UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In a Matter Between:	)	
	)	
GOOD SAMARITAN HOSPITAL	)	
	)	Case 31-CA-117462
Respondent,	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION (CNA),	)	
	)	
	)	
Charging Party.	)	

REPLY TO RESPONDENT GOOD SAMARITAN HOSPITAL'S ANSWERING BRIEF TO EXCEPTIONS BY CALIFORNIA NURSES ASSOCIATION

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I. INTRODUCTION AND ARGUMENT

Charging Party California Nurses Association ("CNA" or "Union") respectfully submits this brief in reply to the answering brief of Respondent, Good Samaritan Hospital ("Employer" or "Respondent"), to the Union's exceptions to Administrative Law Judge ("ALJ") Mary Miller Cracraft's decision in the above-entitled matter.[1]

Respondent's position in support of the ALJ's deferral to Arbitrator John Kagel's award is premised upon an oversimplified recounting of a set of several associated—but separate—decisions made by Respondent when it engaged in its so-called "restructuring" of Good Samaritan Hospital's nursing department. Despite sharing some common factual origins, the facts necessary to resolve the arbitral and statutory issues are not one and the same.

Using semantically imprecise descriptions of the issues before the arbitrator, Respondent attempts to persuade the Board that deferral is appropriate here. But a careful look at the arbitration record and the arbitral award reveals that facts required to determine the statutory issues were not presented to or considered by Arbitrator Kagel. The issue before the arbitrator was whether the decision to eliminate the 52 individual Charge Nurses jobs violated the layoff article of the parties' contract. (See RX 11, Arbitration Transcript ("Tr."), Vol. I, 10:14-11:17) The unfair labor practice issues—unilateral transfer of unit work formerly performed by Charge Nurses to Department Supervisors and a consequent mid-term contract modification of the unit's scope—were left unresolved by the arbitration decision.

Significantly, by the parties' stipulation, the scope of the arbitrator's authority narrowly involved the contractual disputes arising out of Respondents decision to eliminate 52 Charge Nurse assignments. Although the parties agreed to be bound by Arbitrator Kagel's award, the

[1] In this brief, "ALJD ___" refers to the Administrative Law Judge's decision; "CPX ___" refers to Exhibits submitted by the Charging Party Union in its prehearing brief to the ALJ; "RX ___" refers to Exhibits submitted by Respondent Employer in its prehearing brief to the ALJ.

Union and Respondent also agreed that Arbitrator Kagel did not have the authority to resolve issues of decisional or effects bargaining that were before the Board. (CPX 1:12; RX 5:12) To retroactively expand the arbitrator's limited authority as stipulated by the parties and expressly recognized by the arbitrator now would violate the most fundamental principle regarding alternative dispute resolution—that the parties agree to be bound by the arbitrator. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Board law and the record demonstrate that the arbitral and statutory issues were not parallel and the ALJ's deferral to the arbitrator's decision must be reversed. Additionally, to the extent that the arbitration award can be seen as deciding the statutory issues in this case, which it cannot by virtue of Arbitrator Kagel's explicit recognition of his limited jurisdiction, deferral to that decision is inappropriate under the *Spielberg/Olin* standard because the award was clearly repugnant to the Act.

A. Respondent Seeks To Retroactively Enlarge The Limited Scope Of The Arbitration Stipulated To By The Parties.

Respondent seeks, *post facto*, to enlarge the arbitrator's narrow authority as agreed upon by the parties in attempt to defer this statutory matter to an arbitration decision that was made in its favor. The parties, however, only authorized Arbitrator Kagel to decide whether or not the Respondent's elimination of 52 Charge Nurse assignments was a permanent termination or reduction in force that violated the layoff provision of the parties' contract, stipulating that the unfair labor practices issues regarding decisional and effects bargaining were not before him.[2] (CPX 1:12; RX 5:12) A simple reading of Arbitrator Kagel's decision indisputably establishes that he did not decide issues of decisional or effects bargaining, which were beyond his limited authority as he explicitly recognized in his decision. (CPX 1:12; RX 5:12)

[2] The parties gave Arbitrator Kagel authority to determine the wording of the issue or issues to be decided. (CPX 1:1-2; RX 5:1-2). Therefore, despite the inclusion of the Recognition clause in the Union's initial grievance, the issue at arbitration was validly limited by Arbitrator Kagel.

