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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

**CALIFORNIA NURSES ASSOCIATION,**  
**Petitioner,**  
  
**and**  
  
**GOOD SAMARITAN HOSPITAL,**  
  
**Respondent.**

**Case No. 31-CA-117462**  
**RESPONDENT GOOD**  
**SAMARITAN HOSPITAL'S**  
**ANSWERING BRIEF IN**  
**RESPONSE TO EXCEPTIONS**

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## 1. INTRODUCTION

When employers and labor organizations agree to arbitrate, it is with an understanding that the arbitration will be fair, efficient, cost effective, and *final*. Part of the finality of the arbitration decision is the fact that there is not a robust appeal process whereby the arbitrator's decision may be challenged. Instead, the parties both agree that the arbitrator's decision will be final, binding and not subject to appeal.

Based on the strong public policy in favor of alternative dispute resolution and parties' agreement to be bound by the decision of the mutually selected arbitrator, the Board has a long history of deferring to employer and labor organization's grievance and arbitration procedure where a grievance and unfair labor practice charge ("ULP") overlap. Consistent with the Board's limited authority and public policy considerations, Administrative Law Judge Mary M. Cracraft (the "ALJ") deferred the present ULP to Arbitrator Kagel's decision and award. Arbitrator Kagel had been selected by agreement of Good Samaritan Hospital (the "Employer or the "Hospital") and California Nurses Association ("CNA" or the "Union") to hear a grievance which was factually identical to the current ULP. The ALJ's decision to defer was based on the well-founded conclusions that the statutory issues presented in the ULP and the contractual issues presented to Arbitrator Kagel in the related grievance are factually parallel and that the arbitrator's decision was not repugnant to the purposes of the Act. Indeed, the ULP and the grievance are factually nearly identical, a point which has been conceded by the CGC. CGC's Opposition to Motion to Defer, pg. 4, fn. 3.

Now, in an effort to avoid the sting of an adverse and *final* arbitration decision, counsel for the General Counsel (the "CGC") and the Union seek improper appellate review via the Board's unfair labor practice machinery. This attempt to circumvent the established deferral rule must be rejected as both beyond the scope of authority vested in the Board and against the strong public policy favoring alternative dispute resolution. Thus, the Hospital prays the Board overrule all of CGC's and the Union's exceptions. As a supplement to this brief, the Hospital has

attached responses to each of the Union's specific exceptions as Exhibit A and each of the CGC's exceptions as Exhibit B.<sup>1</sup>

## **2. PROCEDURAL BACKGROUND**

On November 13, 2013, pursuant to its rights under the CBA and the NLRA, the Hospital moved forward with a plan to restructure its nursing department and eliminate the position of Charge Nurse. The Charge Nurse position was a bargaining unit, non-supervisory position. In conjunction with the restructure, the Hospital created two new positions. The Hospital created a Department Supervisor position in the affected nursing units and created a break relief Nurse assignment to handle the tasks previously done by the Charge Nurses including relief of meal and rest breaks. The Hospital gave notice to the Union several months prior to the implementation of the restructure and requested bargaining over the effects. However, the Union failed and refused to engage in such bargaining.

On November 19, 2013, the Union filed an Unfair Labor Practice Charge, which has since been amended 4 times.<sup>2</sup> The original Charge and the four subsequent amended charges allege various 8(a)(5) and 8(d) allegations all arising out of the Hospital's restructure of its nursing department, the elimination of the Charge Nurse position, alleged transfer of bargaining unit work to non-bargaining unit Department Supervisors and alleged modification of the parties' collective bargaining agreement through the transfer of work. MD Ex. 2. The current 4th Amended Charge alleges: the Hospital failed and refused to bargain with the Union in good faith when it 1) transferred work formerly performed by Charge Nurses to the Department Supervisor position and 2) modified the CBA through this transfer of work. MD Ex. 2.

On December 3, 2013, the Union filed its Step 2 grievance alleging identical claims arising out of the Hospital's restructure. MD Ex. 3 is the Union's December 3, 2013 Step 2 grievance alleging that the "Employer violated multiple provisions of the collective bargaining

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<sup>1</sup> For reasons of judicial economy, the Employer is answering both sets of objections in one brief because of significant overlap. The argument is the same and submitting two briefs would be duplicative.

<sup>2</sup> It is clear that the Union's repeated amendment of the Charge was an attempt to disassociate the charge from the grievance and amounts to impermissible forum shopping.

agreement when it issued layoff notice for 52 charge nurses, coupled with the notice of intent to remove charge nurse job from bargaining unit and have charge nurse work performed by supervisors." The parties commenced arbitration over the grievance.

The Region originally denied the Hospital's *Collyer* deferral request and issued a Complaint on May 29, 2014. However, the Region subsequently issued a deferral decision on November 14, 2014 holding the Charge in abeyance during the arbitration. MD Ex. 4.

On January 15, 2015, following a fair and regular hearing, Arbitrator Kagel issued a written decision denying the Union's grievance in its entirety. See Arbitrator's Decision MD Ex. 5. In his ruling, Arbitrator Kagel held: "**The added Supervisors perform No Bargaining Unit work with respect to taking patient assignments, except they are specifically authorized, and required, to assist in emergencies, as a *Union witness recognized.***" MD Ex. 5, Arbitrator's Decision pg. 17:2-4 (emphasis added).

On April 2, 2015, the Region emailed the parties notifying them that the Region had decided to revoke deferral. The Hospital requested a written decision explaining the rationale and Juan Ochoa Diaz, a supervisory field attorney for the Region, indicated that a letter would be forthcoming. MD Ex. 6.

On April 7, 2015, the Union amended the Charge for a fourth time eliminating two of the allegations set forth in the Complaint and adding an allegation that the Hospital transferred work formerly performed by Charge Nurses to Department Supervisors thereby modifying the parties' collective bargaining agreement (the "CBA").

On April 17, 2015, the Region re-considered its deferral decision and revoked the decision based on the bald assertions that the contractual issues presented are not factually parallel and that the award is repugnant to the purposes and policies of the Act. MD Ex. 7. The Board refused to provide any explanation for this decision even though the burden of proof in this matter rests with it.

On April 24, 2015, the Hospital sent a letter to the Region demanding the grounds for the revocation of deferral and providing the legal authority prohibiting such revocation and

an associated FOIA request. MD Ex. 8. On April 28, 2015, the Region denied the Hospital's FOIA request. MD Ex. 9. On April 30, 2015, Mr. Ochoa Diaz contacted counsel for the Hospital on behalf of the Region. He explained that the Region determined the issues before the arbitrator and the Board were not factually parallel. Particularly, the arbitration was focused on whether the Hospital correctly followed the CBA's layoff procedure. He did not explain why the Region's decision was based upon the "focus of the arbitration" as opposed to the facts presented. He further advised that the Region determined that the award was repugnant to the Act, but refused to discuss this area as it would reveal the Region's prosecution strategy.

