

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER,
COMMUNITY HEALTH SYSTEMS, INC., and/or
COMMUNITY HEALTH SYSTEMS PROFESSIONAL
SERVICES CORPORATION, LLC,
a single employer and/or joint employers, et al.**

and

Cases

**08-CA-117890
et al.**

**CALIFORNIA NURSES ASSOCIATION/NATIONAL
NURSES ORGANIZING COMMITTEE (CNA/NNOC)**

and

**UNITED STEEL, PAPER AND FORESTRY
RUBBER, MANUFACTURING, ENERGY
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO-CLC**

**FALLBROOK HOSPITAL CORPORATION D/B/A
FALLBROOK HOSPITAL, COMMUNITY HEALTH SYSTEMS, INC.,
AND/OR COMMUNITY HEALTH SYSTEMS PROFESSIONAL
SERVICES CORPORATION, LLC, a single employer and/or joint
employers**

and

Cases

**21-CA-090211
21-CA-096065**

**CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE
(CNA/NNOC), AFL-CIO**

**COUNSEL FOR GENERAL COUNSEL'S MOTION TO CONSOLIDATE
COMPLIANCE SPECIFICATION AND AMENDED CONSOLIDATED
COMPLAINT**

Pursuant to Section 102.24, 102.25, 102.33(d), 102.35(a)(8), and 102.54 of the Board's Rules and Regulations, Counsel for General Counsel of the National Labor

Relations Board, respectfully moves the Honorable Administrative Law Judge Eleanor Laws (Judge Laws) to hereby consolidate a Compliance Specification and Notice of Hearing in Cases 21-CA-090211 and 21-CA-096065 (Compliance Specification) with the Amended Consolidated Complaint in Cases 08-CA-117890 et al. (Amended Consolidated Complaint), and the unfair labor practice hearing in Cases 08-CA-117890, et al., and to allow testimony thereon.

1. The unfair labor practice hearing in Cases 08-CA-117890, et al. commenced on February 29, 2016 before Judge Laws, in Cleveland, Ohio, concerning alleged unfair labor practice conduct engaged in at the Affinity facility, and thereafter recessed on March 11, 2016.

2. The parties are scheduled to resume the unfair labor practice hearing for the Consolidated Complaint allegations pertaining to Fallbrook Hospital Corporation (Respondent Fallbrook) on April 18, 2016, in San Diego, California.¹ The Consolidated Complaint allegations involving Hospital of Barstow, Inc., d/b/a Barstow Community Hospital (Respondent Barstow) are scheduled to be heard on May 23, 2016, and on consecutive dates thereafter.

3. On March 22, 2016, the General Counsel of the National Labor Relations Board issued an Order Transferring Cases in Cases 21 CA-090211 and 21-CA-096065 from Region 21 to Region 8.²

4. On March 25, 2016, the Regional Director for Region 8 of the National Labor Relations Board issued the Compliance Specification.³

¹ Case 21-CA-143512 pertaining to Respondent Fallbrook was part of the Second Order Consolidating Cases that issued on February 5, 2016 by the Regional Director of Region 8 of the National Labor Relations Board.

²See attached Exhibit A.

5. On April 14, 2014, the National Labor Relations Board (Board) issued its Decision and Order reported at 360 NLRB No. 73 in Cases 21-CA-090211 and 21-CA-096065.⁴ In this Decision and Order, the Board found that Respondent Fallbrook, had, *inter alia*, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, by failing to bargain in good faith with California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL-CIO (Union).

6. By its Decision and Order, the Board ordered Respondent Fallbrook, its officers, agents, successors and assigns to, among other things, reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through the final bargaining session on January 8, 2013.

7. On May 8, 2015, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) in Case 14-1056 entered its judgment enforcing in full the provisions of the Board's Order.⁵

8. Since the issuance of the Judgment by the DC Circuit, Respondent Fallbrook has continued to fail to comply with the Board's Order.

The General Counsel respectfully submits that in accordance with Section 102.54(c) of the Board's Rules and Regulations, it is appropriate for Judge Laws to consolidate these cases as it would be more efficient for the Compliance Specification to be litigated in conjunction with the hearing involving the matters in Cases 08-CA-117890, et al. General Counsel moves that the Compliance Specification be litigated

³ See attached Exhibit B.

⁴ See attached Exhibit C.

⁵ See attached Exhibit D.

during the portion of the hearing involving Respondent Barstow, which is scheduled to commence on May 23, 2016, and continue for consecutive dates thereafter.

The General Counsel is seeking to litigate all known issues in one case to avoid duplicative litigation and to conserve resources. See, *Peyton Packing Co.*, 129 NLRB 1358 (1961); *Jefferson Chemical Co., Inc.*, 200 NLRB 992 (1972). The Compliance Specification involves the same respondents at issue in the ongoing proceedings before Judge Laws and alleges the single employer and/or joint employer status of Respondent Community Health Systems Inc. (CHSI) and Respondent Community Health Systems Professional Services Corporation (Respondent CHSPSC) with Respondent Fallbrook. The single employer and/or joint employer issues will be fully litigated in Cases 08-CA-117890 et al. in Nashville, Tennessee pursuant to Judge Laws' Case Management Order.

Respondent Fallbrook, Respondent CHSPSC and Respondent CHSI are not unduly prejudiced by the allegations of single and joint employer status as contained in the Compliance Specification as the Respondents have been on notice since at least October 19, 2015 when the Amended Consolidated Complaint issued, which alleged them to have a single and/or joint employer relationship. Furthermore, the Compliance Specification issued on March 25, 2016 and the General Counsel seeks to litigate it on May 23, 2016 with the Barstow facility allegations, rather than on April 18, 2016 when the allegations involving the Fallbrook facility will be heard, to give the Respondents sufficient time to answer and the parties ample time to prepare prior to the scheduled hearing date.⁶ Thus, Respondents have no basis to argue that

⁶The Fallbrook facility is approximately 110 miles from the situs of the Barstow hearing which will take place at the offices of the National Labor Relations Board, Region 31 in Los Angeles, California. The situs of the Barstow hearing will not be overly burdensome or cause any undue hardship upon Respondent Fallbrook or any of its witnesses.

they will be prejudiced or unduly burdened by litigating the Compliance Specification in a consolidated hearing with the presently litigated Amended Consolidated Complaint.

CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests the Administrative Law Judge to grant General Counsel's Motion to Consolidate Compliance Specification in Cases 21-CA-090211 and 21-CA-096065 with the Amended Consolidated Complaint in Cases 08-CA-117890, et al.

DATED at Cleveland, Ohio this 25th day of March 2016.

Respectfully submitted,

/s/ Aaron B. Sukert

AARON B. SUKERT

s/ Stephen M. Pincus

STEPHEN M. PINCUS

Counsel for the General Counsel

National Labor Relations Board – Region 8

1240 East 9th Street – Room 1695

Cleveland, OH 44199-2086

Aaron.Sukert@nlrb.gov

Stephen.Pincus@nlrb.gov

(216) 522-8179

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, was filed electronically with the National Labor Relations Board, Division of Judges, and served by electronic mail, as designated below, on the 25th day of March, 2016 on the following parties:

CARMEN DIRIENZO, ESQ.
4 HONEY HOLLOW RD
KATONAH, NY 10536-3607
carmen.dirienzo@hotmail.com

BRYAN CARMODY, ESQ.
134 EVERGREEN LANE
GLASTONBURY, CT 06033
bryancarmody@bellsouth.net

DON T. CARMODY, ESQ.
P.O. BOX 3310
BRENTWOOD, TN 37024-3310
doncarmody@bellsouth.net

ANDREW J. LAMMERS, ESQ.
73 BOGARD STREET
CHARLESTON, SC 29403
Andrewlammers316@gmail.com

LEONARD W. SACHS, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST, STE 600
PEORIA, IL 61602-1350
CHSI-NLRB-hh@HowardandHoward.com>

TRACY C. LITZINGER, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350
CHSI-NLRB-hh@HowardandHoward.com>

MICHAEL D. GIFFORD, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350
CHSI-NLRB-hh@HowardandHoward.com>

PATRICK McCARTHY, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350
CHSI-NLRB-hh@HowardandHoward.com>

MICHELLE WEZNER, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350
CHSI-NLRB-hh@HowardandHoward.com>

ROBERT D. HUDSON, ESQ.
FROST BROWN TODD LLC
7310 TURFWAY RD STE 210
FLORENCE, KY 41042-1374
RHudson@fbtlaw.com

BRENDAN P. WHITE, ESQ.
NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)
2000 FRANKLIN STREET
OAKLAND, CA 94612
BWhite@nationalnursesunited.org

M. JANE LAWHON, ESQ.
CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES UNITED
LEGAL DEPARTMENT
2000 FRANKLIN STREET STE 300
OAKLAND, CA 94612
JLawhon@CalNurses.org

ANTONIA DOMINGO, ESQ.
ASSISTANT GENERAL COUNSEL
UNITED STEELWORKERS
60 BOULEVARD OF THE ALLIES, 8TH FLOOR
PITTSBURGH, PENNSYLVANIA 15222
adomingo@usw.org

NICOLE DARO, LEGAL COUNSEL
CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED
(CNA/NU)
LEGAL DEPARTMENT
2000 FRANKLIN STREET STE 300
OAKLAND, CA 94612
NDaro@CalNurses.org

STEVEN B. CHESLER, ESQ.
966 CHEROKEE ROAD
SUITE 202
LOUISVILLE, KY 40204
Sches415@hotmail.com

MS. KATHERINE R. CLOUD, ESQ.
RILEY WAMOCK & JACOBSON, PLC
1906 WEST END AVENUE
NASHVILLE, TN 37203
Kcloud@rwjplc.com

MR. JOHN R. JACOBSON, ESQ.
RILEY WAMOCK & JACOBSON, PLC
1906 WEST END AVENUE
NASHVILLE, TN 37203
jjacobson@rwjplc.com

MR. WILLIAM OUTHIER, ESQ.
RILEY WAMOCK & JACOBSON, PLC
1906 WEST END AVENUE
NASHVILLE, TN 37203
wouthier@rwjplc.com

JACOB J. WHITE, ESQ.
WEINBERGER ROGER & ROSENFELD
800 WILSHIRE BLVD., STE 1320
LOS ANGELES, CA 90017-2623
jwhite@unioncounsel.net

BRUCE A. HARLAND, ESQ.
WEINBERG, ROGER & ROSENFELD
1001 MARINA VILLAGE PKWY
STE 200
ALAMEDA, CA 94501
bharland@unioncounsel.net

DATED at Cleveland, Ohio this 25th day of March, 2016

s/ Aaron B. Sukert
AARON SUKERT
STEPHEN PINCUS
Counsel for the General Counsel
National Labor Relations Board – Region 8
1240 East 9th Street – Room 1695
Cleveland, OH 44199-2086
Stephen.Pincus@nlrb.gov
Aaron.Sukert@nlrb.gov
(216) 522-8179

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FALLBROOK HOSPITAL CORPORATION
d/b/a FALLBROOK HOSPITAL

and

CASES 21-CA-090211
21-CA-096065

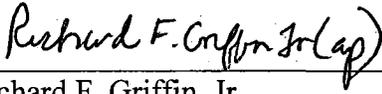
CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC),
AFL-CIO

ORDER TRANSFERRING CASE FROM REGION 21 TO REGION 8

Cases 21-CA-090211 and 21-CA-096065 having been filed with the Regional Director in Region 21, the Board having ordered Respondent to reimburse the Union for expenses incurred in bargaining, and the General Counsel of the Board having duly considered the matter, and deeming it necessary in order to effectuate the purposes of the National Labor Relations Act, and to avoid unnecessary cost and delay,

HEREBY ORDERS THAT, in accordance with the Rules and Regulations of the National Labor Relations Board, Cases 21-CA-090211 and 21-CA-096065 be, and hereby are, transferred to, and continued in, Region 8.

