

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE EXECUTIVE SECRETARY**

<p>DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL, and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers,</p> <p>and</p> <p>NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED</p>	<p>08-CA-167313</p>
<p>HOSPITAL OF BARSTOW INC., d/b/a BARSTOW COMMUNITY HOSPITAL, COMMUNITY HEALTH SYSTEMS, INC., and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers</p> <p>and</p> <p>CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC)</p>	<p>31-CA-167522 31-CA-174673 31-CA-189833</p>

<p>BLUEFIELD HOSPITAL COMPANY, LLC d/b/a BLUEFIELD REGIONAL MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers,</p> <p>and</p> <p>NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), AFL-CIO</p>	<p>10-CA-168085 10-CA-151016 10-CA-153544 10-CA-174418 10-CA-177532</p>
<p>GREENBRIER, VMC, LLC d/b/a GREENBRIER VALLEY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers</p> <p>and</p> <p>NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), AFL-CIO</p>	<p>10-CA- 167330 10-CA-150997 10-CA-153336</p>

**CHSPSC, LLC AND COMMUNITY HEALTH SYSTEMS, INC.’S  
RESPONSE IN OPPOSITION TO GENERAL COUNSEL’S REQUEST  
FOR SPECIAL PERMISSION TO APPEAL  
ORDER OF ADMINISTRATIVE LAW JUDGE**

CHSPSC, LLC (“CHSPSC”) and Community Health Systems, Inc. (“CHSI”) (collectively, the “Corporate Respondents”), submit this Response in Opposition to the Request of Counsel for the General Counsel (“CGC” or “Counsel”) for Special Permission to Appeal Order of Administrative Law Judge and respectfully request an expedited ruling.

**I. INTRODUCTION**

This matter presents a simple solution to a complex problem consistent with controlling authority and revived historic precedent. At an appropriate stage of an already lengthy proceeding, the Corporate Respondents tendered a reasonable consent settlement offer by way of a carefully crafted guarantee that embraces the essence of the consent settlement agreement recently approved

by the National Labor Relations Board in *UPMC*, 365 NLRB 153 (2017). Unfortunately, CGC's myopically-focused pursuit of a single/joint employer finding and a broad corporate-wide remedy has clouded Counsels' vision. The untimely filing of the Special Appeal, to the surprise of the Respondents and Judge Carter, shows that CGC has lost sight of the General Counsel's ultimate obligation – the efficient pursuit of justice in a manner that effectuates the purposes of the Act. Whether by summarily rejecting the Special Appeal on procedural grounds or by denying it on the merits the same result obtains. The consolidated litigation will proceed as planned, conclude expeditiously, conserve limited public and private resources, with the Consent Settlement Agreement serving as an easily obtained appropriate mechanism to guarantee compliance.

**II. THE BOARD SHOULD SUMMARILY DENY THE REQUEST FOR SPECIAL APPEAL BECAUSE CGC FAILED TO FILE PROMPTLY AND WITHIN SUCH TIME AS TO NOT DELAY THE PROCEEDING.**

**A. CGC Filed the Request for Special Appeal Three Months After the Order Issued Without Justification for Delay While the Hearing Proceeded in the Absence of the Corporate Respondents.**

On April 19, 2018, Administrative Law Judge, Geoffrey Carter (“Judge Carter”), entered the Order Granting Renewed Motion for Consent Order and Partial Dismissal (the “Consent Settlement Agreement” or the “Order”) (Special Appeal, Exh. A) and dismissed the single/joint employer allegations against the Corporate Respondents. Judge Carter previously had set additional hearing dates for May 3 and 4, as well as June 12 and 13, 2018. The Corporate Respondents did not attend any additional days of hearing in May and June, 2018.

Judge Carter also scheduled hearing dates for August 1, 2, 7, 8, and 9, 2018. At no time during conferences or hearings since entry of the Consent Settlement Agreement did CGC remotely suggest that Counsel harbored the intent to pursue a special appeal to challenge the Order. Nevertheless, on July 18, 2018, at 6:44 p.m. EST, more than 90 days after the Order issued, CGC

served General Counsel's Request for Special Permission to Appeal Order of Administrative Law Judge (the "Special Appeal").

In response, on July 23, 2018, the Corporate Respondents filed a motion to cancel the August hearing dates "in large part because the General Counsel's request for special permission to appeal [Judge Carter's] April 19, 2108 order rais[ed] the question (among others) of whether [the Corporate Respondents] need[ed] to be present at any future hearings to defend their interests . . . ." (Exh. A, p. 3).

Judge Carter's succinct summary of the facts and circumstances that justified cancellation of the August hearing dates provides a compelling justification for summarily rejecting the Special Appeal:

The General Counsel's July 18<sup>th</sup> request for special permission to appeal my April 19 order in this case came as a surprise, seeing as how the General Counsel did not indicate, for a period of three months, that such an appeal might be forthcoming. Given the General Counsel's silence following my order, CHSPSC and CHSI understandably did not attend trial proceedings on May 3-4 or June 12-13, 2018, and made other commitments during the August 1-2 and 7-9, 2018 trial dates at issue here. Now that the General Counsel has decided to seek review of my April 19 order, and thereby potentially draw CHSPSC and CHSI back into the fray as alleged single/joint employers, I find that it is reasonable to provide CHSPSC and CHSI an opportunity to resume participating in the trial in this case to protect their interests. Accordingly, I shall grant Respondents' motions to cancel the August 1-2 and 7-9, 2018 trial dates in this case.

(Exh. A, p. 3).

CGC's Special Appeal contains 22 pages of text, including previously briefed arguments presented to Judge Carter. Undeniably, CGC could have prepared and filed the Special Appeal well before the May 3, 2018 hearing date. At a minimum, CGC could have notified the Parties and Judge Carter that a filing was imminent or even contemplated. CGC fails to offer any justification for this unreasonably tardy three-month delay.

**B. The Board Should Reject the Untimely Special Appeal on an Expedited Basis to Avoid Placing Otherwise Orderly Litigation into Procedural Chaos.**

The Special Appeal already has disrupted and will continue to disrupt procedural aspects and timeframes established by Judge Carter to ensure efficient administration of the proceeding. As to the prior hearings, the Corporate Respondents justifiably have missed several days of the proceeding, resulting in potentially irreparable prejudice. At minimum, the Corporate Respondents will need to assess the record and determine whether to recall witnesses to clarify issues, if any, affecting their interests and to otherwise address admitted evidence to which each may have raised meritorious objections. CGC's inexplicable three months of silence with respect to the Special Appeal has created potential due process issues which could have been entirely avoided or better managed with proper, timely action by the CGC.