On September 28, 2015, the Region served the Hospital with a subpoena, requesting documents related to the pending Charge. The subpoena requests only evidence and documents which were already presented at the arbitration, including a number of documents which were exhibits presented in the arbitration, the transcripts of the arbitration, all exhibits and the arbitration decision itself, effectively conceding the issues are factually parallel. MD Ex. 10.

On November 3, 2015, the Hospital filed a motion to defer the hearing to arbitration. On November 10, 2015 both the CGC and CNA filed oppositions to the Hospital's motion to defer. On November 16, 2015 after considering the entire record including the legal authority and argument, the ALJ issued her decision ordering the Charge deferred to the decision of Arbitrator Kagel. On December 14, 2015, both the CGC and the Union filed exceptions to the ALJ's decision.

### **3. FACTS AND ARGUMENT IN SUPPORT OF ALJ'S DECISION**

#### **a. All Exceptions Should be Disregarded for Failure to Comply with the Board's Rules and Regulations (CGC Exceptions 1-3, Union Exceptions 1-27)**

As a threshold issue, both the CGC and the Union failed to comply with procedural requirements for submitting exceptions pursuant to 102.46(b)(1) of the Board's Rules and Regulations. Exceptions failing to comply with any provision of 102.46(b)(1) are appropriately disregarded. 102.46(b)(2). For all exceptions, both the Union and the CGC failed to designate by precise citation of page the portions of the record relied on; and failed to

concisely state the grounds for the exception as required by 102.46(b)(1)(iii-iv). Additionally CGC's exception 3 and the Union's exceptions 21-27 fail to comply with 102.46(b)(ii) by failing to identify the part of the ALJ's decision to which objection is made. Thus, the Hospital requests that the Board overrule all exceptions due to significant procedural defects and certify the ALJ's decision.

**b. The Burden of Proof Rests With the CGC and the Union**

"[A]rbitration has become a central pillar of Federal labor relations policy and in many contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." *D. R. Horton, Inc.*, 357 NLRB No. 184 , slip op. at 17 (2012); *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). It is consistent "with the fundamental objectives of federal law to require the parties here to honor their contractual obligations rather than, by casting [a] dispute in statutory terms, to ignore their agreed-upon procedures." *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Consistent with this precept, the party seeking to have the Board reject deferral and consider the merits of the ULP matter has the burden of showing that the standards for deferral have not been met. *Id.* at 574; *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390, 391 (2006) ("[W]here parties have agreed to be bound to an arbitrator's resolution of an issue, the Board will defer to that resolution except in those rare cases in which the arbitrator's decision is 'palpably wrong . . ."). Here, the burden of proof for all matters rests with the CGC and the Union. The CGC and the Union have not met this burden.

**c. Federal Labor Relations Policy Dictates That The Board Must Defer To the Arbitration Award (CGC Exception 3)**

The Board *must* uphold its deferral decision when (1) the arbitration proceedings were fair and regular; and (2) the decision was not repugnant to the purposes and policies of the NLRA. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). In *Olin Corp.*, 268 NLRB 573 (1985), the Board added the requirements that (1) the contractual issue was factually parallel to the ULP

issue; and (2) the arbitrator was presented generally with the facts relevant to resolving the ULP charge. *See also Turner Construction Co.*, 339 NLRB, 451, 451 fn. 2 (2003).<sup>3</sup>

Neither a court nor the Board may reverse an arbitrator's decision merely because it would interpret the contract differently, "or simply because the arbitrator's analysis is opaque." *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 756 (3d Cir.), cert. denied, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982). **The Board must defer to an arbitrator's decision if it meets the *Spielberg* requirements even if the Board disagrees with the contract interpretation.** *NLRB v. Pincus Brothers Inc.-Maxwell*, 620 F.2d 367, 374 (3d Cir.1980). (emphasis added). "As a result of both judicial and Board deference to arbitration awards, an arbitrated result could be sustained which is only arguably correct and which could be decided differently in a trial de novo." *Id*; see also *Bath Marine Draftsmen Ass'n v. NLRB*, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007) (The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding).

No authority exists requiring the Board to defer to a second arbitration hearing, and the language of *Spielberg Mfg. Co.* and subsequent deferral cases support that deferral to an existing arbitration award is correct. In addition to being unsupported by existing Board law, the Board should reject a rule requiring deferral to a new arbitration because it is contrary to public policy concerns of judicial efficiency, cost effectiveness and the finality of labor arbitration. Thus CGC's exception 3 should be overruled.

**(1) The Arbitration was Factually Parallel to the ULP Charge(CGC Exception 1, Union Exceptions 1-7, 9-17, 21-22, 24-25)**

**(A) The contractual issues decided by Arbitrator Kagel are factually parallel to the pending unfair labor practice issues**

As set forth in *Olin Corp.*, 268 NLRB 573 (1985), for deferral to be appropriate, the arbitrator need not have been presented with the relevant law relating to the ULP in question, and his or her decision need not have contained a rationale showing consideration of the ULP

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<sup>3</sup> The Board must apply the *Spielberg Mfg. Co.* and *Olin Corp.* standard because the original charge was filed on November 19, 2013.

allegation; rather, the test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge."

*Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985); see also *Laborers Local 294*, 331 NLRB 259, 261 (2000). Despite referencing the appropriate standard, both the Union and the CGC proceed to analyze and focus on whether or not the arbitrator considered the statutory issues. Again, this standard is inappropriate in the instant case.

Here, the contractual issues are not only factually parallel to the unfair labor practice issues, they are factually identical. At a base level, both claims arise out of the Hospital's decision to restructure the Nursing Department and eliminate the role of Charge Nurses. The Charge and the grievance contain the same allegations; both arise out of the Union's claim that the Hospital was required to bargain regarding its "intent to remove the charge nurse job from bargaining unit *and have charge nurse work performed by supervisors.*"

At the center of this dispute is the Management Rights Article of the CBA which grants the Hospital the explicit right to eliminate job classifications. Article 3. The Parties' dispute regarding the meaning of this provision is central to a determination of whether the Hospital's elimination of the position and any attendant transfer of work were permissible. As such, any resolution of the Union's allegation will require interpretation of the collective bargaining agreement which is more appropriately adjudicated by an arbitrator pursuant to the parties' agreed upon grievance and arbitration procedure. The Arbitrator ruled that the Hospital had the unfettered right to eliminate the job classification of Charge Nurses. See MD Ex. 5, Arbitrator's Decision, pg. 14:10-14; 16:18-22; 19:1-2.

