

Nos. 14-1056, 14-1094

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**FALLBROOK HOSPITAL CORPORATION,
D/B/A FALLBROOK HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case Nos.
Respondent/Cross-Petitioner)	21-CA-090211
)	21-CA-096065

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties, Intervenors, Amici. Fallbrook Hospital Corporation, d/b/a Fallbrook Hospital (“Fallbrook”) is the petitioner/cross-respondent before this Court. The Board is the respondent/cross-petitioner before this Court. Fallbrook, the Board’s General Counsel, and the California Nurses Association/National Nurses Organizing Committee (“the Union”) appeared before the Board in Cases 21-CA-090211 and 21-CA-096065.

B. Ruling Under Review. The case involves Fallbrook’s petition to review and the Board’s cross-application to enforce a Decision and Order the Board issued on April 14, 2014, reported at 360 NLRB No. 73.

C. Related cases. The ruling under review has not previously been before this Court or any other court. A related case, *Hospital of Barstow, Inc.*, 361 NLRB No. 34, 2014 WL 4302559 (Aug. 29, 2014), is currently pending before this Court pursuant to Fallbrook's petition for review (Docket No. 14-1167) and the Board's cross-application for enforcement (Docket No. 14-1195).

/s/ Linda Dreeben
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Dated at Washington, DC
this 21st day of November, 2014

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STATEMENT OF JURISDICTION

This case is before the Court on a petition filed by Fallbrook Hospital Corporation (“Fallbrook”) to review, and a cross-application filed by the National Labor Relations Board (“the Board”) to enforce, a Board order finding numerous unfair labor practices committed by Fallbrook against the California Nurses Association/National Nurses Organizing Committee (“the Union”). The Board had

jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order issued on April 14, 2014, and is reported at 360 NLRB No. 73. (A. 304-320.)¹

The Court has jurisdiction over these consolidated proceedings under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final with respect to all parties. Fallbrook filed a petition for review on April 15, 2014. It was timely because the Act places no time limit on such filings. On June 2, 2014, the Board filed a cross-application for enforcement, and the Court consolidated the cases.

STATEMENT OF THE ISSUES

1. Whether the Board’s Order, but for one contested special remedy, is entitled to summary enforcement because Fallbrook does not contest the Board’s unfair-labor-practice findings or other remedies.

2. Whether the Board properly exercised its broad remedial discretion in ordering Fallbrook to reimburse the Union for its negotiating expenses where Fallbrook’s violations during contract negotiations needlessly expended the Union’s time and resources.

¹ “A.” refers to the parties’ joint deferred appendix, filed on November 12, 2014. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case involves unfair labor practices committed by Fallbrook during negotiations with the Union for a first contract after the Board conducted an election and certified the Union as the representative of Fallbrook's registered nurses. From the outset of negotiations, Fallbrook engaged in relentless avoidance tactics without a sincere desire to reach agreement. Fallbrook's tactics included an unyielding refusal to provide any proposals or any counterproposals until the Union submitted all of its proposals, abrupt and unexplained departures from bargaining sessions, and an unfounded declaration that the parties were at impasse over the Union's use of certain forms, which Fallbrook never even attempted to bargain. Additionally, Fallbrook refused to provide relevant information requested by the Union and steadfastly refused to bargain over the discharge of two nurses represented by the Union.

After the Union filed unfair-labor-practice charges, the Board's General Counsel issued a consolidated complaint alleging that Fallbrook had committed numerous violations of Section 8(a)(1) and (5) of the Act (29 U.S.C. § 158(a)(1) and (5)). An administrative law judge conducted a three-day hearing and issued a decision and recommended order finding that Fallbrook committed the violations as alleged. (A. 308-20.) Fallbrook and the Union filed exceptions with the Board.

On review, the Board found Fallbrook's exceptions meritless and issued a decision affirming the judge's findings, but modifying the recommended remedy to include special remedies. (A. 304-08.) In its opening brief to this Court, Fallbrook waived all challenges to the Board's unfair-labor-practice findings, as well as to the majority of the Order's remedial provisions, which greatly narrows the focus of this appeal. The sole issue remaining for this Court's review involves Fallbrook's challenge to the Board's determination that an award of negotiating expenses was appropriate in light of Fallbrook's now-admitted, and pervasive, bad-faith bargaining. The facts supporting the Board's findings are summarized below, followed by the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background and the Parties

Fallbrook is an acute care facility owned by a parent company, Community Health Systems ("CHS"). The Union was engaged in an organizational drive seeking to represent Fallbrook's registered nurses. At some point before the election, the Union and CHS tentatively agreed to three collective-bargaining issues: retirement benefits, union security, and recognition.² CHS and the Union agreed to these articles provided the nurses selected the Union as their

² Fallbrook was not a party to the original pre-certification tentative agreement entered between Fallbrook's parent company, CHS, and the Union. (A. 309; 53-54.) On August 2, 2012, Fallbrook signed the tentative agreement. (A. 310; 233-39.)

representative. Shortly thereafter, the nurses voted in favor of the Union, and, on May 24, 2012, the Board certified the Union as the representative of the 104 registered nurses employed at Fallbrook. (A. 307; 142.)