Issued in Washington, D.C. this
22nd day of March, 2016



Richard F. Griffin, Jr.
General Counsel

EXHIBIT B

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 21**

**FALLBROOK HOSPITAL CORPORATION
D/B/A FALLBROOK HOSPITAL, COMMUNITY
HEALTH SYSTEMS, INC., AND/OR COMMUNITY
HEALTH SYSTEMS PROFESSIONAL SERVICES
CORPORATION, LLC, a single employer and/or
joint employers**

and

CASES

21-CA-090211

21-CA-096065

**CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING
COMMITTEE (CNA/NNOC), AFL-CIO**

COMPLIANCE SPECIFICATION AND NOTICE OF HEARING

On April 14, 2014, the National Labor Relations Board (the Board) issued its Decision and Order (Board's Order) reported at 360 NLRB No. 73, in the above-captioned cases, finding that Fallbrook Hospital Corporation d/b/a Fallbrook Hospital (Respondent Fallbrook) had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, (the Act), *inter alia*, by failing to bargain in good faith with California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL-CIO (the Union).

1. By its Order, the Board ordered Respondent Fallbrook, its officers, agents, successors and assigns to, among other things, reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through the final bargaining session on January 8, 2013.

2. On May 8, 2015, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) in Case 14-1056 entered its judgment enforcing in full the provisions of the Board's Order.

3. Since the issuance of the Judgment by the DC Circuit, Respondent Fallbrook has continued to fail to comply with the Board's Order. As controversies have arisen over whether Respondent Community Health Systems, Inc., (Respondent CHSI) and Respondent Community Health Systems Professional Services Corp., LLC (Respondent CHSPSC) are a single employer and/or joint employer with Respondent Fallbrook, and as to the liability of Respondent Fallbrook, Respondent CHSI and Respondent CHSPSC (collectively, Respondent) to fulfill the remedial obligations of the Board's Order as enforced; and the amount of expenses the Union incurred for the collective-bargaining negotiations due under the terms of the Board's Order; the Regional Director of the National Labor Relations Board for Region 8, pursuant to the authority duly conferred upon him by the Board, hereby issues this Compliance Specification and Notice of Hearing.

4. At all material times, Respondent Fallbrook has been a Delaware corporation, and until approximately December 31, 2014, it maintained its principal office and place of business in Fallbrook, California (Fallbrook facility), and was engaged in the operation of an acute care hospital providing healthcare services.

5. At all material times, Respondent CHSI, which operates as a holding company, has been a Delaware corporation with its principal office and place of business in Franklin, Tennessee, and with an office and place of business in Fallbrook, California, where

it was engaged in the operation of an acute care hospital providing inpatient and outpatient care until approximately December 31, 2014,.

6. Since about January 1, 2015, Respondent CHSPSC has been a limited liability company and at all material times, Respondent CHSPSC has been a wholly owned subsidiary of Respondent CHSI with an office and place of business in Franklin, Tennessee, and with an office and place of business in Fallbrook, California, where it was engaged in the operation of an acute care hospital providing inpatient and outpatient care until approximately December 31, 2014.

7. At all material times, Respondent Fallbrook and Respondent CHSI have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged management personnel with each other; have interrelated operations with common human resources and centralized control of labor relations, compliance and regulatory programs, information technology services and electronic health records programs, reimbursement programs, purchasing, construction projects, procurement and materials management, facilities management, pharmaceuticals management, financial reporting, physician support, as well as billing and case management; and have held themselves out to the public as a single-integrated business enterprise.

8. At all material times, Respondent Fallbrook and Respondent CHSPSC have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common

labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged management personnel with each other; have interrelated operations with common human resources and centralized control of labor relations, compliance and regulatory programs, information technology services and electronic health records programs, reimbursement programs, purchasing, construction projects, procurement and materials management, facilities management, pharmaceuticals management, financial reporting, physician support, as well as billing and case management; and have held themselves out to the public as a single-integrated business enterprise.

9. At all material times, Respondent CHSI and Respondent Fallbrook have been parties to a contract which provides that Respondent Fallbrook is the agent of Respondent CHSI, in connection with the operation of the acute care hospital providing inpatient and outpatient care.

10. At all material times, Respondent CHSI has possessed and exercised control over the labor relations policies of Respondent Fallbrook and administered a common labor policy for Respondent Fallbrook's employees.

11. At all material times, Respondent CHSPSC and Respondent Fallbrook have been parties to a management services agreement which provides that Respondent Fallbrook is the agent of Respondent CHSPSC, in connection with the operation of the acute care hospital providing inpatient and outpatient care.

12. At all material times, Respondent CHSPSC has possessed and exercised control over the labor relations policies of Respondent Fallbrook and administered a common labor policy for Respondent Fallbrook's employees.

13. Based on the conduct described above in paragraphs 5 and 7, Respondent Fallbrook and Respondent CHSI, are, and at all material times, have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.

14. Based on the conduct described above in paragraphs 6 and 8, Respondent Fallbrook and Respondent CHSPSC, are, and at all material times, have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.

15. Based on the conduct described above in paragraphs 9 and 10, Respondent CHSI and Respondent Fallbrook, are, and at all material times, have been joint employers of the employees of Respondent Fallbrook.

16. Based on the conduct described above in paragraphs 11 and 12, Respondent CHSPSC and Respondent Fallbrook, are, and at all material times, have been joint employers of the employees of Respondent Fallbrook.

17. The Board standard for computing the amount of expenses incurred for the preparation and conduct of collective-bargaining negotiations includes reasonable salaries, printing costs, per diem, and other reasonable costs and expenses.¹

18. The relevant period for computing the amount of expenses incurred by the Union for the preparation and conduct of the 11 collective-bargaining sessions is the period from July 3, 2012, through January 8, 2013, herein the relevant period.²

¹ *Frontier Hotel & Casino*, 318 NLRB 857 (1995)

19. An appropriate measure for calculating the salaries the Union paid its representatives during Respondent Fallbrook's failure and refusal to bargain in good faith with the Union, pursuant to the Board's Order is by dividing the Union representatives' respective yearly salaries by the number of yearly workdays and multiplying that number by the number of bargaining sessions attended.

20. An appropriate measure for calculating the printing costs due pursuant to the Board's Order is to include the printing costs associated with the preparation and conduct of the bargaining sessions held during the relevant period.

21. An appropriate measure for calculating the travel expenses due pursuant to the Board's Order is to include the mileage traveled by Union representatives associated with the preparation and conduct of the bargaining sessions held during the relevant period. The reimbursement for mileage traveled is computed by multiplying the number of miles traveled by the mileage reimburse rate.³

22. An appropriate measure for calculating the travel expenses due pursuant to the Board's Order is to include the food purchased by Union representatives associated with the travel for preparation and conduct of the bargaining sessions held during the relevant period.

23. An appropriate measure for calculating the salaries due pursuant to the Board's Order is to include wages lost by the employee-members of the Union negotiating committee while they attended the bargaining sessions held during the relevant period.

² Collective-bargaining sessions between Respondent Fallbrook and the Union in year 2012 took place on July 3, 17, and 25; August 2 and 22; September 12; October 11 and 18; and November 20 and 30. The last collective-bargaining session took place on January 8, 2013.

³ The mileage reimburse rate established by the Internal Revenue Service for the relevant period is \$.555.

24. An appropriate measure for calculating other reasonable expenses due pursuant to the Board's Order is to include hotel and conference room expenses associated with the travel for preparation and conduct of the bargaining sessions held during the relevant period.

Lost Salaries, Printing Costs, and Travel Expenses

25. Stephen Matthews (Matthews) was a Union representative during the relevant period.

a. The salary paid to Matthews for the bargaining sessions that took place during the relevant period is computed as illustrated below:

Yearly Salary	Work-days in a Year	Average Work-day Salary	Number of Bargaining Sessions Attended	Total Owed
\$119,292.97	260	\$458.82	11	\$5,047.01

b. The total printing costs incurred by Matthews associated with the preparation and conduct of the bargaining sessions that took place during the relevant period is \$132.23.

c. The travel expenses incurred by Matthews associated with the preparation and conduct of the bargaining sessions that took place during the relevant period are computed as illustrated below:

Miles Traveled	Reimburse Rate	Total Owed
3,629	0.555	\$2,014.10

d. The total food purchased by Matthews associated with the travel for preparation and conduct of the bargaining sessions that took place during the relevant period is \$865.73.

e. The total salary paid to Matthews, printing costs, and mileage and food expenses associated with his travel in preparation and conduct of the bargaining session that is owed to the Union is \$8,059.07, as set forth in Appendix A.

26. James Moy (Moy) was a Union representative during the relevant period.

a. The salary paid to Moy for the bargaining sessions conducted during the relevant period is computed as illustrated below:

<u>Yearly Salary</u>	<u>Work-days in a Year</u>	<u>Average Work-day Salary</u>	<u>Number of Bargaining Sessions Attended</u>	<u>Total Owed</u>
\$135,947.20	260	\$522.87	5	\$2,614.37

b. The total printing costs incurred by Moy associated with the preparation and conduct of the bargaining sessions that took place during the relevant period is \$4.08.

c. The travel expenses incurred by Moy associated with the preparation and conduct of the bargaining sessions that took place during the relevant period are computed as illustrated below:

<u>Miles Traveled</u>	<u>Reimburse Rate</u>	<u>Total Owed</u>
3,145	0.555	\$1,745.36

d. The total food purchased by Moy associated with the travel for preparation and conduct of the bargaining sessions conducted during the relevant period is \$512.79.

e. The total salary paid to Moy, printing costs, and mileage and food expenses associated with his travel in preparation and conduct of the bargaining session that is owed to the Union is \$4,876.60, as set forth in Appendix A.

27. Glynnis Golden-Ortiz (Golden-Ortiz) was a Union representative during the relevant period.

a. The salary paid to Golden-Ortiz for the bargaining sessions conducted during the relevant period is computed as illustrated below:

<u>Yearly Salary</u>	<u>Work-days in a Year</u>	<u>Average Work-day Salary</u>	<u>Number of Bargaining Sessions Attended</u>	<u>Total Owed</u>
\$162,856.91	260	\$626.37	4	\$2,505.49

b. The total printing costs incurred by Golden-Ortiz associated with the preparation and conduct of the bargaining sessions that took place during the relevant period is \$110.84.

c. The food purchased by Golden-Ortiz associated with the travel for preparation and conduct of the bargaining sessions conducted during the relevant period totals \$18.26.

d. The total salary paid to Golden-Ortiz, printing costs, and food expenses associated with her travel in preparation and conduct of the bargaining session that is owed to the Union is \$2,634.59, as set forth in Appendix A.

Wages Lost: Bargaining Committee Employees

28. Carol Givens (Givens) was an employee of Respondent Fallbrook and a member of the Union's bargaining committee during the relevant period.

a. The lost wages paid to Givens by the Union for the bargaining sessions conducted during the relevant period is computed as illustrated below:

Date	Regular Hours	Hourly Rate	Hourly Diff. Pay Rate	Total Owed
8/22/2012	12	\$39.90	\$ -	\$478.80
9/12/2012	12	\$39.90	\$ -	\$478.80
10/18/2012	12	\$39.90	\$ -	\$478.80
11/20/2012	12	\$39.90	\$5.00	\$538.80
11/30/2012	12	\$39.90	\$5.00	\$538.80

b. The total wages paid to Givens by the Union that are associated with the conduct of the bargaining sessions that is owed to the Union is \$2,514.00, as set forth in Appendix B.

29. Rosenda McDowell (McDowell) was an employee of Respondent Fallbrook and a member of the Union's bargaining committee during the relevant period.

a. The lost wages paid to McDowell by the Union for the bargaining sessions conducted during the relevant period is computed as illustrated below:

Date	Regular Hours	Hourly Rate	Hourly Diff. Pay Rate	Total Owed
7/17/2012	12	\$29.22	\$ -	\$350.64
7/25/2012	12	\$29.22	\$ -	\$350.64
11/20/2012	12	\$29.22	\$5.00	\$410.64
11/30/2012	12	\$29.22	\$5.00	\$410.64
1/8/2013	12	\$ 29.22	\$5.00	\$410.64

b. The total wages paid to McDowell by the Union that are associated with the conduct of the bargaining sessions that is owed to the Union is \$1933.20, as set forth in Appendix B.

30. Shelly Mueller (Mueller) was an employee of Respondent Fallbrook and a member of the Union's bargaining committee during the relevant period.

a. The lost wages paid to Mueller by the Union for the bargaining sessions conducted during the relevant period is computed as illustrated below:

Date	Regular Hours	Hourly Rate	Hourly Diff. Pay Rate	Total Owed
7/25/2012	12	\$31.00	\$5.00	\$432.00
11/20/12	12	\$31.00	\$5.00	\$432.00

b. The total wages paid to Mueller by the Union that are associated with the conduct of the bargaining sessions that is owed to the Union is \$864.00, as set forth in Appendix B.