Furthermore, where an arbitrator concludes based on the credited testimony that the Employer's decision was based on core entrepreneurial concerns outside the scope of mandatory bargaining and labor costs were not a factor in the decision the arbitration properly resolves the issue. *Oklahoma Fixture Co.*, 314 NLRB 958 (1994). Here, the arbitrator not only considered whether the decision was based on the Hospital's entrepreneurial concerns, he concluded that the Charge Nurse restructure did so at a \$700,000 *increase* in labor costs. Arb.

Dec. Page 17. Similar to *Oklahoma Fixture Co.*, the decision was made for liability purposes related to the Affordable Care Act and to create an additional level of accountability and safety. Arb. Dec. Page 16-17.

Furthermore, the issues before the arbitrator are factually parallel to the issues set forth in the ULP. The Union testified at length regarding the Charge Nurse job duties and the Department Supervisor duties and admitted that Department Supervisors did not engage in any patient care and, therefore, admitted that they do no bargaining unit work. MD Ex. 11 Arbitration Transcript ("Tr.") Vol. 1, 75:9-76:5. In fact, in its post-Arbitration Brief, the Union states "A number of Charge Nurses and bedside nurses provided testimony that in their view, the elimination of the Charge Nurse role and its replacement with Supervisors **who cannot perform clinical functions . . . is unsafe for patients and nurses . . .**" MD Ex. 12 at pg. 9:14-17; See also Union's Brief general, pgs. 9-10 (emphasis added). The Union further argued that "[**The Employer**] **conceded that the Dept. Supervisors are not permitted under the CNA contract to perform any bedside nursing work**, unlike the Charge Nurses, yet they failed to address the reality that this means bedside nurses must now do without a key resource that used to be available when they had Charge Nurses on every shift." MD Ex. 12 at pg. 10:18-21 (emphasis added). In essence, the Union conceded at arbitration that the Department Supervisors do not perform bargaining unit work.

While the current allegations are couched in slightly different terms than the original Charge, they arise out of the same set of facts and are similarly encompassed within the Union's grievance allegations which have been adjudicated and summarily dismissed by the Arbitrator. The grievance explicitly alleges that the Hospital transferred bargaining unit work previously performed by Charge Nurses to non-bargaining unit Supervisors in violation of the CBA. The Arbitrator expressly ruled that bargaining unit work was not transferred to the non-bargaining unit supervisors. The Arbitrator held: "**The added Supervisors perform No Bargaining Unit work with respect to taking patient assignments**, except they are specifically

authorized, and required, to assist in emergencies, as a **Union witness recognized.**" MD Ex. 5, Arbitrator's Decision pg. 17:2-4 (emphasis added).

It is only now that the Union lost at arbitration that they are attempting to back track regarding these clear admissions and engage in forum shopping. The Union's attempt to have the same underlying issues which are factually parallel adjudicated in two separate forums cannot be condoned and is contrary to law.

The Union's grievance specifically alleged "the attendant transfer of bargaining unit work" in violation of contract. Extensive evidence was presented on this point. See MD Ex. 11 Arbitration Transcript ("Tr.") Vol. 1, 75:9-76:5. The Hospital relied on the management rights article which provided management the right to eliminate a job classification. The grievance, evidence, and management rights article were considered by the Arbitrator. The present case is distinguishable from the cases cited by the CGC and the Union. In those cases, the operative collective bargaining agreements were silent on the relevant topics and simply did not prohibit the alleged management action. Here, the collective bargaining agreement authorized the actions of the Hospital. Because the arbitrator found no transfer of work, no layoff and that the Hospital acted within its management rights, it follows that there could be no violation of the Act. Such a conclusion is determinative of the unfair labor practice allegation and it follows that the award is consistent with the Act. See *Dennison National Co.*, 296 NLRB 169, 171.

The cases cited by the CGC and the Union all apply the wrong deferral standard. *Kohler Mix Specialties*, 332 NLRB 630 (2000) does not apply because labor costs were an issue in *Kohler*. *Kohler* specifically notes that if labor costs were not an issue, *Oklahoma Fixture Co.*, 314 NLRB 958 (1994) would control. *Armour & Co.*, 280 NLRB 824 (1986) similarly does not apply because in *Armour & Co.*, the arbitrator only concluded that the Employer's actions were not prohibited by the contract. The present case is different as the arbitrator concluded that the actions were authorized by the contract. Likewise, in *Columbian Chemicals Co.* 307 NLRB 592 (1992) the decision was repugnant to the Act because the arbitrator did not rely on a

management rights clause and instead held that it was the management's basic prerogative to take action. Here, the opposite is true because the management rights clause of the collective bargaining agreement both authorizes the action and imposes a bargaining obligation which tracks that of the Act.

The Union's reliance on *Heartland Health Care Center*, 359 NLRB No. 155 (2013) is misplaced as in *Heartland Health Care Center* the arbitrator was not presented with the relevant facts. Here, the record is clear that the union presented facts related to the transfer of bargaining unit work, the decision not to staff the charge nurse position, and management's compliance with the contract.

*Haddon Craftsmen, Inc.*, 300 NLRB.789 (1990) is similarly misplaced. There the ALJ declined to defer to arbitration because the Board complaint alleged a failure to comply with Article III, Section 7(a) and the arbitrator had been presented with no evidence as to whether there had been compliance with Article III, Section 7(a). The arbitrator admitted in his decision that "he had no evidence before him on which to base a finding as to whether there had been compliance with Section 7(a). The arbitration transcript, Arbitrator's decision, and both parties' post arbitration hearing briefs make clear that the relevant evidence necessary to determine the ULP was presented to the arbitrator. See MD Ex. 13, pages 5, 7, 10-11; MD Ex.12, pages 9-1; MD Ex. 11 - Tr. Vol. 1, 46:1-56:15; 91:14-24; Tr. Vol. 3, 281:4-284:13; 294:1-296:9; Tr. Vol. 4, 352:13-20-353:21; 370:4-372:18; 437:24-438:7; 443:7-446:2; Tr. Vol. 4, 373:14- 374:6-24.

Lastly, the Union's argument that the ALJ failed to consider the impact of deferral in the context of section 7 rights is meritless because while the 4th amended charge alleges a failure to comply with article III, section 7(a) of the Act, the arbitrator was presented with evidence necessary to resolve that issue. At arbitration, substantial evidence was presented to the arbitrator relating to the employees' opportunity to choose whether to remain in the unit in another classification or to accept a supervisory position. See MD Ex. 5, Arbitrator's decision, pg. 13.