B. Fallbrook Maintains Various Reporting Policies Involving Patients, Visitors, and Staff To Improve Patient Safety

Fallbrook has multiple reporting processes in place to improve patient care and safety, including an on-line event report form, also referred to as an incident report. Employees complete the incident report if a noteworthy event occurs during their shift. Examples of the types of incidents that nurses should document include: injuries to or falls of patients, visitors, and staff; medication errors; patients leaving against medical advice; and infant mix-ups. Nurses receive training on the policy, the reporting system, and completion of the forms during new employee orientation. (A. 308-09; 261-277, 123-26.)

Linda Maxell, Fallbrook's risk manager, patient advocate, and facility compliance officer, reviews and investigates each incident report. She receives 10 to 15 incident reports each week. Maxell testified that incident reports are not subject to discovery in medical malpractice litigation and are exempt from public disclosure as patient safety work product.³ (A. 309; 120, 123-25, 126, 127.)

³ The Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. ch. 6a, subch. VII, part C, establishes a voluntary reporting system designed to enhance the data available to assess and resolve patient safety and health care quality issues. The Act provides federal privilege and confidentiality protections for

C. The Union Develops a Form To Assist the Nurses with Patient Care and Safety and with Protection of Their Licenses

The Union created an “assignment despite objection” (“ADO”) form, which nurses can use to document assignments or situations they feel may compromise patient safety or care or their nursing license. The Union distributed these forms to Fallbrook’s nurses shortly after the election, conducted training, and made them available for the nurses’ use. (A. 309; 242-44, 63-64, 88, 94-96.)

Under the Union’s ADO process, a nurse should first verbally notify her supervisor about the issue or concern and offer the supervisor an opportunity to address it. If the matter remains unresolved, the nurse should then complete the ADO form, which contains sections regarding the reason for the objection, its potential effect, and the supervisor’s response. The nurse gives a copy each to her manager, the union facility bargaining committee member, and the union labor representative.⁴ Nurses using the forms continued to perform the work assignment. (A. 309; 242-44, 64, 98.)

patient safety information, called patient safety work product, to encourage the reporting and analysis of medical errors.

⁴ The union representatives who received the completed ADO forms used them to gather information to ensure protection of the nurses’ licenses. The bargaining updates also show that the Union encouraged nurses to complete the form because, according to the updates, the forms assisted in obtaining improvements at the bargaining table in hospital policies regarding patient care and protections for the nurses’ licenses. (A. 310-11; 254-59.)

The Union does not require the nurses to complete the ADO forms, nor are there any consequences for not using them. Further, the Union did not instruct its members to use the ADO forms to the exclusion of Fallbrook's incident forms or otherwise encourage its members to disregard Fallbrook's internal procedures for addressing patient safety concerns. (A. 309; 242-44, 92, 94-96, 97-98.)

D. The Parties Establish Preliminary Bargaining Details and Hold Their First Bargaining Sessions; Fallbrook's Representative, Don Carmody, Conditions Bargaining on Receipt of All the Union's Contract Proposals

On June 13, Fallbrook and the Union held an initial meeting to discuss bargaining logistics. Union representative Stephen Matthews was the Union's lead negotiator and representative, and attorney Don Carmody was Fallbrook's lead negotiator and representative. A bargaining team comprised of labor representatives and nurses assisted Matthews, while a team comprised of supervisors and representatives from Fallbrook and CHS assisted Carmody. The Union submitted a preliminary information request, and the parties discussed future bargaining dates. (A. 309; 35-37.)

On June 25, Fallbrook provided some of the requested information. On July 3, the parties held their first bargaining session. They first discussed the Union's outstanding information request, and the Union presented its first set of proposals, which totaled about 30 articles. Carmody then informed the Union that Fallbrook would refrain from offering *any* proposals until the Union provided *all* of its

proposals. For the Union, Matthews insisted that Fallbrook's approach amounted to bad-faith bargaining, but Carmody did not yield and reiterated Fallbrook's inflexible bargaining tactic. (A. 309; 158-223, 37-41.)

On July 17, the parties met again. Carmody commenced the session by adamantly restating Fallbrook's resolute refusal to provide any proposals or counterproposals until the Union submitted everything. The Union submitted three additional proposals, which left the Union's wage proposal as the only outstanding article. Fallbrook did not submit any proposals or counterproposals. (A. 309; 224-30, 41-43.)

E. Fallbrook Continues Its Steadfast Refusal To Submit Proposals, Discharges Two Nurses Without Bargaining, and Objects to the ADO Form

On July 25, the parties held their third bargaining session. Carmody began this session once again repeating Fallbrook's adamant refusal to provide any proposals or engage in bargaining until the Union submitted all of its proposals. Matthews expressed continued frustration at Fallbrook's refusal to engage in bargaining, particularly since the Union had only one article outstanding and the Hospital had offered nothing. Matthews also informed Fallbrook that the Union was awaiting a response to its information request. The meeting finished without Fallbrook submitting any proposals or offering counterproposals. (A. 309; 44-45.)

At the July 25 session, the parties also discussed nurse Libby Sandwell, whom the Union believed Fallbrook unjustly discharged. The Union demanded bargaining over her discharge and reminded Carmody that it was awaiting Fallbrook's response to an information request. Carmody refused to provide the requested information or schedule a meeting over Sandwell's discharge. (A. 310; 45-46.)