Although Judge Carter cancelled the August hearing dates, he declined to postpone the trial indefinitely while the Board considers the Special Appeal. Instead, to ensure continued progress and "to mitigate any prejudice to parties and witnesses" Judge Carter scheduled the proceeding to resume on September 11, 12, 18, 19, and 20, 2018. Judge Carter cautioned that he would "not be inclined to cancel the September trial dates . . . unless, by August 15, 2018, the parties present mutually agreeable alternative trial dates . . . ." (Exh. A, p. 4). In establishing this new timeframe, Judge Carter, in a palpably understated manner, "recognize[d] that, at times, it has been a challenge to schedule trial dates in this case." *Id.* at fn. 5. Assuming this challenge continues and any of the scheduled September dates prove unworkable, counsel for the Corporate Respondents (along with the rest of the parties and their witnesses), may be required to make arrangements to abandon, alter, or rescheduled existing obligations on or before August 15, 2018.

Moreover, to the extent the Special Appeal remains pending as of the next trial date, the Corporate Respondents will be required to choose between appearing at hearings in which the

allegations against them have been dismissed or failing to appear at all in a case where CGC has expressed a clear intent to pursue the Corporate Respondents with vigor.

**C. Board Regulation and Well-Established Board Law Support Expedited Denial of the Special Appeal Because of Prejudice and Delay.**

Given parties' rights to file post-hearing exceptions and appeals, the Board limits interlocutory special appeals. Special appeals must be circumscribed because they can interfere with ongoing proceedings, resulting in delays and prejudice. Hence, the Board has curbed its acceptance of special appeals via regulation and decisional rulemaking. Those limitations firmly support expedited denial of the Special Appeal.

With respect to regulation, “[R]equests to the Board for special permission to appeal from a ruling of the . . . Administrative Law Judge . . . *must be filed in writing promptly and within such time as not to delay the proceeding . . .*” 29 CFR § 102.26 (Emphasis added). The special permission, therefore, must be pursued both promptly and in a manner that does not delay the hearing. While the Board has not strictly defined the term “promptly,” Merriam-Webster defines it as “1: being ready and quick to act as occasion demands; and 2: performed readily or immediately.” CGC was neither quick to act as the occasion of dismissal of the single/joint employer allegations demanded nor did CGC perform readily or immediately.

The Board takes a practical approach when applying its special appeal regulation. “Although the term ‘promptly’ is not specifically defined, common sense dictates that it be defined by the circumstances of each particular case.” *Lewis Foods of 42<sup>nd</sup> St., LLC, A McDonalds Franchise & McDonalds USA, LLC, Joint Employers, et al.*, 02-CA-093893, *et al.*, 2015 WL 1815276, at fn.2 (April 21, 2015). The term “promptly” therefore, should incorporate, in part, aspects of preparatory burden. When appeal preparation necessarily takes substantial time, a longer period perhaps could be deemed “prompt.” CGC labored under no such burden with this

Special Appeal. Absent such extenuating circumstances, the scope of “promptly” within the meaning of 29 CFR § 102.26 should not embrace a delay of three months.

In addition, CGC’s Special Appeal fails to meet the second part of 29 CFR § 102.26. Irrefutably, the late filing already has caused a “delay [in] the proceedings” as shown by cancellation of the August hearing dates. A prompt filing with a request for an expedited ruling would have permitted the parties to rearrange hearing dates instead of conducting proceedings during a time within which the Corporate Respondents had no reason to participate. Instead, the Corporate Respondents must now contemplate whether to return to various hearing locations to supplement the record and recall witnesses. Cancellation of the August hearing dates also shows why a request for special permission to appeal during ongoing hearings involving multiple respondents at multiple locations should be the subject of early disclosure and filing.<sup>1</sup>

In a case decided as recently as March 18, 2018, the Board denied the CGC’s request for special permission to appeal an October 25, 2017 oral ruling and a November 24, 2017 written order when the CGC filed the request on February 9, 2018. *Hampton Roads Shipping Assn.*, 05-CA-176015, 2018 WL 1325100, at \*1 (Mar. 13, 2018). The request, filed less than two-and-a-half months after the written order, was not made “promptly,” as required by 29 CFR § 102.26. *Id.*

*Hampton Roads Shipping Assn.* involved pre-hearing rulings regarding the scope of evidence and allegations to be heard at hearing. Despite several pre-hearing teleconferences, CGC never sought clarification of the rulings or indicated a special appeal would be filed. Instead, CGC filed the special appeal after multiple days of the hearing occurred. Accepting the special appeal could have resulted in recalling witnesses and presenting additional proof, thus delaying the

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<sup>1</sup> With seven respondents at different locations, multiple CGC and union counsel, scheduling hearings alone can be challenging. Disclosure and cooperation are necessary for managing litigation of this nature in order to effectuate the purposes of the Act.

proceedings.<sup>2</sup> The Board panel unanimously denied the appeal in summary fashion, without substantial explanation, on “timeliness grounds” pursuant to 29 CFR § 102.26. The same approach should be expeditiously applied to CGC’s Special Appeal, thus allowing Judge Carter to complete the administrative hearing in a timely, orderly fashion.

The Board also has emphasized interlocutory prejudice associated with delayed special appeals as potential grounds for denial. *CSC Holdings, LLC & Cablevision Sys., New York City Corp. & Commc’ns Workers of Am., AFL-CIO*, S 29-CA-134419, 29-C, 2015 WL 5245077, at \*1 fn. 2 (Sept. 9, 2015) (deeming filing within 26 days timely, in the absence of a showing of prejudice). The prejudice associated with CGC’s delay in this case is manifest. CGC’s non-disclosure and delay caused the Corporate Respondents to miss several days of hearing, raising substantial due process concerns.

The Corporate Respondents, who no longer face single/joint employer allegations, had no reason to follow the case over the intervening three months, during which time various rulings occurred and multiple witnesses testified. The Special Appeal, if granted, will continue to derail the hearing process and only encourage future lengthy delays by CGC. Conversely, an expedited denial will restore normalcy with respect to hearing administration, after which the Board will be fully capable of rectifying errors, if any, via the exceptions process.

