

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 THE CHARGING PARTY’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 the Charging Party’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.) The Union Acknowledges the Parties’ Commitment to the LRA and the Board Should Reject the Union’s Efforts to Spin Arbitration Out as one of the Labor Relations Agreement’s Key Terms

As to the question of whether the Union and Barstow were parties to a Labor Relations Agreement (hereafter, the “LRA”), the Union argues that an agreement was never reached, but practically in the next breath, acknowledges that the Union “proceeded for a time on the assumption that the agreement would be finalized.” See AB, page 1; see also Tr. page 565 (Roy Hong’s testimony that the parties proceeded “under the basis of the understanding that the agreement would be signed soon”). Though made

begrudgingly, the Union's acknowledgment that, at least "for a time," the LRA governed the parties' conduct was necessary for the Union to preserve any semblance of credibility. To say, for example, that Barstow afforded the Union access to the Hospital's break rooms during the course of the Union's campaign (see Tr. 566) in the absence of any returning consideration would be to defy common sense. The Union's Answering Brief does not specify precisely when the Union broke from their "assumption," or more to the point, opted to no longer honor the parties' agreement. Mr. Matthews' testimony, however, does make clear that the Union recognized the LRA continued to apply during the parties' negotiation of an initial Collective Bargaining Agreement. Thus, when Mr. Matthews wished to express an objection as to Barstow's conduct at the bargaining table, he not only referred to, but quoted from, the "Standard of Bargaining" set forth by the LRA. See Tr. 195-95; 246-47; 308. Similarly, as part of challenging Barstow's position that the Union ought to present the entirety of their proposals before the Hospital responded, the Union, if only by adopting the General Counsel's arguments (see GC AB, pages 13-14), seeks to invoke and rely upon the LRA, specifically the bargaining subjects on which the parties reached so-called pre-agreement. The Board must not allow the Union and the General Counsel to have the matter both ways.¹

The Union's efforts to wiggle out of the parties' commitment to arbitration, therefore, do not arise from any wholesale denial of the LRA's existence, for the Union obviously saw the absurdity of such a position. Instead, the Union has taken the more

¹ Nor should the Board lend any credence to the Union's assertion that, in the context of the 301 action that Barstow brought against the Union, Barstow took an inconsistent position as to the parties' agreement. See AB, page 2. If only temporally, the proposed LRA, standing alone, is entirely separate from the parties' later commitment to apply the terms of the LRA to the Union's organizing of Barstow's RNs.

targeted approach of asserting that the terms of the LRA did not provide for arbitration as the sole forum for resolution of the parties' disputes. The Union contends that the record does not include any evidence, or at least Barstow did not cite to any evidence, that would reflect the parties' commitment to arbitration. See AB, page 1. In point of fact, the record is replete with evidence of not only the parties' agreement to arbitrate disputes (see e.g., Respondent's Ex. 26), but also the Union's participation in the selection of a permanent arbitrator (namely, Mr. Ralph Berger), as well as the occurrence of actual arbitrations. See Tr. 509, 511-12.

2.) Paragraph 14 of the LRA Did Not Render, as a Forever Impossibility, the Parties' Ability to Reach an Informal Agreement

The Union argues that, by virtue of Paragraph 14 of the LRA, "none of the terms of the agreement ever became binding on the parties." See AB, page 1. In so doing, the Union essentially asks that the Board ignore, as though the points are simply irrelevant, the fact that, through the course of the Union's campaign and as part of the election, the Union continuously dipped into the honey pot of the LRA. And now, having secured an election victory made possible by the LRA, the Union comes to the Board with the audacity to ask that the Board not hold the Union accountable for the obligations the Union assumed by the parties' obvious, largely performed agreement to adhere to the LRA.

Moreover, Paragraph 14 simply does not support the Union's attempts to pull off an end around on the commitments the Union assumed under the LRA. Paragraph 14 provides that neither the Union nor the Hospital would be bound by any provision set forth by the LRA "**solely**" by virtue of the fact the provision appeared in "**any draft**" of the LRA. See Respondent's Ex. 26, page 18 (emphasis added). Barstow's position that

the Union is obligated to arbitrate the disputes now before the Board does not arise “solely” from the fact the LRA provides for arbitration. Instead, Barstow’s position is staked to the parties’ subsequent verbal agreement to observe the LRA, and even more so, the fact that, as demonstrated unmistakably by the record, the Union’s organizing campaign, the election and at least the parties’ early negotiations all took place on the tracks paved by the LRA. The language of Paragraph 14 does not reflect any intention that, no matter the future circumstances, the parties could never be bound by any of the LRA’s terms in the absence of an executed document. Furthermore, even upon the presumption, solely for the sake of argument, that the Board should see such an intention behind the language of Paragraph 14, Barstow should point out the intentions of a party are not forever set in stone. Here, as time wore on and other developments unfurled, the parties, through their respective attorneys, reached a verbal agreement to observe the terms of the LRA, which is precisely what did occur, at least up to the point in time when the Union saw no further value in honoring the LRA and elected to “jump ship,” plunder in hand.