It is also apparent from Respondent's representations during the arbitration that its scope was limited exclusively to contractual issues regarding the elimination of the 52 Charge Nurses. For example, in Respondent' opening statement, its position was that the grievance should be denied because the layoff provision of the contract could not be invoked given that no permanent termination occurred when it eliminated the Charge Nurse assignments. (RX 11, Tr. Vol. I, 34:2-13) Later in the arbitration, when Respondent's counsel was questioning one of its witness about the selection of the new Department Supervisor position, Arbitrator Kagel was quick to interject: "The issue, as I understand it… is whether the Employer violated the CBA by the elimination of the position of 52 Charge Nurses. That's what I thought we were doing." (RX 11, Tr. Vol. VI, 400:25-401:3) Employer's counsel responded, "That's how we understand…" (*Id.* at 401:6)

The entirely distinct statutory issues arose from the separate action by Respondent—transferring bargaining unit work assigned to the Charge Nurse classification to the newly created Department Supervisors. Respondent here takes advantage of the temporal closeness of these separate actions—conveniently conflating the actions as a single decision to "restructure" the nursing department—to imply that any conclusion about the elimination of the 52 Charge Nurse assignments was also a conclusion about the statutory issues. The Union and Respondent did not agree to be bound by the arbitrator on questions related to unilateral change or the transfer of unit work to the Department Supervisors, and the arbitrator expressly did not address the statutory issues. Therefore, the Board must reverse the ALJ's decision to defer the statutory matters here to Arbitrator Kagel's award.

B. Although The Factual Genesis Of The Arbitral And Statutory Issues Overlap, Respondent Wrongly Asserts That The Facts Necessary To Decide The Statutory Issues Were Presented To Arbitrator Kagel.

Respondent's assertion that deferral is appropriate because the statutory and arbitral facts

are "nearly identical" or "related to" each other is inconsistent with the *Spielberg/Olin* deferral standard. For deferral to be appropriate, the arbitrator must have been presented generally with the facts relevant to resolve any unfair labor practice. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). Even when the facts of an arbitration and unfair labor practice charge closely overlap, the Board has declined to defer to the arbitrator's award. See, e.g., *Heartland Health Care*, 359 NLRB No. 155, slip op. at *8 (2013).

Under Board law, the resolution of an 8(a)(5) issue "requires a determination of whether the decision is a mandatory subject of bargaining, whether the Union has waived a statutory right to bargain about the decision or its effects, and whether Respondent has already satisfied its obligation, if any, to bargain." *Kohler Mix Specialties,* 332 NLRB 630, 631 (2000). The statutory issues regarding transfer of unit work and mid-term modification of the parties' contract were never presented nor mentioned during the arbitration, and none of the facts necessary to make the determinations required by *Kohler Mix Specialties* with regard to the transfer of unit work or the mid-term modification of the contract were presented to the arbitrator. Accordingly, Arbitrator Kagel made no factual finding or conclusion in his award that would resolve the statutory issues regarding unilateral transfer of unit work. Therefore, the ALJ's deference to the arbitrator's decision was not appropriate here and should be reversed.

1. Although aspects "of the restructure" were presented at arbitration, the factual record did not address the transfer of work from former Charge Nurses to Department Supervisors.

With its laundry list of testimony and evidence (that lacks citations to the record), Respondent attempts to gloss over key distinctions between the facts and decisions relevant to the transfer of former Charge Nurse work to Department Supervisors with the facts and decisions relevant to the elimination of the 52 Charge Nurse assignments.

Respondent makes the specious claim that "extensive evidence" on transfer of bargaining unit work was presented at arbitration by citing to less than a single page of testimony out of a 575 page arbitration transcript. (See Respondent's Answer to Exceptions at 9) As reflected in Arbitrator Kagel's decision, only a single limited conclusion on one discrete Department Supervisor job duty could be drawn from the cited witness testimony—that Department Supervisors perform no bargaining unit work "with respect to taking patient assignments" except in emergencies. (CPX 1:17; RX 5:17) In the other sections of the arbitration transcript cited by Respondent, testimony related to either: (1) Respondent's defense that the role of Department Supervisors was to address nurse and patient safety concerns; or (2) Respondent's proffered reason for creating the Department Supervisor position—that added supervision in nursing units would improve patient satisfaction scores and thus avoid financial penalties under the Affordable Care Act. (See Respondent's Answer to Exceptions at 10, 13)[3]

Moreover, Respondent wrongly implies that presentation of facts on the "steps and timing of the restructure" was also a presentation about the steps and timing of the transfer of unit work. (See Respondent's Answer to Exceptions at 12, emphasis added) The notice of the restructure, which witnesses were questioned about at arbitration, stated: "The new structure will involve the creation of a Department Supervisor position throughout all units and the elimination of the Charge Nurse positions." (See RX 11, Tr., Joint Exhibit 4) Notice of to the Union about the transfer of work was not included in the notice about the restructure. In other words, the presentation of facts regarding decision-making, purpose, notice, timing, impact, etc. "of the

