

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

---

HOSPITAL OF BARSTOW, INC. d/b/a	:	Case Nos:
BARSTOW COMMUNITY HOSPITAL	:	31-CA-090049
	:	31-CA-096140
and	:	
	:	
CALIFORNIA NURSES ASSOCIATION /	:	
NATIONAL NURSES ORGANIZING	:	
COMMITTEE	:	

---

**RESPONDENT’S REPLY BRIEF TO COUNSEL FOR THE GENERAL  
COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO  
THE DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE JAY POLLACK**

As the Respondent in the above-captioned cases, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital (hereafter, “Barstow” or the “Hospital”) hereby replies, by and through Barstow’s Undersigned Counsel, to Counsel for the General Counsel’s Answering Brief to the Exceptions that Barstow filed with the National Labor Relations Board (hereafter, the “Board”) in response to the Decision (hereafter, the “Decision”) issued by Administrative Law Judge Jay Pollock (hereafter, the “Judge”).

**1.) Barstow’s Exceptions Comply with the Board’s Rules**

Seeking to be relieved of the unenviable task of confronting Barstow’s arguments, the General Counsel puts before the Board picayune and wholly unavailing procedural attacks on the Exceptions and the Supporting Brief. As a preliminary matter, the Undersigned counsel will represent that the format used for the Exceptions and the Supporting Brief is the very same format used in countless other cases before the Board and never before has the claim been peddled that the format does not comply with the Board’s Rules.

In any event, through the section entitled “Issues Presented,” Barstow’s Supporting Brief expressly links every Exception with a particular argument. The Exceptions are then woven into Barstow’s arguments. Contrary to the General Counsel’s expectations, the Board’s Rules did not require Barstow to identify, perpetually through the Supporting Brief, every “particular instance” in which any given Exception is the subject of argument. See AB, page 2. Moreover, the Supporting Brief is replete with citations to the record, and clearly, by referring to his own copy of the record, the General Counsel was able to challenge, however unconvincingly, Barstow’s factual assertions. Ironically enough, the General Counsel’s protest over the grounds of some of the Exceptions is at odds with the vision of the Board’s Rules, which call for the grounds of an exception to be stated “**concisely**.” See Section 102.46(b)(1)(iv) (emphasis added). The Brief in Support of the Exceptions, quite obviously, is the forum in which a party is supposed to explain the party’s challenges to the Judge’s rulings, findings and / or conclusions. The General Counsel’s assertion that Barstow has put “bare exceptions” before the Board is, frankly, nothing more than a transparent, if wholly ineffective attempt to deprive the Hospital of the due process of the Board’s review of the Judge’s rulings. Indeed, Barstow’s explanation of the Exceptions was so thorough that the Supporting Brief nearly reached the page limitation prescribed by the Board’s Rules. See Section 102.46(j).

**2.) Barstow’s Insistence Upon the Entirety of the Union’s Proposals Did Not Violate the Act**

The General Counsel presents the Board with a chart, complete with headings, columns and rows. See AB, page 12. In reality, the chart only sets forth one primary claim, which is that the Hospital has confused proposals with pre-negotiated agreements.

These “pre-negotiated agreements,” however, are later described by the General Counsel as being comprised of “articles [that] had **largely** been negotiated and agreed upon prior to the election and certification.” See AB, page 13 (emphasis added). By the General Counsel’s own view of the evidence, therefore, no truly final agreement had been reached between the parties as to any mandatory subject of bargaining. Instead, to whatever the degree, further negotiations were necessary over these subjects and those negotiations began with Barstow’s proposals, which were not immediately accepted by the Union. Instead, Mr. Matthews felt the need to talk with Mr. Losada, who approved the Union’s acceptance of Barstow’s proposals. See Tr. 629, 632, 634. Thus, although the Union ultimately elected to recognize certain agreements the parties had previously reached, the Union initially resisted, which served to portend the Union’s later refusal to recognize the LRA for any purpose whatsoever.

In addition, even under the presumption that, as the negotiations began, the parties, free of any incident, simply and seamlessly signed off on the pre-negotiated subjects, the General Counsel has no basis to allege, in any meaningful way, that Barstow’s position violated the Act. In making the claim that Barstow refused to make **any** proposal before receipt of the entirety of the Union’s proposals, the General Counsel put the case in an entirely artificial context. In particular, the General Counsel has ignored the fact that Barstow had not simply engaged in prior negotiations with the Union, but reached agreement with the Union on several key subjects. Thus, when the parties met for negotiations in the wake of the election, as a practical matter, negotiations were already in a “midstream” position.