Neither the CGC nor the Union can meet its burden to establish that the issues are not parallel and CGC Exception 1 and Union Exceptions 1-7, 9-17, 21-22, 24-25 are correctly overruled.

**(B) The Arbitrator Was Presented With The Facts Relevant To Resolving The Unfair Labor Practice Issues (Union Exceptions 1-7, 9-17, 21-22, 24-25)**

**1) The Union Misstates the Factual Record in an Effort to Avoid Deferral**

It is so obvious that the evidence relevant to resolving the ULP was presented at the arbitration, even the CGC conceded the matter in its opposition to the motion to defer and does not except to the ALJ's findings on this point. CGC's Opposition to Motion to Defer, pg. 4, fn. 3. Nevertheless, the Union advances this meritless argument through an egregious misrepresentation to the Board.

The questions in the ULP case are as follows: (1) whether the Respondent unilaterally transferred the unit work of the Charge Nurses to non-unit Department Supervisors without meeting its bargaining obligation under the Act, and (2) whether the Hospital failed to continue in effect all the terms of and conditions of the collective bargaining agreement by *transferring bargaining unit work*. (See the 4th Amended Complaint). The Union has misrepresented the second issue as whether the Respondent implemented a mid-term modification of the scope of the bargaining unit through the *elimination of the Charge Nurse classification* without bargaining in good faith. See Union Brief in Support of Exceptions, Page 11. The allegations related to the alleged modification of the contract through the elimination of the Charge Nurse classifications, which were part of the Third Amended Complaint, were abandoned when the Union filed its Fourth Amended Complaint. The Union may not revive these allegations here in its exceptions.

At Arbitration, the Hospital and the Union presented five days of testimony and hundreds of pages of documentary evidence relating to every aspect of the restructure including:

- The purpose behind the decision

- The decision making process
- The role of the former Charge Nurses
- The role of the new Department Supervisors
- Substantial information regarding how the two positions were completely distinct
- The Union's concession that the Department Supervisors are statutory supervisors under the Act
- The notice provided to the Union prior to the restructure
- The steps and timing of the restructure
- The Hospital's offer to engage in effects bargaining over the effects of the restructure decision including the allocation of bargaining unit work
- The Union's refusal to participate in this effects bargaining or discuss the impact of the restructure in any way
- The Hospital's position regarding why decisional bargaining over the restructure was not required
- The process of placing the former Charge Nurses into new positions
- The creation of break relief positions to replace the Charge Nurse positions
- The Union's bad faith throughout the process
- The parties' history of conducting layoffs and eliminating job classifications without engaging in decisional bargaining
- The Hospital's undeniable management right to eliminate job classifications
- The impact of the restructure on the Bargaining Unit members – The fact that no Nurses were terminated
- The fact that the number of bargaining unit positions remained the same before and after the restructure
- The terms and conditions of the parties' Collective Bargaining Agreement ("CBA")
- The positive impact of the restructure on Nurse and Patient safety
- The positive impact of the restructure on supervision and the Hospital as a whole
- The Hospital's legitimate and non-arbitrary rationale behind the decision

See generally Employer's Motion to Defer Exhibit ("MD Ex.") 13 (the Hospital's Post Arbitration Brief); MD Ex. 12 (Union's Post Arbitration Brief); MD Ex. 11; and MD Ex. 14 (Joint Exhibits to Arbitration 1-4), MD Ex. 15 (Union's Exhibits to Arbitration 1-32) and MD Ex. 16 (Employer's Exhibits to Arbitration 1-26).

A review of the parties' briefs and the Arbitrator's decision makes it clear that the issues are factually parallel. For example, the Union alleges that the Hospital transferred bargaining unit work without negotiating with the Union. However, the Hospital's position is that it repeatedly offered to engage in effects bargaining over the restructure which would have necessarily included negotiation over the appropriate allocation of work previously done by the Charge Nurses. The Union refused to engage in this effects bargaining. These issues and the

relevant facts on these issues were thoroughly presented in the course of the arbitration. See the MD. Ex.13, page 7-10. Similarly, both parties presented evidence and arguments regarding the alleged transfer of bargaining unit work to the Department Supervisors including the job descriptions and ample testimony regarding the relative job responsibilities. See MD Ex. 13, pages 5, 7, 10-11; MD Ex.12, pages 9-1; MD Ex. 11 - Tr. Vol. 1, 46:1-56:15; 91:14-24; Tr. Vol. 3, 281:4-284:13; 294:1-296:9; Tr. Vol. 4, 352:13-20-353:21; 370:4-372:18; 437:24-438:7; 443:7-446:2; Tr. Vol. 4, 373:14- 374:6-24. As set forth above, the Arbitrator expressly ruled in the Hospital's favor on these issues based on the evidence and argument.

The Union focuses on an issue which is not part of the ULP; modification of the scope of the unit. Even if the issue of whether the elimination of the Charge Nurse classification constituted a mid-term modification was relevant to the pending ULP, this issue was in fact brought forward by the Union at the arbitration and evidence was presented on this issue. In its grievance, the Union alleged that the Hospital violated Article 1, Recognition by removing the Charge Nurses from the Bargaining Unit. (See MD Ex. 2). Evidence on this issue was presented during the Arbitration. (See MD Ex. 13, pg. 21; MD Ex.5, pg. 3, 11, 14). The arbitrator made a ruling on this issue stating "The job classification of Charge Nurse does not disappear from the Agreement including the bargained-for differential for the position, by the Employer's action. Rather, the Employer determined to no longer fill it, as was its right." (See MD Ex. 5, pg. 14).<sup>4</sup> Therefore the ULP issue is resolved as the contract gave the express right not to fill the Charge Nurse position to the Employer and as such there could be no unlawful modification of the contract.

Given the substantial evidence presented by both the Hospital and *the Union* regarding the very facts and issues presented to the Board in the Charge, there can be no doubt that the contractual issues decided by the Arbitrator are factually parallel to the unfair labor practice issues, and that the Arbitrator was presented generally with the facts relevant to

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<sup>4</sup> The Union also claims that the Arbitrator's decision was limited to the narrow issue of whether there was a layoff. A simple reading of the decision clearly evidences that this statement is false.

resolving the unfair labor practice issues. It is hard to fathom what information would be even remotely relevant to the Charge that was not presented during the Arbitration. The Union has not met its burden to establish what these facts would be. The Union's Exceptions 1-7, 9-17, 21-22, 24-25 are correctly overruled.

**(2) The Decision Was Not Repugnant To The Act (CGC Exception 2, Union Exceptions 1, 5-8, 10, 13, 15-20, 23-25)**

With regard to the "clearly repugnant" standard, the Board does not require that the award be totally consistent with Board precedent. *Martin Redi-Mix*, 274 NLRB 559, 559 (1985). Rather, the Board will defer unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to *any* interpretation consistent with the Act. *Laborers Local 294*, 331 NLRB 259, 261 (2000); *Olin Corp.*, 268 NLRB 573, 574 (1985).

"Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board." *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1204 fn. 6 (1985); see also *Specialized Distribution Management, Inc.*, 318 NLRB 158, 161 (1995). When the arbitrator's decision can be interpreted in *any* way consistent with the Act, the arbitrator's decision is not repugnant to the Act. See *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354-355 (9th Cir. 1979). See also *Combustion Engineering*, 272 NLRB at 217. Thus, the Board's disagreement with an arbitrator's conclusion is an insufficient basis for the Board to decline to defer to the arbitrator's decision. *Kvaerner Philadelphia Shipyard*, 47 NLRB 390, 391 (2006); *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005).

The ALJ's role is not to serve as an appellate arbitrator, review the award de novo, or substitute her judgment of what penalty, if any, the arbitrator should have imposed because to do so would undermine the strong public policy in favor of alternative dispute resolution and the parties' agreement to be bound by the decision of the arbitrator whom they mutually selected. *Shands Jacksonville* 359 NLRB No. 104 (2013); see also *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 265 (5th Cir. 1999); See *Blue Circle Cement Co.*, 41 F.3d at 206;

*Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1406 (5th Cir.1996) (board deference to arbitrator's credibility findings is at apex). Thus, declining to defer to an arbitration award which is fair and regular and not repugnant to the Act is an abuse of discretion. *Liquor Salesmen's Local 2 v. NLRB*, 664 F.2d 318 (2d Cir. 1981).

As described in detail above, the cases cited by the CGC and the Union all concern arbitrations where the grievance was dismissed because either the arbitrator concluded that the contract didn't prohibit the actions by the employer or the arbitrator was not presented with evidence to find a contractual violation. (See discussion at pg. 10-11). All of these cases are inapplicable as the arbitrator concluded that the contract affirmatively authorized the Employer's actions and was presented with evidence by both parties in support of his conclusion. See MD Ex. 5, pg 14-17.

Neither the Union nor the CGC articulate how the cases relied upon by the Hospital are inapplicable. They have failed to meet their burden of demonstrating how the decision is inconsistent with *any* interpretation of the facts under the Act. Although the Board may not have made the same decision, that is not the appropriate standard. The CGC's Exception 2 and the Union's Exception's 1, 5-8, 10, 13, 15-20, 23-25 are correctly overruled.

**4. Union's Request to Apply Standard Similar to *Babcock* Must Be Rejected (Union Exception 26-27)**

The Union acknowledges that the new deferral standard set forth in *NLRB v. Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) is not applicable to this Charge. Nevertheless, it prays in its exceptions that a new standard, largely identical to *Babcock*, is adopted in this case. This suggested retroactive standard has already been considered and rejected by the Board.

In the *Babcock* decision, issued on December 15, 2014, the Board held that the new standard will not be applied to currently pending cases. *Id.* at pg. 14. Further, in the General Counsel's Memorandum 15-02 issued on February 10, 2015, the Board instructed that the standard *would not be applied* if the collective-bargaining agreement under which the

grievance arose was executed on or before December 15, 2014 even if the arbitrator was not authorized to decide the statutory issue.<sup>5</sup> Because the Charge was pending at the time *Babcock* was decided and the relevant CBA was negotiated prior to *Babcock* and has a term date of November 11, 2015, the new *Babcock* standard does not apply. Thus, the deferral determination must be based upon the *Spielberg* factors as set forth above and must be deferred to the Arbitration decision.

**5. CONCLUSION**

The Hospital respectfully requests all exceptions of both the CGC and the Union are overruled and the decision of the ALJ deferring the case to arbitration is certified..

DATED: January 11, 2016

Respectfully submitted,

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<sup>5</sup> The Union attempts to rely on this same Memorandum in support of its argument. This must be rejected as contrary to the express and implied reasoning and mandates of the General Counsel's Memorandum 15-02.

EXHIBIT A

CALIFORNIA NURSES ASSOCIATION'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>Union's Exception Taken</u>	<u>Employer's Response</u>
1.	ALJD 10	The decision of the Administrative Law Judge (ALJ) to dismiss the complaint and implicitly defer to the decision of the Arbitrator John Kagel, contrary to the standards outlined in <i>Spielberg Mfg. Co.</i> , 112 NLRB 1080(1955) and <i>Olin Corp.</i> , 268 NLRB 573(1984).	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The ALJ was charged with determining if deferral of the matter was proper. The ALJ did not evaluate the credibility of the evidence or other legal issues because the ALJ found deferral appropriate. <i>Shands Jacksonville</i> 359 NLRB No. 104) (2013); <i>Olin Corp.</i>, 268 NLRB 573 (1985).</p> <p>Declining to defer to an arbitration award which is fair and regular and not repugnant to the Act is an abuse of discretion. <i>Liquor Salesmen's Local 2 v. NLRB</i>, 664 F.2d 318 (2d Cir. 1981).</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
2.	ALJD 3:2-3	The ALJ's conclusion that "the basic disagreement [at arbitration] was whether the event announced on November 13, 2013, was a 'layoff or a 'restructuring.'"	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The disagreement discussed throughout the decision was whether the events were a restructure or a layoff. See for example, Arbitration Award, Pg. 3, Pg. 8, Pg. 10.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>

3.	ALJD 6:2, n. 9	The ALJ's conclusion that Arbitrator Kagel made an "inherent" determination "regarding whether Charge Nurses performed bargaining unit work with respect to taking patient assignments prior to being eliminated."	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The arbitrator made an express conclusion that no bargaining unit work was performed with respect to taking patient assignments. Arbitration Award Pg. 17. The ALJ did not evaluate the credibility of the evidence or other legal issues because the ALJ found deferral appropriate. <i>Shands Jacksonville</i> 359 NLRB No. 104) (2013); <i>Olin Corp.</i>, 268 NLRB 573 (1985).</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
4.	ALJD 6:9-11	The ALJ's conclusion that "Looking at the issues from a factual basis, the arbitral issues and the statutory issues are factually parallel."	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." <i>Andersen Sand &amp; Gravel Co.</i>, 277 NLRB 1204, 1205 (1985); see also <i>Laborers Local 294</i>, 331 NLRB 259, 261 (2000). As set forth in the Employer's brief, all such evidence was presented at arbitration.</p> <p>The Union failed to describe what evidence was not presented. The cases cited by the Union are inapplicable because, in those cases, the management rights clause was not considered and where labor costs were not an issue.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
5.	ALJD 6:29- 31	The ALJ's conclusion that "the arbitrator further fully considered the	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the</p>

