Fallbrook Hospital Corporation d/b/a Fallbrook Hospital *and* California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL–CIO. Cases 21–CA–090211 and 21–CA–096065

April 14, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On May 16, 2013, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to amend the remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union, the judge recommended, among other things, a 6-month extension of the certification year, but declined to grant the Union's request for reim-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In her decision, the judge inadvertently stated that the Union requested information to prepare for bargaining over the discharge of employee Libby Sandwell, when in fact the Union requested information concerning Martha Robinson's discharge. She also inadvertently stated that employee Rebecca Ojala, who had been a member of the Union's bargaining team, was no longer a member of the Respondent's bargaining team. These errors do not affect our disposition of this case.

[2] We adopt the judge's finding that deferral to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971), is not appropriate here, because the parties have not executed a written contract setting forth an agreed-upon grievance-arbitration procedure. See generally *Arizona Portland Cement Co.*, 281 NLRB 304, 304 fn. 2 (1986) (deferral not appropriate where "there is no contract in existence under which the parties are mutually bound by an agreed-upon grievance-arbitration procedure"). In adopting the judge's finding, Member Johnson relies on the Federal Arbitration Act's requirement that agreements to arbitrate must be in writing. 9 U.S.C. § 2. We do not rely on the judge's statement that the Respondent's affirmative defense was untimely raised in its amended answer. See *Sheet Metal Workers Local 18—Wisconsin*, 359 NLRB 1095, 1096 (2013) ("Deferral to arbitration is an affirmative defense that may be raised in the answer or even at the hearing.").

In adopting the judge's 8(a)(5) and (1) findings, we find no merit in the Respondent's contention on exception that it had no bargaining obligation because the underlying certification of representative issued when the Board lacked a quorum. The Respondent waived its right to challenge the validity of the certification when it entered into negotiations with the Union. *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995); *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326–327 (8th Cir. 1984). We also find no merit in the Respondent's contention that the Acting General Counsel lacked the authority to prosecute this case. The Acting General Counsel was properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, which does not contain the limitation cited by the Respondent, and not pursuant to Sec. 3(d) of the Act. See *Muffley v. Massey Energy Co.*, 547 F.Supp.2d 536, 542–543 (S.D.W.Va. 2008), affd. 570 F.3d 534 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act). See *Ardit Co.*, 360 NLRB 74 (2013).

In adopting the judge's finding that the Respondent unlawfully refused to furnish requested information concerning the discharge of employee Martha Robinson, we find no merit in the Respondent's contention that the Union was attempting to "use an information request as a discovery device for filed or contemplated unfair labor practice charges." In any event, "a potential lawsuit is not a valid reason for depriving the Union of [relevant] information." *CJC Holdings, Inc.*, 315 NLRB 813, 816 (1994), enfd. 97 F.3d 114 (5th Cir. 1996).

Member Johnson agrees with the judge and his colleagues that the Respondent unlawfully refused to bargain over the terms of an initial collective-bargaining agreement. However, he does not find that the Respondent's request for a full set of proposals from the Union during bargaining—a position that in other circumstances may serve to speed bargaining to either agreement or a good-faith impasse and thus serve the Act's goals—reflected an unlawful refusal to bargain.

[3] On exception, the Union requests that the judge's remedy be modified to require the Respondent to read the Board's remedial notice to assembled employees during paid working hours. We find that the Union has not demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007). We also find that a remedy requiring the Respondent to reimburse the Union for its litigation expenses is not warranted, as the defenses raised by the Respondent, although found to be without merit, were not frivolous. See, e.g., *Waterbury Hotel Management LLC*, 333 NLRB 482, 482 fn. 4 (2001), enfd. 314 F.3d 645 (D.C. Cir. 2003).

[4] We shall modify the judge's recommended Order to include the provisions discussed below in the Amended Remedy and to conform to the violations found and our standard remedial language. We shall also substitute a new notice to conform to the recommended Order as modified.

Although the Respondent excepts "to the entirety" of the judge's recommended Order, it does not specifically argue on exception that the judge's recommended affirmative bargaining order is an improper remedy for the violations found. We therefore find it unnecessary to address whether a specific justification for that remedy is warranted. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (finding that "a generalized exception to a remedial order is insufficiently specific to preserve a particular objection for appeal," and that in the absence of particular exceptions the Board may issue an affirmative bargaining order without specifically stating the basis for such).

bursement for its negotiation expenses. Having examined record evidence of the Respondent's bad-faith bargaining conduct, we find, for the reasons set forth below, that both a full 1-year extension of the certification year pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962), and an award of negotiating expenses are necessary to fully remedy the detrimental impact the Respondent's unlawful conduct has had on the bargaining process.

Extension of the Certification Year

The judge correctly stated that an extension of the certification year is warranted where, as here, "an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of the opportunity to bargain during the time of the union's greatest strength." *Santa Barbara News-Press*, 358 NLRB 1415, 1417 (2012). The appropriate length for the extension must be determined by considering "the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations." *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed. Appx. 331 (D.C. Cir. 2005). Indeed, "[t]he Board may order 'a complete renewal of a certification year, even in cases where there has been good-faith bargaining in the prior certification year.'" *HTH Corp.*, 356 NLRB 1397, 1405 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012) (quoting *Glomac Plastics, Inc.*, 234 NLRB 1309, 1309 fn. 4 (1978)).

Here, the Union was certified as the exclusive collective-bargaining representative of the Respondent's nurses on May 24, 2012,[5] and the parties held their first bargaining session on July 3. As found by the judge, the Respondent engaged in bad-faith bargaining from the outset, and this conduct continued until the final bargaining session on January 8, 2013. Thereafter, the Respondent refused to respond to any of the Union's requests for future bargaining dates. Thus, by its conduct, the Respondent effectively precluded any meaningful bargaining for virtually the entire certification year. In these circumstances, we find that a full 1-year extension of the certification year is warranted, beginning when the parties commence good-faith negotiations, rather than the 6-month period recommended by the judge.[6]

Negotiation Expenses

The judge denied the Union's request for reimbursement of its negotiation expenses, finding that the Respondent's conduct was not so egregious as to warrant this remedy. Contrary to the judge, we find that this reimbursement is warranted.

In *Frontier Hotel & Casino*, 318 NLRB 857, 858 (1995), enfd. in pertinent part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the Board set forth the standard for determining whether negotiating expenses should be awarded. The Board stated:

> In most circumstances, [an affirmative bargaining order], accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations. In cases of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table . . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

Id. at 859.

As described in detail in the judge's decision, the record shows that the Respondent deliberately acted to prevent any meaningful progress during bargaining sessions that were held. For example, the Respondent's bargaining team failed to provide any proposals or counterproposals during the first eight bargaining sessions until it received a full set of proposals from the Union, left the September 12 bargaining session abruptly and without explanation, and left the October 11 bargaining session 3 minutes after arriving. In addition, although the Respondent proffered some proposals during the next three bargaining sessions, it subsequently threatened that it would not continue bargaining if the Union persisted in encouraging employees' use of the Union's assignment

[5] All dates refer to 2012, unless otherwise noted.

[6] Member Johnson agrees with the judge that, in the circumstances here, a 6-month extension of the certification year is appropriate. He also agrees with the judge that an award of negotiating expenses is not warranted because the Respondent's misconduct during this period was not so "unusually aggravated" as to "have infected the core of [the] bargaining process" as the misconduct of the respondent in *Frontier Hotel & Casino*, 318 NLRB 857 (1998), enf. granted in relevant part denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), where the Board has awarded negotiating expenses.

despite objection (ADO) form.[7] At a bargaining session held on January 8, 2013, the Respondent falsely claimed that the nurses' use of the ADO forms caused the parties to be at impasse, refused to bargain further, and left the meeting after about 15 minutes. Thereafter, the Respondent reaffirmed its refusal to bargain when it refused to respond to the Union's requests for future bargaining dates.