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<sup>2</sup> Exh. B, Respondents’ Consolidated Memorandum in Opposition to General Counsel’s Request for Special Permission to Appeal and Appeal of Rulings of the Administrative Law Judge in *Hampton Roads Shipping Assn.*

### III. THE BOARD SHOULD DENY THE SPECIAL APPEAL BECAUSE JUDGE CARTER DID NOT ABUSE HIS DISCRETION BY ENTERING THE CONSENT SETTLEMENT AGREEMENT.

Judge Carter's decision to enter the Consent Settlement Agreement reflects faithful adherence to Board policy emphasizing and favoring settlement. This policy functions by effectively conserving administrative and taxpayer resources while promoting industrial peace.<sup>3</sup> The Consent Settlement Agreement's single/joint context favored its entry. Single/joint employer findings serve the purpose of guaranteeing a remedy through joint and several obligations. *Emsing's Supermarket, Inc.*, 294 NLRB 302 (1987). As Judge Carter correctly determined, a "proposed remedial guarantee will serve as a reasonable alternative to a finding of single/joint employer status...." (Order at p. 6).

#### A. Judge Carter Did Not Abuse His Discretion by Entering the Consent Settlement Agreement Based on *UPMC*.

In *UPMC*, 365 NLRB 153 (2017), the Board recently approved the adoption of a consent settlement agreement resolving single/joint employer allegations and recognized a corporate respondent's proper role in guaranteeing final remedies. In so doing, the Board restored the application of *Independent Stave*, 297 NLRB 740 (1987), to consent settlement agreements which may be entered despite the objections of other parties to the proceedings.

*UPMC* involved a fact pattern and procedural history bearing striking similarities to the instant case. In *UPMC*, multiple hospitals faced numerous allegations, together with single employer allegations against their corporate affiliate/parent. The underlying unfair labor practice allegations in *UPMC* were, on balance, far more troubling than the allegations in this matter.

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<sup>3</sup> *Independent Stave*, 287 NLRB 740, 743 (1987); *Poole Foundry & Machine Co. v. NLRB*, 192 F. 2d 740, 742 (4th Cir. 1951); *Hotel Holiday Inn de Isla Verde v. NLRB*, 723 F.2d 169, 173 fn. 1 (1st Cir. 1983); *Combustion Engineering*, 272 NLRB 215 (1984); *Coca-Cola Bottling Co.*, 243 NLRB 501, 502 (1979); *Texaco, Inc.*, 273 NLRB 1335, 1336-1337 (1985).

Twenty-two cases involving more than fifty alleged unfair labor practices had been consolidated, with alleged multiple instances of surveillance; multiple threats; multiple interrogations; photographing union activity; disparate enforcement of solicitation policies on several occasions; supporting a company-sponsored labor organization; four separate employee discharges for union activity; and nine separate instances of adverse disciplinary actions for union activity. *UPMC*, 2014 LRRM (BNA) 171779 (NLRB Div. of Judges).

As in this case, the administrative law judge in *UPMC* segmented the proceedings, with single employer allegations to be heard in the final hearing phase of the case.<sup>4</sup> Prior to commencement of the single employer phase, *UPMC* moved to dismiss the single employer allegations against it based on a simple offer to guarantee remedies for substantiated unfair labor practices. Judge Carissimi, and later the Board, entered the basic terms of that offer, with minor modifications. In so doing, the Board applied *Independent Stave* factors:

1. *General* - Single-employer status does not constitute an unfair labor practice.<sup>5</sup> It “provides a backup party—or a potential alternate party—that is responsible for providing whatever relief is ultimately ordered.” *UPMC* at p. 7. *UPMC* offered a guarantee which was “effectively” this “outcome.” *Id.*
2. *Independent Stave Factor 1* – “[O]pposition is ‘an important consideration weighing against approval,’ *but* it is not determinative . . . .” *UPMC* at p. 7. Union and General Counsel consent “is not the decisive factor to be weighed.” *Id.*, quoting *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 217.
3. *Independent Stave Factor 2* - The “reasonableness” factor is “the most important consideration when evaluating a consent settlement agreement.” *UPMC* at p. 8. The *UPMC* consent decree was reasonable because: (a) *UPMC*’s remedial guarantee was “as effective as a finding of single

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<sup>4</sup> Judge Carter segmented the proceedings via hearing location, rather than bi-furcation, deferring proof on single/joint issues until the Nashville phase of the proceedings, where the Corporate Respondents are located.

<sup>5</sup> Similarly, CGC has not alleged the Corporate Respondents engaged in any unfair labor practices, nor have the Corporate Respondents been defending against any. The *UPMC* analysis directly applies to the Consent Settlement Agreement because it resolves single/joint employer allegations.

employer status;” (b) the single employer allegations meant UPMC was not alleged to be a wrongdoer; (c) the order eliminated risk while providing an additional party to help guarantee a remedy; and (d) such an order “greatly expedites” the resolution of the proceedings because it eliminates a complex phase of the case. *Id.* at 8-9.

4. *Independent` Stave Factors 3 and 4* - “[T]here are no allegations of fraud, coercion, or duress, and there is no evidence that UPMC has a history of violating the Act or has breached previous settlement agreements resolving unfair labor practice disputes.” *UPMC* at 7-8.

CGC concedes that the Consent Settlement Agreement, with its guarantees, “largely tracks” the one approved by the Board in *UPMC*. (Special Appeal at p. 7). As in *UPMC*, the Corporate Respondents offered the Consent Settlement Agreement prior to the commencement of the single/joint phase of the proceeding, thus averting significant costs and delay. The guarantee in the Order equates to a single/joint outcome because it provides, without the need for further litigation, a *de facto* single/joint remedy. Judge Carter agreed by issuing, in his well-reasoned discretion, a thorough, detailed Order.

