

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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HOSPITAL OF BARSTOW, INC. d/b/a	:
BARSTOW COMMUNITY HOSPITAL	:
	:
And	: Case No. 31-CA-090049
	: Case No. 31-CA-096140
CALIFORNIA NURSES ASSOCIATION /	:
NATIONAL NURSES ORGANIZING	:
COMMITTEE	:

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**RESPONDENT’S ANSWERING BRIEF TO CHARGING PARTY’S  
EXCEPTIONS TO THE DECISION BY ADMINISTRATIVE LAW  
JUDGE JAY R. POLLACK**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board (hereafter, the “Board”), Respondent Hospital of Barstow, Inc. d/b/a Barstow Community Hospital (hereafter, “Barstow” or the “Hospital”) hereby files, by and through the Hospital’s Undersigned Counsel, this Answering Brief to the Exceptions filed by the Charging Party, the California Nurses Association / the National Nurses Organizing Committee (hereafter, the “CNA” or the “Union”), to the Decision issued by Administrative Law Judge Jay R. Pollack on September 9, 2013.

**BACKGROUND**

On September 9, 2013, Administrative Law Judge Jay Pollack (hereafter, the “Judge” or “Judge Pollack”) issued a Decision in which he found that Barstow violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereafter, the “Act”), by (1) allegedly refusing to offer proposals or counter proposals until the Union offered a full contract proposal and (2) by declaring impasse at the 9<sup>th</sup> collective

bargaining session and refusing to continue negotiations unless the Union agreed to discontinue their usage of Assignment Despite Objection forms. The Judge also found that deferral to arbitration would be inappropriate in this case. (ALJD 7:48-8:7.) In response to the Decision, Barstow filed timely Exceptions with the Board, whereby the Hospital has asserted, *inter alia*, the Judge's findings and conclusion that the Hospital violated Sections 8(a)(5) and (1) of the Act are unsupported by the record and / or controlling law.

In response to the Decision, the Union filed four Exceptions. The first Exception asserts that the Judge erred in finding that the Hospital changed its policy concerning how nurses could obtain training for required certifications prior to the Union's certification. (ALJD 3:44-45.) The Union's remaining three Exceptions address only the remedies the Judge declined to award. Specifically, the Union excepts to the Judge's failure to award a remedy which includes (1) a Notice Reading; (2) reimbursement of the Union's negotiation costs, or (3) reimbursement of the Union's litigation costs. (ALJD 8:40-9:28.)

### **SUMMARY OF ARGUMENT**

The Judge's finding with regard to the timing of the Hospital's change in the method of onsite training offered for nurse certifications and the Judge's conclusion that no violation of the Act arose from the Hospital's policies and practice concerning such training is well supported by the Record. There is no basis upon which the Judge's finding and conclusion should be overturned.<sup>1</sup>

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<sup>1</sup> In its Brief in Support of Exceptions (öUBSEö), the Union has incorporated by reference the discussion of this Exception in the Brief of Counsel for the Acting General Counsel (the öAGCö). Correspondingly, the detail in support of the Hospital's opposition to this Exception is presented in Respondent's Answering Brief to the Exceptions of the AGC and incorporated by reference herein.

With respect to the Union's challenge to the appropriateness of the Judge's Remedy, the Union has proffered no case law or Board precedent that would substantiate such extraordinary, enhanced remedies as notice reading<sup>2</sup> and reimbursement of litigation or negotiation costs in the circumstances of this case. Indeed, it is worthy of note that, although the AGC also sets forth an Exception to Judge Pollack's finding regarding the timing of the change in policy with respect to how nurses obtain certification training, Exceptions filed by the AGC do not challenge in any way the remedies awarded and not awarded by Judge Pollack. Moreover, although the Complaint seeks a notice reading among requested remedies, it does not seek the extraordinary remedies of litigation or negotiation costs.