We find that the Respondent's misconduct infected the core of the bargaining process to such an extent that its effects cannot be eliminated by the mere application of our traditional remedy of an affirmative bargaining order. In these circumstances, requiring the Respondent to reimburse the Union's negotiation expenses is also "warranted both to make the [Union] whole for the resources that were wasted because of the [Respondent's] unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." *Frontier Hotel & Casino*, supra at 859. Such expenses may include, for example, reasonable salaries, travel expenses, and per diems. See, e.g., *J. P. Stevens & Co.*, 239 NLRB 738, 773 (1978), remanded on other grounds 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981).

Accordingly, we shall amend the judge's remedy and modify the recommended Order to require the Respondent to reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through the final bargaining session on January 8, 2013.

ORDER

The National Labor Relations Board orders that the Respondent, Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, Fallbrook, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union, California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to submit any proposals or counterproposals until the Union submits all of its proposals and by conditioning bargaining on the nurses' abandoning the use of ADO forms.

(c) Refusing to bargain collectively with the Union by failing and refusing to bargain over the terms and conditions of employment of its unit employees, including discharges and their effects.

(d) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time, regular part-time, and per diem registered nurses, including those who serve as relief charge nurses, employed by the Respondent at its facility located at 624 East Elder Street, Fallbrook, California; excluding all other employees, managers, confidential employees, physicians, employees of outside registries and other agencies supplying labor to the Respondent, already represented employees, guards and supervisors as defined in the Act.

(b) Reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through January 8, 2013, as set forth in the amended remedy.

(c) Bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above concerning terms and conditions of employment, including the discharges of Libby Sandwell and Martha Robinson and the effects of each discharge.

(d) Furnish to the Union in a timely manner the information requested by the Union on August 2, 2012.

(e) Within 14 days after service by the Region, post at its Fallbrook, California facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper

[7] The Union had directed the unit employees to use its ADO form to document any circumstances they believed were unsafe for patients, or that would put a nurse's license in jeopardy.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 21, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on May 24, 2012, is extended for a period of 1 year commencing from the date on which the Respondent begins to bargain in good faith with the Union.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union, California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL–CIO, as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by refusing to offer any proposals or counterproposals until the Union provides a complete set of its proposals and by conditioning bargaining on the nurses' abandoning the use of ADO forms.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to bargain over terms and conditions of your employment, including discharges and their effects.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL bargain with the Union, as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time, regular part-time, and per diem registered nurses, including those who serve as relief charge nurses, employed by us at our facility located at 624 East Elder Street, Fallbrook, California; excluding all other employees, managers, confidential employees, physicians, employees of outside registries and other agencies supplying labor to the Respondent, already represented employees, guards and supervisors as defined in the Act.

WE WILL reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through January 8, 2013.

WE WILL bargain with the Union over our unit employees' terms and conditions of employment, including the discharges of Libby Sandwell and Martha Robinson and the effects of each discharge.

WE WILL furnish to the Union in a timely manner the information requested by the Union on August 2, 2012.

FALLBROOK HOSPITAL CORPORATION D/B/A FALLBROOK HOSPITAL

Lisa E. McNeill, Esq., for the General Counsel.
Don T. Carmody, Esq., Carmen M. DiRienzo, Esq., for the Respondent.
Micah Berul, Esq. and *Nicole Daro, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in San Diego, California, on April 8–10, 2013. The California Nurses Association/National Nurses Organizing Committee (CNA/NNOC, CNA, the Union, or the Charging Party)[1]

[1] The transcript repeatedly and erroneously refers to the CNA as the CAN. It was a battle with auto-correct every time I wrote CNA, and it is my hope I prevailed on each instance.

filed the charge in Case 21–CA–090211 September 26, 2012, the first amended charge on November 8, 2012, and the second amended charge on December 14, 2012.[2] The Acting General Counsel issued the complaint on December 21, 2012. Fallbrook Hospital (the Respondent, Hospital, or Fallbrook) filed an answer on January 4, 2013, denying all material allegations and asserting affirmative defenses. The Respondent filed an amended answer on February 8, 2013.

The Charging Party filed the charge in Case 21–CA–096065 on January 9, 2013. The Acting General Counsel consolidated the cases and issued the consolidated complaint on March 6, 2013. The Respondent filed an answer on March 20, 2013, denying all material allegations and asserting affirmative defenses. The Respondent filed an amended answer on April 2, 2013, that omitted some previously asserted affirmative defense and added others.[3] The Respondent filed a motion to dismiss on April 2, 2013, asserting the Board lacks a quorum based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and the Acting General Counsel's appointment was unlawful. I denied the motion on April 5, 2013.

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to bargain with the Union in good faith over the terms of a collective-bargaining agreement, failing and refusing to bargain with the Union over the termination of two employees, and failing to furnish relevant information to the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation operating an acute care hospital in Fallbrook, California. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of $250,000 and annually receives and purchases goods, materials, and services valued in excess of $5000 directly from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Fallbrook Hospital is an acute care facility. Community Health Systems (CHS) is the Hospital's parent company. CNA/NNOC was certified to represent the following unit on May 24, 2012:

> All full-time, regular part-time, and per diem registered nurses, including those who serve as relief charge nurses, employed by the Respondent at its facility located at 624 East Elder Street, Fallbrook, California; excluding all other employees, managers, confidential employees, physicians, employees of outside registries and other agencies supplying labor to the Respondent, already represented employees, guards and supervisors as defined in the Act.

At all relevant times the Union has been nationally affiliated with the AFL–CIO. Stephen Matthews is a labor representative with the CNA/NNOC. He negotiates collective-bargaining agreements and represents nurses. (GC Exh. 2.)[4]

The Hospital has a policy entitled "Event and Government Reporting" which ensures processes are in place to improve patient care and safety. Per the policy, employees are instructed to fill out an on-line event report form, also referred to during the hearing as an incident report, if something noteworthy occurs on their shift. The form lists several examples of what types of incidents or events should be reported. Employees are trained on the policy and the event reporting system during new employee orientation. Nurse Shelly Mueller (Mueller) believed the incident report was for reporting an event like a slip and fall, medication error, or a patient leaving against medical advice. She supposed it could be used to report an unsafe working condition, but had not been instructed to use the form for this purpose.

Linda Maxell (Maxwell), a registered nurse, is the risk manager, patient advocate, and facility compliance officer at Fallbrook Hospital. She reviews every incident report and investigates each incident with the director of the department where the incident originated. Maxwell meets weekly with the chief nursing officer and the director of nursing at the skilled nursing facility to discuss each incident. Maxwell receives roughly 10–15 incident reports a week.

If a nurse believes staffing is inadequate, pursuant to Hospital policy, he or she is to raise this concern with the charge nurse and then move up the chain of command if the matter is not resolved. With regard to patient safety, nurses fill out a form of acuity each night. Nobody outside the Hospital can resolve issues relating to patient care.

The Union has created so-called "assignment despite objection" (ADO) forms upon which nurses can document assignments or situations they feel are not safe for the patient or may compromise the nurse's license.[5] The Union provided the

[2] All dates are in 2012, unless otherwise indicated.

[3] At the hearing, the Respondent indicated that one of the omissions was inadvertent. I therefore granted the Respondent's request to amend the answer to include it as affirmative defense no. 9.

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "CP Exh. for Charging Party's exhibit; "GC Br." for the Acting General Counsel's brief; "R. Br. for the Respondents' brief; and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

[5] There is another form called "technical despite objection" or "TDO" which offers a similar protection to the nurse as the ADO but the focus is on technology as opposed to an assignment. Use of the TDO form has no bearing on this case.

forms to the Respondent's nurses shortly after the election. A stack is kept at the Hospital and available for nurses' use. Matthews and fellow Union Labor Representative Glynis Golden-Ortiz trained the nurses on how to use the form in June. Before filling out the ADO form, the nurse must first verbally let her supervisor know about the issue or concern and give him/her a chance to address it. Once filled out, the nurse gives a copy of the form to his/her manager, a copy to the Union's facility bargaining committee member, and a copy to the union labor representative. There is a line on the form designated for the supervisor's response. (GC Exh. 8.) The Union did not instruct its members to fill out the ADO form instead of the Hospital's form or to fail to follow the Hospital's internal procedures for addressing patient safety concerns or incidents. Union members are not required to fill out ADO forms and there are no repercussions for failing to use them.

