

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MERCY HOSPITAL

and

Case 18-CA-155443

**SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE MINNESOTA**

MERCY HOSPITAL

and

Case 18-CA-163045

ANGEL MARIE ROBINSON, AN INDIVIDUAL

**GENERAL COUNSEL'S BRIEF IN REPLY TO RESPONDENT'S ANSWERING BRIEF
TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel respectfully submits this Brief in Reply to Respondent's Answering Brief to Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge in the above-captioned cases.

I. INTRODUCTION

This is not an overly complicated case, nor is it one where deferral is appropriate, as Respondent contends. In its lengthy Answering Brief, Respondent argues that the Administrative Law Judge appropriately deferred the Section 8(a)(5) and 8(d) allegations and that the deferred allegations lack merit. In making these assertions, however, Respondent employs the same strategy that it has used during both the litigation of this case and the

subsequent briefings, which is to confuse and obfuscate the issues, arguing that the case involves complicated contract interpretation questions that must be decided by an arbitrator. For example, in the Answering Brief Respondent devotes many pages to a discussion of irrelevant evidence including bargaining history dating back to 2010 and bids in other departments, while also mischaracterizing crucial record evidence regarding past practice and the arbitrator's award. In addition, Respondent mischaracterizes the 2015 arbitrator's award and Stillings' important role in the parties' bargaining relationship.

Addressing the merits of the allegations, Respondent contends that certain allegations are time-barred by Section 10(b) of the Act. Lastly, Respondent falsely claims that the General Counsel failed to plead the Section 8(d) allegations, and argues that the General Counsel should be precluded from proceeding on these theories. Incredulously, Respondent makes this claim despite the fact that Section 8(d) violations are clearly alleged in the consolidated complaint.

Respondent in its Answering Brief seems intent on distracting the Board's attention away from the real issues in this case, which involve a series of unilateral changes, contract modifications, and direct dealing in Mercy Hospital's Environmental Services Department ("EVS department"), all of which represent a stark departure from the parties' past practice, the arbitrator's award, and the requirements of the parties' collective-bargaining agreement. Most of Respondent's arguments are already addressed in General Counsel's Brief in Support of Exceptions; the focus of this brief will be to expose the Respondent's strategy of confusion and complication in order to direct the Board to the relevant facts in this case.¹

¹ Throughout this brief, the following references will be used: "GC Brief at ___" for General Counsel's Brief in Support of Exceptions; "R Brief at ___" for Respondent's Answering Brief; "Exh. ___" to refer to either Respondent or General Counsel's trial exhibits; "Tr. ___" to refer to the trial transcript; and "JD" to refer to the judge's decision.

II. ARGUMENT

A. Despite Respondent's Misleading Suggestions, Deferral is Inappropriate

i. Respondent's Answering Brief Presents Irrelevant Evidence of Bargaining History and Rebids in Other Departments

Respondent devoted a sizeable portion of its Answering Brief to a discussion of the parties' bargaining history dating back to 2010 and re-bids in other departments at Mercy Hospital. (R. Brief at 3 – 10.) This discussion proves to be a red herring, however, as none of this evidence is germane to any of the allegations in this matter. Indeed, although Respondent devotes pages to these facts, they do not add to Respondent's arguments. Here, regardless of past bargaining on rebids or the mechanics of prior rebids in this and other departments², Respondent and the Union agreed to include work assignments as part of the May 2015 rebid in order to implement the March 2015 arbitrator's award. (Tr. 41; GC Exh. 12.) Then, as Respondent admits and the judge found, mere days after the EVS employees participated in the May 2015 rebid and chose work assignments in seniority order, Crothall's manager Charles Stillings posted new positions in the Mother-Baby Center and began to switch employees assignments and hand out work assignments without regard for the posting or seniority requirements. By this conduct, Respondent undermined the arbitrator's award, violated the contract and years of past practice, as well as the National Labor Relations Act. (GC Brief at 15-16; JD 10:29-30; 11:9-10; 11:37-39; 12:12-13; 12:25-26.)