Judge Carter’s Order, in pertinent part, followed the Board’s *UPMC* analysis, repeatedly relying on its reasoning and express language. As to three of the *Independent Stave* factors, no material dispute or disagreement existed. With respect to factor one, per *UPMC*, CGC’s and Charging Party’s opposition were not “decisive or determinative . . . .” (Order at p. 6). Factor three favored adoption. Allegations of fraud, coercion and duress did not exist. (Order at p. 8). Factor four likewise favored adoption. CGC conceded a lack of recidivism for both Corporate Respondents. (Order at p. 8).<sup>6</sup>

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<sup>6</sup> Despite this concession, CGC persists in listing proceedings in which the Corporate Respondents never appeared. The Corporate Respondents are not recidivists, having never been held by the Board to be single or joint employers. Moreover, as will be presented by Respondent Hospitals in their opposition to the Special Appeal, the handful of adverse Board rulings for the five hospital entities involved in this case, none of which involved the Corporate Respondents, have been incorrectly characterized. Even if Respondent Hospitals had extensive, adverse records before the Board, which they do not, recidivism for the Corporate Respondents has never been established and cannot now be established *nunc pro tunc*. This absence of recidivism supports the Corporate Respondents, having

With substantial analysis, again following the Board’s reasoning in *UPMC*, Judge Carter exercised his discretion to accurately and firmly find that *Independent Stave* factor two favored adoption. The Consent Settlement Agreement was “reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation.” (Order at p. 8). Judge Carter found as follows:

Much of the Board’s analysis of the settlement agreement in *UPMC* directly applies to the proposed consent settlement agreement at issue here. I find that CHSI and CHSPSC’s proposed settlement agreement *clearly removes the risk* that those entities might wind up with no liability for any unfair labor practices that Respondent Hospitals may have committed. Similarly, I find that the proposed agreement clearly would *expedite the resolution of this case* by eliminating the need to litigate the single/joint employer allegations concerning CHSI, CHSPSC and their relationships to each of the five Respondent Hospitals. I also find, contrary to the objections raised by the General Counsel and the Charging Party, that CHSI and CHSPSC’s proposed remedial guarantee will serve as a *reasonable alternative* to a finding of single/joint employer status, and that the proposed remedial guarantee is *reasonable under the circumstances* of this case (including the lack of any complaint allegations that CHSI or CHSPSC committed any unfair labor practices).

(Order at p. 6) [Emphasis added]. Based on the foregoing, including Judge Carter’s cogent analysis of each *Independent Stave Factor*, as recently applied in the analogous *UPMC* case, the Consent Settlement Agreement that closely tracks Board adopted *UPMC* language should not be disturbed as an abuse of discretion.

**B. CGC’s Challenges to the Reasonableness of the Consent Settlement Agreement Have No Merit.**

Each of CGC’s arguments incorrectly challenge the reasonableness of the Consent Settlement Agreement. Predictably, CGC fails to acknowledge the remedial significance of the guarantees provided by the Order. First, the agreement provides financial guarantees. CGC seeks backpay and interest in amounts exceeding \$3 million arising from alleged unfair labor practices

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never previously been found to have violated the Act as single or joint employers, either with Respondent Hospitals or with any other affiliated entity.

at Respondent Hospitals Bluefield and Greenbrier. (CGC CHS II Damage Computation, attached as Exh. C). The Order provides a guarantee for all monetary remedies that might be ordered against each Respondent Hospital.<sup>7</sup> This guarantee eliminates the risk of CGC moving forward unsuccessfully in the single/joint phase of the case, while providing a financial outcome identical to that which successful litigation of that hearing phase would achieve. Hence, the financial portion of the Consent Settlement Agreement is reasonable.

Second, the Consent Settlement Agreement effectively guarantees non-monetary remedies. The Complaint presents alleged violations concentrated at Respondents Bluefield and Greenbrier, both in terms of their number and seriousness, including surface bargaining allegations. (Complaint ¶¶ 20-24, 37-49).<sup>8</sup> Respondents Bluefield and Greenbrier remain affiliated with the Corporate Respondents. The efficacy of the non-monetary guarantees with respect to these hospitals is not subject to dispute.

With respect to non-monetary remedies at Respondent Hospitals Affinity, Barstow, and Watsonville, the parties acknowledge these facilities are no longer affiliated with the Corporate Respondents. Were these Respondent Hospitals to be the subject of adverse findings on the underlying unfair labor practices, the non-monetary relief would primarily consist of notices,

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<sup>7</sup> CGC's statement that the "named Corporate Respondents, among other entities, are not held responsible for any remedies ordered," is simply false. (Special Appeal at p. 3). A guarantee is a Board-approved form of responsibility.

<sup>8</sup> Greenbrier allegedly: impliedly threatened union members with job loss if they refused to accept promotions, dealing directly with employees (Complaint ¶¶ 20, 37); changed a policy, resulting in more PTO use (Complaint ¶ 38); removed relief charge nurse duties in two units (Complaint ¶ 38); changed the method for obtaining work in the Cath Lab (Complaint ¶ 38); disciplined and discharged an employee, refusing to bargain and respond to an information request about it (Complaint ¶¶ 39, 40); and failed to bargain in good faith (Complaint ¶¶ 41, 42). Bluefield allegedly: delayed a wage increase and told employees they did not receive wage increases because of the union (Complaint ¶¶ 21, 23); told employees not to discuss an ongoing disciplinary investigation (Complaint ¶ 22); subcontracted CRNA work and failed to bargain about it (Complaint ¶¶ 23, 44); suspended an employee twice, failed to respond to an information request about it, and failed to bargain about the suspensions (Complaint ¶¶ 43, 47); delayed or failed to fully respond to three information requests (Complaint ¶¶ 45, 46, 48); and failed to bargain in good faith (Complaint ¶¶ 49).

information responses, and a policy rescission at Barstow.<sup>9</sup> (Special Appeal, Exh. B). Respondent Affinity has closed; therefore, non-monetary relief would consist of notice mailing. If the Corporate Respondents were to litigate and become subject to single/joint findings with respect to these allegations, they would be obliged, to the best of their ability, to effectuate those remedies. The Corporate Respondents have so obliged themselves, thus providing non-monetary relief at divested hospitals equivalent to that which would be obtained if the single/joint issue were to be litigated. The Corporate Respondents have provided a reasonable, non-monetary guarantee to resolve these allegations. As explained below, none of CGC's challenges to reasonableness support a conclusion that Judge Carter abused his discretion.