On July 29, Fallbrook discharged nurse Martha Robinson, who also served on the Union's facility bargaining committee, which updates nurses on bargaining efforts. Matthews tried to discuss the discharge with Fallbrook representatives but they refused and directed him to Carmody. When Matthews telephoned Carmody regarding Robinson, Carmody told him Fallbrook would not meet about the discharge, but suggested the Union could avail itself of Fallbrook's internal grievance system. (A. 310; 47-49.)

At some point during the July sessions, Fallbrook's "avoidance tactics" changed and Fallbrook set up a new bargaining "roadblock." (A. 312.) Specifically, Carmody objected to the nurses' use of the Union's ADO form, citing discovery concerns. Matthews indicated that the Union would continue to encourage the nurses to complete the forms, but, because none of the Union's proposals addressed use of the ADO forms, he also expressed the Union's willingness to negotiate over its use if Fallbrook submitted a proposal. Carmody

informed Matthews that Fallbrook refused to recognize the form. Fallbrook did not at that time, or ever, submit any proposals concerning the ADO form. (A. 310, 313; 44-46, 49, 135.)

On August 2, the parties met again. The Union began the session with questions about Robinson's discharge and the Union's concern that Fallbrook denied her union representation at an investigatory interview. Matthews requested information as to whether Fallbrook treated Robinson differently because of her union activities and age. Carmody indicated that some information would be forthcoming, but he would not commit to meet about the discharge. The parties then signed off on the three articles (recognition, union security, and retirement benefits) that the Union and CHS had negotiated prior to the election. Fallbrook did not submit any new proposals or counterproposals. (A. 310; 231-39, 51-52, 54.)

After the session, Fallbrook provided information responsive to all but one of the requests related to Robinson's discharge. In the disputed request, the Union sought a list of emergency room nurses' discharges for the past three years and the reason for the discharge. (A. 310; 73.)

F. The Parties Discuss the Creation of a New Position; Fallbrook Abruptly Cuts Off Two Bargaining Sessions; the Union Files an Unfair-Labor-Practice Charge

The parties met again on August 22, and primarily discussed the creation of a new position, clinical informaticist, which would involve electronic charting.

Once again, Carmody invoked Fallbrook's fixed unwillingness to bargain "with no room for debate or even basic discussion" until Fallbrook received all of the Union's proposals. (A. 310; 55.) Fallbrook did not submit any proposals or counterproposals at the meeting. (A. 310; 55.)

On September 12, the parties held their sixth bargaining session, during which the parties again discussed the clinical informaticist position. Additionally, the Union requested the exit interviews of the nurses who had left Fallbrook, explaining that this information would assist in drafting its wage proposal. After Fallbrook representatives caucused, Carmody abruptly announced, without explanation, that bargaining was over for the day. He stated that he would email an explanation later that day, but Matthews never received any explanatory email from Carmody. (A. 310; 56-57.)

On September 26, the Union filed an unfair-labor-practice charge with the Board alleging that Fallbrook violated the Act by conditioning bargaining on the Union's submission of all proposals and refusing to meet with the Union over the discharge of the two nurses. On October 11, the parties met for a seventh time.

One of the Union's usual bargaining team members, Rebecca Ojala, whom Fallbrook had recently selected as the clinical informaticist, was present in her role as a member of the union team.⁵ Carmody entered, and without sitting down, immediately stated that Fallbrook would not bargain because the Union had a member of management present. The Union offered to discuss its wage proposal, but Fallbrook's team members walked out. The meeting lasted three minutes. Matthews subsequently emailed the wage proposal to Carmody. (A. 310; 142-45, 240-41, 57-58.)

G. The Parties Engage in Mediator-Assisted Bargaining; Fallbrook Finally Submits Its First Proposals; the Union Files Two Amended Charges

On October 18, the parties reconvened for their eighth bargaining session, with the presence of a mediator. After the meeting, Fallbrook finally submitted its first set of proposals. On November 8, the Union amended its September 26 charge to include allegations that Fallbrook refused to provide relevant and necessary information. (A. 310; 146-49, 60-61.)

The parties met again with the mediator on November 20 and 30, during which Fallbrook submitted another 15 proposals, and the Union submitted 10 counterproposals. On December 14, the Union filed a second amendment to the

⁵ The record does not disclose the precise date of Ojala's hire into the clinical informaticist position or when Matthews or other union representatives became aware of her hiring.

September 26 charge and alleged further refusals by Fallbrook to provide information. (A. 310; 150-53, 61-62.)