ii. Respondent Mischaracterizes Past Practice Evidence

In its Answering Brief, Respondent mischaracterizes critical past practice evidence regarding the posting and awarding of assignments and wrongly asserts that the General Counsel

² Record evidence suggests that work assignments were sometimes included in prior rebids. (Tr. 53, 54, 68, 83-84, 256, 270-71, 640-41; U Exh. 1, 2, 3.)

failed to acknowledge contrary past practice evidence (R. Brief at 34-35.) First, Respondent suggests that General Counsel’s theory rests on the belief that work assignments were listed on the face or job postings, while, in fact, this has never been the position of the General Counsel.³ (GC Brief at 15-16; GC Exh. 11, 29, 32.) Instead, the General Counsel argues that work assignments were always associated with a vacancy. In other words, any time a job was posted, the employees knew the assignment that went with that vacancy and then bid on that vacancy in seniority order.

Secondly, and contrary to the Respondent’s suggestions, the General Counsel’s Brief in Support of Exceptions does address Respondent’s past practice evidence, scant though it may be. Respondent’s past practice evidence consists of the testimony of a single witness – former EVS supervisor Shirley Bauer.⁴ (GC Brief at 15, fn. 5.) Bauer, a former EVS supervisor, testified regarding her long-ago experience in the EVS department, saying that she “believed” that EVS employees would ask her if a specific posting was for a specific work area, and if they asked “we always answered the same thing, we post for FTE, shift, and weekend assignment.” (Tr. 755.)

As hard as it is to believe that Bauer and the other EVS supervisors uniformly provided this robotic answer each time an employee asked about the assignment associated with a job posting, Bauer’s testimony simply cannot overcome the overwhelming past practice evidence showing that, prior to Crothall assuming management of the EVS department, each time an EVS

³ Troublingly, Respondent insinuates that the General Counsel’s employee witnesses were lying in their affidavits to the Region regarding this issue. (R. Brief at 35, fn. 32.) At trial, the employee witnesses clearly testified that work assignments were posted, as in each time an assignment was vacated, a posting went up. As required by Article 18, the EVS department’s job postings have always included the FTE, the shift, and the possible weekend rotation. (Tr. 122-23, GC 11.) Though the job or work assignment—whether it was 3 Heart, the Operating Room, or the Trash Route—was not listed on the face of the posting, the record evidence demonstrates that this information was readily available to the EVS employees. (Tr. 57, 124, 125, 282, 108, 166, 283, 416.)

⁴ The remaining Respondent witnesses, including Stillings, Watson, and the recruiters, testified that they had no knowledge of the past practice in the EVS department, explaining that they had not ever seen the pre-Crothall EVS job postings before and were unaware of how jobs were posted and awarded within the EVS department prior to Crothall’s arrival. (Tr. 542, 577, 643, 810; GC Exh. 11, 29.)

assignment was vacated, a job posting went up and that job—and the associated assignment—would be filled in seniority order. (GC Brief at 15; Tr. 126, 268, 282-83, 416; GC Exh. 11, 29, 32.)

Finally, Respondent’s suggestion—despite the lack of evidence—that all of the EVS employees have always simply bid on shifts, without regard to the assignment—simply defies logic. Both the documentary and testimonial evidence show that the EVS jobs widely varied depending on the department or floor that one worked in and the tasks associated with each assignment. This is not a situation where the manager tells employee A to go clean the toilets for the day and employee B to wash the floors. To the contrary, the evidence shows that the EVS work assignments were permanent and so varied that each work assignment needed a guide to go along with it. Even if one discounts the very strong past practice evidence, Respondent’s position that EVS employees never knew the assignments they were bidding on simply does not make sense.