In support of its Exceptions concerning the imposition of extraordinary remedies, the Union mischaracterizes as "egregious" the Respondent's bargaining conduct, in circumstances where the Respondent provided information in response to the Union's requests, submitted over twenty proposals, "tentatively agreed" upon three proposals, and participated effectively in ten bargaining sessions.<sup>3</sup> The Union has cited cases where extraordinary remedies were required to address years of repeated unfair labor practices by recidivist offenders and companies that refused to bargain for years. Here, the Hospital engaged immediately following certification in good faith bargaining toward an initial agreement. There was no negative history between the parties; quite the opposite. The campaign and election were the product of a neutrality accord. The fact that the

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<sup>2</sup> A Notice Reading was in fact held at Barstow in the presence of a Board Agent from Region 31 on September 12, 2013 pursuant to Section 10(j) temporary relief awarded in the matter of *Rubin v. Hospital of Barstow*, Case No.: 5:B-CV-00933 (USDC, No. Cal.2013.). Thus, the Board should deny the Union's Exception No. 2 as moot.

<sup>3</sup> Following the imposition of Section 10(j) temporary relief referenced in Footnote 2 above, the Hospital has participated in seven additional collective bargaining sessions with the Union.

parties had a difference of opinion about whether a lawful impasse had been reached, or whether, having previously agreed upon major economic proposals, the Respondent was within the bounds of lawful bargaining to insist that the Union present the remainder of its proposals does not remotely elevate this case to the level of those cited by the Union as authority for the issuance of extraordinary remedies. Similarly, the Union's assertion that the Hospital's bargaining team exhibited bad faith by arriving late to some of the bargaining sessions and cancelling one session upon two days' notice merits no consideration as a basis for the imposition of extraordinary remedies.

The Union's assertions that the Respondent unreasonably complicated litigation proceedings are baseless and most likely rooted in the Union's failed, repeated efforts to deny Respondent's right to present evidence in support of its affirmative defenses. In this regard, the Union's Petition to quash Respondent's subpoenas of Union personnel and records was denied by the Judge. Despite that denial, the Union failed to produce its witnesses at trial in Barstow, California. In order to facilitate the presence of the Union personnel subpoenaed, the Hospital recommended, and the Judge agreed, to conduct the final day of Hearing in San Francisco – clearly a cooperative litigation effort above and beyond the Hospital's responsibility. Moreover, the Union's charge that all of the Respondent's defenses were "frivolous" deserves no consideration at all; the Union's Motion in Limine only targeted some of the Respondent's defenses, obviously acknowledging the validity of the others. As to the defenses challenged by the Union, the Board already has rejected the Union's claim that the defenses are "frivolous" by its Order denying the Union's special appeal of Judge Pollack's denial of the Union's Motion in Limine.

In sum, the Union has offered no basis for the Board to find error in Judge Pollack's determination that extraordinary remedies were not warranted in this matter. Finally, the Hospital reiterates here its disagreement with Judge Pollack's findings of unfair labor practices for all of the reasons set forth by the Hospital's Exceptions and Brief in Support of Exceptions.

1. **Judge Pollack's Finding That the Hospital Changed Its Policy on How Nurses Could Obtain Required Certifications Prior to the Union's Election Is Fully Supported by the Record.**

Judge Pollack found that the Hospital changed its policy with regard to training for required nurse certifications in April, 2012, prior to the Union's certification. (ALJD 3:44-45). This finding is fully supported by the Record and should be upheld by the Board. As noted above in the Summary of Argument, the Hospital incorporates by reference its Argument concerning this issue as presented in the Respondent's Answering Brief to the Exceptions of Counsel for the Acting General Counsel.

2. **Judge Pollack's Rejection of a Notice Reading is Proper.**

The Union argues that Judge Pollack erred by declining to require a reading of the notice by Hospital management in the presence of the Registered Nurses and the Board on paid working time. (UBSE 8-9). Acknowledging the notice reading as an "extraordinary" remedy, the Union relies for authority upon HTH Corp., 356 NLRB No. 182 (2011), Relco Locomotives, 359 NLRB No. 133 (2013), and Homer D. Bronson Co., 349 NLRB No. 50 (2007). But the Union's arguments untenably stretch the Board's reasoning in those cases, mischaracterize the evidence in the case at bar, and misunderstand the Board's obligations in requiring the extraordinary remedy of a notice