31. Rebecca Ojala (Ojala) was an employee of Respondent Fallbrook and a member of the Union's bargaining committee during the relevant period.

a. The lost wages paid to Ojala by the Union for the bargaining sessions conducted during the relevant period is computed as illustrated below:

Date	Regular Hours	Hourly Rate	Hourly Diff. Pay Rate	Total Owed
7/17/2012	12	\$35.05	\$ -	\$420.60
8/2/2012	12	\$35.05	\$ -	\$420.60

b. The total wages paid to Ojala by the Union that are associated with the conduct of the bargaining sessions that is owed to the Union is \$841.20, as set forth in Appendix B.

Hotel and Conference Room Expenses

32. The Union incurred hotel and conference room expenses that are associated with the preparation and conduct of the bargaining sessions during the relevant period.

a. The hotel and conference room expenses billed directly to the Union are described below:

<u>Location</u>	<u>Date</u>	<u>Cost</u>
Fallbrook Community Center	9/12/2012	\$432.00
Pala Mesa Resort	10/31/2012	\$192.24
Pala Mesa Resort	11/8/2012	\$96.12
Pala Mesa Resort	10/17/2012	\$192.24
Pala Mesa Resort	8/2/2012	\$352.34
Pala Mesa Resort	11/30/2012	\$523.31
Pala Mesa Resort	11/20/2012	\$427.77

b. The hotel and conference room expenses incurred by the Union that are associated with the conduct of the bargaining sessions that is owed to the Union totals \$2,216.02.

33. Summarizing the facts and calculations specified above, the obligations of Respondent to reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012 through January 8, 2013, under the terms of the Board's Order will be discharged by payment to the Union in the total amount of \$23,938.68.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Section 102.56 of the Board's Rules and Regulations, it must file an answer to the compliance specification. The answer must be received by this office on or before April 15, 2016, or postmarked on or before April 14, 2016. Unless filed electronically in a PDF format, Respondent should file an original and

four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that such answer be signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed. See Section 102.56(a). If the answer being filed electronically is a PDF document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a compliance specification is not a PDF file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.



A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. When an answer is filed electronically, an original and four paper copies must be sent to this office so that it is received no later than three business days after the date of electronic filing.

Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

As to all matters set forth in the compliance specification that are within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge, and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the compliance specification are true. If the answer of Respondent fails to deny allegations of the compliance specification in the manner required under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the compliance specification as to Respondent are true and preclude Respondent from introducing any evidence controverting those allegations.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT at a date, time and place to be determined, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this compliance specification. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Cleveland, Ohio this 25th day of March 2016.

/s/ Allen Binstock

ALLEN BINSTOCK
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 AJC FEDERAL OFFICE BLDG
1240 EAST NINTH ST
CLEVELAND, OH 44199

Attachments

**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE**

Cases 08-CA-21-CA-090211 and 096065

The issuance of the notice of formal hearing in these cases does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

WAYNE T. SMITH, CEO
COMMUNITY HEALTH SYSTEMS, INC., SINGLE EMPLOYER
4000 MERIDIAN BOULEVARD
FRANKLIN, TN 37067

RON BIERMAN, CEO
DHSC, LLC D/B/A AFFINITY MEDICAL CENTER
875 8TH ST NE
MASSILLON, OH 44646-8503

RACHEL A. SEIFERT
COMMUNITY HEALTH SYSTEMS, INC.,
AND/OR CHSPSC, LLC (PRIOR TO JANUARY 1, 2015 KNOWN AS
COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES
CORPORATION)
4000 MERIDIAN BOULEVARD
FRANKLIN, TN 37067

BLUEFIELD HOSPITAL COMPANY, LLC D/B/A BLUEFIELD REGIONAL
MEDICAL CENTER AND ITS SINGLE AND/OR JOINT EMPLOYER
COMMUNITY HEALTH SYSTEMS, INC., AND/OR ITS SINGLE AND/OR JOINT
EMPLOYER CHSPSC, LLC (PRIOR TO JANUARY 1, 2015 KNOWN AS
COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES
CORPORATION)
4000 MERIDIAN BLVD.
FRANKLIN, TN 37067

WILLIAM HAWLEY, CEO
BLUEFIELD HOSPITAL COMPANY, LLC D/B/A BLUEFIELD
REGIONAL MEDICAL CENTER
500 CHERRY STREET
BLUEFIELD, WV 24701-3306

KIRKPATRICK CONLEY, CEO
FALLBROOK HOSPITAL CORPORATION D/B/A FALLBROOK HOSPITAL
624 EAST ELDER STREET
FALLBROOK, CA 92028-3099

FALLBROOK HOSPITAL CORPORATION
4000 MERIDIAN BLVD.
FRANKLIN, TN 37067

FALLBROOK HOSPITAL CORPORATION,
d/b/a FALLBROOK HOSPITAL
c/o CORPORATION SERVICE COMPANY,
d/b/a CSC – LAWYERS INCORPORATING SERVICE
2710 GATEWAY OAKS DRIVE, SUITE 150N
SACRAMENTO, CA 95833

ROBERT M. CALHOUN, CEO
GREENBRIER VMC, LLC, D/B/A GREENBRIER VALLEY MEDICAL CENTER
202 MAPLEWOOD AVENUE
RONCEVERTE, WV 24970

ROB FOLLOWELL, CEO
GREENBRIER VMC, LLC, D/B/A GREENBRIER VALLEY MEDICAL CENTER
202 MAPLEWOOD AVENUE
RONCEVERTE, WV 24970-1334

SEAN FOWLER, CEO
HOSPITAL OF BARSTOW, INC., D/B/A BARSTOW COMMUNITY HOSPITAL
820 E MOUNTAIN VIEW ST
BARSTOW, CA 92311-3004

SEAN FOWLER, CEO
HOSPITAL OF BARSTOW, INC. D/B/A BARSTOW COMMUNITY HOSPITAL
555 S 7TH AVE
BARSTOW, CA 92311-3043

NAOMI MITCHELL, HR MANAGER
JACKSON HOSPITAL CORP. D/B/A KENTUCKY RIVER MEDICAL
CENTER, COMMUNITY HEALTH SYSTEMS, INC. AND COMMUNITY
HEALTH SYSTEMS PROFESSIONAL SERVICES CORP., LLC,
/A SINGLE EMPLOYER AND/OR JOINT EMPLOYER
540 JETT DRIVE
JACKSON, KY 41339-9622

THOMAS D. MILLER
CHIEF EXECUTIVE OFFICER
QUORUM HEALTH CORPORATION
4000 MERIDIAN BOULEVARD
FRANKLIN, TENNESSEE 37067

C.E. (MICKEY) BILBREY
PRESIDENT & CEO
QUORUM HEALTH RESOURCES, LLC
105 CONTINENTAL PLACE
BRENTWOOD, TN 37027

AGENT OF SERVICE
QHCCS, LLC
C/O CORPORATION SERVICE COMPANY
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808

JERI GILBERT, DIRECTOR OF HR
WATSONVILLE COMMUNITY HOSPITAL
75 NEILSON ST
WATSONVILLE, CA 95076-2468

AUDRA EARLE, CEO
WATSONVILLE COMMUNITY HOSPITAL
75 NIELSON ST.
WATSONVILLE, CA 95076

CERTIFIED MAIL
NO RETURN RECEIPT

STEVE MATTHEWS, NEGOTIATOR/LABOR REPRESENTATIVE
NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)
225 W BROADWAY STE 500
GLENDALE, CA 91204-1331

ROY HONG, ASSISTANT DIRECTOR, ORGANIZING
NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)
225 W BROADWAY STE 500
GLENDALE, CA 91204-1331

JOHN BORSOS, LABOR REPRESENTATIVE NNOC
NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)
770 L STREET, SUITE 1480
SACRAMENTO, CA 95814

MICHELLE MAHON, LABOR REPRESENTATIVE
NATIONAL NURSES ORGANIZING COMMITTEE
2000 FRANKLIN ST
OAKLAND, CA 94612-2908

JAMES MOY, LABOR REPRESENTATIVE
CNA/NNOC
225 WEST BROADWAY, SUITE 500
GLENDALE, CA 91204

BRANT HORACEK, NNOC LABOR REPRESENTATIVE
CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES UNITED
2000 FRANKLIN STREET
OAKLAND, CA 94612

CELESTE PETERSON, LABOR REPRESENTATIVE
NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)
2000 FRANKLIN STREET
OAKLAND, CA 94612

RANDY PIDCOCK, STAFF REPRESENTATIVE
UNITED STEEL WORKERS, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO-CLC
85 C MICHAEL DAVENPORT BLVD
STE B
FRANKFORT, KY 40601-4479

SUE FENDLEY, CNA LABOR REPRESENTATIVE
CALIFORNIA NURSES ASSOCIATION (CNA)
2000 FRANKLIN STREET
OAKLAND, CA 94612

JASON CAPELL, UNION REPRESENTATIVE
SEIU, UNITED HEALTHCARE WORKERS – WEST
5480 FERGUSON DR.
LOS ANGELES, CA 90022

REGULAR MAIL

CARMEN DIRIENZO, ESQ.
4 HONEY HOLLOW RD
KATONAH, NY 10536-3607

BRYAN CARMODY, ESQ.
134 EVERGREEN LANE
GLASTONBURY, CT 06033

DON T. CARMODY, ESQ.
P.O. BOX 3310
BRENTWOOD, TN 37024-3310

LEONARD W. SACHS, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST, STE 600
PEORIA, IL 61602-1350

M. JANE LAWHON, ESQ.
CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES UNITED
LEGAL DEPARTMENT
2000 FRANKLIN STREET STE 300
OAKLAND, CA 94612

TRACY C. LITZINGER, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350

KATHARINE R. CLOUD, ESQ.
RILEY WARNOCK & JACOBSON, PLC
1906 WEST END AVE
NASHVILLE, TN 37203-2301

WILLIAM M. OUTHIER
RILEY WARNOCK & JACOBSON, PLC
1906 WEST END AVENUE
NASHVILLE, TN 37203-2309

JOHN R. JACOBSON, ESQ.
RILEY WARNOCK & JACOBSON, PLC
1906 WEST END AVE
NASHVILLE, TN 37203-2301

ROBERT D. HUDSON, ESQ.
FROST BROWN TODD LLC
7310 TURFWAY RD STE 210
FLORENCE, KY 41042-1374

BRENDAN P. WHITE, ESQ.
NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)
2000 FRANKLIN STREET
OAKLAND, CA 94612

NICOLE DARO, LEGAL COUNSEL
CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED
(CNA/NNU)
LEGAL DEPARTMENT
2000 FRANKLIN STREET STE 300
OAKLAND, CA 94612

STEVEN B. CHESLER, ESQ.
966 CHEROKEE ROAD
SUITE 202
LOUISVILLE, KY 40204

ANDREW J. LAMMERS
73 BOGARD STREET
CHARLESTON, SC 29403

MICHAEL D. GIFFORD, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350

PATRICK McCARTHY, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350

MICHELLE WEZNER, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC
211 FULTON ST STE 600
PEORIA, IL 61602-1350

JACOB J. WHITE, ESQ.
WEINBERG ROGER & ROSENFELD
800 WILSHIRE BLVD, STE 1320
LOS ANGELES, CA 90017-2623

BRUCE A. HARLAND, ESQ.
WEINBERG ROGER & ROSENFELD
800 WILSHIRE BLVD, STE 1320
LOS ANGELES, CA 90017-2623

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This

conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.
- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

Summary of Salaries and Travel Expenses Owed

Name	Salary	Printing Costs	Travel Expenses: Mileage	Travel Expenses/Per Diem: Food	Total
Stephen Matthews	\$5,047.01	\$132.23	\$2,014.10	\$865.73	\$8,059.07
James Moy	\$2,614.37	\$4.08	\$1,745.36	\$512.79	\$4,876.60
Glynnis Golden-Ortiz	\$2,505.49	\$110.84	\$0.00	\$18.26	\$2,634.59
				Total:	\$15,570.26