**1. The Consent Settlement Agreement Reasonably Applies to the Proper Parties.**

CGC raises several specious challenges to the scope of the Consent Settlement Agreement concerning its coverage and applicability to the parties. First, rather than accepting a guarantee which Judge Carter deemed applicable to CHSI, CGC makes a curious argument against its applicability. (Special Appeal at pp. 14, 16). CHSI is a company which holds stock and has no employees. (Affidavit of Ben Fordham, attached as Exh. 1 to Special Appeal Exh. D). It accepted the Consent Settlement Agreement. By appointing CHSPSC as its agent to effectuate compliance, CHSI joined in the Order and its *UPMC* guarantee.

Judge Carter properly addressed this issue in the Order, as follows: "CHSI has agreed to be bound by the settlement agreement, and has designated CHSPSC as its agent for purposes of compliance. That arrangement is sufficient, particularly given the General Counsel's assertion in

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<sup>9</sup> Affinity, Barstow, and Watsonville allegedly implemented benefit plans and did not respond to information requests (Complaint ¶¶ 29, 30, 31, 34-36). Affinity and Barstow allegedly transferred 401(k) assets to an identical plan which resulted in a brief blackout period. (Complaint ¶¶ 29, 31). Barstow allegedly changed a disciplinary policy about overtime, resulting in oral or written warnings, about which Barstow did not bargain or respond to an information request, and it implemented an allegedly unlawful personnel form. (Complaint ¶¶ 19, 31, 32, 33).

the complaint that CHSPSC is a wholly owned subsidiary of CHSI (and CHSI's admission that CHSPSC is an 'indirect subsidiary' of CHSI)." (Order at p. 6). CGC's protests to the contrary lack the support of cogent argument.

Next, CGC argues deficiency because the Consent Settlement Agreement does not expressly bind QHCCS, LLC ("QHCCS") and Quorum Health Corporation ("QHC"), neither of which are parties to this case. (Special Appeal at pp. 15-17, Order at p. 5, fn. 5). However, *Independent Stave* does not require inclusion of non-parties to render a consent settlement agreement reasonable. With or without the Consent Settlement Agreement, the status of QHCCS and QHC as successors to the guarantee or as single/joint employers with Respondent Hospitals can be heard in compliance, if necessary.<sup>10</sup> The Consent Settlement Agreement resolved specific single/joint allegations made against the Corporate Respondents to the fullest and most reasonable extent practicable. Such an order should not be disturbed because it does not resolve non-party successorship allegations.

Once again, rather than accepting Judge Carter's clear ruling that compliance provides the appropriate mechanism to establish successorship, CGC offers a curious argument against it. In the Order, Judge Carter cogently, rationally, and fully addressed the concerns now raised by CGC about QHC and QHCCS. "[T]here is no basis for requiring QHC and QHCCS to be included in the consent settlement agreement. QHC and QHCCS were severed from the case in July 2017 (since they were pled in as alleged *Golden State* successors), and *any liability that those entities*

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<sup>10</sup> Despite the severance of QHCCS and QHC from this case, CGC wants to litigate the issue now, inaccurately describing the record as establishing QHCCS is the "replacement" for CHSPSC, when in fact the record simply indicates QHCCS "serves" three of the hospitals in the case." (Special Appeal at p. 6, Exh. E, Tr. 23-24). Moreover, CGC falsely, incorrectly describes CHSI's lawful divestiture of hospitals as an act whereby "CHSI re-distributed its hospitals and moved Affinity, Barstow and Watsonville from its wholly-owned subsidiary Respondent CHSPSC to Respondents QHC and QHCCS."

*ultimately may or should have can be litigated, to the extent necessary, in a compliance proceeding.*” (Order at pp. 6-7) (Emphasis added).

Both Judge Carter and the Corporate Respondents reject CGC’s suggestion that the Order’s “compliance rights” language precludes successorship or otherwise improperly weakens the Consent Settlement Agreement. The Order imposes guarantor status, then includes language to comport with divestiture reality by making CHSPSC’s ultimate remedial actions subject to its “ability to effectuate non-monetary remedies for divested Respondent Hospitals.” Judge Carter and the Corporate Respondents understood, based on the parties’ briefing, arguments, and the language itself, exactly what it meant – the language extends to full limits of the relief the Corporate Respondents could eventually effectuate. The Consent Settlement Agreement remains reasonable because no amount of language adjustment or litigation can change corporate realities.

CGC’s successor argument, perhaps more than any other, reveals a zeal for litigation and barriers to settlement that can lead to misapplied resources. The appropriate remedies for substantiated unfair labor practices, if any, with respect to Affinity, Barstow, and Watsonville will not be unduly burdensome. But if the need to litigate successorship arises, CGC retains every right to address the issue. If established, the non-monetary guarantee language will be fully binding upon QHCCS and QHC within the parameters and contours of *Golden State Bottling* and its progeny. Meanwhile, the successorship issue presents no barrier to the reasonableness of the Consent Settlement Agreement. To the contrary, CGC’s strained attempt to convince the Board otherwise helps make the case for ending litigation via *Independent Stave* and *UPMC*.<sup>11</sup>

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<sup>11</sup> Similarly, CGC states time and again that a resolution of this litigation will have “far reaching effects” on other litigation between some of the parties, without once stating what those effects might be. (Special Appeal at p. 4, 22). Respectfully, speculation about a different case should not be considered by the Board.

Finally, CGC presents a series of inaccurate statements about parties in the instant case, as compared to the parties in *UPMC*, in an attempt to distinguish *UPMC*. The first full paragraph on page 17 of the Special Appeal contains a remarkable series of misstatements, reported and responded to, *seriatim*, below.

- “In *UPMC*, the relationship between the corporate parent and subsidiary was undisputed. In contrast, the Corporate Respondents deny any single and/or joint employer relationships with the Respondent Hospitals.”

Response: The instant case is situated identically to *UPMC*, insofar as the corporate parents and subsidiaries dispute single/joint status, which would have necessitated a lengthy, costly hearing, but for the consent settlement agreement. For this reason, consent settlement agreements entered in *UPMC* and in this case.

- “The General Counsel has been prohibited from adducing such [single/joint] evidence into the record....”

Response: In both *UPMC* and the instant case, the hearings occurred in segments, with single/joint evidence to be heard last. This sequencing allowed the entry of consent settlement agreements in both cases, thus saving agency resources. Nothing untoward occurred in either of these parallel cases.

- “[T]he collective Respondents have been permitted to skirt the General Counsel’s trial subpoenas for documents proving these relationships.”

