Hospital’s Exceptions and dismiss the Complaint.

Dated: September 20, 2013
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Respectfully submitted,

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, 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 Charging Party NNOC's Amended Answering Brief to Respondent's Exceptions was served on September 20, 2013 upon the following:

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Respectfully submitted,

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