H. Carmody Declares the Negotiations at Impasse over an Issue Fallbrook Never Sought To Bargain

While contract negotiations were underway at Fallbrook, there were parallel contract negotiations in progress at Barstow Community Hospital (“Barstow”), another CHS hospital. On December 28, there was a scheduled bargaining session between the Union and Barstow. Matthews represented the Union (which represented a unit of Barstow’s registered nurses), and Carmody represented Barstow in these negotiations.⁶ Several minutes into the meeting, Carmody, in “a very loud manner and very aggressively, got up from his chair and said, we are not going to bargain with you at Fallbrook or [at Barstow] if your nurses use these assignment despite objection forms.” (A. 66.) Carmody then precipitously declared the parties at impasse – both in the Barstow and the Fallbrook negotiations. (A. 314; 65-67.) Matthews responded that the Union intended to continue using the ADO forms, but that the parties were not at impasse because the

⁶ The negotiations for a first contract between Barstow and the Union followed a remarkably similar pattern to the bargaining in the instant case. *See Hosp. of Barstow, Inc.*, 361 NLRB No. 34, 2014 WL 4302559, at *7 nn. 12, 13 (Aug. 29, 2014), *petition for review and cross-application for enforcement pending*, D.C. Cir. Nos. 14-1167, 14-1195. For example, Carmody, on behalf of Barstow, repeatedly refused to offer any proposals or counterproposals until the Union submitted all of its proposals and adamantly objected to the Union’s use of the ADO form at Barstow but never sought to bargain over its use.

Union was willing to bargain over the use of the forms or any other issue.

Carmody refused, stating that he was “done,” and was unwilling to bargain with the Union unless it “[gave] up on the ADOs.” (A. 66.) Carmody then “stormed out.” (A. 66.) Later that day, Matthews sent Carmody an email recounting the events of the earlier session and, once again, underscoring the Union’s willingness to negotiate over any issue and with the assistance of a mediator. He resent the email on December 31. Carmody never replied to either communication. (A. 311; 245-46, 66-67.)

The parties held their final bargaining session on January 8, 2013, with the assistance of a mediator. Carmody was not present, and Fallbrook attorney Don DeMarco was the lead negotiator. Like Carmody before him, DeMarco announced that the parties were at impasse because of the Union’s use of the ADO forms. Matthews continued to dispute this position, reiterating the Union’s willingness to bargain over the forms. After 15 minutes, DeMarco declared the parties done for the day and left. (A. 311; 68-71.)

On January 9, the Union filed a second charge with the Board alleging that Fallbrook failed and refused to bargain in good faith until the Union ceased use of the ADO forms. On January 14, Matthews sent Carmody an email, inquiring about future bargaining dates. Carmody confirmed that there were no scheduled dates,

and wrote that he would respond “otherwise” to Matthews’ message shortly.

Matthews received no response. (A. 311; 154-56, 247-49, 72.)

On January 16, Matthews asked Carmody about an outstanding information request regarding Fallbrook’s new 401K plan and sought to schedule bargaining dates. Carmody did not reply. On January 21, Matthews followed up with a similar request; Carmody again did not respond. (A. 311; 250-53, 72-73.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On those facts, the Board (Chairman Pearce and Members Hirozawa and Johnson) determined, in agreement with the administrative law judge, that Fallbrook violated Section 8(a)(1) and (5) of the Act (29 U.S.C. § 158(a)(1) and (5)) by failing and refusing to bargain with the Union over the terms of a collective-bargaining agreement;⁷ failing and refusing to bargain with the Union over the discharge of two employees; and failing to furnish relevant information to the Union. The Board’s Order requires Fallbrook to cease and desist from the unfair-labor-practices found and, 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. The Board also affirmatively ordered Fallbrook to bargain

⁷ Member Johnson agreed that Fallbrook unlawfully refused to bargain over the terms of an initial bargaining agreement, but would not have found that Fallbrook’s request for a full set of proposals – which “in other circumstances” might aid bargaining – reflected an unlawful refusal to bargain. (A. 304 n. 3.)

collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement and to bargain with the Union over the discharges of Sandwell and Robinson and their effects. The Board directed Fallbrook to furnish the Union with the information requested.

Further, after examining the evidence of Fallbrook's bad-faith bargaining conduct, the Board modified the administrative law judge's recommended order and required Fallbrook to reimburse the Union for expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through January 8, 2013, and extended the certification period by one year.⁸ Finally, the Board directed Fallbrook to post a remedial notice.

SUMMARY OF ARGUMENT

Before the Court, Fallbrook has not challenged any of the Board's unfair-labor-practice findings. Accordingly, the Board is entitled to summary enforcement of its findings that Fallbrook violated the Act by refusing to bargain in good faith with the Union and by refusing to bargain collectively with the Union through its refusal to submit any proposals or counterproposals until the Union submitted all of its proposals, conditioning bargaining on the nurses abandoning

⁸ Member Johnson would have adopted the judge's recommendation to extend the certification period by six months and not to award negotiating expenses. (A. 305 n.6.)

the use of certain forms, its refusal to bargain over the terms and conditions of employment, including discharges, and its refusal to furnish necessary and relevant information. The Board is therefore entitled to summary enforcement of the portions of its Order remedying those violations, including an affirmative bargaining order and the special remedy that extends the Union's certification period for one full year because of Fallbrook's bad-faith bargaining.