Response: Again, the cases are substantively parallel. No Respondent has skirted anything. CGC has not yet propounded broad-based single/joint subpoenas in this case. Had the Consent Settlement Agreement not been entered, those subpoenas would no doubt have been forthcoming. In *UPMC*, the subpoenas did issue, resulting in disputes and an enforcement action. In the instant case, the Consent Settlement Agreement simply entered prior to those disputes.

- “In *UPMC*, the parent *UPMC* and the subsidiary Shadyside stipulated to their relationship resulting in the Board’s finding that the consent agreement in that case was reasonable as the stipulation itself was as effective as a single employer finding.”

Response: As in *UPMC*, the parties similarly have no dispute about material aspects of the relationships between Respondent Hospitals and the Corporate Respondents. CHSI indirectly owned Respondent Hospitals. CHSPSC served Respondent Hospitals. Here and in *UPMC*, single/joint status was denied. In

UPMC, a guarantee was entered. In the instant case, a guarantee was entered. CGC's argument that some stipulation in *UPMC* distinguished it from the instant case misses the mark.

CGC's arguments concerning the parties and non-parties to the Consent Settlement Agreement and the rights and obligations it establishes provide no basis for challenging Judge Carter's exercise of discretion.

## **2. Unpled Assertions of Corporate Respondent Direct Participation Do Not Undermine the Reasonableness of the Consent Settlement Agreement.**

CGC argues Judge Carter abused his discretion because CGC has not had the opportunity to prove the Corporate Respondents engaged in direct participation violations of the Act. However, as in *UPMC*, CGC presented no direct allegations in the Complaint, nor were the Corporate Respondents defending against any such allegations. CGC's hope that someday more allegations might be pled or proven does not support the Special Appeal. As explained below, CGC's argument of premature entry actually favors the Corporate Respondents. Early entry of the Order firmly supported its adoption.

Judge Carter entered the Consent Settlement Agreement at the proper time in the proceedings. Single/joint allegations had been pled, without allegations of Corporate Respondent participation having been asserted. A complex, lengthy hearing on the single/joint issues had not yet commenced.<sup>12</sup> If the Corporate Respondents had presented the Consent Settlement Agreement

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<sup>12</sup> The single employer analysis would have been fact intensive and would necessarily have included a review of CHSPSC and CHSI's alleged ownership, operations, management, and labor relations connections with each of the Hospital Respondents. *Dow Chemical Co.* 326 NLRB 288 (1998); *Masland Industries*, 311 NLRB 184, 186 (1993). No one factor would be controlling, and a single employer relationship would depend on "all the circumstances." *Id.* Litigating single/joint status between the respective Corporate Respondents (a services company and a stock holding company) and five different, stand-alone, acute care hospitals, located in different parts of the country, one of which has closed, would have been a substantial undertaking. When adding joint employment to the mix, given uncertainty and complexity with respect to that area of law, a minimum delay of six months would have been inevitable.

after the single/joint phase was well underway, denial of its entry would have been appropriate. Filing at that time would not have resulted in cost savings, the settlement's primary purpose.

If one were to accept CGC's argument, consent settlement agreements could never be entered. Parties who oppose settlement will, of course, always want the opportunity to propound subpoenas and/or will hope on cross-examination to develop facts to support new claims. CGC, however, chose to plead allegations of vicarious liability via single/joint employer status. Under the circumstances, facing protracted, costly proceedings, Judge Carter had every right and likely the duty under *UPMC* to enter a guarantee Order resolving the vicarious liability allegations pled.

CGC cites Judge Eleanor Laws' ongoing management of consent order issues in the other pending litigation between most of the parties in this case. (Special Appeal at 12). Once again, the point made by CGC supports the Corporate Respondents. CGC admits having pled direct participation allegations in the case before Judge Laws. Judge Laws chose to defer consideration of a proffered consent order until she rules on the direct allegations. (Special Appeal at 12). In the absence of such allegations in this case, Judge Carter appropriately entered the Order as having settled the pled vicarious liability issues.

### **3. Contrary to CGC's Protests, the Divestitures, and the Affinity Closure Support the Reasonableness of the Consent Settlement Agreement.**

CGC argues the Consent Settlement Agreement should not have been entered because CHSPSC could, depending on compliance, be "free of liability" with respect to the allegations at Respondent Hospitals Barstow, Watsonville, and Affinity. (Special Appeal at p. 15). CGC's argument, once again, supports entry of the Consent Settlement Agreement. A former single/joint employer would naturally encounter great difficulty affecting the actions of its *former affiliates*. This difficulty applies to any order, whether such order follows settlement or litigation.

In determining reasonableness, one must examine the burdens and benefits of further litigation. The litigation burden was heavy. The parties faced litigating single/joint status between CHSI and three different, divested hospitals in different parts of the country, single/joint status between CHSPSC and those three divested hospitals, and single/joint status between CHSI and CHSPSC. The litigation benefit was negligible. No amount of litigation could change the inherent difficulty associated with compelling former affiliates to act with respect to non-monetary remedies. Moreover, at Affinity, a closed hospital, mere notice mailing hung in the balance in terms of a remedy. The single/joint outcome with respect to non-monetary remedies for specific alleged unfair labor practices allegedly committed by the divested Hospital Respondents would therefore essentially have been the same, with or without litigation.

The Board has recognized that changed circumstances can undermine remedial significance, rendering further litigation contrary to the purposes of the Act. *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976)(rescinding a rule constituted “voluntary action” which should be “encouraged,” constituting a substantial remedy based on “subsequent conduct”); *American Federation of Musicians, Local 76*, 202 NLRB 620 (1973)(subsequent conduct, such as withdrawing a threat, makes a case “for all practical purposes, moot . . . .”); *Kentile, Inc.*, 145 NLRB 135, 137 (1963)(litigating a bargaining unfair labor practice charge filed by one union, after another union’s election, “would not effectuate the policies of the Act.”); *Benvenuti, Rene*, 107 NLRB 905 (1954)(resumption of bargaining, with a successor agreement achieved, renders earlier bargaining charge subject to dismissal because litigating “would not effectuate the purposes of the Act . . . .”).

Courts have also recognized that labor litigation should be curtailed when changed circumstances render remedies impractical. *NLRB v. Grace Co.*, 184 F.2d 126 (8th Cir.