3.) Regardless of Whether the Union Preserved the Right to File Unfair Labor Practice Charges, the Union Also Committed to Arbitration

By incorporation of the General Counsel’s Answering Brief, the Union argues that Paragraph 5(d)(1) of the LRA preserved for the Union the right to file unfair labor practice charges. The Union does not address the fact that the Paragraph makes no express reference to unfair labor practice charges, nor does the Union recognize that, to the extent an unfair labor practice charge may lead to a “governmental action,” the Union’s right to file a charge is linked to disputes that arise from “contractual or employment-related issues.” The Paragraph makes no reference to disputes that may

arise from the parties' **negotiations**, which are governed by the agreed-upon standard and process set forth by Paragraph 4(a)(2) of the LRA. To the extent the Union believed that Barstow's conduct at the bargaining table did not comply with the requirements of the LRA, which is precisely the allegation made by Mr. Matthews during the negotiations, the Union was obligated under Paragraph 11(a) of the LRA to bring the dispute to Mr. Berger.

Paragraph 4(a)(3) does make reference to disputes that may arise in the context of "bargaining" and the Union's right to pursue "governmental action." Even under the assumption, however, that such nebulous language authorized the Union to file the charges that brought the current dispute to the Board, the fact remains that, given how the Union's own chief negotiator styled the Union's objections, i.e., Barstow was not in compliance with Paragraph 4(a)(2), the Union was also obligated to take the dispute to the parties' arbitrator. In the event the Union was not unhappy with the arbitrator's award, the Union could have, by virtue of any related unfair labor practice charge, urged the Board to reject the award under Spielberg and pick up the prosecution of the statutory violations alleged by the charge.

4.) The Duration of the Parties' Collective Bargaining Relationship

Finally, the Union seeks to defend (here also, by incorporation of the General Counsel's arguments) the Judge's refusal to defer the parties' dispute to arbitration based upon the lack of any collective bargaining relationship between the parties. The Union's defense, however, is comprised simply of terming Barstow's argument as "weak" and setting forth a summary of the factors the Board considered in Collyer. See GC AB, page 8-9. The Union does not dispute that the length of the parties' relationship is only a

“factor” the Board may consider in the context of a deferral analysis and simply makes no effort to confront, let alone refute, Barstow’s arguments as to why the parties’ relationship should not control the deferral analysis in the case at bar. In what is plainly a recognition of the shaky foundation underlying the Judge’s determination, the Union endeavors to refortify the foundation by a review of the other factors the Board may apply in the context of a deferral analysis (see GC AB, pages 9-10), not a single one of which was relied upon by the Judge. The Union argues that Barstow has displayed an “enmity toward employees’ protective rights,” even though, throughout the campaign, the Hospital did not seek to persuade the RNs to vote against the Union, but rather, agreed to stay neutral on the question. The Union also ignores the fact that the allegations related to “HeartCode” were dismissed by the Judge, and therefore, do not reflect any enmity toward employees’ protected rights. The Union makes the point that no collective bargaining agreement existed, only to then recognize the parties’ verbal commitment to the LRA. As explained above, the claim that the LRA preserved the Union’s right to file unfair labor practice charges looks at the issue backwards, as the question is whether the Union agreed to take the current disputes to arbitrator, whether as an exclusive forum or one that should exist side-by-side with deferred unfair labor practice charges filed with the Board. The Union’s claim of any lack of clarity as to “whether [Barstow] was willing to arbitrate the dispute during the investigation of the [charges]” (see GC AB, page 10) is outrageous. From the very start, Barstow has consistently pursued arbitration of the disputes now before the Board, and just as consistently, the Union has searched for every opportunity, by hook or by crook, to undermine the parties’ commitment to arbitration. Finally, as presented by the Union’s chief negotiator, Mr. Matthews, who claimed

Barstow's conduct violated the LRA, the dispute now before the Board is very much a dispute as to the interpretation of an agreement (to wit, the LRA), and therefore, an entirely appropriate dispute for resolution by an arbitrator.

CONCLUSION

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

Dated: Katonah, New York
 November 20, 2013

Respectfully submitted,

_____/s/_____

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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 Reply Brief to the Charging Party’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:

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Dated: Katonah, New York
November 20, 2013

Respectfully submitted,

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