The sole issue remaining for the Court's review is Fallbrook's challenge to the Board's remedy directing Fallbrook to reimburse the Union for its negotiating expenses because of Fallbrook's egregiously unlawful conduct during negotiations for the first contract. The Board acted well within its broad remedial discretion and exercised its particular labor expertise when it determined that Fallbrook's bad-faith bargaining and deliberate efforts to prevent meaningful progress in bargaining warranted this special remedy. The Board's remedial order is fully consistent with its precedent and amply supported by the factual findings underpinning Fallbrook's statutory violations. The Board carefully assessed Fallbrook's conduct and determined that its deleterious, deliberate, and pugnacious actions infected the very core of bargaining. The Board concluded that Fallbrook relentlessly refused to submit proposals or offer any counterproposals until the Union submitted a complete set of proposals for the entire agreement, precipitously discontinued bargaining on multiple occasions, sometimes without explanation,

and summarily rebuffed the Union's requests for relevant and necessary information. And finally, the Board concluded that Fallbrook's egregious conduct continued throughout the negotiations until it hastily declared the parties at impasse over an issue it never sought to bargain, despite the Union's repeated and uncontested willingness to bargain over all matters. Fallbrook's conduct deprived the Union of any meaningful bargaining and needlessly expended the Union's resources and economic strength during the critical negotiations for a first contract. Under these circumstances, the Board reasonably exercised its remedial discretion in ordering Fallbrook to reimburse the Union's negotiating expenses to restore the Union's lost resources and the economic strength necessary to return the parties to the status quo at the bargaining table.

As shown below, Fallbrook offers the Court no basis for disturbing the Board's exercise of its remedial discretion in awarding reimbursement of the Union's negotiating expenses. In seeking to avoid imposition of this remedy, Fallbrook misapplies the Board's standard for an award of reimbursement. Further, it inappropriately urges the Court to revisit the factual underpinnings of the Board's uncontested unfair-labor-practice findings. Fallbrook has forfeited any such challenge, and this Court must reject its attempt to recast its bargaining tactics in a more favorable light.

ARGUMENT**I. THE BOARD’S ORDER, BUT FOR ONE UNCONTESTED SPECIAL REMEDY, IS ENTITLED TO SUMMARY ENFORCEMENT BECAUSE FALLBROOK DOES NOT CONTEST THE BOARD’S UNFAIR-LABOR-PRACTICE FINDINGS OR OTHER REMEDIES**

In its opening brief, Fallbrook does not contest any of the Board’s unfair-labor-practice findings that it committed multiple violations of Section 8(a)(1) and (5) of the Act, including its failure to bargain in good faith with the Union during contract negotiations by its pattern of egregious tactics and other misconduct, its refusal to bargain over the discharge of two nurses, and its refusal to furnish relevant information to the Union. Nor does Fallbrook contest those portions of the Board’s remedial order finding that its bad-faith bargaining warrants imposition of an affirmative bargaining order and the special remedy of a full one-year extension of the Union’s certification period. Fallbrook’s waiver of these issues entitles the Board to summary enforcement of those portions of its Order. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

The uncontested violations do not disappear simply because Fallbrook has not challenged them. Rather, they remain in the case, “lending their aroma to the context in which the [challenged] issues are considered.” *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982); *accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc). Thus, this Court should consider the appropriateness of the award of negotiating expenses in the

context of the uncontested violations and the uncontested determination that those violations justified the imposition of at least one special remedy – a one-year extension of the certification year.

II. THE BOARD PROPERLY EXERCISED ITS BROAD REMEDIAL DISCRETION IN ORDERING FALLBROOK TO REIMBURSE THE UNION FOR ITS NEGOTIATING EXPENSES WHERE FALLBROOK’S VIOLATIONS DURING CONTRACT NEGOTIATIONS NEEDLESSLY EXPENDED THE UNION’S TIME AND RESOURCES

A. Standard of Review and Applicable Principles Regarding the Board’s Remedial Authority

Fallbrook only challenges the Board’s remedial order directing it to pay the Union’s negotiating expenses incurred from July 3, 2012, through January 8, 2013. It faces a high hurdle in doing so. The Board enjoys broad discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board’s authority to issue remedies is a “broad discretionary one, subject to limited judicial review”); *accord United Food & Commercial Workers Int’l Union v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988) (“*UFCW*”). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board is directed to order remedies for unfair labor practices. The Supreme Court “has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *accord Cobb*

Mech. Contractors, Inc. v. NLRB, 295 F.3d 1370, 1375 (D.C. Cir. 2002) (“[T]he Board is accorded broad discretion in fashioning an appropriate remedy.”).

The Board’s remedial order is “subject to limited judicial review,” *UFCW*, 852 F.2d at 1347, and its “choice of remedies is entitled to a high degree of deference.” *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir.1998) (“a reviewing court must give special respect to the Board’s choice of remedy”). This deferential standard flows from the recognition that “[i]n fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). As such, a reviewing court must enforce the Board’s choice of remedy unless a challenging party can show “that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *United Food & Commercial Workers Union v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

Section 10(c) of the Act (29 U.S.C. § 160(c)) expressly authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also “to take such affirmative action . . . as will effectuate the policies

of th[e] Act.” The Board’s task in applying Section 10(c) is to restore the status quo ante—in other words, “to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1975). Moreover, in devising an appropriate remedy, the Board attempts to “both compensate the party wronged and withhold from the wrongdoer the ‘fruits of its violation.’” *Mead Corp. v. NLRB*, 697 F.2d 1013, 1023 (11th Cir. 1983) (citation omitted); *see also Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996).