Wages Lost by Bargaining Committee Employees

Name	Date	Regular Hours	Hourly Rate	Hourly Diff. Pay Rate	Owed
Carol Givens	8/22/2012	12	\$ 39.90	\$ -	\$ 478.80
	9/12/2012	12	\$ 39.90	\$ -	\$ 478.80
	10/18/2012	12	\$ 39.90	\$ -	\$ 478.80
	11/20/2012	12	\$ 39.90	\$ 5.00	\$ 538.80
	11/30/2012	12	\$ 39.90	\$ 5.00	\$ 538.80
Total:					\$ 2,514.00
Rosenda McDowell	7/17/2012	12	\$ 29.22	\$ -	\$ 350.64
	7/25/2012	12	\$ 29.22	\$ -	\$ 350.64
	11/20/2012	12	\$ 29.22	\$ 5.00	\$ 410.64
	11/30/2012	12	\$ 29.22	\$ 5.00	\$ 410.64
	1/8/2013	12	\$ 29.22	\$ 5.00	\$ 410.64
Total:					\$ 1,933.20
Shelly Mueller	11/20/2012	12	\$ 31.00	\$ 5.00	\$ 432.00
	7/25/2012	12	\$ 31.00	\$ 5.00	\$ 432.00
Total:					\$ 864.00
Rebecca Ojala	7/17/2012	12	\$ 35.05	\$ -	\$ 420.60
	8/2/2012	12	\$ 35.05	\$ -	\$ 420.60
Total:					\$ 841.20

EXHIBIT C

360 NLRB No. 73 (N.L.R.B.), 199 L.R.R.M. (BNA) 1081, 2014-15 NLRB Dec. P 15786, 2014 WL 1458265

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

FALLBROOK HOSPITAL CORPORATION D/B/A FALLBROOK HOSPITAL

AND

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES

ORGANIZING COMMITTEE (CNA/NNOC), AFL-CIO

Cases 21-CA-090211 and 21-CA-096065

April 14, 2014

SUMMARY

The Board unanimously adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(5) and (1) by: (a) refusing to bargain with the Union over the terms of an initial collective-bargaining agreement; (b) refusing to bargain with the Union over employee discharges and their effects; and (c) refusing to furnish the Union with relevant, requested information concerning employee discharges. In addition, the Board majority consisting of Chairman Pearce and Member Hirozawa adopted the Judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to submit proposals or counterproposals during the first eight bargaining sessions until it received a full set of the Union's proposals, and further found that the Respondent unlawfully conditioned bargaining on unit employees abandoning the use of certain Union forms. Member Johnson dissented from these latter two findings. The same Board majority also reversed the Judge and ordered a full 1-year extension of the certification year and reimbursement of the Union's negotiating expenses. Member Johnson, dissenting, agreed with the Judge's recommendation to extend the certification year by 6 months and to deny the Union's request for negotiating expenses. Charges filed by California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL-CIO. Administrative Law Judge Eleanor Laws issued her decision on May 16, 2013. Chairman Pearce and Members Hirozawa and Johnson participated.

DECISION AND ORDER

*1 BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

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

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

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

AMENDED REMEDY

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

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

Extension of the Certification Year

The judge correctly stated that an extension of the certification year is warranted where, as here, “an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of the opportunity to bargain during the time of the union's greatest strength.” *Santa Barbara News-Press*, 358 NLRB No. 141, slip op. at 3 (2012). The appropriate length for the extension must be determined by considering “the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations.” *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed.Appx. 331 (D.C. Cir. 2005). Indeed, “[t]he Board may order ‘a complete renewal of a certification year, even in cases where there has been good-faith bargaining in the prior certification year.’” *HTH Corp.*, 356 NLRB No. 182, slip op. at 9 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012) (quoting *Glomac Plastics, Inc.*, 234 NLRB 1309, 1309 fn. 4 (1978)).

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

Negotiation Expenses

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

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

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

Id. at 859.

As described in detail in the judge's decision, the record shows that the Respondent deliberately acted to prevent any meaningful progress during bargaining sessions that were held. For example, the Respondent's bargaining team failed to provide any proposals or counterproposals during the first eight bargaining sessions until it received a full set of proposals from the Union, left the September 12 bargaining session abruptly and without explanation, and left the October 11 bargaining session 3 minutes

after arriving. In addition, although the Respondent proffered some proposals during the next three bargaining sessions, it subsequently threatened that it would not continue bargaining if the Union persisted in encouraging employees' use of the Union's assignment despite objection (ADO) form.⁷ At a bargaining session held on January 8, 2013, the Respondent falsely claimed that the nurses' use of the ADO forms caused the parties to be at impasse, refused to bargain further, and left the meeting after about 15 minutes. Thereafter, the Respondent reaffirmed its refusal to bargain when it refused to respond to the Union's requests for future bargaining dates.

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

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

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

(e) Within 14 days after service by the Region, post at its Fallbrook, California facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2012.

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

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

Dated, Washington, D.C. April 14, 2014

Mark Gaston Pearce
Chairman
Kent Y. Hirozawa
Member
Harry I. Johnson, III
Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

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

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

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

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

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

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

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

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

FALLBROOK HOSPITAL CORPORATION D/B/A FALLBROOK HOSPITAL

Lisa E. McNeill, Esq., for the General Counsel.

Don T. Carmody, Esq., *Carmen M. DiRienzo, Esq.*, for the Respondent.

Micah Berul, Esq. and *Nicole Daro, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

*6 ELEANOR LAWS, Administrative Law Judge.

This case was tried in San Diego, California, on April 8-10, 2013. The California Nurses Association/National Nurses Organizing Committee (CNA/NNOC, CNA, Union, or Charging Party)¹ filed the charge in Case 21-CA-090211 September 26, 2012, the first amended charge on November 8, 2012, and the second amended charge on December 14, 2012.² The Acting General Counsel issued the complaint on December 21, 2012. Fallbrook Hospital (the Respondent, Hospital, or Fallbrook) filed an answer on January 4, 2013, denying all material allegations and asserting affirmative defenses. The Respondent filed an amended answer on February 8, 2013.

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

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

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

FINDINGS OF FACT

I. JURISDICTION

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

of the Act, and a health care institution within the meaning of Section 2(14) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

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

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

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

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

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

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

The Union has created so-called "assignment despite objection" (ADO) forms upon which nurses can document assignments or situations they feel are not safe for the patient or may compromise the nurse's license.⁵ The Union provided the forms to the Respondent's nurses shortly after the election. A stack is kept at the Hospital and available for nurses' use. Matthews and fellow Union Labor Representative Glynis Golden-Ortiz trained the nurses on how to use the form in June. Before filling out the ADO form, the nurse must first verbally let her supervisor know about the issue or concern and give him/her a chance to address it. Once filled out, the nurse gives a copy of the form to his/her manager, a copy to the Union's facility bargaining committee member, and a copy to the union labor representative. There is a line on the form designated for the supervisor's response. (GC Exh. 8.) The Union did not instruct its members to fill out the ADO form instead of the Hospital's form or to fail to follow the Hospital's internal procedures for addressing patient safety concerns or incidents. Union members are not required to fill out ADO forms and there are no repercussions for failing to use them.

*8 Maxwell noted one important feature of the Hospital's event report form is it cannot be discovered in a medical malpractice suit or by the public because it is designated as a "safety work product" designed to encourage improvements in patient safety.⁶

She does not believe the ADO form has similar protections. Maxwell also noted the ADO form lacks certain specific and pertinent information.

B. Bargaining Meetings and Progress

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

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

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

The first bargaining session took place on July 3 at the Palo Mesa Resort. For the Union, Matthews and three bargaining team nurses were present.⁹ For the Hospital, the same individuals who at the June 13 meeting were present, with the exception of Jim Carmody. The meeting began with a discussion about the information requests. The Union then presented its initial written proposals, which totaled more than 30.¹⁰ (GC Exh. 3.) Carmody stated the Hospital would not give any proposals until the Union provided all their proposals. Matthews responded that this was bad-faith bargaining, and Carmody replied that he had negotiated in this manner for 30 years. In Matthews' experience, an employer had never conditioned bargaining on the Union first presenting all of its proposals. The Hospital did not submit any proposals.

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

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

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

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

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

The fourth bargaining session was on August 2, at the same place as the previous sessions with the same people present. Matthews stated Robinson was denied her right to a *Weingarten* meeting, and he submitted a written request for information enumerating 12 items he believed would assist the Union in representing her. (GC Exh. 5.) Specifically, the Union wanted this information to see if Sandwell was treated differently because of her union activities and also to determine if there was an age bias. Carmody said Smorzewski would provide some of the information in the next couple of days but the Hospital would not commit to meet about Sandwell. Carmody also gave the previously-agreed to retirement benefits proposal, which he drafted, to the Union. The parties signed off on previously-agreed-to articles regarding recognition, union security, and retirement benefits. The Hospital did not submit any new proposals or counter-proposals at the meeting.

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

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

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

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

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

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

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

On November 1, Nurses McDowell, Mueller, and Givens submitted an ADO form stating they believed it was unsafe to monitor telemetry patients outside of their specific units. Givens filled out the form and gave it to Supervisor Irma Papini. Nobody filled

out an incident report about this issue. Maxwell saw the completed form for the first time at the hearing and was very concerned it had not previously been brought to her attention.

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

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

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

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

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

The parties had their eleventh and final bargaining session on January 8, 2013, with a mediator present.¹¹ Carmody was not present. Don DeMarco, an attorney for the Hospital, negotiated on its behalf with Ellis also present. Ojala was no longer on the bargaining team for the Hospital. James Moy, a labor representative for the Union, was also present. DeMarco expressed that the parties were at impasse because of the Union's insistence on using the ADO forms. Matthews disputed this and said they were willing to bargain over the forms. DeMarco said they were done for the day and left the session. The session lasted about 15 minutes.

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

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

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

C. Affiliation with National Union of Healthcare Workers

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

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

III. DECISION

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

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

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

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

*13 I find the totality of the conduct indicates the Respondent operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining. From July through October, over the course of eight bargaining sessions, the Hospital would not submit any new proposals or counter-proposals, arguing that it was not going to bargain with the Union until it received all of the Union's proposals. By the October 11, 2012, bargaining session, the Union had prepared its wage proposal, which was the only proposal it had left to submit. Having met the Respondent's initial demands, the Union offered to discuss the proposal. The Hospital negotiating team walked out, however, asserting Ojala, who the Hospital had recently appointed to the informaticist position, was now management. Only after a mediator was engaged did the Hospital come forward with any new

proposals. A little more than a month later, with no bargaining sessions in the interim, Carmody announced, during a bargaining session involving Barstow Hospital, that Respondent would not bargain with the Union at Barstow or Fallbrook Hospitals if the nurses continued to use ADO forms. He declared they were at impasse both places. Thereafter, as detailed in the statement of facts, the Hospital insisted that it was at impasse, and ultimately stopped responding to the Union's requests to bargain.

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

1. Failure to submit proposals or counterproposals

The Acting General Counsel and Charging Party first assert the Respondent's refusal to bargain with the Union until it had submitted all its proposals shows bad faith. The Charging Party and Acting General Counsel point to *MRA Associates, Inc.*, 245 NLRB 676, 677 (1979), for support. There, the Board affirmed the administrative law judge's determination that failure to submit any proposals over the course of three bargaining sessions was evidence of ““basic intransigence” on the employer's part, designed to undermine the union's efforts to negotiate a contract. The Charging Party also notes that pursuant to *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996), enfd. 140 F.3d 169 (2d Cir. 1998), “failure to pursue proposals or lack of exchange of proposals or counterproposals” is a factor to consider. See also *United Technologies*, 296 NLRB 571, 572 (1989) (violation where employer refused to submit counter proposals and conditioned its bargaining over economic contract issues); *Ardley Bus Corp.*, 357 NLRB No. 85, slip op. at 4 (August 31, 2011) (violation where employer demanded union proposals in writing as a bargaining condition); *Vanguard Fire & Supply*, 345 NLRB 1016, 1017 (2005), enfd. 468 F.3d 952 (6th Cir. 2006) (same where submission of bargaining agenda is precondition to bargaining).