Maxwell noted one important feature of the Hospital's event report form is it cannot be discovered in a medical malpractice suit or by the public because it is designated as a "safety work product" designed to encourage improvements in patient safety.[6] She does not believe the ADO form has similar protections. Maxwell also noted the ADO form lacks certain specific and pertinent information.

B. Bargaining Meetings and Progress

Pursuant to an agreement entered into prior to the Union's certification, the CHS and the Union had tentatively agreed on some issues including retirement benefits, union security, and recognition. (GC Exh. 6.) These provisions were pre-negotiated before the election as to what the parties would agree to if the nurses selected CNA as their representative.

The Hospital and Union met for the first time on June 13. The meeting was introductory and took place at the Hospital. Matthews was present for the Union along with Golden-Ortiz and bargaining team nurses Mueller, Carol Givens (Givens),[7] Rosenda McDowell (McDowell), and Rebecca Ojala. Don Carmody (Carmody), the Hospital's attorney, was present for the Hospital, along with the Hospital's human resources director, Greg Smorzewski (Smorzewski), CHS Human Resources Director Jan Ellis (Ellis), and Corporate Representative Jim Carmody.[8] Matthews gave the Hospital a preliminary information request and the parties discussed dates for bargaining.

On June 25, Union received some of the information it requested from the Hospital.

The first bargaining session took place on July 3 at the Palo Mesa Resort. For the Union, Matthews and three bargaining team nurses were present.[9] For the Hospital, the same individuals who at the June 13 meeting were present, with the exception of Jim Carmody. The meeting began with a discussion about the information requests. The Union then presented its initial written proposals, which totaled more than 30.[10] (GC Exh. 3.) Carmody stated the Hospital would not give any proposals until the Union provided all their proposals. Matthews responded that this was bad-faith bargaining, and Carmody replied that he had negotiated in this manner for 30 years. In Matthews' experience, an employer had never conditioned bargaining on the Union first presenting all of its proposals. The Hospital did not submit any proposals.

The parties had another bargaining session on July 17, 2012, at the same location with most of the same individuals present. Carmody started off the meeting by stating the Hospital expected all the Union's proposals before they would offer any proposals or counterproposals. According to Matthews, Carmody was very loud and adamant that his way was the way it was going to be. The Union submitted three additional proposals, leaving only its wage proposal left to submit. (GC Exh. 4.) The Hospital did not submit any proposals or counterproposals.

The third bargaining session was July 25 at the same location with the same individuals present. Carmody again voiced the Hospital's refusals to submit proposals until the Union had submitted all of theirs. Matthews stated he expected the Hospital to bargain and told Carmody the Union needed proposals from the Hospital. By this time, the Union had submitted everything except its wage proposal, and was awaiting a response to an information request prior to making the wage proposal. Carmody presented the Union with a change to the heading for the union security provision to indicate it was between Fallbrook Hospital and the California Nurses Association. The Hospital did not submit any new proposals.

The parties also discussed Nurse Libby Sandwell, who the Union believed was unjustly terminated. The Union demanded bargaining over her termination, and was awaiting a response from the Hospital to an information request. Carmody would not agree to provide the requested information or meet about Sandwell's termination.

Martha Robinson is a nurse who served on the Union's facility bargaining committee. The members of the facility bargaining committee keep nurses up to date on bargaining efforts. Robinson was terminated on July 29. Matthews tried to meet with Smorzewski the morning of July 30, to discuss her termination, but Smorzewski said Carmody instructed him not to discuss terminations. When pressed, Smorzewski instructed Matthews to call Carmody. Matthews called Carmody, who said the Hospital would not meet about Robinson's termination, and they could use the Hospital's internal grievance system.

At some point during the July meetings, Carmody expressed that the Hospital could be legally liable in connection with the ADO forms and said the Hospital was not going to recognize them. Matthews responded that the Union intended to continue to use the forms but if the Hospital wanted to make a proposal about their use, the Union was willing to negotiate.

The fourth bargaining session was on August 2, at the same place as the previous sessions with the same people present. Matthews stated Robinson was denied her right to a *Weingarten*

[6] I take notice that the witness was referring to the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. ch. 6A, subch. VII, part C.

[7] Givens left Fallbrook Hospital in February 2013, and at the time of the hearing worked at Meniffe Hospital.

[8] Jim Carmody and Don Carmody are not related. Jim Carmody's position was not identified.

[9] McDowell and Givens missed this session.

[10] One of the proposals submitted, art. 29, was aimed at making several improvements to patient care.

meeting, and he submitted a written request for information enumerating 12 items he believed would assist the Union in representing her. (GC Exh. 5.) Specifically, the Union wanted this information to see if Sandwell was treated differently because of her union activities and also to determine if there was an age bias. Carmody said Smorzewski would provide some of the information in the next couple of days but the Hospital would not commit to meet about Sandwell. Carmody also gave the previously-agreed to retirement benefits proposal, which he drafted, to the Union. The parties signed off on previously-agreed-to articles regarding recognition, union security, and retirement benefits. The Hospital did not submit any new proposals or counter-proposals at the meeting.

The Hospital provided information responsive to all but one of the requests related to Sandwell's termination. The disputed request asks for a list of terminations of emergency room nurses for the past 3 years and the reason each was terminated.

Bargaining resumed on August 22 at the same location with the same individuals. The parties discussed a new position of clinical informaticist, which involves electronic charting, and Matthews requested information about it. Matthews said the Union expected some proposals, and Carmody said the Hospital expected all of the Union's proposals before it would respond. The Hospital did not submit any proposals or counterproposals at the meeting.

The sixth bargaining session took place on September 12 at the Fallbrook Community Center. The parties discussed the new position of clinical informaticist. The Union also requested exit interviews of the nurses who had left the Hospital to assist in putting together a wage proposal. After caucusing with the other individuals from the Hospital, Carmody returned and said they were done for the day and he would send an email explaining why they were leaving. Matthews did not receive an email or any other communication explaining why the Hospital bargaining team members left the meeting.

The parties seventh bargaining session was back at Palo Mesa on October 11. Rebecca Ojala, who had been selected as the clinical informaticist, was present as usual in her role as a member of the bargaining team. Carmody came in with his team, and without sitting down, immediately said he would not bargain because the Union had a member of management present. The Union offered to discuss a wage proposal it had prepared, but the members of the Hospital negotiating team refused and walked out. The meeting lasted about 3 minutes. Matthews subsequently emailed the wage proposal to Carmody. (GC Exh. 7; Tr. 51.)

The parties reconvened for their eighth bargaining session on October 18 at a hotel in Temecula with a mediator present. After the meeting, Matthews received an email from Ellis with proposals about grievance/arbitration and no-strike/no-lockout.

The Union periodically distributes bargaining updates consisting of a page or two of highlights related to bargaining. A Fallbrook Hospital bargaining update dated October 19 contained a blurb about improving patient care, and noted the Union stands by its proposals, including the nurses' right to protect their licenses by use of ADO forms. (R. Exh. 2.)

During the time period relevant to the instant complaint, CHS was also bargaining with the Union at Barstow Hospital. The Union distributed ADO forms at Barstow Hospital and used them in the same manner as at Fallbrook Hospital. In an October 19 bargaining update to the nurses at Barstow Hospital, the Union reported that it would stand by various proposals, including one to allow nurses to protect their licenses by use of the ADO form. (R. Exh. 1.)

On November 1, Nurses McDowell, Mueller, and Givens submitted an ADO form stating they believed it was unsafe to monitor telemetry patients outside of their specific units. Givens filled out the form and gave it to Supervisor Irma Papini. Nobody filled out an incident report about this issue. Maxwell saw the completed form for the first time at the hearing and was very concerned it had not previously been brought to her attention.

The parties met again with the mediator on November 20 back at Palo Mesa. The Hospital submitted 14 proposals. During the next session, on November 30, the Hospital offered a proposal regarding leaves of absence, and the Union submitted 10 counterproposals.