reading. The cases cited by the Union in support of its contention that a notice reading should be ordered are all distinguishable from the case at bar on grounds of the repetitious nature and severity of the violations found in each case. In HTH Corp., the Board was faced with an employer who had refused to bargain for nine years by the time the case was reviewed by the Board, spurring multiple rounds of litigation and "numerous, wide-ranging unfair labor practices." 356 NLRB No. 182 at 182. Similarly, in Relco Locomotive, the Board held that the employer was required to read the notice issued in the case based upon the employer's "proclivity to violate the Act," reflected in that case by the fact the Board had found that the employer had committed "multiple and serious violations of the Act" on three separate occasions in a two-year period. 359 No. 133 at 1. Finally, the facts in Homer D. Bronson Co. are entirely inapposite. In that case, the Board ordered a notice reading based upon a finding that the employer repeatedly threatened employees with plant closure and job loss if they chose union representation. 349 NLRB No. 50 at 1.

Here, the Respondent participated in ten collective bargaining sessions in the space of six months. During the first three sessions, Respondent submitted proposals that had been largely agreed upon as part of the neutrality accord between the Parties; they were discussed, slightly modified, and agreed upon by the third session. (Tr.42, 43-45,241, GC Exhibit 6.) The Hospital also responded to information requests made by the Union during the early sessions, and supplied numerous proposals following the sixth session. (ALJD 4:8-35; Tr.69-71,241, GC Exhibits 2(j), 17.) Although the Union characterizes all of the collective bargaining sessions as "sham" in its brief, the Union's own witnesses testified otherwise, and the Union claimed in Collective Bargaining Updates it

disseminated to its members that the Union was indeed making progress in negotiations. (Tr.314, Respondent Exhibit 5.)The Union cannot have it both ways, saying on the one hand to its members that progress was taking place in negotiations, but saying on the other hand to the Board that the nurses “had no progress in its contract bargaining.” (UBSE 9.)

It is clear from a review of all three cases cited by the Union that a compelling factor considered by the Board in determining whether a notice reading is appropriate is a consideration of whether the employer is a recidivist, which the Hospital is not. Additionally, both HTH Corp. and Relco Locomotive included protracted histories of conflict between the employer and union and multiple rounds of litigation before the Board, which the Board explicitly stated had an impact on its decision to issue a notice reading. No such history exists in the case at bar. The negotiations at issue were in connection with an initial collective bargaining agreement.

Finally, the Board’s cases ordering a notice reading, including those cited by the Union, make it clear that such a remedy is an “extraordinary” or “special” remedy that will be imposed only where required by the particular circumstances of a case. Ishikawa Gasket America, Inc., 337 NLRB No. 29 (2001). Particularly because the Board has labeled the notice reading remedy as “extraordinary”, the party seeking the remedy is necessarily tasked with demonstrating why traditional remedies will not sufficiently ameliorate the unfair labor practices found by the judge. See Federated Logistics and Operations, 340 NLRB No. 36 (2003) (Battista dissent). In this case, the Union has failed monumentally to sustain this burden. In addition to its convenient characterization of the collective bargaining sessions for the purpose of this argument as “sham”, as

opposed to its trumpeting "progress" in the negotiations to its members, the Union relies for support of extraordinary remedy assessment upon its assertion that the Respondent made unilateral changes "a charge Judge Pollack specifically denied. The Union also relies upon the Respondent's declaration of impasse and refusal to bargain further unless the Union ceased its use of ADO forms, a position in support of which the Hospital has presented evidence that goes to the very core of its mission. The Hospital has committed no conduct so pervasive or outrageous as to require additional remedies, and nothing about the violations found by Judge Pollack are so egregious as to render insufficient traditional notice posting remedies. Accordingly, the Hospital respectfully submits that the Board should uphold Judge Pollack's determination that a notice reading remedy is not necessary or appropriate in the case at bar.