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

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

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

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

2. The ADO forms and patient care

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

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

a. Proposals about ADO forms

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

b. Use of ADO form and bargaining objectives

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

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

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

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

The Respondent argues that the Union was impermissibly using the ADO forms as a tool to negotiate over patient care. It is without question that the Hospital's core function is patient care and safety. It does not follow, however, that the Hospital can simply refuse to engage in any bargaining over issues that touch on patient care. As the Board has noted, "[i]n the health care

field, patient welfare and working conditions are often inextricably intertwined.” *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007).

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

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

*17 The Respondent makes various arguments about the rogue and the sloppy nature of the ADO form and how the Union handles them, as well the potential perils of their use. These arguments miss the point. First, and most fundamentally, there is no evidence that the Union ever insisted that the Respondent recognize the form, as alleged. (R. Br. 2.) The Union continued to support its members' use of the form, but had no control over whether any supervisors or managers at the Hospital would sign off on or accept the ADO forms. When the Union offered to bargain over the matter following the Respondent's assertions of impasse, the Respondent declined to put its belief that the Union was engaged in bad-faith bargaining by insisting on perpetual use of the ADO form, with all its inherent flaws, to the test. Any assertions that the Union could have offered nothing through collective bargaining are speculation. The Respondent did not claim to know what proposals the Union would have made regarding the forms, or what alternative solutions the give-and-take of bargaining might have generated. See *Reisman Bros., Inc.*, 165 NLRB 390, 393 (1967).

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

Finally, as the Acting General Counsel points out, this case does not turn on whether the use of the ADO form is a mandatory or permission subject of bargaining. Respondent's unwillingness to discuss the matter with the Union either constitutes a refusal to bargain over a mandatory subject or insistence on a permissive subject of bargaining, both of which violate the Act under *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 344, 347-349 (1958); see also *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 4-5 (2011).

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

c. ADO forms as protected concerted activity

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

d. Impasse

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

B. Alleged Refusal to Bargain over Terminations

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

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

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

The Respondent cites to *Alan Ritchey* to support its position that there was no duty to bargain, but clearly misconstrues the decision. *Alan Ritchey* concerns unilateral change allegations, absent here. The issue in *Alan Ritchey* was "whether an employer whose employees are represented by a Union must bargain with the Union *before* imposing discretionary discipline on a unit employee." Id. at 1 (emphasis in original). It concluded that "after the employer has decided (with or without an investigatory interview) to impose certain types of discipline, it must provide the Union with notice and an opportunity to bargain over the discretionary aspects of its decision *before* proceeding to implement the decision." Id. at 10 (emphasis in original). In the instant case, the terminations had been decided and implemented. The Union's demands to bargain were post discipline. Thus even if the Board had decided to give *Alan Ritchey*, retroactive application, it would not govern. The question before me is whether the Respondent had a duty to bargain over the terminations and their effects after they had already been implemented.²⁰ The answer is yes. As the Acting General Counsel points out, the Union could have bargained over things like severance packages, neutral recommendation letters, or benefits payouts. (GC Br. 20-21.) Accordingly, I find the Respondent violated the Act as alleged by refusing to bargain over the terminations.

C. Alleged Failure to Provide Information

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

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

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

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

There is no question that nurses held the same position before and after the Union's certification. The Court in *Press Democrat Pub. Co. v. NLRB*, 629 F.2d 1320, 1326 (1980), enforcing the Board's order in relevant part, held that relevance is established where “nearly identical work is being performed by unit and nonunit personnel.” Here, the work was identical, not nearly identical. Moreover, the information was sought to assist the Union in representing a unit employee following her termination. Information regarding nurses terminated prior to the Union's certification is clearly a subject that pertains to the bargaining unit's obligation to represent its members, regardless of when the Union was certified. See *N Star Steel Co.*, 347 NLRB 1364, 1368 (2006); *Public Service Co. of New Mexico v. NLRB*, 692 F.3d 1068 (10th Cir. 2012), enfg. 356 NLRB No. 160 (2011).

The Respondent offered no evidence at hearing as to why it failed to supply the requested information.²¹ The Respondent attempts to shield itself by asserting it provided information responsive to 11 of the 12 enumerated requests in Matthews' written request for information. (R. Br. 21.) However, absent an explanation about the information it did not provide, this is not a defense. The Respondent also argues that the information is confidential, and cites to *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1143-1144, (6th Cir. 1993), to argue it did not need to provide it. The Respondent belatedly raised its confidentiality defense for the first time in its posthearing brief, it was not litigated, and unsurprisingly neither the Charging Party nor the Acting General Counsel addressed it in their briefs. Thus, Respondent is precluded from relying on the alleged confidentiality concern.²² See *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 890-891 (7th Cir. 1985); *Anthony Motor Co.*, 314 NLRB 443, 451 (1994).

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

D. The Respondent's Affirmative Defenses

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

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

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

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

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

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

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

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

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

*22 The fourth affirmative defenses argue that the Board lacked a quorum when the certification was issued, and it is therefore invalid. The fifth affirmative defense asserts the present complaint is invalid for the same reason. The sixth affirmative defense challenges the Board's authority to appoint the Acting General Counsel based, in part, on lack of a quorum. These arguments derive from the D.C. Circuit's decision in *Noel Canning*, supra, and the Board has rejected them. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn. 1 (2013). Any arguments regarding the legal integrity of Board precedent are properly addressed to the Board.

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

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

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

5. Eighth affirmative defense: remedies requested are improper

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

6. Ninth affirmative defense: discontinuity of representation

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

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

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

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

Western Commercial Transport, 288 NLRB 214, 217 (1988). The Supreme Court recognized in *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192, 199 fn. 5 (1986), that “increased financial support and bargaining power” are “ordinary, valid reasons for affiliations and mergers.” See also *Sullivan Bros. Printers*, 317 NLRB 561, 562-563 (1995).

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

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

The Respondent asserts that “depletion of the CNA resources” to fund the Kaiser campaign changes the character of the Union. Though aware of the money the CNA transferred to the NUHW from Lighty's testimony the previous day, after its last witness testified the following day, the Respondent sought to call two additional witnesses to refute Lighty's testimony. I denied the request on timeliness grounds and invited the Respondent to make an offer of proof. The offer of proof was that the witness testimony would contradict Lighty's testimony that it is in the interest of the CNA to fund the election campaign of the NUHW in the Kaiser Permanente election matter. I decline the Respondent's request to reconsider my ruling, and I reject the offer of proof. Even if it is considered, however, I find the CNA's actions of loaning money to the NUHW does not change the identity of the CNA. The Board gives “little weight” to the assets/books factor, particularly where, as here, the Respondent has not shown that fewer resources would be committed to their representational obligations than prior to the affiliation. *Deposit Telephone Co.*, 349 NLRB 214, 223 (2007); *Independence Residences, Inc.* 358 NLRB No. 42, slip op. at 27 (2012). There was no evidence presented to show that the union members are not being represented at the same level as before the affiliation. To assume that the Union changed the amount of funding it devotes to representing its members by virtue of the loans it provides to the NUHW would be speculative.

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

CONCLUSION OF LAW

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

REMEDY

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

The Charging Party and the Acting General Counsel request remedies in addition to those the Board generally grants for the above violations. The Board has broad discretion to fashion a just remedy to fit the circumstances of each case it confronts.

Maramont Corp., 317 NLRB 1035, 1037 (1995). The Supreme Court has interpreted Section 10(c) as vesting the Board with discretion to devise remedies that effectuate the policies of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-899 (1984).

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

To support the argument for a notice reading, the Charging Party cites, *HTH Corp.*, 356 NLRB No. 182 (2011), and *Homer D. Bronson Co.*, 349 NLRB 512, 515-516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). *HTH Corp.* involved multiple rounds of litigation, including a previous order to set aside an election. In *Homer D. Bronson Co.*, the company president gave multiple unlawful speeches among many other violations during the course of a union organizing campaign. The Acting General Counsel cites to *Excel Case Ready*, 334 NLRB 4 (2001), a case involving discharges and other coercive behavior during an organizing campaign, and *Federated Logistics & Operations*, 340 NLRB 255 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005), where there were extensive and serious unfair labor practices that pervaded the unit and had a long-term coercive effect on the unit during an organizing drive. Although I find the violations the Respondent committed are serious, they are not “so numerous, pervasive, and outrageous” such that additional remedies are required “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995).

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

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

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

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

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

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

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB No. 9, slip op. at. 5-6 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *Id.*, slip op. at p. 3. See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, Fallbrook Hospital, Fallbrook, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive representative of the following bargaining unit (unit):

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

(b) Failing and refusing to bargain over unit employees' terms and conditions of work, including over terminations.

(c) Failing and refusing to supply the Union with requested information.

(d) In any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

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

(a) On request, bargain with the Union as the as the exclusive representative of the unit over the terms of a collective-bargaining agreement and if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, bargain with the Union as the exclusive representative of the unit over unit employees' terms and conditions of work, including the terminations of Robinson and Sandwell.

(c) Furnish the Union with the following information requested in its August 2, 2012 letter: The list of termination of RNs in the [emergency room] for the last 3 years with reason for termination of each RN.

(d) Within 14 days after service by the Region, post at its facility in Fallbrook California, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2012.

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

Dated, Washington, D.C. May 16, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the California Nurses Association/National Nurses Organizing Committee in the unit described below over the terms of a collective-bargaining agreement:

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

WE WILL NOT refuse to bargain in good faith with the California Nurses Association/National Nurses Organizing Committee over bargaining unit employees' terms and conditions of work, including over terminations.

WE WILL NOT refuse to provide with the California Nurses Association/National Nurses Organizing Committee the information it requests that is necessary and relevant to the performance of its duties as the exclusive collective bargaining representative of the employees in the above unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the California Nurses Association/National Nurses Organizing Committee over the terms of a collective-bargaining agreement and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, on request, bargain in good faith with the California Nurses Association/National Nurses Organizing Committee over bargaining unit employees' terms and conditions of work, including over terminations.

WE WILL provide the California Nurses Association/National Nurses Organizing Committee with the following information requested in its August 2, 2012 letter: The list of termination of RNs in the [emergency room] for the last 3 years with reason for termination of each RN.

FALLBROOK HOSPITAL CORPORATION D/B/A FALLBROOK HOSPITAL

Footnotes

- 1 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.
In her decision, the judge inadvertently stated that the Union requested information to prepare for bargaining over the discharge of employee Libby Sandwell, when in fact the Union requested information concerning Martha Robinson's discharge. She also inadvertently stated that employee Rebecca Ojala, who had been a member of the Union's bargaining team, was no longer a member of the Respondent's bargaining team. These errors do not affect our disposition of this case.
- 2 We adopt the judge's finding that deferral to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971), is not appropriate here, because the parties have not executed a written contract setting forth an agreed-upon grievance-arbitration procedure. See generally *Arizona Portland Cement Co.*, 281 NLRB 304, 304 fn. 2 (1986) (deferral not appropriate where "there is no contract in existence under which the parties are mutually bound by an agreed-upon grievance-arbitration procedure"). In adopting the judge's finding, Member Johnson relies on the Federal Arbitration Act's requirement that agreements to arbitrate must be in writing. 9 U.S.C. § 2. We do not rely on the judge's statement that the Respondent's affirmative defense was untimely raised in its amended answer. See *Sheet Metal Workers Local 18--Wisconsin*, 359 NLRB No. 121, slip op. at 2 (2013) ("Deferral to arbitration is an affirmative defense that may be raised in the answer or even at the hearing.").
In adopting the judge's 8(a)(5) and (1) findings, we find no merit in the Respondent's contention on exception that it had no bargaining obligation because the underlying certification of representative issued when the Board lacked a quorum. The Respondent waived its right to challenge the validity of the certification when it entered into negotiations with the Union. *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995); *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326-327 (8th Cir. 1984). We also find no merit in the Respondent's contention that the Acting General Counsel lacked the authority to prosecute this case. The Acting General Counsel was properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, which does not contain the limitation cited by the Respondent, and not pursuant to Sec. 3(d) of the Act. See *Muffley v. Massey Energy Co.*, 547 F.Supp. 2d 536, 542-543 (S.D.W.Va. 2008), *affd.* 570 F.3d 534 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act). See *The Ardit Co.*, 360 NLRB No. 15 (2013).
In adopting the judge's finding that the Respondent unlawfully refused to furnish requested information concerning the discharge of employee Martha Robinson, we find no merit in the Respondent's contention that the Union was attempting to "use an information request as a discovery device for filed or contemplated unfair labor practice charges." In any event, "a potential lawsuit is not a valid reason for depriving the Union of [relevant] information." *CJC Holdings, Inc.*, 315 NLRB 813, 816 (1994), *enfd.* 97 F.3d 114 (5th Cir. 1996).
Member Johnson agrees with the judge and his colleagues that the Respondent unlawfully refused to bargain over the terms of an initial collective-bargaining agreement. However, he does not find that the Respondent's request for a full set of proposals from the Union during bargaining--a position that in other circumstances may serve to speed bargaining to either agreement or a good-faith impasse and thus serve the Act's goals--reflected an unlawful refusal to bargain.
- 3 On exception, the Union requests that the judge's remedy be modified to require the Respondent to read the Board's remedial notice to assembled employees during paid working hours. We find that the Union has not demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007). We also find that a remedy requiring the Respondent to reimburse the Union for its litigation expenses is not warranted, as the defenses raised by the Respondent, although found to be without merit, were not frivolous. See, e.g., *Waterbury Hotel Management LLC*, 333 NLRB 482, 482 fn. 4 (2001), *enfd.* 314 F.3d 645 (D.C. Cir. 2003).
- 4 We shall modify the judge's recommended Order to include the provisions discussed below in the Amended Remedy and to conform to the violations found and our standard remedial language. We shall also substitute a new notice to conform to the recommended Order as modified.