iii. Respondent Mischaracterizes the March 2015 Arbitrator’s Award

In its Answering Brief, Respondent asserts “nowhere in the decision did Arbitrator Jacobs find or conclude that work assignments were synonymous with workweek schedules, or that Mercy was required under Article 14(F) (or any other contract provision) to post work assignments and award them on the basis of seniority.” (R. Brief at 14.) To the contrary, Arbitrator Jacobs did just that, finding unpersuasive Respondent’s assertion that it did not have to use seniority bidding because it was only changing work assignments. Note that Respondent argued that they were only changing work assignments, yet the arbitrator concluded “there was sufficient evidence to establish that the employer was *in effect* creating workweek schedules subject to the conditions of practicability or inconsistency of hospital management as discussed

here.” (GC Exh. 4, p. 20.) The arbitrator went on to find that there was “no evidence whatsoever to support a claim that seniority bidding is not practicable.” *Id.*

iv. Stillings’ Role in Respondent’s Labor Relations

In the Answering Brief, Respondent reasserts that the parties in fact have a long and productive bargaining relationship and minimizes the role that Stillings, an employee of Crothall Healthcare, has played in managing the EVS department. Respondent also suggests that HR Director Nancy Watson and HR Generalist Paula Wahlberg remain intimately involved in the department, as they have always been. (R. Brief at 27.) Yet, this is not borne out by the record evidence. Stillings, as a Crothall manager, hires EVS employees, requests that new positions are created in the EVS department, directs employee work, offers work assignments to different employees, and manages supervisors. In addition, he engaged in the conduct leading to these unfair labor practice charges. (Tr. 153, 396-97, 459, 472, 827; GC Exh. 18, 19; R Exh. 29.) Prior to Crothall assuming management of the department in 2013, managers and supervisors employed by Mercy Hospital performed these management duties. The evidence shows that Watson and Wahlberg, who are with Mercy Hospital’s human resources department, are not closely involved in the EVS department and have told the Union that they will back Stillings on his management decisions. (Tr. 52, 155; U Exh. 12).

B. Respondent’s Arguments on the Merits are Faulty

i. Respondent Wrongly Asserts that Certain Allegations are Time-Barred by Section 10(b)

In the Answering Brief, Respondent argues that the Union had clear and unequivocal notice that the Respondent was making the work assignment changes without posting them on the Allina Knowledge Network or otherwise assigning them on the basis of seniority, and was

discussing these changes in huddle meetings since at least 2013.⁵ (R Brief at 44.) Therefore, Respondent suggests that this conduct continued for years without challenge, and so any claim that Mercy has violated the Act on these actions is barred by the statute of limitations.

Respondent spends pages listing the multiple times that Stillings and Crothall made assignment changes without posting the vacancies or awarded them in seniority order. (R Brief at 11-13.)

Respondent repeatedly emphasizes that, in response to these changes, the Union “did not object or demand to bargain and no grievance or unfair labor practice charge was filed.” (R Brief at 11.)

Here, Respondent ignores three crucial concerns. First, the Union was in no position to object, demand bargaining, or file grievances or charges because, with one exception, ***Respondent did not notify the Union of the changes.***⁶ Though Respondent asserts that “there is no question that the Union was aware of Mercy’s conduct,” it does not argue that it notified the Union of all of the changes and there is no evidence that it did so. (R Brief. At 44.) Under these circumstances, where the employer has not notified the Union of the changes, and there is no evidence that the Union knew of or should have known of the changes, there is no “clear and unequivocal notice”, and there can be no Section 10(b) bar. See *Leach Corp.*, 312 NLRB 990, 991 (1993). Notably, “the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b).” *Id.* quoting *Chinese American Planning Council*, 307 NLRB 410 (1992). Respondent falls short of meeting this burden.

⁵ Under Section 102.46(d)(2), the answering brief should be limited to the questions raised in the exceptions and in the brief support thereof. It should be noted that the General Counsel’s exceptions do not address either Section 10(b) nor any claim that the Section 8(d) allegations were not properly pled. Therefore, Respondent’s arguments regarding 10(b) and Section 8(d) pleadings are inappropriately included in the Answering Brief. To the extent that the Board is inclined to consider these assertions, however, we respond herein.