1950)(petition for enforcement of a bargaining order at a time the employer had closed its plant – an employer can’t be punished for its “failure to do the impossible . . . .”); *NLRB v. Globe Security Services*, 548 F.2d 1115 (1977)(the Board may not enforce an order requiring a “vain and useless act” of ordering an employer to bargain with a unit which no longer exists).<sup>13</sup> Changed circumstances support the reasonableness of the Consent Settlement Agreement.

**4. CGC’s Request for a Nationwide Cease and Desist Order Does Not Render the Consent Settlement Agreement Unreasonable.**

CGC strenuously argues that the request for a corporate-wide remedy bars a UPMC-based Consent Order. For several reasons, this argument lacks merit. First, CGC’s request for corporate-wide relief is inconsistent with the relationships pled in the Complaint. The Complaint alleges relationships and unfair labor practices with only five hospitals out of more than 200 entities associated with the Corporate Respondents. (Affidavit of Ben Fordham, attached as Exh. 1 to Special Appeal Exh. D). It involves approximately 250 employees out of more than 120,000 employees affiliated with the Corporate Respondents. *Id.* It involves alleged unfair labor practices concentrated at only two hospital entities, Bluefield and Greenbrier, in two small units out of forty-six bargaining units within affiliated entities. *Id.* (Complaint ¶¶ 20-24, 37-49). CGC nevertheless persists with efforts to bootstrap a nationwide cease and desist order to unfair labor practice allegations primarily at two current corporate affiliates, potentially leapfrogging across employer

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<sup>13</sup> *NLRB v. McMahon*, 428 F.2d 1213, 1214 (9th Cir. 1970)(refusal, on grounds of mootness, to enforce bargaining order directed to a defunct organization); *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883, 886 (D.C. Cir. 1970)(order enforced only to the extent that sale of business has not made performance impossible); *NLRB v. Schnell Tool & Die Corp.*, 359 F.2d 39, 44 (6th Cir. 1966)(Board must determine that order is enforceable in practice before seeking judicial enforcement); *NLRB v. Reynolds Corp.*, 168 F.2d 877 (5th Cir. 1948)(cease and desist parts of Board order cannot be enforced where the employees at issue were no longer employed by the employer).

entities to bind over forty other bargaining relationships. An unprecedented request of this nature does not support disturbing the Consent Settlement Agreement.<sup>14</sup>

Second, the request for a nationwide cease and desist order lacks a sufficient unfair labor practice underpinning in the Complaint. The Complaint does not assert the Corporate Respondents engaged in unfair labor practices nationwide. The Complaint does not request specific relief in the form of corporate-wide rescission of policies, posting, or other specific relief within potential single or joint employment relationships not named in this case. Rather, the Complaint alleges single/joint liability for specific unfair labor practices at specific, named hospital entities. A nationwide remedial request not tied to alleged nationwide unfair labor practices, disconnected from the specifically pled single or joint relationships, equates to an effort to seek punitive, unsupported remedies. Such a request cannot bar entry of the Consent Settlement Agreement.

Third, the Board's remedial authority has limits which apply here. The Supreme Court has indicated the Board should not issue a remedy beyond the relationships pled in a complaint. *Communications Wkrs. of America AFL-CIO v. NLRB*, 362 U.S. 479, 480 (1960)(cease and desist order requiring union to refrain from engaging in strike violations with "any other employer" was invalid); *Carpenters Local 60 (Mechanical Handling) v. NLRB*, 365 U.S. 651, 655 (1961)(order requiring disgorgement of dues beyond employees affected by union's unfair labor practices invalidated). The Board may only "remove the consequences of the violation." *Id.* at 655. It may not punish a respondent by interfering with respondent's relationships among employees who have not been subjected to wrongdoing. *Id.*; *See also, Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984)(Board remedies must be tailored to the specific unfair labor practice pled, without

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<sup>14</sup> Judge Carter correctly noted the numerous CHSI/CHSPSC affiliates, as compared to the few involved in the case, reasoning that the request for relief "extends well beyond the specific allegations in the complaint." Order at p. 7, fn. 6.

estimation or speculation). A speculative request for nationwide relief, unsupported by pleading or law, should not bar entry of the Order.

More than eighty years after the Act's passage, no matter involving remotely similar allegations to the case at bar has led to a nationwide cease and desist order covering all future violations of the Act. CGC claims to have evidence of centralized or corporate-wide unfair labor practices, and yet the Complaint does not allege that the Corporate Respondents maintained a policy or form corporate-wide, or that the Corporate Respondents engaged in wrongdoing.<sup>15</sup> Neither *Independent Stave* nor *UPMC* require a respondent to offer items in a consent settlement agreement to address unalleged acts.

CGC relies on distinguishable cases involving narrow remedies and employers which, unlike the Corporate Respondents, were alleged to have themselves violated the Act and who presented a recidivist history. In *Miller Group*, 310 NLRB 1235 (1993), the Board merely required the same corporation to post a notice at two locations which were part of the same bargaining unit. *Tradesman International*, 351 NLRB 399 (2007), involved a single hiring agency with dozens of substantiated 8(a)(3) violations, with the placement of a non-discrimination clause in contracts and a posting at one location. *HTH Corp.*, 361 NLRB 65 (2014) ("NTH II"), involved an order against a recidivist employer which merely applied to one location and one bargaining unit following prior litigation ("NTH I").