In the November 30 Fallbrook Hospital bargaining update, the Union poses the question of how it can get management to address the most critical issues and give acceptable counterproposals. One answer it provides is to document patient care issues by filling out ADO forms. The update goes on to note that the nurses at Barstow Hospital have already won patient care improvements by using the ADO forms. (R. Exh. 4.)

The December bargaining update distributed to the nurses at CHS-affiliated hospitals describes the ADO form, and encourages nurses to use them. It states that the professional practice committee will use them to raise patient care issues that need to be addressed and the bargaining team will use them at the negotiating table to win important contract provisions. (R. Exh. 3.)

There was a scheduled bargaining session for Barstow Community Hospital on December 28. About 5 or 6 minutes into the session, Carmody informed Matthews that he would not bargain with the Union at Barstow or Fallbrook if the nurses used the ADO forms and they were at impasse both places. Matthews stated that the Union intended to use the ADO forms, but the parties were not at impasse and Union was willing to bargain over the use of the forms or any other issue. Carmody told Matthews the Hospital would not bargain with the Union unless they were willing to stop using the forms, stated they needed mediation, and left the room. Matthews sent Carmody an email that same day, recounting the events of the earlier session, and noting the Union's willingness to negotiate with the assistance of a mediator. He resent the email on December 31. (GC Exh. 9.)

The January 2013 bargaining update distributed to the nurses at CHS-affiliated hospitals discusses how filing ADO forms led to a change in scheduling practices and notes that nurses in Barstow and Fallbrook have won improvements in equipment by using ADO forms. (R. Exh. 5.)

The parties had their eleventh and final bargaining session on January 8, 2013, with a mediator present.[11] Carmody was not present. Don DeMarco, an attorney for the Hospital, negotiated on its behalf with Ellis also present. Ojala was no longer on the

[11] McDowell recalled two mediators were present.

bargaining team for the Hospital. James Moy, a labor representative for the Union, was also present. DeMarco expressed that the parties were at impasse because of the Union's insistence on using the ADO forms. Matthews disputed this and said they were willing to bargain over the forms. DeMarco said they were done for the day and left the session. The session lasted about 15 minutes.

On January 14, 2013, Matthews sent Carmody an email, noting that for the Hospital had been conditioning bargaining on the Union's discontinuance of the ADO forms, and inquiring about future bargaining dates. Carmody responded the same day, noting that the Union was correct that no future bargaining dates were scheduled, and informing Matthews he would respond shortly. (GC Exh. 11.) Matthews did not receive a response.

Matthews sent Carmody an email on January 16, 2013, inquiring about a response to an information request the Union had made and asking for available bargaining dates. (GC Exh. 12.) Carmody did not reply. Matthews followed up with a similar request on January 21, and received no response. (GC Exh. 13.)

During the bargaining sessions, neither the Hospital nor the Union made any proposals specifically over the use of the ADO forms.

C. Affiliation with National Union of Healthcare Workers

Michael Lighty works for the CNA/NNOC and its national affiliate, National Nurses United (NNU). The NNU has roughly 185,000 members and five affiliates, the largest of which is the CNA/NNOC. Its purpose is to build a national nurses' movement. The National Union of Healthcare Workers (NUHW) affiliated with the CNA effective January 1, 2013, pursuant to a November 30, 2012 agreement. (GC Exh. 1(aa).) CNA's board of directors approved the agreement on November 29. Under the agreement the two entities provide support to each other but each remains autonomous. An integration team, consisting of Holly Miller from the CNA and Phyllis Willet from the NUHW, was formed and its work consists of reviewing accounting methods and reporting requirements. CNA/NNOC writes a check each month to NUHW to cover expenses primarily related to an organizing campaign at Kaiser Permanente. The monthly amounts have been between $1 and $1.2 million from January through April 2013. The agreement spells out terms related to the repayment of the loans from CNA to NUHW.

Since the affiliation, the CNA maintains its same name, address, phone number, and website. One of the four women serving on the council of presidents stepped down in April for reasons unrelated to the affiliation and was replaced. Aside from that, the officers of CNA have not changed since the affiliation. CNA's business agents did not change after the affiliation, nor did their duties. The same 35 members of CNA's board of directors have remained since the affiliation. There have been no operational changes to the CNA since the affiliation, and no changes to how CNA processes grievances or arbitrates disputes. The affiliation likewise did not change how CNA negotiates labor contracts and has not resulted in changes to contract negotiation committees. Membership dues and initiation fees have remained the same. CNA represents the same types of employees, primarily registered nurses, before and after the affiliation. The affiliation has not changed the number of members the CNA represents. The work of the stewards has not changed since the affiliation. CNA members have no rights under NUHW contracts and vice versa. CNA's internal voting processes did not change following the affiliation. The affiliation has not impacted the CNA's retirement funds. There has been no change to the CNA's reporting requirements to State or Federal agencies.

III. DECISION

A. Alleged Refusal to Bargain for Initial Collective-Bargaining Agreement

The complaint, at paragraph 8, asserts that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith to establish a collective-bargaining agreement with the Union.

Section 8(a)(5) and (d) of the Act obligates parties to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Wooster Div. of Borg-Warner Corp*., 356 U.S. 342, 344 (1958). The good-faith requirement means that a party may not "negotiate" with a closed mind or decline to negotiate on a mandatory bargaining subject. "While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Sincere effort to reach common ground is of the essence of good-faith bargaining. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir.1943); *NLRB. v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir. 1941), cert. denied 313 U.S. 595 (1941).

The quantity or length of bargaining sessions does not establish or equate with good-faith bargaining. *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952). The Board will consider the "totality of the conduct" in assessing whether bargaining was done in good faith. *NLRB v. Suffield Academy*, 322 F.3d 196 (2d Cir. 2003), enfg. 336 NLRB 659 (2001).

I find the totality of the conduct indicates the Respondent operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining. From July through October, over the course of eight bargaining sessions, the Hospital would not submit any new proposals or counter-proposals, arguing that it was not going to bargain with the Union until it received all of the Union's proposals. By the October 11, 2012, bargaining session, the Union had prepared its wage proposal, which was the only proposal it had left to submit. Having met the Respondent's initial demands, the Union offered to discuss the proposal. The Hospital negotiating team walked out, however, asserting Ojala, who the Hospital had recently appointed to the informaticist position, was now management. Only after a mediator was engaged did the Hospital come forward with any new proposals. A little more than a month later, with no bargaining sessions in the interim, Carmody announced, during a bargaining session involving Barstow Hospital, that Respondent would not bargain with the Union at Barstow or Fallbrook Hospitals if the nurses continued to use ADO forms. He declared they were at impasse both places. Thereafter, as detailed

in the statement of facts, the Hospital insisted that it was at impasse, and ultimately stopped responding to the Union's requests to bargain.

I consider the totality of the Respondent's conduct, noting the nature of the Respondent's avoidance tactics changed over time. To best align with the complaint allegations, I will analyze the parts in consideration of the whole.

1. Failure to submit proposals or counterproposals

The Acting General Counsel and the Charging Party first assert the Respondent's refusal to bargain with the Union until it had submitted all its proposals shows bad faith. The Charging Party and the Acting General Counsel point to *MRA Associates, Inc.*, 245 NLRB 676, 677 (1979), for support. There, the Board affirmed the administrative law judge's determination that failure to submit any proposals over the course of three bargaining sessions was evidence of "basic intransigence" on the employer's part, designed to undermine the union's efforts to negotiate a contract. The Charging Party also notes that pursuant to *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996), enfd. 140 F.3d 169 (2d Cir. 1998), "failure to pursue proposals or lack of exchange of proposals or counterproposals" is a factor to consider. See also *United Technologies*, 296 NLRB 571, 572 (1989) (violation where employer refused to submit counter proposals and conditioned its bargaining over economic contract issues); *Ardley Bus Corp*., 357 NLRB 1009, 1012 (2011) (violation where employer demanded union proposals in writing as a bargaining condition); *Vanguard Fire & Supply*, 345 NLRB 1016, 1017 (2005), enfd. 468 F.3d 952 (6th Cir. 2006) (same where submission of bargaining agenda is precondition to bargaining).