[3] To the extent that other testimony was presented about Department Supervisors, this was done to probe Respondent's defense that "[t]he layoff article was never invoked because at the end of the day, we were able to place everybody in staff positions or promote them to Department Supervisors." (See RX 11, Tr., Vol. I, 36:1-4) To the extent that testimony regarding effects bargaining was presented, Arbitrator Kagel was quick to clarify that the presentation of these facts related only to the sequence and timing of the alleged layoff. (See RX 11, Tr.,, Vol. IV, 466:8-466:12)

restructure" concerned only Respondent's creation of the Department Supervisor position and elimination of the 52 Charge Nurses.

The facts required to make determinations regarding Respondent's bargaining obligations in its decision to transfer of work from Charge Nurses to Department Supervisors and its effective mid-term contract modification of the unit's scope were not presented at arbitration. Thus, under *Kohler Mix Specialties*, the ALJ's deferral to the arbitral award was inappropriate.

2. Respondent misstates the Board's analysis with regard to the application of *Oklahoma Fixture*.

Contrary to Respondent's assertion, the Board's holding in *Oklahoma Fixture Co.*, 314 NLRB 958 (1994), regarding whether a unilateral decision to subcontract out unit work is a mandatory subject of bargaining does not apply here. Board precedent that governs this case is found in *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003), which held that a decision to reclassify or transfer unit work to supervisors or managers is a mandatory subject of bargaining where it has an impact on unit work. See, e.g., *Land O'Lakes, Inc.*, 299 NLRB 982, 986–987 (1990); *Hampton House*, 317 NLRB 1005 (1995).

Respondent also misstates the holding of *Oklahoma Fixture Co.* and inverses it. As the Board recently explained, *Oklahoma Fixture Co.* was the "unusual situation" it had referred to in *Torrington Industries*, 307 NLRB 809, 810 (1992), where a "nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject." *Mi Pueblo Foods*, 360 NLRB No. 116 (2014). That labor costs were not a factor in a decision to subcontract unit work does not automatically render a decision to subcontract a non-mandatory subject of bargaining. Although labor costs are a significant factor in determining whether or not a decision to subcontract is a mandatory subject of bargain, it is not a determinative one. *Mi Pueblo Foods*, 360 NLRB, slip op. at 23 (citing *Dubuque Packing*

Co., 303 NLRB 386 (1991), and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964)).

Moreover, *Oklahoma Fixture Co.* derived its holding from *Torrington Industries, Inc.*, which defined a "core entrepreneurial decision" as "a change in the scope and direction of the enterprise." 307 NLRB at 810 (citing *First Nat'l Maintenance Corp v. N.L.R.B.*, 452 U.S. 666, 677 (1981)(announcing a test for determining whether a decision to close plant operations is a mandatory subject of bargaining). Even if the transfer of unit work to a supervisory position in the same location could be considered "subcontracting" appropriate for *Oklahoma Fixture Co.* analysis or a closure of plant operations appropriate for *First Nat'l Maintenance Corp* analysis, Arbitrator Kagel made no finding that there was a basic change in the scope or direction of Respondent's operation. Indeed, the work transferred to the new Department Supervisors is the same work once performed by the Charge Nurses.

Even assuming that *Oklahoma Fixtures Co.* applies, which it does not, the arbitrator's factual findings relate solely to Respondent's basis for eliminating the Charge Nurses. In no way did Arbitrator Kagel make factual findings regarding the basis for transferring unit work from Charge Nurses to the Department Supervisors. Respondent certainly could have created a new layer of supervision in the nursing department without transferring Charge Nurse duties to the new Department Supervisors. Moreover, the additional costs noted by Arbitrator Kagel were the costs associated only with adding Break Relief nurses and have no bearing on whether labor costs were considered when Respondent decided to transfer Charge Nurse duties to Department Supervisors. (See CPX 1:16-17; RX 5:16-17) The basis for transferring unit work to Department Supervisors was not presented to Arbitrator Kagel, and he made no finding that the basis for doing so made the decision a non-mandatory subject of bargaining.

C. Respondent's Reliance On *Dennison National Co.* Is Misplaced And The Arbitration Award Is Repugnant To The Act.

Arbitrator Kagel made no finding that Respondent's transfer of unit work to Department Supervisors was authorized by the contract and made no conclusions that would resolve the statutory issues. Therefore, Respondent's reliance on *Dennison National Co.*, 296 NLRB 169, 171 (1989), in support of deferral is misplaced. Again, Respondent misstates Arbitrator Kagel's findings by incorrectly implying that the arbitrator's conclusions regarding the elimination of the 52 Charge Nurse assignments are conclusions about all decisions made as part of the restructure.