		<p>issue of transfer of bargaining unit work to supervisors and found that the Department Supervisors perform no bargaining unit work, thus in effect determining the contractual and statutory issues of breach of contract."</p>	<p>credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
6.	ALJD 7:1-2	<p>The ALJ's conclusion that "[the arbitrator's] findings resolve the unfair labor practice allegation that Respondent transferred unit work to non-unit, supervisory employees without</p>	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is</p>

		<p>bargaining."</p>	<p>conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
7.	ALJD 7:12- 13	<p>The ALJ's implicit conclusion that "[t]o the extent that CNA argues that this case does not turn on contractual interpretation, I reject this argument."</p>	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to</p>

			concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).
8.	ALJD 7:13- 14	The ALJ's implicit conclusion that "[t]he arbitrator specifically considered the parties' contract in making his finding."	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The arbitrator expressly considered the parties' contract in making the findings. Arbitration Award pg 3-8.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
9.	ALJD 7:26	The ALJ's implicit conclusion that " <i>Olin</i> does require that the issues be factually parallel."	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p><i>Olin</i> expressly holds: "We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." <i>Olin Corp.</i>, 268 NLRB 573 (1985).</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
10.	ALJD 7:32- 33	The ALJ's implicit conclusion that "the statutory issues revolve, in part, and were determined in whole by analysis of the contract management	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB</p>

		rights clause."	<p>958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The arbitrator expressly considered the parties' contract in making the findings. Arbitron Award pg 3-8. The arbitrator found the Hospital acted within its management rights and such a conclusion is determinative of the unfair labor practice allegation. <i>See Dennison National Co.</i>, 296 NLRB 169, 171.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
11.	ALJD 7:34- 35	The ALJ's implicit conclusion that "the contractual and statutory issues are factually parallel."	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." <i>Andersen Sand &amp; Gravel Co.</i>, 277 NLRB 1204, 1205 (1985); see also <i>Laborers Local 294</i>, 331 NLRB 259, 261 (2000). As set forth in the Employer's brief, all such evidence was presented at arbitration.</p> <p>The Union failed to describe what evidence was not presented. The cases cited by the Union are inapplicable because, in those cases, the management rights clause was not considered and where labor costs were not an issue.</p>

			<p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
12.	ALJD 8:5-6	<p>The ALJ's implicit conclusion that "the evidence presented to the arbitrator is generally the same evidence necessary for determination of the unfair labor practice issues."</p>	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." <i>Andersen Sand &amp; Gravel Co.</i>, 277 NLRB 1204, 1205 (1985); see also <i>Laborers Local 294</i>, 331 NLRB 259, 261 (2000). As set forth in the Employer's brief, all such evidence was presented at arbitration.</p> <p>The Union failed to describe what evidence was not presented. The cases cited by the Union are inapplicable because, in those cases, the management rights clause was not considered and where labor costs were not an issue.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
13.	ALJD 8:6, n. 12	<p>The ALJ's implicit conclusion that "[t]o the extent that CNA argues that the arbitrator did not consider comparative duties of Department Supervisors and Charge Nurses, I reject that argument as the evidence before the arbitrator included the job duties and</p>	<p>In support of this exception, the Union relies upon documentary evidence introduced in prehearing briefs. The Union does not dispute that this evidence was presented. Instead this argument goes to the weight afforded to the evidence.</p> <p>"When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); See <i>Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is</p>

		testimony regarding those job duties."	properly disregarded. 102.46(b)(2).
14.	ALJD 8:22- 24	The ALJ's conclusion that "the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice allegations."	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." <i>Andersen Sand &amp; Gravel Co.</i>, 277 NLRB 1204, 1205 (1985); see also <i>Laborers Local 294</i>, 331 NLRB 259, 261 (2000). As set forth in the Employer's brief, all such evidence was presented at arbitration.</p> <p>The Union failed to describe what evidence was not presented. The cases cited by the union are inapplicable because, in those cases, the management rights clause was not considered and here labor costs were not an issue.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
15.	ALJD 9:12- 13	The ALJ's finding that "the arbitrator found there was no transfer of Charge Nurse duties to Department Supervisors."	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); See <i>Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator including job descriptions, job duties, and testimony by both Employer witnesses and Union witnesses as to job duties.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to</p>

			concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).
16.	ALJD 9:12- 15	The ALJ's implicit conclusion that "because the arbitrator found there was no transfer of Charge Nurse duties to Department Supervisors, the presence of this [management rights] provision [requiring bargaining before utilization of non-unit employees for bargaining unit work] in the parties' contract would not be applicable to the arbitrator's decision had it been called to his attention."	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir. 1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The arbitrator expressly considered the parties' contract in making the findings. Arbitron Award pg 3-8. The arbitrator found the Hospital acted within its management rights and such a conclusion is determinative of the unfair labor practice allegation. <i>See Dennison National Co.</i>, 296 NLRB 169, 171. The issues are factually parallel and it is not required that the Arbitrator decide the statutory issues.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
17.	ALJD 9:22-	The ALJ's conclusion that	In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that

	:24	<p>"it is unnecessary to reach the General Counsel's further argument regarding the arbitrator's failure to consider the unfair labor practice issues of decisional bargaining, notice, and waiver."</p>	<p>the ALJ erred in these findings.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The issues are factually parallel and it is not required that the Arbitrator decide the statutory issues.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
18.	ALJD 9:28- 30	<p>The ALJ's implicit conclusion that "CNA misperceives the arbitrator's holding" as repugnant to the Act because "[the arbitrator] specifically stated that the scope of the unit was not compromised by the fact that a position set forth in the unit was not filled." The ALJ's conclusion misstates the Union's position and Arbitrator</p>	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The ALJ correctly quotes the Arbitrator's Award at page 14.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>