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

5 All dates refer to 2012, unless otherwise noted.

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

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

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

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

2 All dates are in 2012, unless otherwise indicated.

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

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

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

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

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

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

9 McDowell and Givens missed this session.

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

11 McDowell recalled two mediators were present.

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

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

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

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

15 I find this particularly true in light of the fact that the safety issue raised was not an event in line with the long list of examples the Hospital's policy provides. I also note that management was aware of the issue by virtue of the forms of acuity the nurses fill out

- nightly for patient safety. (Tr. 351.) In any event, if the nurses failure to abide by the Hospital's requirement to use its reporting system, action related to their disobedience, as opposed to a refusal to bargain with the Union over anything, would seem more appropriate.
- 16 The complaint allegations in another pending case the Charging Party cites to in its brief are the type of allegations that would appropriately lead to a ruling on the issue. (CP Br. 10-11.)
- 17 I note that impasse was not raised as an affirmative defense, and may be considered waived. *M & C Vending Co.*, 278 NLRB 320, 325 (1986). Notably, the Charging Party did not present argument about this defense in its brief. I address it briefly in the event it may be considered as part of the Respondent's seventh affirmative defense.
- 18 The Respondent contends that I should discredit the reference in the email to its "erroneous claim of impasse." As there is no evidence to support this contention, I do not.
- 19 To the extent a reviewing authority disagrees with me, I find the Acting General Counsel presented the correct legal framework and analysis, and that the Respondent did not meet its burden to prove impasse based on a single issue. (GC Br. 25-27.) See also *Sacramento Union*, 291 NLRB 552, 554 (1988), enfd. 888 F.2d 1394 (9th Cir. 1989). *King Radio Corp.*, 172 NLRB 1051, 1066-1067 (1968).
- 20 The Charging Party argues that there was a duty to bargain before the nurses' terminations, but the complaint does not allege this or any other unilateral change.
- 21 In its brief, the Respondent states that the parties discussed, off the record, the fact that Smorzewski had supplied Matthews by email in August 2012, with information concerning nurses terminated from Fallbrook Hospital in the last 2 years, and relies on this to argue compliance. (R. Br. 21-22.) Despite the fact that Smorzewski was present throughout the hearing, the Respondent offered no evidence to support its assertion. On May 7, 2013, the Charging Party filed a motion to strike this portion of the brief, which I hereby enter into the record as ALJ Exh. 1. As I had already considered this section of the brief, and decided to give it the evidentiary weight it is due, which is none, I did not grant the motion. The Respondent's argument that providing the information would be unduly burdensome is premised on this argument, and I reject it accordingly.
- 22 Confidentiality claims must be timely raised so as to notify the Union of any confidentiality concern and to bargain for an accommodation. *West Penn Co.*, 339 NLRB 585 (2003); *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). Aside from the procedural error of failing to raise this defense on time, the undue delay deprived the Union of the opportunity to bargain for accommodation, assuming the information requested was confidential.
- 23 The Respondent requests an adverse inference based on the Union's failure to produce loan documents requested pursuant to subpoena. The Union represented that there are not any loan documents. The Respondent argues this strains credibility. Considering that the affiliation agreement spells out the loan repayment, however, I have no reason to believe there are additional documents. The Respondent also requests an adverse inference based on the Union's failure to turn over banking documents requested. I find the Union complied with the subpoena request by turning over documents showing the electronic transfers from the CNA to the NUHW as described in the transcript at pp. 447-448.
- 24 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.
- 25 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

360 NLRB No. 73 (N.L.R.B.), 199 L.R.R.M. (BNA) 1081, 2014-15 NLRB Dec. P 15786, 2014 WL 1458265

EXHIBIT D

785 F.3d 729

United States Court of Appeals,
District of Columbia Circuit.FALLBROOK HOSPITAL CORPORATION,
Doing Business as Fallbrook Hospital, Petitioner

v.

NATIONAL LABOR RELATIONS
BOARD, Respondent.

Nos. 14–1056, 14–1094.

|
Argued Jan. 8, 2015.|
Decided May 8, 2015.**Synopsis**

Background: Hospital employer petitioned for review of portion of National Labor Relations Board (NLRB) order, 2014 WL 1458265, finding that it had committed unfair labor practices by refusing to bargain in good faith with union certified to represent bargaining unit of registered nurses working in hospital's acute care unit, insofar as hospital was ordered to reimburse union's negotiation expenses. NLRB cross-petitioned for enforcement of its order.

Holdings: The Court of Appeals, [Edwards](#), Senior Circuit Judge, held that:

[1] Court would summarily enforce NLRB's findings and order with respect to employer-abandoned challenges to charges and uncontested remedies;

[2] NLRB's decision that reimbursement remedy was warranted was amply supported by substantial evidence in the record and had a rational basis in the law; and

[3] remand for NLRB to hear additional evidence was not required.

Employer's petition and motion denied; Board's cross-petition granted.

West Headnotes (12)

[1] Labor and Employment

🔑 Status quo; “make whole” relief

Reimbursement remedy is appropriate where it may fairly be said that an employer's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies; such a remedy is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. National Labor Relations Act, § 8(a)(1, 5), 29 U.S.C.A. § 158(a)(1, 5).

[Cases that cite this headnote](#)

[2] Labor and Employment

🔑 Taking of additional evidence

Remand is permissible under NLRA if the movant can demonstrate to the court's satisfaction that any purported new evidence is material and could not reasonably have been raised before National Labor Relations Board (NLRB). National Labor Relations Act, § 10(e), 29 U.S.C.A. § 160(e).

[Cases that cite this headnote](#)

[3] Labor and Employment

🔑 Refusal to bargain

Because statutory standard of good faith bargaining is determined by facts of each case, whether or not party has failed to live up to this duty falls squarely within province of National Labor Relations Board's (NLRB) expertise. National Labor Relations Act, § 8(d), 29 U.S.C.A. § 158(d).

[Cases that cite this headnote](#)

[4] Labor and Employment

🔑 [Interference, restraint, or coercion in general](#)

Labor and Employment

🔑 [Refusal to Bargain](#)

Employer's unfair labor practice in form of refusal to bargain collectively with representatives of employees is also violation of NLRA subsection which makes it unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to bargain collectively through representatives of their own choosing. National Labor Relations Act, §§ 7, 8(a)(1, 5), [29 U.S.C.A. §§ 157, 158\(a\)\(1, 5\)](#).

[Cases that cite this headnote](#)

[5] Labor and Employment

🔑 [Discretion of board](#)

Choice of remedies for unfair labor practice is primarily within province of National Labor Relations Board (NLRB). National Labor Relations Act, § 8, [29 U.S.C.A. § 158](#).

[Cases that cite this headnote](#)

[6] Administrative Law and Procedure

🔑 [Discretion](#)

The breadth of agency discretion is at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions in order to arrive at maximum effectuation of Congressional objectives.

[Cases that cite this headnote](#)

[7] Labor and Employment

🔑 [Remedies](#)

National Labor Relations Board's (NLRB) order of remedies for unfair labor practice should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the NLRA; in other words, there must be so gross an abuse of power as to be arbitrary. National Labor Relations Act, § 8, [29 U.S.C.A. § 158](#).

[Cases that cite this headnote](#)

[8] Labor and Employment

🔑 [Proceedings in general](#)

Court of Appeals would summarily enforce National Labor Relations Board's (NLRB) findings and order that employer committed two unfair labor practices by refusing to bargain with union in good faith, affirmative bargaining order, one-year extension of union's certification period, cease-and-desist order, and notice posting, because employer had expressly abandoned its challenges to those determinations. National Labor Relations Act, §§ 8(a)(1, 5), 10(e, f), [29 U.S.C.A. §§ 158\(a\)\(1, 5\), 160\(e, f\)](#).

[Cases that cite this headnote](#)

[9] Labor and Employment

🔑 [Particular Relief](#)

National Labor Relations Board's (NLRB) determination that employer's deliberate misconduct in refusing to bargain with union in good faith so infected core of bargaining process as to justify reimbursement of negotiation expenses remedy was supported by substantial evidence in the record and was eminently rational; NLRB specifically found that employer acted in obstinate and pugnacious manner, operated with closed mind and put up series of roadblocks designed to thwart and delay bargaining, and that totality of employer's conduct made it clear that there was no intent to bargain, and it found multiple violations of NLRA based on employer's conduct at bargaining table, including but not limited to refusing to bargain over mandatory subjects and refusing to provide information requested by union. National Labor Relations Act, § 8(a)(1, 5), [29 U.S.C.A. § 158\(a\)\(1, 5\)](#).

[Cases that cite this headnote](#)

[10] Labor and Employment

🔑 [Discretion of board](#)

Labor and Employment

🔑 Remedies

National Labor Relations Board (NLRB) discretion in fashioning remedies under NLRA is extremely broad and subject to very limited judicial review. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[Cases that cite this headnote](#)

[11] Labor and Employment

🔑 Presentation of Objections to Board

Where petitioner objects to finding on issue first raised in decision of National Labor Relations Board (NLRB) rather than of ALJ, petitioner must file a petition for reconsideration with NLRB to permit it to correct the error, if there was one. National Labor Relations Act, § 10(e), 29 U.S.C.A. § 160(e).

[Cases that cite this headnote](#)

[12] Labor and Employment

🔑 Remand to Board

Court of Appeals would not exercise its discretion to remand unfair labor practice case against hospital employer to allow National Labor Relations Board (NLRB) to reconsider its remedy of reimbursement of union's negotiation expenses, despite employer's contention that "integral changed circumstances" required remand in that it no longer employed any union-represented employees, that given closure of acute care unit parties would never resume negotiations toward collective bargaining agreement, and that parties had reached apparent interminable impasse over effects bargaining; plainly stated purpose of NLRB's order was to reimburse union for resources wasted in vain attempt to bargain and to restore status quo ante, and nothing in decision discussed prospective bargaining strength vis-a-vis employer or suggested that remedy could be apportioned in manner urged by employer. National Labor Relations Act, § 10(e), 29 U.S.C.A. § 160(e).

[Cases that cite this headnote](#)

*732 On Petition for Review and Cross–Application for Enforcement of an Order of the National Labor Relations Board.

Attorneys and Law Firms

Kaitlin A. Kasetta argued the cause for petitioner. On the briefs was [Bryan T. Carmody](#).

Barbara A. Sheehy, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were [Richard F. Griffin, Jr.](#), General Counsel, [John H. Ferguson](#), Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, and [Jill A. Griffin](#), Supervisory Attorney.

Before: [GARLAND](#), Chief Judge, [PILLARD](#), Circuit Judge, and [EDWARDS](#), Senior Circuit Judge.

Opinion

Opinion for the court by Senior Circuit Judge [EDWARDS](#).