Matthews, McDowell, Givens, and Mueller provided consistent and uncontroverted accounts of the bargaining sessions between July and October, which are detailed in the statement of facts. There is no contrary description of the meetings, and I credit the witness' corroborated and undisputed testimony about what occurred. As current employees testifying against their own pecuniary interests, I find McDowell and Mueller's testimony to be particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.,* 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries,* 197 NLRB 489, 491 (1972). With regard to Givens, she left Fallbrook Hospital voluntarily to pursue another job, and therefore has nothing to gain or lose by being truthful. The witnesses were clear that Carmody adamantly and consistently refused to bargain over anything until the Union submitted all of its initial written proposals. Over the course of seven bargaining sessions, the Respondent obstinately adhered to a fixed position of unwillingness to bargain, with no room for debate or even basic discussion. The Respondent submitted no proposals or counterproposals during these sessions. Only after the October 18 session with the mediator did the Respondent submit its first proposal.

The Respondent points to *NLRB v. Arkansas Rice Growers Co-Op Assn*., 400 F.2d 565, 568 (8th Cir. 1968), for the proposition that failure to make a counterproposal, in and of itself, does not constitute an unfair labor practice. While this is true, the court's point was that the single refusal to offer a counterproposal to the union's proposal regarding dues collection was not a per se violation. Notably, the court enforced the Board's order, stating in relevant part, "Although as the Company suggests, it may not be bound to make counterproposals, nevertheless, evidence of its failure to do so may be weighed with all other circumstances in considering good faith." Id.

The Respondent also argues that provisions CHS and the Union negotiated prior to the Union's certification show good faith. That there may have been good faith negotiations between the Hospital's parent company and the Union at some point in the past does not impact my findings based on the record before me.[12]

Based on the foregoing, particularly considering the obstinate and pugnacious manner in which the Respondent's bargaining agents conducted themselves during the sessions along with other indicia of bad faith discussed below, I find the Respondent's conduct of steadfastly refusing to submit any proposals or counterproposals violated Section 8(a)(1) and (5) of the Act as alleged.

2. The ADO forms and patient care

The complaint allegation at paragraph 8(c), that the Respondent has refused to bargain unless unit employees stop using ADO forms, and the Respondent's sixth and seventh affirmative defenses, that it had no duty to bargain over the delivery of patient care and the Union engaged in bad-faith bargaining by insisting on such bargaining, are intertwined.

To briefly summarize, the parties exchanged some proposals in November after engaging a mediator. Things fell apart again in December, however, when, during a bargaining session at another hospital, the Respondent declared impasse over the Union's use of the ADO forms. The Respondent thereafter attended one more bargaining session where the Respondent's bargaining immediately announced the parties were impasse because of the Union's use of the ADO forms.

a. Proposals about ADO forms

The Respondent asserts that the Union insisted on bargaining over the ADO forms, and because the ADO forms concern patient care, there was no requirement to bargain. The record is devoid of any proposals or counterproposals from either party over the use of ADO forms. There is no evidence that anything substantive about the ADO forms was discussed, much less proposed. The only way they touch on the bargaining sessions is by the Respondent's refusal to bargain because of them and/or about them, despite the Union's willingness to bargain. Because there is no record evidence that the Union or the Respondent submitted or even discussed any proposals about the ADO forms, I find the Respondent's defense on this basis lacks merit. I will nonetheless address the Respondent's arguments grounded in this defense in the event a reviewing authority disagrees with me.

[12] There is no evidence of record about what happened during these negotiations other than they resulted in agreement on certain provisions and CHS was not named as a respondent in this case.

b. Use of ADO form and bargaining objectives

The Respondent argues the Union was insisting on using the ADO form to obtain impermissible bargaining objectives. Specifically, the Respondent asserts it has no duty to negotiate over patient care and the use of the ADO form was an attempt to force such negotiations in bad faith.

As noted, the ADO form is not mentioned in any of the proposals or counterproposals the parties exchanged. At the hearing, the Respondent pointed to bargaining updates the Union sent to its members, which reference proposals relating to the use of ADO forms. The Union's communications to its members about the bargaining negotiations are not bargaining proposals.[13] There is no evidence the bargaining updates were brought to the bargaining table and it was not established at the hearing that anyone on the Respondent's bargaining team received or considered them during negotiations. In any event, what the Union tells its members it will advocate for in bargaining is a far cry from insisting on the same at the bargaining table. While conduct away from the bargaining table may be considered in determining whether parties have engaged in good-faith bargaining, the Board has been "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." *Litton Systems*, 300 NLRB 324, 330 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992). The Board in *Litton* reasoned:

> Typically, away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party's conduct at the bargaining table itself indicates an intent [not] to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining.

Id. Despite the Respondent's assertions that the Union was acting in bad faith, there is no evidence to show that Union's conduct at the bargaining table exhibited intent not to reach agreement.

The Respondent argues that the Union was impermissibly using the ADO forms as a tool to negotiate over patient care. It is without question that the Hospital's core function is patient care and safety. It does not follow, however, that the Hospital can simply refuse to engage in any bargaining over issues that touch on patient care. As the Board has noted, "[i]n the health care field, patient welfare and working conditions are often inextricably intertwined." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007).

The Respondent cites to *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), for support. The Supreme Court explicitly limited its holding, however, to whether an employer, under its duty to bargain in good faith, must negotiate with the union over its decision to close a part of its business. Id. at 667, 687. The Respondent also cites to *NLRB v. Longy School of Music*, 759 F.Supp.2d 153 (2011), which involved a request for preliminary injunctive relief in a case involving partial closure and merger of a private music school. Even if the Board was bound by this decision, it is distinguishable, as the Court's finding that there was no duty to bargain was based on its determination that the employer's actions involved a change in the scope and direction of the enterprise under *First National Maintenance*. See also *Electrical Workers v. NLRB*, 563 F.3d 418 (9th Cir. 2009) (merger and decision to integrate two companies).[14]

Nothing about the scope or direction of the Respondent's business changed. It operated an acute care facility before bargaining began and after it stalled. It had the same obligation to deliver patient care and employed the same event reporting system for monitoring this obligation. The Respondent cites to the nurses' use of the ADO form rather than the Hospital's event reporting system to report their concern about patient safety on November 1 as evidence that the nurses no longer believed they were obligated to use the Hospital's system. This does not establish that the Union was attempting to bypass the Hospital's reporting procedures.[15] In fact, Matthews' uncontroverted testimony is that the Union never instructed nurses to bypass the Hospital's procedures or required them to use the ADO form. Even assuming the Union utilized the ADO forms as part of its bargaining strategy, I find *First National Maintenance* and its progeny are not on point.

The Respondent makes various arguments about the rogue and the sloppy nature of the ADO form and how the Union handles them, as well the potential perils of their use. These arguments miss the point. First, and most fundamentally, there is no evidence that the Union ever insisted that the Respondent recognize the form, as alleged. (R. Br. 2.) The Union continued to support its members' use of the form, but had no control over whether any supervisors or managers at the Hospital would sign off on or accept the ADO forms. When the Union offered to bargain over the matter following the Respondent's assertions of impasse, the Respondent declined to put its belief

[13] It appears that Carmody did not receive at least some of the bargaining updates until they were subpoenaed in connection with this case. (Tr. 172.) The Respondent also points out that art. 29 in the proposals the Union submitted back in July relates to patient care, as Givens acknowledged. This was never asserted as a reason not to bargain with the hospital anywhere close to when the proposal was made. As the Charging Party points out, there was no evidence presented to show anyone at the bargaining table based the decision not to bargain on the assertion that the "Union's actual proposals encroached into areas concerning its entrepreneurial scope of decision making." (CP Br. 17.) Nonetheless, as will be discussed below, it was not a valid reason to simply quit bargaining.