B. The Board Reasonably Determined that Fallbrook’s Egregious Misconduct During Collective-Bargaining Negotiations Warranted Reimbursement of the Union’s Negotiation Expenses to Ensure a Return to the Status Quo at the Bargaining Table

The Board’s statutory authority to fashion appropriate remedies includes the discretion to order special remedies when necessary “to dissipate fully the coercive effects of the unfair labor practices.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (citing cases), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996). The Board has determined that a special remedy is warranted when an employer engages in unusually aggravated misconduct that is “calculated to thwart the entire collective-bargaining process and forestall the possibility of . . . ever reaching agreement with the chosen representative of its employees.” *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), *enforced in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997)) (“*Frontier*”). Under

such circumstances of egregious misconduct, the appropriate remedy – both to restore the status quo ante and to dissipate fully the effect of the violations – is reimbursement of the union’s negotiating expenses. *Frontier*, 318 NLRB at 859. The Board reasons that where an employer willfully defies its statutory obligation, the union has wasted its resources in a futile exercise. *Id.*; see also *NLRB v. HTH Corp.*, 693 F.3d 1051, 1061 (9th Cir. 2012) (upholding several special remedies, including negotiating expenses, where “[u]nion wasted resources over a period of years during which [employer] had no intention of reaching an agreement”).

An order awarding negotiation expenses effectuates the policies of the Act by making “the charging party whole for the resources that were wasted because of the unlawful conduct, and [restoring] the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.” 318 NLRB at 859 (citations omitted). A Board order directing reimbursement for negotiating expenses also creates an incentive for the parties to bargain in good faith and prevents advantages gained by a party’s unlawful conduct. See *Virginia Elec.*, 319 U.S. at 541 (a Board remedy “is a permissible method of effectuating the statutory policy” where it “places the burden upon the [employer] whose unfair labor practices brought about the situation” and it “deprives [the] employer of advantages accruing from a particular method of subverting the Act”); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (Board acts appropriately where

it takes action to “give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining”).

Here, the Board reasonably exercised its discretion and determined that traditional remedies would not eliminate the effects of Fallbrook’s substantial unfair-labor-practices. The Board, therefore, imposed two special remedies – a one-year extension of the certification period and reimbursement of negotiating expenses – to “fully remedy the detrimental impact [Fallbrook’s] unlawful conduct has had on the bargaining process.” (A. 305.) Fallbrook does not challenge the extension of the certification year.⁹

Relying on *Frontier*, the Board based its award of negotiating expenses on Fallbrook’s uncontested egregious conduct, where “the record shows that [Fallbrook] deliberately acted to prevent any meaningful progress during bargaining sessions that were held.” (A. 305.) According to the Board, Fallbrook “operated with a closed mind and put up a series of roadblocks designed to thwart

⁹ Under Board law, an extension of the certification period is only appropriate where “an employer has refused to bargain with the elected bargaining representative during part or all of the year immediately following the certification, that it has ‘taken from the Union’ the opportunity to bargain during the period when unions are generally at their greatest strength.” *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), *enforced*, 156 Fed. Appx. 331 (D.C. Cir. 2005) (internal citations omitted). Fallbrook therefore does not contest that it has “taken from the Union” here the opportunity to bargain between July 2012, and January 2013.

and delay bargaining.” (A. 312.) Fallbrook also engaged in “basic intransigence” by conditioning the submission of its proposals and counterproposals on the Union’s submission of a complete set of contract proposals. (*Id.*) Its representatives abruptly terminated multiple bargaining sessions; one session lasted fewer than three minutes. In addition to Fallbrook’s “obstinate and pugnacious” conduct during the bargaining sessions (*id.*), the Board also found that Fallbrook threatened to discontinue bargaining unless the Union ceased using the ADO form, ultimately making good on this threat by “falsely” declaring the parties at impasse over the Union’s use of the form. (A. 306.) Significantly, although the Union expressed a repeated willingness to bargain over proposals addressing the ADO forms, Fallbrook never produced a proposal.

The Board also assessed Fallbrook’s conduct away from the bargaining table in determining that it engaged in aggravated misconduct warranting an award of reimbursement. Specifically, the Board considered that Fallbrook unilaterally discharged two nurses without offering the Union an opportunity to bargain, and instead, adamantly refused to do so. (A. 315.) Additionally, the Board concluded that Fallbrook failed and refused to furnish the Union with presumptively relevant information. (A. 315, 316.) Fallbrook “offered no evidence at hearing as to why it failed to supply the requested information.” (A. 316.)

Fallbrook's actions "effectively precluded any meaningful bargaining for virtually the entire certification year." (A. 305.) Under these circumstances, not only did Fallbrook eliminate the Union's strength of bargaining when union support was generally at its height, it also wasted the Union's time and resources in a "futile pursuit of a collective-bargaining agreement." *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964-65 (1980); *see, e.g., O'Neill, Ltd.*, 288 NLRB 1354, 1356-57, 1387 (1988) (ordering employer to reimburse union for resources that it wasted in useless bargaining where employer caused bargaining to be a "complete and utter sham"), *enforced*, 965 F.2d 1522 (9th Cir. 1992) . The Union fruitlessly expended time and financial resources associated with arranging dates to be available for bargaining, developing and drafting proposals and counterproposals, consulting with the mediator, and keeping union members apprised of bargaining efforts. There is an "undeniable causation between [Fallbrook's] misconduct and the useless expenditure of the Union's resources in their attempts to bargain." *HTH*, 693 F.3d at 1061. Accordingly, the Board properly directed Fallbrook to bear the costs of its violations. *See, e.g., NLRB v. Rutter-Rex Mfg. Co.*, 396 U. S. 258, 264-65 (1969) (wrongdoing employer must bear the costs stemming from its violations); *HTH*, 693 F.3d at 1061 ("[employer] is not entitled to benefit financially from the consequences of the delay created by its unlawful bargaining tactics").