[EDWARDS](#), Senior Circuit Judge:

In a decision issued on April 14, 2014, the National Labor Relations Board (“Board”) held that Fallbrook Hospital Corporation (“Fallbrook” or “Hospital”) had violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the “Act”), 29 U.S.C. § 158(a)(1), (5), by refusing to bargain in good faith with the California Nurses Association/National Nurses Organizing Committee, AFL–CIO (“Union”), after the Union had been certified to represent a bargaining unit of registered nurses working in the Hospital's acute care unit. *See Fallbrook Hosp. Corp.*, 360 N.L.R.B. No. 73 (2014), [slip op. at 1–2](#) & n. 2. The Board further held that “an award of negotiating expenses [was] necessary to fully remedy the detrimental impact [that Fallbrook's] unlawful conduct has had on the bargaining process.” *Id.* at 2. Fallbrook now petitions for review of the Board's decision ordering it to pay negotiation expenses to the Union. The Board, in turn, cross-petitions for enforcement of its order. We deny Fallbrook's petition and grant the Board's cross-petition.

Far from the run-of-the-mill failure to bargain, the Board specifically found that Fallbrook acted in an “obstinate and pugnacious manner,” *id.* at 9, “operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining,” *id.*, and that the totality of Fallbrook's conduct

made it “clear” that “there was no intent to bargain,” *id.* at 15. The Board found *multiple* violations of the Act based on Fallbrook’s conduct at the bargaining table, including but not limited to refusing to bargain over mandatory subjects and refusing to provide information requested by the Union. *Id.* at 1 & n. 2; *see also id.* at 15.

[1] As the Board’s decision makes clear, a reimbursement remedy is appropriate “where it may fairly be said that [an employer’s] substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies.” *Id.* at 2 (internal quotation marks omitted) (quoting *Unbelievable, Inc.*, 318 N.L.R.B. 857, 859 (1995), *enfd in pertinent part*, *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C.Cir.1997)). Such a remedy “is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.” *Unbelievable*, 318 N.L.R.B. at 859.

On May 21, 2014, after the Hospital filed its Petition for Review with this court, Fallbrook gave notice to the Union that it *733 intended to terminate the acute care unit in which members of the bargaining unit worked. In light of this development, “Fallbrook has decided to abandon all issues presented on appeal, except for the Board’s award of negotiating expenses.” Br. of Petitioner 2 n. 2. In other words, the Hospital does not challenge the findings underlying the Board’s conclusion that Fallbrook “deliberately acted to prevent any meaningful progress during bargaining” and that it committed a number of serious violations of the Act. *Fallbrook*, 360 N.L.R.B. No. 73, *slip op.* at 2.

The only question before the court on the petition for review is whether the Board’s award of negotiation expenses was a “clear abuse of discretion.” *See United Steelworkers of Am. v. NLRB*, 376 F.2d 770, 773 (D.C.Cir.1967). Fallbrook argues that the Board’s decision is wanting because it fails to take account of the totality of the circumstances and is unsupported by law. We reject this argument. As explained below, the Board’s decision that negotiation expenses were warranted in this case is amply supported by substantial evidence in the record and has a rational basis in the law.

[2] Fallbrook has filed a motion to remand the case to the Board pursuant to Section 10(e), 29 U.S.C. § 160(e), for the Board to hear additional evidence. A remand is permissible

under Section 10(e) if the movant can demonstrate to the court’s satisfaction that any purported new evidence is material and could not reasonably have been raised before the Board. Fallbrook argues that, because the Hospital has effectively terminated the entire bargaining unit by closing its acute care facility, there are “changed factual circumstances” that justify remand to the Board to reconsider its award of negotiating expenses. Fallbrook’s theory is that there are two separate purposes for the Board’s negotiation expenses remedy: one to redress the effect of Fallbrook’s past misconduct on the Union (which Fallbrook does not contest), and one to provide the Union prospective strength at the bargaining table (which Fallbrook claims is now “unnecessary” due to the closure of the Hospital’s acute care unit). Fallbrook thus argues that the case should be remanded to the Board to allow it to reconsider whether the disputed remedy is still justified. This argument is not only meritless, it reflects real chutzpah. *See, e.g., Harbor Ins. Co. v. Schnabel Found.*, 946 F.2d 930, 937 n. 5 (D.C.Cir.1991) (“It reminds us of the legal definition of chutzpah: chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.”).

The Board’s decision does not, as Fallbrook suggests, apportion the remedy to distinguish between relief for past misconduct and relief to ensure that the Union has prospective strength in collective bargaining. Rather, the Board’s decision states that the purpose for the remedy is to make the Union whole and to put the Union in the same place it was *before* the bargaining ever occurred. Furthermore, the Hospital and the Union held a number of bargaining sessions to negotiate over the effects of the closure of the acute care unit, and these bargaining sessions occurred *after* the Board issued its decision and *after* Fallbrook announced the closure. Therefore, even accepting Fallbrook’s theory—that a portion of the Board’s order was only intended to give the Union prospective strength at the bargaining table—it is still clear that the Board’s remedy is fully justified. In sum, we find no merit in Fallbrook’s motion to remand the case to the Board pursuant to Section 10(e).

I. BACKGROUND

A. Statutory and Legal Background

[3] [4] Section 8(a)(5) of the Act makes it “an unfair labor practice for an employer *734 ... to refuse to bargain collectively with the representatives of his employees....” 29 U.S.C. § 158(a)(5). As is relevant here, the duty to

bargain collectively means, “to meet at reasonable times and confer in good faith with respect to ... the negotiation of an agreement.” *Id.* § 158(d). Because the statutory standard of “good faith” bargaining is determined by the facts of each case, whether or not a party has failed to live up to this duty falls squarely within the province of the Board’s expertise. *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C.Cir.1969). “A violation of Section 8(a)(5) is also a violation of Section 8(a)(1), which makes it an unfair labor practice for an employer to ‘interfere with, restrain, or coerce employees in the exercise’ of their statutory right to bargain collectively through representatives of their own choosing.” *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n. 6 (D.C.Cir.2008) (quoting 29 U.S.C. § 158(a)(1)).

The Board has discretion to fashion appropriate remedies for violations of the duty to bargain. *See* 29 U.S.C. § 160(c) (authorizing the Board to order the violator “to take such affirmative action ... as will effectuate the policies of this subchapter”). As noted above, “[i]n cases of unusually aggravated misconduct,” the Board may order an offending party “to reimburse the charging party for negotiation expenses.” *Unbelievable*, 318 N.L.R.B. at 859. The Board determines whether negotiating expenses are warranted after weighing the evidence in a particular case. *Hosp. of Barstow, Inc.*, 361 N.L.R.B. No. 34 (Aug. 29, 2014), slip op. at 5 n. 13. There are no *per se* rules regarding when reimbursement of negotiation expenses will be ordered.

B. The Facts

It is unnecessary for us to offer a detailed statement of the facts in this case. As noted above, Fallbrook does not contest the Board’s findings, which are fully set forth in the Board’s decision and in the Statement of the Case issued by the Administrative Law Judge (“ALJ”). *See Fallbrook*, 360 N.L.R.B. No. 73, slip op. at 2, 5–8. The Board’s decision notes, in relevant part:

[T]he Union was certified as the exclusive collective-bargaining representative of the Respondent’s nurses on May 24, 2012, and the parties held their first bargaining session on July 3. As found by the judge, the Respondent engaged in bad-faith bargaining from the outset, and this conduct continued until the final bargaining session on January 8, 2013. Thereafter, the Respondent refused to respond to any of the Union’s requests for future bargaining dates. Thus, by its conduct, the Respondent effectively precluded any meaningful bargaining for virtually the entire certification year.

....

As described in detail in the judge’s decision, the record shows that the Respondent deliberately acted to prevent any meaningful progress during bargaining sessions that were held. For example, the Respondent’s bargaining team failed to provide any proposals or counterproposals during the first eight bargaining sessions until it received a full set of proposals from the Union, left the September 12 bargaining session abruptly and without explanation, and left the October 11 bargaining session 3 minutes after arriving. In addition, although the Respondent proffered some proposals during the next three bargaining sessions, it subsequently threatened that it would not continue bargaining if the Union persisted in encouraging employees’ use of the Union’s assignment despite objection (ADO) form. At a bargaining session held on January 8, 2013, *735 the Respondent falsely claimed that the nurses’ use of the ADO forms caused the parties to be at impasse, refused to bargain further, and left the meeting after about 15 minutes. Thereafter, the Respondent reaffirmed its refusal to bargain when it refused to respond to the Union’s requests for future bargaining dates.

Id. at 2–3 (footnote omitted). The Board’s summary of the facts is amplified by the ALJ’s findings, *id.* at 6–8, which were largely adopted by the Board, *id.* at 1. The ALJ found that Fallbrook had engaged in a slew of unfair labor practices, including “failing and refusing to bargain with the Union in good faith over the terms of a collective-bargaining agreement, failing and refusing to bargain with the Union over the terminations of unit employees Robinson and Sandwell, and failing to furnish relevant information to the Union, in violation of Section 8(a)(1) and (5) of the Act.” *Id.* at 15.

In light of these findings, the Board concluded that Fallbrook should be required “to reimburse the Union for the expenses it incurred for the collective-bargaining negotiations held from July 3, 2012, through the final bargaining session on January 8, 2013.” *Id.* at 3. On this point, the Board said:

We find that the Respondent’s misconduct infected the core of the bargaining process to such an extent that its effects cannot be eliminated by the mere application of our traditional remedy of an affirmative bargaining order. In

these circumstances, requiring the Respondent to reimburse the Union's negotiation expenses is also warranted both to make the [Union] whole for the resources that were wasted because of the [Respondent's] unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. Such expenses may include, for example, reasonable salaries, travel expenses, and per diems.

Id. (citations and internal quotation marks omitted).

Fallbrook now petitions for review of the Board's decision ordering the Hospital to reimburse the Union's negotiation expenses. The Board cross-petitions for enforcement.

II. ANALYSIS

A. Standard of Review

[5] [6] [7] It is well understood that “the choice of remedies is primarily within the province of the Board.” *United Steelworkers*, 376 F.2d at 773. “[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions ... in order to arrive at maximum effectuation of Congressional objectives.” *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C.Cir.1967) (footnote omitted). The Board's order of remedies “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943). In other words, there must be “so gross an abuse of power as to be arbitrary.” *United Steelworkers*, 376 F.2d at 773. We find no “abuse of power” in the Board's disposition of this case.

B. Summary Enforcement of the Board's Findings of Section 8(a)(1) and (5) Violations and Uncontested Remedies

[8] Because Fallbrook has expressly abandoned its challenge to the Board's *736 determinations that Fallbrook violated Sections 8(a)(1) and (5) by refusing to bargain in good faith, the Board's award of an affirmative bargaining

order, one-year extension of the Union's certification period, cease-and-desist order, and notice posting, we summarily enforce the Board's findings and order with respect to those charges and uncontested remedies. *See Allied Mech. Servs. v. NLRB*, 668 F.3d 758, 765 (D.C.Cir.2012).

C. The Board's Decision Ordering Reimbursement of Negotiation Expenses

[9] Fallbrook claims that the Board “singled out Fallbrook for the extraordinary remedy based upon three factors: (1) Fallbrook did not make any proposals until the eighth bargaining session by which point the Union had submitted the entirety of its proposals, (2) the short duration of two of the parties' eleven bargaining sessions, and (3) Fallbrook's suspension of negotiations based upon the Union's refusal to cease distribution of the ADO [Forms].” Br. of Petitioner 14. The Hospital also contends that the Board failed to consider some factors that “demonstrate that Fallbrook did not engage in any ‘unusually aggravated misconduct.’ ” *Id.* Fallbrook points to only two such factors: a claim that the Union and the Hospital had entered into a pre-certification agreement pertaining to certain subjects of bargaining; and a claim that the Hospital was operating under the belief that any dispute between the parties would be submitted to an arbitrator. *See id.* at 15. Fallbrook also disputes that its extensive unfair labor practices amounted to “unusually aggravated conduct.” *See id.* at 15–20. We find no merit in these arguments.

Fallbrook's claim that the Board based its order on only “three factors” both mischaracterizes the Board's decision and fails to account for the fact that the Board affirmed and adopted the ALJ's extensive factual findings that “the totality of the conduct indicates [Fallbrook] operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining.” *Fallbrook*, 360 N.L.R.B. No. 73, slip op. at 9. Moreover, the Board found that it was “clear” that Fallbrook had “no intent to bargain, and [that Fallbrook's] continued attempts to challenge the Board's certification make it clear it does not welcome the Union.” *Id.* at 15. Much more than basing its determination “upon three factors,” Br. of Petitioner 14, the Board based its decision on the extensive list of unfair labor practices found by the ALJ and uncontested by the Hospital. Given this litany of misconduct showing Fallbrook's deliberate attempts to prevent any actual bargaining, *see Fallbrook*, 360 N.L.R.B. No. 73, slip op. at 5–9, the Board's chosen remedy is supported by substantial evidence in the record.