The Respondent's attempts to discredit the bargaining team nurses' testimony that the ADOs were not part of the bargaining team's strategy are unconvincing. The nurses did not draft the bargaining reports that labeled the Union's use of the ADO forms as "proposals."

[14] In each of these cases the employer was required to engage in effects bargaining. The Respondent also cites to a few California state court cases that are not binding on the Board.

[15] I find this particularly true in light of the fact that the safety issue raised was not an event in line with the long list of examples the Hospital's policy provides. I also note that management was aware of the issue by virtue of the forms of acuity the nurses fill out nightly for patient safety. (Tr. 351.) In any event, if the nurses failure to abide by the Hospital's requirement to use its reporting system, action related to their disobedience, as opposed to a refusal to bargain with the Union over anything, would seem more appropriate.

that the Union was engaged in bad-faith bargaining by insisting on perpetual use of the ADO form, with all its inherent flaws, to the test. Any assertions that the Union could have offered nothing through collective bargaining are speculation. The Respondent did not claim to know what proposals the Union would have made regarding the forms, or what alternative solutions the give-and-take of bargaining might have generated. See *Reisman Bros., Inc*., 165 NLRB 390, 393 (1967).

Moreover, these arguments logically would forbid employees from making any written complaints about working conditions that may touch on patient care outside of the Hospital's event reporting system or chain of command. The Board has held, however, even in a hospital setting, that "an employer may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process." *Valley Hospital*, supra.

Finally, as the Acting General Counsel points out, this case does not turn on whether the use of the ADO form is a mandatory or permission subject of bargaining. Respondent's unwillingness to discuss the matter with the Union either constitutes a refusal to bargain over a mandatory subject or insistence on a permissive subject of bargaining, both of which violate the Act under *NLRB v. Wooster Div. of Borg-Warner Corp*., 356 U.S. 342, 344, 347–349 (1958); see also *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1735–1736 (2011).

For all the above reasons, I find the Respondent's defenses concerning the use of the ADO form and the Union's insistence on bargaining over patient care lack merit.

c. ADO forms as protected concerted activity

The parties advance arguments about the nurses' use of ADO forms to engage in protected concerted activity. The complaint and the answer are silent on the matter, and without the issue squarely before me in a factual context that was litigated, I cannot decide it. Without support, the Charging Party states the forms are often used to object to assignments that violate state-mandated ratios. (CP Br. 7.) The Respondent asserts that the forms may not be used for protected concerted activity based on the recognized special characteristics of a hospital setting. The form could potentially be filled out for a variety of reasons by an individual or group. Without an allegation before that a specific use of the form was protected concerted activity, I am constrained from ruling.[16]

d. Impasse

The Respondent asserts that the Union insisted to impasse on the use of the ADO form, thereby obviating its duty to bargain.[17] (R. Br. 14.) This contention is absurd and I will not belabor it with a lengthy analysis. The evidence plainly shows that the Union continually offered to bargain about the proposals the parties had submitted, as well as the ADO form, when the Respondent attempted to use it as an excuse not to bargain. The Respondent points to portions of an email Matthews sent and resent following Carmody's abrupt departure from the December 28 bargaining session at Barstow Hospital. The email clearly states Matthews' position that the Union is not at impasse, and conveys that if the Hospital refuses to negotiation in good faith, it will file a charge that its failure to do so is bad-faith bargaining.[18] (GC Exh. 9.) For the Respondent to state this shows the Union is declaring impasse on all bargaining issues while contending the Hospital is attempting in good faith to reach a bargaining agreement is truly confounding. Because there is no evidence the Union ever insisted on impasse, I find this allegation has no merit.[19]

B. Alleged Refusal to Bargain over Terminations

The complaint, at paragraph 9, alleges the Respondent violated the Act by refusing to bargain over the terminations of unit employees Martha Robinson and Libby Sandwell.

An employer has an obligation to bargain with its employees' bargaining representative over terms and conditions of work. Termination of employment is unquestionably a mandatory subject of bargaining. See *N. K. Parker Transport, Inc*., 332 NLRB 547, 551 (2000). This is true even if the parties have not yet negotiated to agreement at that time of the terminations. *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991).

It is uncontested that the Respondent refused to meet to discuss the terminations of either Robinson or Sandwell.

The Respondent cites to *Alan Ritchey* to support its position that there was no duty to bargain, but clearly misconstrues the decision. *Alan Ritchey* concerns unilateral change allegations, absent here. The issue in *Alan Ritchey* was "whether an employer whose employees are represented by a Union must bargain with the Union *before* imposing discretionary discipline on a unit employee." Id. at 1 (emphasis in original). It concluded that "after the employer has decided (with or without an investigatory interview) to impose certain types of discipline, it must provide the Union with notice and an opportunity to bargain over the discretionary aspects of its decision *before* proceeding to implement the decision." Id. at 10 (emphasis in original). In the instant case, the terminations had been decided and implemented. The Union's demands to bargain were post discipline. Thus even if the Board had decided to give *Alan Ritchey,* retroactive application, it would not govern. The question before me is whether the Respondent had a duty to bargain over the terminations and their effects after they had already been im-

[16] The complaint allegations in another pending case the Charging Party cites to in its brief are the type of allegations that would appropriately lead to a ruling on the issue. (CP Br. 10–11.)

[17] I note that impasse was not raised as an affirmative defense, and may be considered waived. *M & C Vending Co*., 278 NLRB 320, 325 (1986). Notably, the Charging Party did not present argument about this defense in its brief. I address it briefly in the event it may be considered as part of the Respondent's seventh affirmative defense.

[18] The Respondent contends that I should discredit the reference in the email to its "erroneous claim of impasse." As there is no evidence to support this contention, I do not.

[19] To the extent a reviewing authority disagrees with me, I find the Acting General Counsel presented the correct legal framework and analysis, and that the Respondent did not meet its burden to prove impasse based on a single issue. (GC Br. 25–27.) See also *Sacramento Union*, 291 NLRB 552, 554 (1988), enfd. 888 F.2d 1394 (9th Cir. 1989). *King Radio Corp.,* 172 NLRB 1051, 1066–1067 (1968).

plemented.[20] The answer is yes. As the Acting General Counsel points out, the Union could have bargained over things like severance packages, neutral recommendation letters, or benefits payouts. (GC Br. 20–21.) Accordingly, I find the Respondent violated the Act as alleged by refusing to bargain over the terminations.

C. Alleged Failure to Provide Information

Paragraph 10 of the complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to respond to the Union's request for a list of the registered nurses (RNs) in the emergency room that have been terminated within the last 3 years and the reasons for the terminations.

As part of the obligation to bargain in good faith, both sides must furnish relevant information upon request. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). It is well settled that an employer must provide information relevant to a union's decision to file or process grievances. See *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Ohio Power Co*., 216 NLRB 987, 991 (1975*),* enfd. 531 F.2d 1381 (6th Cir. 1976). If the information sought relates to the processing of a grievance (or potential grievance), the legal test is whether the information is relevant to the grievance and the determination of relevancy is made based on a liberal, discovery type of standard. *Acme,* 385 U.S. at 437; *Knappton Maritime Corp.*, 292 NLRB 236 (1988). In determining possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even, ultimately reliable. *Postal Service*, 337 NLRB 820, 822 (2002). Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co*., 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co*., 237 NLRB 747, 751 (1978*),* enfd. 603 F.2d 1310 (8th Cir. 1979).

Information concerning employees in the bargaining unit and their terms and conditions of employment, is deemed "so intrinsic to the core of the employer-employee relationship" as to be presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. *Metta Electric*, 349 NLRB 1088 (2007); *Postal Service*, 332 NLRB 635 (2000). However, when the requested information does not concern subjects directly pertaining to the bargaining unit, such material is not presumptively relevant, and the burden is upon the labor organization to demonstrate the relevance of the material sought. *Disneyland Park,* 350 NLRB at 1257; *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000).

The information the Union requested, at least with regard to terminations that occurred after the Union was certified, concerns bargaining-unit members and is therefore presumptively relevant. Any nurses who were terminated prior to the Union's certification were obviously not part of the bargaining unit. The Respondent asserts that because the information requested also included termination of nurses prior to the Union's certification, the Union must prove its relevance.