⁶ Stillings testified that he gave out work assignments without posting just four times in 2013 and 2014, while the Union’s 2013 was pending. (Tr. 781, 782, 783.) In addition, Stillings testified that the Union was not notified of these four occurrences. (Tr. 838.) Even Respondent’s own Answering Brief notes that the hospital notified the Union of only the December 2014 changes. (R. Brief at 12.)

Secondly, the Union *has challenged this conduct* in the form of the 2013 grievance, which was only resolved many months later in the March 2015 arbitration award and May 2015 rebid. (Tr. 38, 40; GC Exh. 3, 4.) Certainly the Union’s grievance, which was pending throughout all of these changes, did not signify the Union’s assent to Respondent’s conduct. Finally, and importantly, the conduct alleged as violative in the consolidated complaint occurred after the May 2015 rebid, well within the Section 10(b) period.

ii. Respondent’s Claims that General Counsel Failed to Plead the Section 8(d) Allegations are Baseless

Respondent claims that the General Counsel failed to plead any Section 8(d) violations in its complaint and thus “due process bars adjudication of General Counsel’s unpled 8(d) theories.” (R. Brief at 24 fn. 23, 42-43.) Respondent also unfairly implies that the General Counsel intentionally hid the Section 8(d) theory from Respondent in its response to the Motion for a Bill of Particulars. *Id.* The Board should give short shrift to these patently false assertions.

First, one need only read the consolidated complaint to know that the Section 8(d) violations are properly pled in paragraphs 11(a) - (g) and paragraph 14.⁷ (GC Exh. 1(q).) Paragraph 14 clearly states: “By the conduct described above in paragraph 11, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees *within the meaning of Section 8(d) of the Act*, in violation of Sections 8(a)(1) and (5) of the Act.”

Next, Respondent insinuates that the General Counsel intentionally withheld information regarding the Section 8(d) violation in its response to Respondent’s Motion for a Bill of Particulars. (R. Brief at 42-43.) However, Respondent fails to recognize that the administrative law judge only ordered that the General Counsel identify the new positions Respondent

⁷ Paragraphs 11(a) – (d) set forth the specific conduct and state that this conduct modified either article 14(f) or 18 of the contract.

unilaterally created in the mother-baby center and the vacant positions Respondent unilaterally failed to post. (GC Exh. 1(o).) The General Counsel provided this information, and even followed up with a supplemental response when additional evidence came to light. (R. Exh. 24, 25.) The complaint alleges that by this same conduct, Respondent implemented unilateral changes, and modified the contract. Thus, Respondent's ominous suggestion is, again, entirely without merit.

In sum, the assertion that the General Counsel failed to plead any Section 8(d) violations is simply untrue and is yet another unhelpful attempt at distracting the Board's attention from the real issues at play here.

III. CONCLUSION

As set forth in General Counsel's Brief in Support of Exceptions, and contrary to the Respondent's attempts to obfuscate the issue, this is a straightforward case and deferral is inappropriate for several reasons. The parties' long and productive bargaining relationship has faltered since Crothall took over management of the EVS department, Respondent's animosity toward protected rights should preclude deferral, the dispute is not well-suited to arbitration, and this dispute is inextricably linked with allegations that are either non-deferrable or for which deferral was not requested.

We urge the Board to look beyond Respondent's mischaracterizations and irrelevant arguments to see this case for what it really is. Here, Mercy Hospital brought in a third party contractor to take over its EVS department and, ever since that time, that contractor has flouted the collective-bargaining agreement, and, following an arbitrator's award to remedy those contract violations, has implemented unlawful unilateral changes and contract modifications, while also engaging in direct dealing and issuing threats to employees who question its conduct.

Thus, it is respectfully submitted that the Board conclude, as requested in our Brief in Support of Exceptions that the judge erred in severing and deferring the Section 8(a)(5) allegations from Case 18-CA-155443 and find that Respondent violated the Act as alleged in the consolidated complaint.

Dated: July 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the General Counsel's Brief in Reply to Respondent's Answering Brief to Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge were served by electronic mail on the 15th day of July, 2016, on the following parties:

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