In an effort to defend the Judge’s conclusions, the General Counsel makes reference to a few cases (see AB, pages 14-15), not a single one of which, incidentally, appears in the Decision. At the outset, the General Counsel cites to Federal Mogul Corporation, 212 NLRB 950 (1974), and asserts that a party may not place conditions on the party’s willingness to “discuss proposals.” Aside from the fact that the General Counsel has mischaracterized Barstow’s position, which was not a refusal to discuss the Union’s proposals, but an unwillingness to offer any of the Hospital’s proposals, the General Counsel exaggerates the import of Federal Mogul as a case in which the Board set forth some type of “bright line” rule. In point of fact, Federal Mogul 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, Ardley Bus Corporation, Inc., 357 NLRB No. 85 (2011), involved the Board’s application of preexisting precedent in the specific context of an employer who met with the Union on only one occasion, and seeking to elevate form over substance, refused to schedule any further meetings unless the union submitted their proposals in a written format. Vanguard Fire & Supply, 345 NLRB 1016 (2005), involved an employer who refused to meet with the union because of the union’s failure to provide a bargaining agenda, even though the Union had provided the employer with a bargaining agenda on at least two (2) prior occasions. Lastly, in United Technologies, 296 NLRB 571 (1989), over the course of six months, the employer and the union took part in twelve bargaining sessions without a single proposal coming from the employer. Over the course of the next six months, the employer submitted a single proposal and soon withdrew recognition.

Here, unlike Federal Mogul, Barstow did not require, as a condition on further negotiations, the Union to accept the Hospital's proposal on any mandatory subject of bargaining. Similarly, unlike Ardley, the record does not include any evidence that Barstow 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. If anything, Vanguard would suggest that Barstow's position was lawful. Whereas the employer in Vanguard refused to meet with the Union even after the Union provided the requested bargaining agenda, Barstow promptly handed over proposals once the Union had presented the entirety of their proposals. Finally, United Technologies is distinguishable, both as a matter of the factual background, as well as the actions the Board found to be violative of the Act. Unlike the employer in United Technologies, after only five (5) bargaining sessions, Barstow tendered seventeen (17) proposals, not to mention provided the Union with requested information. 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 finding of a violation was based upon entirely independent grounds, namely: (1) the employer made a unilateral change, (2) the employer's statement that the 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 summary, the record now before the Board does not establish Barstow engaged in any bad faith. To the extent the Judge saw any doors that Barstow locked as part of the parties' negotiations, he overlooked the fact that the Union always held the key. Upon receipt of the Union's proposals, and now with the opportunity to evaluate how the Union

envisioned the overall terms and conditions of the RNs' employment with Barstow, the Hospital's proposals were immediately submitted, as promised. Neither the Union, nor the General Counsel, nor the Judge has ever offered any logical, substantive explanation as to why or how Barstow's request for the entirety of the Union's proposals should be viewed as even evidence of bad faith, let alone a *per se* violation of Section 8(a)(5) of the Act. The Board should, respectfully, reject what is essentially a request from the General Counsel for the agency to micro-manage the parties' negotiations.

### **3.) The Parties Were Deadlocked Over the ADOs**

In the Answering Brief, the General Counsel sets forth an extraordinary, if alarming view of the meaning and limits of First National Maintenance. The General Counsel submits that, under First National Maintenance, an employer has no duty to bargain over a subject that is driven by the employer's efforts to turn a profit, even though the represented employees' terms and conditions of employment may be directly affected by the subject. See AB, page 16. Yet, the General Counsel does not believe that the same autonomy ought to exist for a healthcare facility, such as Barstow, as to a matter that is driven by the facility's solemn responsibility to provide quality patient care. The Board should reject the General Counsel's view that the Supreme Court has removed an employer's efforts to generate a profit from the bargaining process, but would subject patient care to the burdens and vagaries of the bargaining process, along with a labor organization's economic weapons. For what are obvious reasons, patient care is far too important a subject to be inserted between the crossfire of management and labor.<sup>1</sup>