		Kagel's decision.	
19.	ALJD 9:47- 10:5	The ALJ's implicit conclusion that "it appears that there might have been conflicting evidence regarding the nature of the duties performed by Department Supervisors and whether any of their duties constituted Charge Nurse duties. The arbitrator was free to credit some of the testimony over that of others. Accordingly, I cannot find that this alone would require a finding that the arbitration award is not susceptible of an interpretation consistent with the Act."	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>"When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The issues are factually parallel and it is not required that the Arbitrator decide the statutory issues.</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
20.	ALJD 9:47- 10:5	The ALJ's implicit conclusion that the arbitrator's decision was not repugnant to the Act and was susceptible to an interpretation consistent with	<p>In support of this exception, the Union relies upon Board law. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The Hospital refers to cases cited in its position statements attached to its motion to defer as Exhibit 17 (January 26, 2015 Position Statement) and Exhibit 18 (May 20, 2015 Position Statement).</p> <p>The Union failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise</p>

		to the Act.	citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).
21.	None	The ALJ's failure to find that the contractual and statutory issues are not factually parallel.	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The cases cited by the union are inapplicable because, in those cases, the management rights clause was not considered and here labor costs were not an issue. All evidence relevant to the issue of was presented to the arbitrator.</p> <p>The issues are factually parallel and it is not required that the Arbitrator decide the statutory issues.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
22.	None	The ALJ's failure to find that the arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice.	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>All evidence relevant to the issue of was presented to the arbitrator.</p> <p>The issues are factually parallel and it is not required that the Arbitrator decide the statutory issues.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
23.	None	The ALJ's failure to find that the arbitrator's decision was	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>Cases supporting the arbitrator's decision are cited in the</p>

		palpably wrong and repugnant to the Act.	<p>Employer's brief in support of the ALJ's decision.</p> <p>The issues are factually parallel and it is not required that the Arbitrator decide the statutory issues.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
24.	None	The ALJ's failure to find that Respondent violated the Act by transferring work formerly performed by Unit employees who held the position of charge nurse to the non-bargaining unit position of department supervisor in its nursing department without affording the Union an opportunity to bargain with Respondent with respect to this conduct.	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The ALJ was charged with determining if deferral of the matter was proper. The ALJ did not evaluate the credibility of the evidence or other legal issues because the ALJ found deferral appropriate. <i>Shands Jacksonville</i> 359 NLRB No. 104 (2013); <i>Olin Corp.</i>, 268 NLRB 573 (1985). The ALJ recites the Arbitrator's finding that there was no transfer of work between the positions. See ALJD 7:1-2; 7:fn.9. All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
25.	None	The ALJ's failure to find that Respondent violated the Act by failing to continue in effect all the terms and	<p>In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs. The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The ALJ was charged with determining if deferral of the matter was proper. The ALJ did not evaluate the credibility of the evidence or other legal issues because the ALJ found deferral</p>

		conditions of the Agreement between the parties by transferring work formerly performed by Unit employees who held the position of charge nurse to the non-bargaining unit position of department supervisor in its nursing department.	<p>appropriate. <i>Shands Jacksonville</i> 359 NLRB No. 104) (2013); <i>Olin Corp.</i>, 268 NLRB 573 (1985). The ALJ recites the Arbitrator's finding that there was no transfer of work between the positions. See ALJD 7:1-2; 7:fn.9.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
26.	None	The ALJ's failure to consider whether deferral is inappropriate because the conduct at issue interferes with Section 7 rights or there is a serious economic impact on the many bargaining unit employees.	<p>The Union excepts to the ALJ's failure to consider its argument. The Union has presented no support for this exception.</p> <p>This argument was considered by the ALJ as it was part of the Union's Opposition to Motion to Compel brief at page 13:8-20. The ALJ considered the entire record, including the opposition briefs submitted by CNA and the counsel for the General Counsel. See ALJD 2:1-6. CNA's brief made this argument in its Opposition to the. The Union presents no authority for this novel argument.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
27.	None	The ALJ's failure to adopt a new framework in Section 8(a)(5) post-arbitral deferral cases similar to the post-arbitral deferral standard in <i>Babcock &amp;</i>	<p>The Union excepts to the ALJ's failure to adopt a post-arbitral deferral standard in <i>Babcock &amp; Wilcox Construction Co.</i>, 361 NLRB No. 132 (2014). The Union has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>This argument is contrary to the holding in <i>Babcock &amp; Wilcox Construction Co.</i>, 361 NLRB No. 132 (2014) which expressly required any such change be applied prospectively only.</p> <p>The Union failed to comply with 102.46(b)(1)(ii-iv) of the Board's</p>

	<p><i>Wilcox Construction Co.</i>, 361 NLRB No. 132 (2014) and require that the party urging deferral to demonstrate that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the arbitral award. If the party urging deferral makes this showing, only then should deferral be appropriate, unless the award is clearly repugnant to the Act.</p>	<p>Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
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**EXHIBIT B**

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>CGC's Exception Taken</u>	<u>Employer's Response</u>
1	ALJD 6:9-10	"Looking at the issues from a factual basis, it must be concluded that the arbitral and statutory issues are factually parallel."	<p>In support of this exception, the counsel for the General Counsel ("CGC") relies upon Board law. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." <i>Andersen Sand &amp; Gravel Co.</i>, 277 NLRB 1204, 1205 (1985); see also <i>Laborers Local 294</i>, 331 NLRB 259, 261 (2000). As set forth in the Employer's brief, all such evidence was presented at arbitration.</p> <p>The CGC failed to describe what evidence was not presented. The cases cited by the CGC are inapplicable because, in those cases, the management rights clause was not considered and labor costs were not an issue.</p> <p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
	ALJD 6:29-31	<p>"The arbitrator further fully considered the issue of transfer of bargaining unit work to supervisors and found that the Department Supervisors perform no bargaining unit work, thus, in effect, determining the contractual and</p>	<p>In support of this exception, the CGC relies upon Board law. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. See <i>Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should</p>

No.	ALJD Pg-Ln	CGC's Exception Taken	Employer's Response
		statutory issue of breach of contract."	<p>be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
	ALJD 7:1-2	"These findings resolve the unfair labor practice allegation that Respondent transferred unit work to non-unit, supervisory employees without bargaining."	<p>In support of this exception, the CGC relies upon Board law. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding.</p>

No.	ALJD Pg-Ln	CGC's Exception Taken	Employer's Response
			<p>See <i>Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
	ALJD 7:31- 35	<p>"Here, the statutory issues revolve, in part, and were determine [sic] in whole by analysis of the contract management rights clause. Thus, I reject the General Counsel's and CNA's arguments and find that the contractual and statutory issues are factually parallel."</p>	<p>In support of this exception, the CGC relies upon Board law and documentary evidence introduced in prehearing briefs. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." <i>Andersen Sand &amp; Gravel Co.</i>, 277 NLRB 1204, 1205 (1985); see also <i>Laborers Local 294</i>, 331 NLRB 259, 261 (2000). As set forth in the Employer's brief, all such evidence was presented at arbitration.</p> <p>The CGC failed to describe what evidence was not presented. The cases cited by the CGC are inapplicable because, in those cases, the management rights clause was not considered and where labor costs were not an issue.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. See <i>Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); See <i>Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of</p>