There is no question that nurses held the same position before and after the Union's certification. The court in *Press Democrat Pub. Co. v. NLRB,* 629 F.2d 1320, 1326 (1980), enforcing the Board's order in relevant part, held that relevance is established where "nearly identical work is being performed by unit and nonunit personnel." Here, the work was identical, not nearly identical. Moreover, the information was sought to assist the Union in representing a unit employee following her termination. Information regarding nurses terminated prior to the Union's certification is clearly a subject that pertains to the bargaining unit's obligation to represent its members, regardless of when the Union was certified. See *North Star Steel Co*., 347 NLRB 1364, 1368 (2006); *Public Service Co. of New Mexico v. NLRB*, 692 F.3d 1068 (10th Cir. 2012), enfg. 356 NLRB 1275 (2011).

The Respondent offered no evidence at hearing as to why it failed to supply the requested information.[21] The Respondent attempts to shield itself by asserting it provided information responsive to 11 of the 12 enumerated requests in Matthews' written request for information. (R. Br. 21.) However, absent an explanation about the information it did not provide, this is not a defense. The Respondent also argues that the information is confidential, and cites to *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1143–1144, (6th Cir. 1993), to argue it did not need to provide it. The Respondent belatedly raised its confidentiality defense for the first time in its posthearing brief, it was not litigated, and unsurprisingly neither the Charging Party nor the Acting General Counsel addressed it in their briefs. Thus, Respondent is precluded from relying on the alleged confidentiality concern.[22] See *NLRB v. Pfizer, Inc*., 763

[20] The Charging Party argues that there was a duty to bargain before the nurses' terminations, but the complaint does not allege this or any other unilateral change.

[21] In its brief, the Respondent states that the parties discussed, off the record, the fact that Smorzewski had supplied Matthews by email in August 2012, with information concerning nurses terminated from Fallbrook Hospital in the last 2 years, and relies on this to argue compliance. (R. Br. 21–22.) Despite the fact that Smorszewski was present throughout the hearing, the Respondent offered no evidence to support its assertion. On May 7, 2013, the Charging Party filed a motion to strike this portion of the brief, which I hereby enter into the record as ALJ Exh. 1. As I had already considered this section of the brief, and decided to give it the evidentiary weight it is due, which is none, I did not grant the motion. The Respondent's argument that providing the information would be unduly burdensome is premised on this argument, and I reject it accordingly.

[22] Confidentiality claims must be timely raised so as to notify the Union of any confidentiality concern and to bargain for an accommodation. *West Penn Co.,* 339 NLRB 585 (2003); *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). Aside from the procedural error of failing to raise this defense on time, the undue delay deprived the Union of the opportunity to bargain for accommodation, assuming the information requested was confidential.

F.2d 887, 890–891 (7th Cir. 1985); *Anthony Motor Co.,* 314 NRLB 443, 451 (1994).

Based on the foregoing, I find the Respondent violated the Act as alleged by refusing to provide the information the Union requested.

D. The Respondent's Affirmative Defenses

The Respondent asserted a number of affirmative defenses which are addressed in turn below.

1. First affirmative defense: The Board's Health Care Rule violates Section 9(c) of the Act

The Respondent argues that the bargaining unit certified on May 24, 2012, is invalid and unenforceable because it was constituted pursuant to the Board's Health Care Rule in violation of Section 9(c)(5) of the Act. The time to challenge the certification was during the representation case. The Respondent entered into the consent election agreement, and did not file objections to the election.

The Charging Party filed a motion in limine requesting that I preclude admission of evidence on the issue. (GC Exh. 1(aa).) I denied the motion, though the Respondent did not assert in its answer that it had new evidence to present. (GC Exh. 1(ah).) All representation issues, including the challenge to the unit based on the purported unlawfulness of the Board's Health Care Rule, should have been raised and litigated in the prior representation proceeding. Moreover, the rule's validity is not at issue in this case because there is no reason to believe the unit the Board certified would be inappropriate notwithstanding the Health Care Rule. See *San Miguel Hospital Corp*., *v. NLRB* 697 F.3d 1181 (D.C. Cir. 2012). Finally, even assuming the Respondent's argument has merit, I am bound by the Board's regulations.

2. Second affirmative defense: oral ad hoc agreement to defer to arbitration

The Respondent argues that pursuant to an ad hoc oral agreement, the complaint allegations are subject to the exclusive jurisdiction of an arbitrator. At the hearing, I ruled that I would not consider evidence regarding the oral agreement to arbitrate. The rationale for my ruling was stated on the record and I incorporate it into this decision with the following elaboration.

The Board has found deferral appropriate in instances where: (1) the dispute arose within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the CBA's arbitration provision envisions a broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer indicates a willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to such resolution. *Collyer Insulated Wire Co*., 192 NLRB 837 (1971); *United Technologies Corp*., 268 NLRB 557, 558 (1984).

There has never been a collective-bargaining agreement between the parties in the instant case, much less a long and productive bargaining relationship. As there is no collective-bargaining agreement, it follows there is no arbitration clause. Instead, there is an alleged oral ad hoc agreement that was first raised as an affirmative defense to the amended complaint. This alone renders deferral to arbitration inappropriate. Deciding the merits of this defense would require a "mini trial" to determine whether there was an ad hoc oral agreement and, if so, what its terms were. Such a determination, which would depend on parties' recollections of what precise words were uttered to make the agreement and establish its parameters, presents significant problems. If the arbitrability issue was severed, adjudication of the complaint would be delayed while awaiting a decision on whether there was a binding oral arbitration agreement. If the arbitrability issue was not severed, the parties would potentially expend unnecessary resources, some of them the public's. These problems underscore why the Board has not extended the *Collyer* line of cases to agreements such as the oral ad hoc oral agreement the Respondent attempts to place at issue here. Whether or not the employer has indicated a willingness to arbitrate the dispute, I find the dispute is eminently ill-suited to resolution through arbitration.

3. Third, fourth, and fifth affirmative defenses: lack of quorum and invalid appointments

The fourth affirmative defenses argue that the Board lacked a quorum when the certification was issued, and it is therefore it is invalid. The fifth affirmative defense asserts the present complaint is invalid for the same reason. The sixth affirmative defense challenges the Board's authority to appoint the Acting General Counsel based, in part, on lack of a quorum. These arguments derive from the D.C. Circuit's decision in *Noel Canning*, supra, and the Board has rejected them. See *Belgrove Post Acute Care Center*, 359 NLRB 633, fn. 1 (2013). Any arguments regarding the legal integrity of Board precedent are properly addressed to the Board.

The sixth affirmative defense also avers that the Acting General Counsel is acting beyond his authority based on the Federal Vacancies Reform Act. For the reasons set forth in my April 15, 2013 order denying the Respondent's motion to dismiss, I find this argument lacks merit.

4. Sixth and seventh affirmative defenses: bargaining over patient care

The Respondent's sixth and seventh affirmative defenses are that it had no duty to bargain over the delivery of patient care, and the Union engaged in bad-faith bargaining by insisting on such bargaining. These defenses are intertwined with the duty to bargain argument and are discussed in context above.

5. Eighth affirmative defense: remedies requested are improper

The Respondent asserts in its eighth affirmative defense that the remedies requested in the complaint are improper. Specifically, the Respondent argues that an order for the Hospital to meet with the Union concerning the terminations of Robinson and Sandwell "would be tantamount to ordering the Hospital to accept the Union's proposals on "Discharge and Discipline" and "Grievance Procedure" in violation of Section 8(d) of the Act. This argument, plainly based on the misapprehension that the complaint alleges unlawful unilateral change, fails for the reasons set forth in my discussion about the duty to bargain about the terminations.

6. Ninth affirmative defense: discontinuity of representation

The Respondent's ninth affirmative defense asserts that subsequent to the election, the Charging Party affiliated with another organization, and as a consequence there is a lack of continuity of representation.