---

<sup>1</sup> Valley Hospital Medical Center, which is also cited by the General Counsel (see AB, page 17), addressed whether employees' conduct equated to protected concerted activity,

The General Counsel's position that the ADOs serve to protect the RNs' own responsibility to patient care (see AB, page 16-17, 21) is nothing more than the continuation of a ruse spun by the Union. None of the General Counsel's witnesses were able to explain how these forms, which go entirely untracked by the Union, serve to protect the RNs' licensure. In point of fact, as exposed by the Union's own documentation (see General Counsel's Ex. 6; Respondent's Ex. 5), the ADOs are designed to provide data that supports, at least ostensibly, the Union's proposals related to patient care. These "proposals," which are actually attempts by the Union to co-manage the Hospital's provision of patient care, have accomplished only one result – to wit, serious, heated argument and controversy between the parties, which is, of course, exactly the opposite of what the Act endeavors to accomplish.

Thus, the General Counsel's suggestion that the Union's offer to negotiate over the ADOs held any value is pure fantasy. The record now before the Board would not give even the most ardent of optimists any reason to expect that Barstow and the CNA would ever see eye-to-eye on the ADOs. Mr. Matthews represented that the ADOs were used by the Union at every healthcare facility at which the Union represented RNs. For Barstow, the ADOs were not only an affront to the Hospital's risk management system, but a device that put patient care at risk and exposed the Hospital to liability.

#### **4.) The General Counsel Failed to Address Fully the Affiliation Defense**

The General Counsel's attack on Barstow's affirmative defense is comprised of an effort to marginalize the effect of the give-away of (for the record includes no evidence that the NUHW has or will be able to repay) millions upon millions of dollars to

---

and therefore, is entirely inapposite to the case at bar, which involves a dispute related to bargaining.

the NUHW. The General Counsel ignores Barstow's independent argument that, by the sheer identity of the involved labor organizations, with one the representative of professionals and the other the representative of non-professionals, there was no longer continuity in the CNA's identity. See 28 U.S.C. § 159(b)(1); Sonotone Corp., 90 NLRB 1236 (1950)

### **CONCLUSION**

For all the reasons set forth above, the Board should reject the arguments set forth by the General Counsel's Answering Brief and sustain the Exceptions in their entirety.

Dated:           Katonah, New York  
                  November 20, 2013

Respectfully submitted,

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

Carmen M. DiRienzo  
Attorney for Barstow Community Hospital  
4 Honey Hollow Court  
Katonah, New York  
(917) 217-4691  
[Carmen.DiRienzo@Hotmail.com](mailto:Carmen.DiRienzo@Hotmail.com)

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

---

HOSPITAL OF BARSTOW, INC. d/b/a	:	Case Nos:
BARSTOW COMMUNITY HOSPITAL	:	31-CA-090049
	:	31-CA-096140
and	:	
	:	
CALIFORNIA NURSES ASSOCIATION /	:	
NATIONAL NURSES ORGANIZING	:	
COMMITTEE	:	

---

**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 Reply Brief to Counsel for the General Counsel's Answering Brief to the Respondent's Exceptions to the Decision Issued by Administrative Law Judge Jay R. Pollack was served on Wednesday, November 20, 2013 upon the following:

Juan Carlos Gonzalez  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 31  
11500 West Olympic Boulevard, Suite 600  
Los Angeles, California 90064-1524  
[Carlos.Gonzalez@NLRB.Gov](mailto:Carlos.Gonzalez@NLRB.Gov)

Nicole Daro, Esq.  
Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
[NDaro@CalNurses.Org](mailto:NDaro@CalNurses.Org)

Micah Berul, Esq.  
Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
[MBerul@CalNurses.Org](mailto:MBerul@CalNurses.Org)

Jane Lawhon, Esq.

Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
[JLawhon@CalNurses.Org](mailto:JLawhon@CalNurses.Org)

Dated: Katonah, New York  
November 20, 2013

Respectfully submitted,

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

Carmen M. DiRienzo  
Attorney for Barstow Community Hospital  
4 Honey Hollow Court  
Katonah, New York  
(917) 217-4691  
[Carmen.DiRienzo@Hotmail.com](mailto:Carmen.DiRienzo@Hotmail.com)