Fallbrook's claim that its misconduct did not amount to "unusually aggravated misconduct," *see* Br. of Petitioner 15–20, is belied by the record. Fallbrook has cherry-picked the record and then argued that isolated examples of its misconduct, in and of themselves, do not justify the Board's chosen remedy. For example, Fallbrook argues that the duration of the bargaining sessions does not justify an award of negotiation expenses because "the Board has frequently encountered employers who walk out of bargaining sessions and ... has not assessed the extraordinary remedy of negotiating expenses." *Id.* 17–18. This argument entirely misses the point. The problem with Fallbrook's approach is obvious: the Board's decision rests on the Hospital's entire record of unfair labor practices, which in this case is quite extensive. The Board found that the *totality* of Fallbrook's misconduct justified the remedy. This is perfectly appropriate under *737 established law. *See Hosp. of Barstow*, 361 N.L.R.B. No. 34, slip op. at 5 n. 13 (explaining that "decisions [by the Board] make clear that, in determining whether to award negotiating expenses, [the Board] will consider each case on its own merits, evaluating the effect of the violation on the wronged party and the injury to the collective-bargaining process"). In this case, it cannot be seriously doubted that substantial evidence supports the Board's decision.

Fallbrook further protests that the Board failed to credit the fact that there was a pre-certification agreement between the Union and Fallbrook's parent company. However, the ALJ found that "[t]here is no evidence of record about what happened during these [pre-certification] negotiations other than they resulted in agreement [between the Union and Community Health Systems, the parent company] on certain provisions and [Community Health Systems] was not named as a respondent in this case." *Fallbrook*, 360 N.L.R.B. No. 73, slip op. at 9 n. 12. In other words, Fallbrook never executed an agreement with the Union; the pre-certification negotiations involved only the parent company, not Fallbrook. Thus, the ALJ concluded, "[t]hat there may have been good faith negotiations between the Hospital's parent company and the Union at some point in the past does not impact my findings [regarding Fallbrook's unfair labor practices] based on the record before me." *Id.* at 9. The Board adopted these findings and the conclusion.

The Board's decision here is also consistent with its decision in *Harowe Servo Controls, Inc.*, 250 N.L.R.B. 958 (1980). In that case, the Board held:

That the Respondent can cite *some evidence of agreement on specific issues is therefore of no consequence in the*

circumstances of this case. Indeed, these circumstances lead inexorably to the conclusion that such agreement as was reached was no more than the vehicle chosen by the Respondent to conceal a strategy designed to render bargaining futile.

It is thus evident that the economic resources wasted by the Union in the futile pursuit of a collective-bargaining agreement are a direct and proximate result of the Respondent's willful defiance of its statutory obligation. Accordingly, in order to restore the *status quo ante*, we shall require that the Respondent reimburse the Union for the bargaining expenses it incurred during the period here in question.

Id. at 965 (emphasis added) (footnote omitted). The same considerations apply here.

Fallbrook moreover argues that "the Board ignored the fact that, at the time the negotiations were taking place, the Hospital believed that ... any disputes would be brought to the parties' arbitrator." Br. of Petitioner 15. There is no finding of fact to support this claim and Fallbrook has not contested the Board's findings in this case. Furthermore, the Board expressly adopted the ALJ's "finding that deferral to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971), is not appropriate here, because the parties [had] not executed a written contract setting forth an agreed-upon grievance-arbitration procedure." *Fallbrook*, 360 N.L.R.B. No. 73, slip op. at 1 n. 2. Fallbrook does not contend that the Board's decision on this point is wrong either as a matter of fact or law.

Fallbrook additionally contends that the Board's decision to award negotiation expenses is contrary to law. In particular, Fallbrook contends that its misconduct was not as egregious as the employers' conduct in *Unbelievable*, 318 N.L.R.B. 857, *Harowe Servo Controls*, 250 N.L.R.B. 958, and other cases in which the Board has *738 ordered a respondent to reimburse the charging party for negotiation expenses. Fallbrook's view of the applicable precedent is distorted.

The Board has made it clear that:

[the decision in *Unbelievable*] ... did not set the bar for an award of negotiating expenses at the level of the misconduct in that case. Nor did the Board in *Harowe Servo Controls* set some threshold level of egregiousness

that must be satisfied in order to conclude that an employer's conduct infected the core of the bargaining process.

Hosp. of Barstow, Inc., 361 N.L.R.B. No. 34, slip op. at 5 n. 13. The Board's approach in each case is to weigh the facts in the record to determine whether a reimbursement of negotiation expenses is appropriate to “to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.” *Unbelievable*, 318 N.L.R.B. at 859. The Board adhered to this standard in this case.

The Board found that Fallbrook “deliberately acted to prevent any meaningful progress during bargaining sessions that were held” and “deprive[d] the [U]nion of the opportunity to bargain during the time of the [U]nion's greatest strength.” *Fallbrook*, 360 N.L.R.B. No. 73, slip op. at 2 (internal quotation marks omitted). “The Union fruitlessly expended time and financial resources associated with arranging dates to be available for bargaining, developing and drafting proposals and counter-proposals, consulting with the mediator, and keeping union members apprised of bargaining efforts.” Br. for NLRB 26. Thus, the Board's determination that Fallbrook's deliberate misconduct so infected the core of the bargaining process as to justify a reimbursement of negotiations expenses remedy is supported by substantial evidence in the record and it is eminently rational.

[10] “The Board's discretion in fashioning remedies under the Act is extremely broad and subject to very limited judicial review.” *St. Francis Fed'n of Nurses & Health Prof'ls v. NLRB*, 729 F.2d 844, 848 (D.C.Cir.1984). This means that the court has no business second-guessing the Board's judgments regarding remedies for unfair labor practices. The “choice of remedies is entitled to a high degree of deference” by a reviewing court. *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C.Cir.1981); see also *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) (the Board's remedial power “is a broad, discretionary one, subject to limited judicial review”).

In fashioning an appropriate remedy to address the substantial unfair labor practices in this case, the Board was acting at the “zenith” of its discretion. *Niagara Mohawk*, 379 F.2d at 159. Under this highly deferential standard of review, we have no basis upon which to overturn the Board's order requiring Fallbrook to reimburse the Union for negotiation expenses.

* * * * *

[11] Fallbrook has raised one additional point regarding the merits of the Board's decision. It complains that the Board failed to adequately explain its finding of causation between Fallbrook's misconduct and the Union's losses. Br. of Petitioner at 26–27. Section 10(e) of the Act prevents us from considering this argument, however, because it is raised for the first time on petition for review. See 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection *739 shall be excused because of extraordinary circumstances.”). “Where, as here, a petitioner objects to a finding on an issue first raised in the decision of the Board rather than of the ALJ, the petitioner must file a petition for reconsideration with the Board to permit it to correct the error (if there was one).” *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185 (D.C.Cir.2006).

D. Motion to Remand

[12] As noted at the outset of this opinion, Fallbrook has requested the court to remand the case to the Board pursuant to Section 10(e) of the Act to allow the Board to reconsider its remedy of reimbursement of negotiation expenses in light of changed circumstances. The disposition of such a motion is within the “sound judicial discretion of the court.” *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 569, 70 S.Ct. 833, 94 L.Ed. 1067 (1950) (internal quotation marks omitted). Finding no merit in Fallbrook's request, we deny the motion.

The Board issued its decision and order in this case on April 14, 2014. On May 21, 2014, Fallbrook notified Fallbrook Healthcare District, from which it leased the acute care hospital, that it intended to terminate “nearly all core services” at that hospital. On December 20, 2014, Fallbrook terminated the provision of core services at the leased acute care hospital and terminated the employment of virtually all of its employees, including all the employees represented by the Union. From August to December of 2014, Fallbrook and the Union held several bargaining sessions concerning the effects of the closure. Apparently, Fallbrook declared impasse in the effects bargaining in December 2014, with no agreement having been reached by the parties. The Union has filed at least three unfair labor practice charges against Fallbrook arising from the Hospital's conduct during the effects bargaining. Opp'n of the NLRB to Mot. to Remand, Exs. C–E.

According to Fallbrook, the “integral changed circumstances” requiring remand are: (1) the hospital no longer employs any Union-represented employees; (2) given the closure of the acute care unit, the parties will never resume negotiations toward a collective bargaining agreement; and (3) the parties have reached what appears to be an interminable impasse over effects bargaining. Petitioner’s Mot. to Remand 11.

As noted above, the theory underlying Fallbrook’s motion to remand is that these purported changed circumstances are “material” because the Board’s decision to award negotiation expenses rested on two distinct and severable purposes: one to redress the effect of Fallbrook’s past misconduct on the Union, and one to provide the Union prospective strength at the bargaining table. Fallbrook claims that the latter purpose can no longer be served because of the closure of the acute care unit, and, therefore, a principal justification for the Board’s remedy has been undercut. This is a specious argument and we reject it.

Fallbrook concedes that the Board can—and did—impose a “make whole” remedy on behalf of the Union. Oral Argument at 4:05–4:09. Nonetheless, the Hospital contends that we can read into the Board’s decision a second remedial purpose to restore strength to the Union solely for *prospective* bargaining sessions with Fallbrook. However, Fallbrook concedes—and it must—that this purported second remedial purpose is not actually written anywhere in the Board’s decision; Fallbrook simply “believe[s] it’s implied.” *Id.* at 4:30. We disagree.

The plain truth here is that Fallbrook’s theory regarding the Board’s remedy is *740 unsupported by the language of the Board’s decision. The purpose of the Board’s order—which is plainly stated in its decision—was to reimburse the Union for resources wasted by attempting in vain to bargain with Fallbrook, *and to restore the status quo ante*—*i.e.*, to place the Union in the same position it was in before the parties began bargaining. *See* BLACK’S LAW DICTIONARY 1633 (10th ed.2014) (“status quo ante” defined as “[t]he situation that existed before something else (being discussed) occurred”). Nothing in the Board’s decision discusses prospective (*i.e.*, *future*) bargaining strength vis-à-vis Fallbrook in the manner suggested by the Hospital.

Furthermore, nothing in the Board’s decision suggests that the remedy can be *apportioned* in the manner urged by Fallbrook: some percentage to remedy the resources wasted by the Union

in past futile bargaining sessions with Fallbrook and some percentage for the Union’s prospective power in bargaining sessions yet to come with Fallbrook. Fallbrook’s argument makes no sense.

Under established case law, this court has the discretion to remand a case to the Board to hear additional evidence that is “material and [for which] there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board.” *See, e.g., L’Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1352 (9th Cir.1980) (quoting 29 U.S.C. § 160(e)). We agree with the Board that the “changed circumstances” alleged in Fallbrook’s motion are irrelevant because they do not mitigate the injury inflicted on the Union through the period of futile bargaining. Opp’n of the NLRB to Mot. to Remand 2. In addition, even taking Fallbrook’s “two prongs” theory of the Board’s remedy at face value, Fallbrook admits that it continued to bargain with the Union after the Board issued its decision and after the acute care unit had been closed. *See* Petitioner’s Mot. to Remand 2. Therefore, even if the Board’s decision contemplated “prospective” relief for the benefit of the Union in future bargaining with Fallbrook, such future bargaining did occur after the Board issued its order. Accordingly, even if we were to accept Fallbrook’s theory of the Board’s decision (which we do not), we would disagree with Fallbrook that the Board’s rationale for returning the Union to its status quo ante at the bargaining table was rendered moot. *See id.* at 13.

In sum, because we find no material changed circumstances necessitating a remand of the case to the Board pursuant to Section 10(e) of the Act, we deny Fallbrook’s motion.

III. CONCLUSION

For the reasons set forth above, Fallbrook’s petition for review and motion for remand are denied. The Board’s cross-motion for enforcement is granted.

So ordered.

All Citations

785 F.3d 729, 203 L.R.R.M. (BNA) 3111, 415 U.S.App.D.C. 130, 165 Lab.Cas. P 10,769

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.