The affiliation occurred effective January, 1, 2013. Accordingly, this argument has no bearing on complaint allegations occurring prior to that date.

As the party asserting lack of continuity of representation, the Respondent has the burden of proof. *Sullivan Bros. Printers*, 317 NLRB 561, 562 (1995). In the context of an affiliation, the Respondent must "demonstrate that the affiliation resulted in changes that were sufficiently dramatic to alter the identity of the association, and, thus, the substitution of an entirely different union as the employees' representative." *CPS Chemical Co*., 324 NLRB 1018, 1020 (1997); see also *May Department Stores Co*., 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990); *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 145–147 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008). In making this assessment, the Board looks at the totality of the circumstances. *Mike Basil Chevrolet*, 331 NLRB 1044 (2000). Relevant factors include:

> [C]ontinued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency of membership meetings, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated; and the preservation of the certified union's physical facilities, books, and assets.

Western Commercial Transport, 288 NLRB 214, 217 (1988). The Supreme Court recognized in *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank*), 475 U.S. 192, 199 fn. 5 (1986), that "increased financial support and bargaining power" are "ordinary, valid reasons for affiliations and mergers." See also *Sullivan Bros. Printers*, 317 NLRB at 562–563.

As set forth fully in the statement of facts, the affiliation has changed virtually nothing with regard to the Union's leadership, the manner in which it represents its members, or its day-to-day operations. The Union operates as an autonomous entity before and after the affiliation.

The only factor the Respondent points to in support of its discontinuity argument is the change in the Union's books and/or assets based on its financial support to the NUHW in furtherance of its efforts to organize roughly 45,000 Kaiser Permanente nurses. The evidence shows that the CNA has loaned the NUHW between $1 and $1.2 million a month between January and April 2013, to support its campaign to organize the nurses at Kaiser Permanente.[23]

The Respondent asserts that "depletion of the CNA resources" to fund the Kaiser campaign changes the character of the Union. Though aware of the money the CNA transferred to the NUHW from Lighty's testimony the previous day, after its last witness testified the following day, the Respondent sought to call two additional witnesses to refute Lighty's testimony. I denied the request on timeliness grounds and invited the Respondent to make an offer of proof. The offer of proof was that the witness testimony would contradict Lighty's testimony that it is in the interest of the CNA to fund the election campaign of the NUHW in the Kaiser Permanente election matter. I decline the Respondent's request to reconsider my ruling, and I reject the offer of proof. Even if it is considered, however, I find the CNA's actions of loaning money to the NUHW does not change the identity of the CNA. The Board gives "little weight" to the assets/books factor, particularly where, as here, the Respondent has not shown that fewer resources would be committed to their representational obligations than prior to the affiliation. *Deposit Telephone Co*., 349 NLRB 214, 223 (2007); *Independence Residences, Inc.,* 358 NLRB 362 (2012). There was no evidence presented to show that the union members are not being represented at the same level as before the affiliation. To assume that the Union changed the amount of funding it devotes to representing its members by virtue of the loans it provides to the NUHW would be speculative.

The Respondent further points to the Ninth Circuit's decision in *SEIU v. NUHW*, No. 10-16549 (March 26, 2010), assessing fines to NUHW officers for violations of the Labor Management Reporting and Disclosure Act, to argue that the nurses who chose the CNA would believe that affiliation with an organization with such a sullied reputation is substantially dramatic to change the character of the CNA. Aside and apart from significant foundational problems with this argument, of all the nurses who testified, none were asked about this. The Respondent also asserts that the nurses could potentially find themselves striking in solidarity with the NUHW. These speculative arguments are insufficient to sustain the Respondent's burden of proof.

CONCLUSION OF LAW

By failing and refusing to bargain with the Union in good faith over the terms of a collective-bargaining agreement, failing and refusing to bargain with the Union over the terminations of unit employees Robinson and Sandwell, and failing to furnish relevant information to the Union, in violation of Section 8(a)(1) and (5) of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of and Section 2(6) and (7) of the Act.

---

[23] The Respondent requests an adverse inference based on the Union's failure to produce loan documents requested pursuant to subpoena. The Union represented that there are not any loan documents. The Respondent argues this strains credibility. Considering that the affiliation agreement spells out the loan repayment, however, I have no reason to believe there are additional documents. The Respondent also requests an adverse inference based on the Union's failure to turn over banking documents requested. I find the Union complied with the subpoena request by turning over documents showing the electronic transfers from the CNA to the NUHW as described in the transcript at pp. 447–448.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Charging Party and the Acting General Counsel request remedies in addition to those the Board generally grants for the above violations. The Board has broad discretion to fashion a just remedy to fit the circumstances of each case it confronts. *Maramont Corp.*, 317 NLRB 1035, 1037 (1995). The Supreme Court has interpreted Section 10(c) as vesting the Board with discretion to devise remedies that effectuate the policies of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984).

The complaint requests that the notice to employees of the violations found here be read to its employees at a mandatory meeting during working hours. I decline to grant this enhanced remedy.

To support the argument for a notice reading, the Charging Party cites, *HTH Corp*., 356 NLRB 1397 (2011), and *Homer D. Bronson Co*., 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). *HTH Corp*. involved multiple rounds of litigation, including a previous order to set aside an election. In *Homer D. Bronson Co.,* the company president gave multiple unlawful speeches among many other violations during the course of a union organizing campaign. The Acting General Counsel cites to *Excel Case Ready*, 334 NLRB 4 (2001), a case involving discharges and other coercive behavior during an organizing campaign, and *Federated Logistics & Operations*, 340 NLRB 255 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005), where there were extensive and serious unfair labor practices that pervaded the unit and had a long-term coercive effect on the unit during an organizing drive. Although I find the violations the Respondent committed are serious, they are not "so numerous, pervasive, and outrageous" such that additional remedies are required "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, In*c., 318 NLRB 470, 473 (1995).

The complaint also requests an extended bargaining order under *Mar-Jac Poultry*, 136 NLRB 785 (1962). The Respondent did not provide argument as to why *Mar-Jac Poultry* should not apply. Because the circumstances of this case present inequities similar to those in *Mar-Jac*, I find it applies and will recommend the requested remedy of a 6-month extension of the certification year.

The Charging Party requests litigation costs, asserting the Respondent's defenses are frivolous. While I found the Respondent's defenses meritless, it cannot be said they are entirely frivolous. I therefore declined to grant this requested remedy.

The Charging Party requests negotiation costs based on the Respondent's egregious conduct. It is clear to me there was no intent to bargain, and the Respondent's continued attempts to challenge the Board's certification make it clear it does not welcome the Union. I find, however, that the conduct during bargaining here is not as egregious as the employer's conduct in *Unbelievable, Inc*., 318 NLRB 857, 858 (1995), enf. denied in part 118 F.3d 795 (D.C. Cir. 1997), *Harowe Servo Controls*, 250 NLRB 958 (1980), or other cases where the Board has awarded this remedy. If similar conduct had occurred during previous negotiations between the parties, I would come to a different conclusion. Though a close call, I decline to grant this requested remedy.

Having found the Respondent unlawfully refused to bargain in good faith with the Union to establish a collective-bargaining agreement, the Respondent must forthwith bargain in good faith with the Union, on request, as the exclusive representative of the unit and if an understanding is reached, embody the understanding in a signed agreement.

Having found the Respondent unlawfully refused to bargain with the Union over the terminations of unit members Robinson and Sandwell, the Respondent must, on request, bargain about the terminations of Robinson, and Sandwell.

Having found the Respondent unlawfully refused to provide the Union with information regarding emergency room nurses who were terminated during the last 3 years, Respondent shall be ordered to furnish this information to the Union.

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 11, 15–16 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id, slip op. at p. 3. See *Teamsters Local 25*, 358 NLRB 54 (2012).

I further recommend that the Respondent be ordered to cease and desist from refusing to bargain in good faith with the Union over the terms of a collective-bargaining agreement and termination of unit members, and from refusing to provide the Union with information it requests that is relevant to its duties as the bargaining unit's representative.

[Recommended Order omitted from publication.]