Contrary to Fallbrook's contention (Br. 22-26), the Board's remedy is harmonious with its analysis in *Frontier*, and Fallbrook's conduct is sufficiently egregious to warrant imposition of a reimbursement remedy. *Frontier* does not require the Board to find that an employer's conduct is *as* egregious as, or identical to, that of the employer in *Frontier*. Indeed, by applying *Frontier* here, the Board rejected the argument that *Frontier* establishes a minimum bar or a particular category of egregious conduct to warrant reimbursement for negotiation expenses.¹⁰ The Board reiterated this position in a recent decision involving similar agents and conduct, expressly rejecting the precise argument Fallbrook raises here. In *Hospital of Barstow, Inc.*, 361 NLRB No. 34, 2014 WL 4302559, at *7 n.12 (Aug. 29, 2014), *petition for review and cross-application for enforcement pending*, D.C. Cir. Nos. 14-1167, 14-1195, the Board reiterated the standard for ordering reimbursement of negotiating expenses and stated that *Frontier*:

[D]id not set the bar for an award of negotiating expenses at the level of the misconduct in that case. Nor did the Board in *Harowe Servo Controls* set some threshold level of egregiousness that must be satisfied in order to conclude that an employer's conduct infected the core of the bargaining process. Rather, our decisions, including those in *Frontier Hotel & Casino* and *Harowe Servo Controls*, make clear that, in determining whether to award negotiating expenses, we will consider each case on its own merits, evaluating the effect of the

¹⁰ While the administrative law judge found it was a "close call" and declined to award negotiating expenses because the bargaining conduct was not as egregious as in *Frontier* (A. 318), the Board corrected this misstep in awarding negotiating expenses to the Union.

violation on the wronged party and the injury to the collective-bargaining process.

Accordingly, the absence of identical facts, such as a strike or regressive bargaining (Br. 23), is of no moment.¹¹ The critical Board finding is that Fallbrook engaged in egregious unfair-labor-practices that infected the core of bargaining, causing the Union needlessly to expend time and financial resources.

In disputing the application of *Frontier*, and in an effort to present a diluted version of its egregious misconduct, Fallbrook misrepresents (Br. 23-24) certain factual findings. Contrary to its claim that the Board made no finding that Fallbrook “refused to consider the Union’s proposals” or that Fallbrook “was not open to any changes” (Br. 24), the Board expressly found that Fallbrook “operated with a closed mind.” (A. 312.) Likewise, Fallbrook erroneously claims (Br. 23) that its *pre-negotiation conduct* demonstrates there was an “intent to reach agreement” and cites to the pre-election agreement negotiated by CHS (its parent company) and the Union. Fallbrook was not, however, a party to that agreement before bargaining began. Further, the agreement, which Fallbrook did not sign until August 2, was not self-executing. While Fallbrook and the Union could certainly have agreed to implement certain articles in the absence of a fully-ratified

¹¹ Similarly off-the-mark is Fallbrook’s belief (Br. 16) that the Board’s remedy is unreasonable because Fallbrook did not violate “black letter Board law.” As discussed, Fallbrook misunderstands both *Frontier* and the Board’s broad discretionary authority to determine appropriate remedies for statutory violations.

contract, there is no evidence to suggest that Fallbrook contemplated this approach to show that it was sincere about the three agreed-to articles. Rather, as the Board found, Fallbrook's conduct during the negotiations demonstrated that "there was no intent to bargain." (A. 318.) Fallbrook's efforts to recast these uncontested findings must fail.

Finally, Fallbrook's claim (Br. 26-27) that the Board failed to explain how its bargaining tactics infected the core of bargaining strains credulity and cannot withstand the weight of the Board's explicit findings of Fallbrook's egregious misconduct. As fully described above, over the course of several meetings, Fallbrook's representatives conducted themselves in an "obstinate and pugnacious manner" (A. 312), engaged in "avoidance tactics" (A. 312), adamantly and consistently refused to bargain over anything until the Union submitted all of its proposals, flatly refused to bargain over discharges, refused to provide relevant information to the Union without any explanation, and ended the negotiation process by falsely declaring impasse. Under these circumstances, there can be little doubt that Fallbrook's aggravated misconduct had a "detrimental impact" on the bargaining process and infected the core of bargaining warranting a full one-year extension of the Union's certification period and reimbursement of the Union's negotiating costs.