### **3. Judge Pollack's Refusal to Award Litigation and Negotiation Costs is Proper**

The Union's Exceptions next address Judge Pollack's refusal to award litigation and negotiation costs to the Union. Precedent simply does not support an award of either litigation or negotiation costs in this case. First, the Hospital objects to the Union's request for litigation and negotiation expenses on the ground that, as a matter of law, the Board lacks the authority to impose such a remedy upon the Hospital. The question of the Board's authority to order payment of litigation expenses is an open question of federal law. See Alwin Mfg. Co. v. N.L.R.B., 192 F.2d 133, FN3 (D.C. Cir. 1999) (Court found it unnecessary to reach the question of the Board's authority to order payment of litigation expenses under bad faith exception to the American Rule.) As a Federal agency, the Board's authority is derived exclusively from "statutory authority expressly

granted or necessarily implied. See Arrow-Hart & Hegeman Electric Co. v. F.T.C., 291 U.S. 587, 598 (1934). Accordingly, an agency must establish clear [statutory] support for its claim of congressional authorization to impose fees, which the Board has never done. As a result, the Board lacks the authority to order litigation or negotiation costs, and should therefore decline to grant an award of either litigation or negotiation fees in this case. See Summit Valley Industries, Inc., 456 U.S. 717 (1982).

Moreover, even under the Board's unsupported precedent to date, awards of litigation costs and/or negotiation costs are considered uncommon enhanced remedies available only where the defenses raised are found to be frivolous rather than debatable. Unbelievable, Inc. 318 NLRB No.60 (1995), Wellman Industries, 248 NLRB 325 (1980). Additionally, in Eastern Maine Medical Center, the Board held that reimbursement of negotiation expenses was appropriate only where the employer had demonstrated a proclivity to violate the Act once its actions have been adjudicated unlawful. In other words, the Board has held, in at least one case, that an award of negotiation expenses is appropriate only for recidivist employers. 253 NLRB 224, 228 (1980); See also, Consolidation Coal Co., 310 NLRB 109 (1993); Hickmott Foods, 242 NLRB 1357 (1979). The Board often analyzes the award of litigation and negotiation expenses together as related matters. See Wellman Industries, 248 NLRB 325 (1980); Houston County Electric Cooperative, 285 NLRB 1213 (1987).

The Union's weak attempt to prove that the Hospital's defenses in this case were frivolous is itself frivolous. The Union has no basis to suggest that, for example, the Hospital's defense concerning the Board's lack of power and authority as a result the D.C. Circuit's Decision in Noel Canning v. N.L.R.B. is frivolous, given the fact that the

United States Supreme Court has itself agreed to review the issue. Similarly, the Hospital's argument under First National Maintenance, 452 U.S. 666 (1981), concerning the duty to bargain over Assignment Despite Objection (hereafter, "ADO") forms completed by Registered Nurses is a case of first impression, and presents a novel question of law which could hardly be considered frivolous. While Judge Pollack ultimately found the Hospital's defenses did not rise to the level of excusing the duty to bargain with the Union, there is nothing to suggest in the Record or the Decision that he found the defenses frivolous. In this regard, it is worthy of note that the Judge's denial of the Union's Motion in Limine, which sought to exclude evidence on the Hospital's defenses, is itself an indication that the Hospital's defenses are not frivolous. The NLRB agreed with the Judge's determination that the Hospital's defenses should be heard by denying the Union's immediate appeal of the Judge's denial of the Motion in Limine. In the same vein, the Board should uphold Judge Pollack's refusal to award litigation and negotiation costs.

The Union relies heavily upon Unbelievable, Inc., 318 NLRB No. 60 (1995), and Tiidee Products, 194 NLRB 1234 (1972), to support its contention that litigation and negotiation costs are proper in the case at bar, but both cases are readily distinguishable from the instant case in a number of significant ways. First and foremost, the Board in Unbelievable, Inc. was clear that, "[i]n most circumstances, [a bargaining order], accompanied by the usual cease and desist order and the posting of a notice, will suffice to ameliorate the unfair labor practices found to have been committed. 318 NLRB No. 60 at 5. In Unbelievable, Inc. the Board found that the employer's negotiator had adopted a "pugnacious and obstructive stance" to bargaining, employed egregious