No.	<u>ALJD</u> <u>Pg-Ln</u>	<u>CGC's Exception</u> <u>Taken</u>	<u>Employer's Response</u>
			<p>whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. See <i>Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The arbitrator expressly considered the parties' contract in making the findings. Arbitron Award pg 3-8. The arbitrator found the Hospital acted within its management rights and such a conclusion is determinative of the unfair labor practice allegation. See <i>Dennison National Co.</i>, 296 NLRB 169, 171.</p> <p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
2	ALJD 6:29- 31	"The arbitrator further fully considered the issue of transfer of bargaining unit work to supervisors and found that the Department Supervisors perform no bargaining unit work, thus, in effect, determining the contractual and statutory issue of breach of contract."	<p>In support of this exception, the CGC relies upon Board law. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. See <i>Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); See <i>Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues</p>

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>CGC's Exception Taken</u>	<u>Employer's Response</u>
			<p>... tied to contract interpretation and his decision is binding. See <i>Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
	ALJD 9:12- 15	"However, because the arbitrator found there was no transfer of Charge Nurse duties to Department Supervisors the presence of this provision in the parties' contract would not be applicable to the arbitrator's decision had it been called to his attention."	<p>In support of this exception, the CGC relies upon Board law. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. See <i>Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); See <i>Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. See <i>Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The arbitrator expressly considered the parties' contract in making the findings. Arbitron Award pg 3-8. The arbitrator found the Hospital acted within its management rights and such a conclusion is determinative of the unfair labor practice allegation. See <i>Dennison National Co.</i>, 296 NLRB 169, 171.</p>

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>CGC's Exception Taken</u>	<u>Employer's Response</u>
			<p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
	<p>ALJD 9:21- 22</p>	<p>"The arbitrator need not reach these issues, however, because he found there was no transfer of unit work to supervision."</p>	<p>In support of this exception, the CGC relies upon Board law. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings or evidence which contradicts the credibility finding in its brief or exceptions.</p> <p>The duty to engage in decisional bargaining does not arise because the Hospital acted within its management rights; was not motivated by labor costs; and was based on entrepreneurial concerns. Arbitrator's Decision pg. 17. <i>See Allison Corp.</i>, 330 NLRB 1363, 1365 (2000); <i>Oklahoma Fixture Co.</i>, 314 NLRB 958 (1994).</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The CGC failed to comply with 102.46(b)(1)(iii-iv) of the Board's Rules and Regulations by failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
	<p>ALJD 9: 43- 44</p>	<p>"Given the arbitrator's finding that the</p>	<p>In support of this exception, the CGC relies upon Board law and documentary evidence introduced in prehearing briefs. The CGC has presented no evidence or credible</p>

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>CGC's Exception Taken</u>	<u>Employer's Response</u>
		<p>Department Supervisors do not perform bargaining unit work."</p>	<p>legal authority that the ALJ erred in these findings.</p> <p>The arbitrator's conclusion that there was no transfer of bargaining unit work should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The ALJ was charged with determining if deferral of the matter was proper. The ALJ did not evaluate the credibility of the evidence or other legal issues because the ALJ found deferral appropriate. <i>Shands Jacksonville</i> 359 NLRB No. 104) (2013); <i>Olin Corp.</i>, 268 NLRB 573 (1985). The ALJ recites the Arbitrator's finding that there was no transfer of work between the positions. See ALJD 7:1-2; 7:fn.9.</p> <p>The CGC failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>CGC's Exception Taken</u>	<u>Employer's Response</u>
	ALJD 10:2-5	"The arbitrator was free to credit some testimony of the testimony over that of others. Accordingly, I cannot find that this alone would require a finding that the arbitration award is not susceptible to an interpretation consistent with the Act."	<p>In support of this exception, the CGC relies upon Board law and documentary evidence introduced in prehearing briefs. The CGC has presented no evidence or credible legal authority that the ALJ erred in these findings.</p> <p>The arbitrator's conclusion should not be disturbed. "When there is conflicting testimony on an issue, Board deference to the findings of arbitrators and ALJs should be at its apex, as credibility determinations are involved." <i>Mobil Exploration &amp; Producing U.S., Inc. v. NLRB</i>, 200 F.3d 230, 265 (5th Cir. 1999); <i>See Blue Circle Cement Co.</i>, 41 F.3d at 206; <i>Asarco, Inc. v. NLRB</i>, 86 F.3d 1401, 1406 (5th Cir.1996). All evidence relevant to the issue of whether bargaining unit work was transferred was presented to the arbitrator.</p> <p>The Arbitrator is the appropriate finder of fact on issues tied to contract interpretation and his decision is binding. <i>See Bath Marine Draftsmen Ass'n v. NLRB</i>, 475 F.3d 14, 24, 181 LRRM 2267 (1st Cir. 2007).</p> <p>The CGC failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).</p>
3	None	The ALJ erred in failing to address and consider deferral to a new arbitration in lieu of deferral to the arbitral award.	<p>The CGC excepts to the ALJ's failure to consider its argument. The CGC has presented no support for this exception.</p> <p>This argument was considered by the ALJ as it was part of the Union's Opposition to Motion to Compel brief at page 13:8-20. The ALJ considered the entire record, including the opposition briefs submitted by CNA and the CGC. See ALJD 2:1-6. CNA's brief made this argument in its Opposition to the. The CGC presents no authority for this novel argument.</p> <p>The ALJ determined that the statutory issues in the ULP were factually parallel to the prior arbitration. There would clearly be no need for an additional arbitration on the same factually parallel issues.</p> <p>The CGC failed to comply with 102.46(b)(1)(ii-iv) of the Board's Rules and Regulations by failing to identify that</p>

<u>No.</u>	<u>ALJD Pg-Ln</u>	<u>CGC's Exception Taken</u>	<u>Employer's Response</u>
			part of the administrative law judge's decision to which objection is made; failing to designate by precise citation of page the portions of the record relied on; and failing to concisely state the grounds for the exception. This exception is properly disregarded. 102.46(b)(2).

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7<sup>th</sup> Floor, Los Angeles, California 90067.

On January 11, 2016, I electronically served by email a document entitled **RESPONSE TO GOOD SAMARITAN HOSPITAL'S ANSWERING BRIEF IN RESPONSE TO EXCEPTIONS** in this action to the parties below:

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(BY ELECTRONIC SERVICE) On December 17, 2015, I transmitted the aforementioned document(s) directly, through an agent, or through a designated electronic filing service provider to the aforementioned electronic notification address(es). The transmission originated from my electronic notification address, which is [td@jmbm.com](mailto:td@jmbm.com), and was reported as complete and without error. Pursuant to Rule 2.260(f)(4), I will maintain a printed form of this document bearing my original signature and will make the document available for inspection and copying on the request of the court or any party to the action or proceeding in which it is filed, in the manner provided in rule 2.257(a).

I electronically filed the document at [www.nrlrb.gov](http://www.nrlrb.gov).

Executed on January 11, 2016 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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PATRICIA DESANTIS