C. This Court Must Reject Fallbrook's Attempts To Recast the Facts in an Effort To Establish Less Egregious Conduct

Fallbrook's waiver of all the unfair-labor-practice violations, and therefore the underlying facts supporting them, renders Fallbrook's conduct precisely as the Board found it and in the manner the Board characterized it. Before this Court, Fallbrook seeks to avoid reimbursement by recasting the uncontested facts and parsing specific conduct in isolation to support its baseless assertion (Br. 14-19) that it did not engage in "unusually aggravated misconduct." As discussed above, in determining that Fallbrook violated the Act, the Board fully laid out Fallbrook's egregious conduct. In a litany of examples, Fallbrook parses its months-long misconduct into isolated events attempting to persuade this Court that the uncontested facts do not support a finding of aggravated misconduct. In doing so, Fallbrook ignores the Board's finding that it violated the Act when it "engaged in bad-faith bargaining from the outset and this conduct continued until the final bargaining session on January 8, 2013," and "deliberately acted to prevent any meaningful progress during bargaining sessions that were held." (A. 305.) If Fallbrook wanted this Court to reexamine the facts that formed the basis for the Board's finding that Fallbrook violated the Act, it needed to challenge them in its opening brief. It chose not to do so.

Fallbrook begins its litany by challenging (Br. 17) the Board's finding that its adamant refusal to bargain until the Union submitted every single proposal

constituted bad faith, instead asserting that its position was not designed to avoid bargaining. Once again, this claim comes too late. The Board found, and Fallbrook elected not to challenge, that Fallbrook violated the Act when it engaged in “avoidance tactics” (A. 312) and “deliberately acted to prevent any meaningful progress during bargaining sessions.” (A. 305.) Further, Fallbrook’s claim (Br. 17) that it was not avoiding bargaining because it had 90 percent of the Union’s bargaining proposals by the first bargaining session is curious. In the face of those proposals, Fallbrook adamantly refused to bargain for eight sessions until every single union proposal was presented. Its reliance on an agreement negotiated with its parent company (discussed above at p. 29) similarly fails to provide any cover for its abject lack of bargaining throughout multiple sessions. Likewise, its assertion (Br. 17) that its conduct never interfered with the Union’s ability to prepare proposals and bargain strains credulity. Fallbrook refused to provide requested relevant information without any explanation, including information about the reasons nurses left the hospital, information surrounding the two discharges, and issues of pay. The failure to provide this information precluded meaningful bargaining. Continuing its mischaracterizations of its conduct, Fallbrook self-servingly recasts its behavior at the bargaining table (Br. 18-19), suggesting that its misconduct was not aggravated because it only walked out of one-fifth of the bargaining sessions and may have had “good and sufficient reason

for its conduct.” Fallbrook’s claim (Br. 19) that its abrupt departures were “relatively benign” ignores the Board’s explicit finding that its agents conducted themselves in an “obstinate and pugnacious manner” (A. 312) throughout the bargaining process. Moreover, and significantly, Fallbrook does not challenge the Board’s conclusion that its bad-faith bargaining warranted the special remedy of a one-year extension of the bargaining certification year.¹²

Finally, Fallbrook raises (Br. 19-20) settled issues involving the ADO form in an attempt to show that it did not engage in aggravated misconduct. In doing so, Fallbrook (Br. 18, 25) continues its “absurd” and “truly confounding” claim (A. 314) that it was entitled precipitously to declare impasse during contract negotiations with a different unit because the Union continued to distribute ADO forms to the nurses. Contrary to Fallbrook’s claim, there is no support for its position; the declaration of impasse was instead the culmination of its aggravated misconduct. The Board expressly found, and Fallbrook does not contest, that the Union repeatedly expressed a sincere willingness to bargain over the use of the

¹² In addition, Fallbrook notes (Br. 15) its belief, untethered to any written agreement, that the parties would bring any disputes to an arbitrator. In doing so, it erroneously claims (Br. 16) that the Board found its arbitration defense to be “genuine”; in fact, the Board found that defense only to be “not frivolous.” (A. 304 n.3.) In any event, Fallbrook does not challenge the Board’s decision not to defer the case to arbitration. As such, it cannot now rely on non-deferral, or its errant belief the parties’ bargaining would go to arbitration, to suggest the award of negotiating expenses is improper.

form, that Fallbrook refused to submit any proposals concerning the form, and instead “falsely claimed that the nurses’ use of [it] caused the parties to be at impasse.” (A. 306.)

In a further mischaracterization of the evidence, Fallbrook embellishes its argument with the unfounded claim (Br. 19) that the ADO forms are somehow at odds with patient safety and “the core of Fallbrook’s business.” (Br. 25.) While the ADO forms may expose Fallbrook to liability in a malpractice suit (Br. 25 n.14), the nurses used the forms precisely to protect the patients and their own licenses. There is uncontroverted evidence (A. 314) that the Union never instructed the nurses to bypass Fallbrook’s internal safety reporting system or required them to use the ADO forms, and not a shred of evidence that the nurses’ use of the ADO forms compromised patient safety. In short, the Board’s uncontested finding that there was no impasse over the ADO form precludes Fallbrook from predicating any argument on impasse.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full and denying the petition for review.

Respectfully submitted,

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NOVEMBER 2014

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FALLBROOK HOSPITAL CORPORATION,)	
d/b/a FALLBROOK HOSPITAL)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1056, 14-1094
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case Nos.
Respondent/Cross-Petitioner)	21-CA-090211
)	21-CA-096065

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,556 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 21st day of November, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 21st day of November, 2014