Respondent's assertion that Arbitrator Kagel concluded that the contract "affirmatively authorized" it to transfer bargaining unit work defies the plain meaning of the arbitration award. First, the arbitrator made a finding regarding a single bargaining unit job duty—that Department Supervisors do not "tak[e] patient assignments" except for emergencies. (CPX 1:17; RX 5:17) With no conclusion about any other job duties, the arbitration award cannot be interpreted to mean that all other bargaining unit duties were not transferred to the Department Supervisors.

Second, the arbitrator's conclusion regarding the layoff provision was made without consideration of the statutory issues regarding transfer of unit work. Even if this finding could be said to apply to the statutory issues, which it does not, *Dennison National Co.* still would not apply here because Arbitrator Kagel did not find that the layoff provision authorized the elimination of the 52 Charge Nurses. Rather, he found only that the layoff provision did not prohibit Respondent's unilateral conduct. *Kohler Mix Specialties* should apply not *Dennison National Co.*

Respondent also misleadingly quotes the arbitration award's discussion of Article 3.19 of the contract, which provided a managerial right to not fill a position. The arbitrator's award stated: "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." (CPX 1:14; RX 5:14) The preceding paragraph gives context to this quote, and it is clear that the question addressed by arbitrator is whether "the elimination of Charge Nurses was a permanent termination of their employment as Charge Nurses." Thus, the finding made by Arbitrator Kagel is that the job classification of Charge Nurse does not disappear from the contract as a result of the elimination of Charge Nurses from their assignments. In other words, the arbitrator makes no conclusion about the transfer of unit work in his analysis.

Moreover, the management rights clause expressly requires Respondent to bargain prior to its utilization of non-unit employee to perform unit work. This provision, as recognized by the ALJ, is a restatement of the law such that reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining requiring good faith bargaining. (ALJD 9)[4] It is not reasonable to interpret the arbitrator's award to mean that a management right not to fill a job classification affirmatively authorizes Respondent to transfer unit work to supervisors and it would render the non-unit employee utilization provision superfluous.

Finally, if the arbitrator's decision could be read to have found that the unilateral transfer of unit work to supervisors was authorized by the contract, the award would be repugnant to the Act. It is settled law that "once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that [position] without first securing the consent of the union or the Board." *Wackenhut Corp.*, 345 NLRB 850, 852 (2005) (elimination of unit position and transfer of the relevant duties to non-unit positions was a change in unit scope requiring consent of the union). The ALJ's deferral to the arbitration award is inappropriate under the *Spielberg/Olin* standard,

[4] Because there was no genuine issue of contract interpretation, the expertise of an arbitrator was not required to resolve the unfair labor practice issues. See, e.g., *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 617 (1973).

because the arbitrator's decision is in clear contradiction to Board law, making it palpably wrong and repugnant to the Act with regard to the Complaint allegations.

D. Respondent Misstates the Union's Request that the Board Apply a New Deferral Standard to Section 8(a)(5) Cases.

Finally, Respondent misstates the Union's request that the Board apply a new deferral standard to Section 8(a)(5) cases. The Union does not ask the Board retroactively apply *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014). Rather, the Union asks that the Board apply a new post-arbitration deferral standard to 8(a)(5) cases such as this that is similar to *Babcock & Wilcox*'s deferral standard in Section 8(a)(3) cases.

A new standard is appropriate here because Respondent's unilateral conduct at issue here both interfered with Section 7 rights and had a serious economic impact on bargaining unit members. Respondent's conduct here abrogated the collective bargaining relationship, reducing the scope of the bargaining unit dramatically by over 8% and resulted in 52 bargaining unit members having to choose from their right to collective bargaining, their current rate of pay, or their continued employment. Under a new deferral standard like that of *Babcock & Wilcox*, deferral to the arbitrator's award would not be appropriate. Thus, the ALJ's decision to dismiss the Complaint should be reversed.

II. CONCLUSION

For the foregoing reasons, the Board should reverse the ALJ's dismissal of the Complaint, and the case should be remanded for consideration on its merits necessary to decide the statutory issues.

DATED: January 25, 2016

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

REPLY TO GOOD SAMARITAN HOSPITAL'S ANSWER TO EXCEPTIONS BY CALIFORNIA NURSES ASSOCIATION

Case 31-CA-117462

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

DATED: January 25, 2016

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