obstructionist tactics to avoid bargaining, and refused to discuss the Union's proposals at bargaining, all of which, combined, justified the award of litigation costs. In the instant case, the Union's own witnesses testified to the Hospital's attendance at bargaining sessions, provision of information in response to information requests, submission of proposals, and tentative agreement on proposals. In fact, as noted above, the Union touted success and progress at the bargaining table in the "bargaining updates" disseminated to bargaining unit members. (Tr.314, Respondent Exhibit 5.) All of these actions put the lie to the Union's claim that the Hospital engaged in conduct "designed to weaken the Union and destroy the collective bargaining process, as well as the purposes and policies of the Act." (UBSE 10) Similarly, the facts in the instant case make it impossible for the Union to sustain its argument that it is entitled to an award of negotiation costs. To begin with, the Hospital is not a recidivist, a requirement the Board set forth for an award of negotiation costs in Eastern Maine Medical Center, *supra*. Furthermore, the Union has failed to prove that the Hospital engaged in the kind of surface bargaining that occurred in the cases to which it cites for support. Indeed, the Charges filed by the Union did not even allege any surface bargaining by Barstow. Unlike Harowe Servo Controls, 250 NLRB 958, in which the Board found that the employer attempted to "thwart the whole process", the underlying record in this case establishes, as explained above, that progress was indeed made during a number of the bargaining sessions between the Union and the Hospital, including a number of proposals that were tentatively agreed upon by the parties. In sum, despite its desperate attempts to contort the Hospital's conduct and defenses in this matter into the categories of "egregious" and "frivolous" which warranted extraordinary remedies in the cases cited, the Union fails miserably. The worst

that can be said truthfully for the Hospital's conduct is not that it was "egregious", but that the Judge disagreed with the Hospital's determinations of (1) good faith bargaining within the framework of the neutrality accord between the parties, and (2) lawful impasse in circumstances of a case of first impression. The worst that can be said truthfully regarding the Hospital's affirmative defenses is not that they were "frivolous", but that the Judge and the Board found them appropriate for litigation and the Judge determined (incorrectly we think) that they were without merit.

The Union attempts to bootstrap its argument that extraordinary remedies are warranted by quoting the self-serving testimony of its chief negotiator regarding his opinion that the Hospital's chief negotiator raised his voice at negotiations. The absence of mention of these opinions in the Judge's Findings indicates that the Judge accorded them precisely the level of probative value they warranted - zero. The same is true of the Union's assertion that the Hospital somehow exhibited "egregious" behavior in exercising its right to prove certain defenses by questioning Union personnel pursuant to subpoena, and by eliciting testimony describing the "HeartCode" method of training in detail.

The Board could not be clearer in its intent to limit the award of litigation and/or negotiation costs to any but the most egregious cases, and typically those that involve recidivist offenders. Judge Pollack correctly determined after four days of hearing and an extensive Record that no extraordinary remedies are warranted here, and his Decision should be upheld in this regard.

## **CONCLUSION**

For all the foregoing reasons, the Board should dismiss the Union's Exceptions in their entirety.

Dated: Katonah, New York  
November 6, 2013

Respectfully submitted,

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Carmen M. DiRienzo  
Attorney for Barstow Community  
Hospital  
4 Honey Hollow Court  
Katonah, NY 10536  
(917) 217-4691  
[CarmenDiRienzo@hotmail.com](mailto:CarmenDiRienzo@hotmail.com)

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**CERTIFICATE OF SERVICE**

The Undersigned, Carmen M. DiRienzo, 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 Answering Brief to Charging Party's Exceptions to the Decision Issued by Administrative Law Judge Jay R. Pollack was served on Wednesday, November 6, 2013 upon the following:

Nicole Daro, Esq.  
Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
NDaro@CalNurses.Org

Micah Berul, Esq.  
Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
MBerul@CalNurses.Org

Jane Lawhon, Esq.  
Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
JLawhon@Calnurses.org

J. Carlos Gonzalez, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 31  
11500 West Olympic Blvd., Suite 600  
Los Angeles, CA 90064  
carlos.gonzalez@nlrb.gov

Dated: Katonah, NY  
November 6, 2013

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_

Carmen M. DiRienzo  
Attorney for Barstow Hospital  
4 Honey Hollow Court  
Katonah, NY 10536  
(917)217-4691  
Carmen.DiRienzo@hotmail.com