CGC has not presented a single decision supporting a corporate-wide remedy based on the allegations pled in the Complaint. *J.P. Stevens & Co.*, 240 NLRB 33 (1979), involved a single

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<sup>15</sup> Judge Carter correctly noted that the case involves one policy at Barstow (which CGC describes as a "CHSI policy" because it references "CHS"), while pointing out that *CGC did not allege in the Complaint* that CHSI/CHSPSC implemented the policy corporate-wide, and that *The Boeing Company*, 365 NLRB 154 (2017), requires the evaluation of the nature and extent of the potential impact on NLRA rights and legitimate justifications, raising "significant questions" about what the Board will require, in any event, to support a corporate-wide remedy with respect to work rules. Order at p. 7, fn. 7.

company with fourteen prior Board decisions rendered against it, many of which involved hallmark violations, followed by multiple contempt citations. *Overnite Transportation*, 329 NLRB 990 (1999), involved one corporation subjected to multiple *Gissel* bargaining orders and hallmark unfair labor practices during a campaign at over fifty service centers, resulting in a nationwide posting. *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 961 (2nd Cir. 1988), involved one named company which directly engaged in hallmark unfair labor practices of discharging groups of union adherents at multiple locations. The employer had a “long history” of established violations over a “fifteen year period.” *Id.* at 961. Despite these facts, a limited access and posting remedy applied at only 8 out of 43 stores. *Id.* at 954.<sup>16</sup>

Fourth, the opposing parties’ memoranda proceed with respect to the requested nationwide cease and desist order remedy as if the Board did not overrule *USPS*. Even if CGC’s request for a nationwide cease and desist order were cognizable, which it is not, neither *Independent Stave* nor *UPMC* require a consent order to satisfy all available remedies. *UPMC*, 365 NLRB 153 (2017), slip op. \*6; *Local 201, Electrical Workers (General Electric Co.)*, 188 NLRB 855 (1971) (consent order adopted despite failing to remedy a portion of the complaint); *Gourmet Toast Corp.*, 2011 WL 2433351 (NLRB Div. of Judges)(consent order approved despite having failed to meet 80% of General Counsel’s damage estimate, relying upon other, similar cases approving consent orders); *Ribbon Sumyoo Corp.*, 1992 WL 1465636 (NLRB Div. of Judges)(consent order approved despite objections regarding amounts requested, a release entered into, and the absence of notice posting). The request for a corporate-wide remedy does not bar entry of the Consent

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<sup>16</sup> The Complaint, by presenting single/joint allegations, does not even rise to a *Burns Sec. Servs.* 300 NLRB 160, slip op. (Dec. 31, 1990) scenario. In *Burns Sec. Servs.*, the respondent actually engaged in unfair labor practices. The Board rejected an ALJ-recommended nationwide cease and desist order in favor of a limited order covering *only the three sites where the unfair labor practices occurred.*

Order because *Independent Stave* does not require full satisfaction of any request. The test, one of reasonableness, has been met.

Fifth, Judge Carter squarely, reasonably addressed CGC's request for a corporate-wide remedy and correctly determined the request to be insufficient to bar entry of the Consent Settlement Agreement:

There is no requirement under *Independent Stave* that a proposed settlement agreement provide the full measure of relief sought in the complaint (let alone the specific remedy of corporate-wide relief). Instead, *Independent Stave* requires the settlement to be "reasonable." Moreover, I note that there are no allegations in the complaint that charge CHSI or CHSPSC with any direct involvement in unfair labor practices. Although the General Counsel and the Charging Party maintain that evidence of CHSI's or CHSPSC's direct and corporate-wide involvement in violations of the Act may be presented if we litigate the single/joint employer allegations in the complaint, the proposition that the General Counsel would actually succeed in demonstrating that corporate-wide relief is appropriate (as opposed to the more traditional remedy of relief at the facilities where specific violations occurred), is highly speculative. See *Consolidated Edison Co. of New York*, 323 NLRB 910, 911-912 (1997) (noting that the Board's usual practice is to confine injunctive and notice-posting requirements "to the facilities at which the violations were committed.")

(Order at p. 7 (footnotes addressing the limited nature of Complaint allegations, fn. 6 and fn. 7, omitted)). If Judge Carter were to have accepted CGC's argument, overzealous counsel could always avert a consent settlement agreement by tacking an attenuated request for relief onto a complaint, then asserting an unqualified right to engage in protracted litigation no matter the adverse consequences. CGC's approach is inconsistent with *Independent Stave*, which requires reasonableness. Judge Carter's reasonableness belies CGC's alleged abuse of discretion.

#### IV. CONCLUSION

CGC failed to promptly file the Request for Special Appeal causing delay and prejudicing the Corporate Respondents. Moreover, Judge Carter fairly applied *Independent Stave*, consistent with Board policy favoring settlements to effectively conserve administrative and taxpayer resources while promoting industrial peace. CGC's zeal has led to assertions inconsistent with Board policy, such as describing a multi-million dollar financial guarantee as fueling a desire to litigate because it provides "nothing more than what would be ordered if the Complaint contained no single and/or joint employer pleadings." (Special Appeal at p. 22.) Denying the untimely Request for Special Appeal could assist the parties by ushering in a more measured approach.

For the reasons stated above, the Corporate Respondents respectfully request the Board to deny the Special Appeal on an expedited basis.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned attorney, Leonard W. Sachs, hereby certifies that on July 30, 2018, the foregoing was filed and served via e-mail upon:

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

**DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER,  
COMMUNITY HEALTH SYSTEMS, INC.,  
HOSPITAL OF BARSTOW, INC., d/b/a  
BARSTOW COMMUNITY HOSPITAL,  
WATSONVILLE HOSPITAL CORPORATION d/b/a  
WATSONVILLE COMMUNITY HOSPITAL,  
and/or  
COMMUNITY HEALTH SYSTEMS PROFESSIONAL  
SERVICES CORPORATION, LLC,  
a single employer and/or joint employers and  
QUORUM HEALTH CORPORATION and QHCCS, LLC,  
successor employers, et al.**

**and**

**Cases**

**08-CA-167313, et al.<sup>1</sup>**

**NATIONAL NURSES ORGANIZING COMMITTEE  
(NNOC), CALIFORNIA NURSES ASSOCIATION/NATIONAL  
NURSES ORGANIZING COMMITTEE (CNA/NNOC)  
and CALIFORNIA NURSES ASSOCIATION (CNA),  
NATIONAL NURSES UNITED, et al.**

**ORDER GRANTING MOTIONS TO CANCEL TRIAL DATES, AND  
SUPPLEMENTING RULING ON MOTION TO RECONSIDER SUBPOENA  
SANCTIONS**

This order will serve the following two purposes: (a) providing my ruling on motions, submitted by Respondents Bluefield and Greenbrier and by Respondents CHSPSC and CHSI on July 23, 2018, to cancel the August 1-2 and 7-9, 2018 trial dates in this case; and (b) supplementing my June 13, 2018 decision to deny Respondent Bluefield's oral motion to reconsider my June 6, 2018 order granting the General Counsel's motion for subpoena sanctions. I address each of those topics below.

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<sup>1</sup> This consolidated case includes: Cases 08-CA-167313; 10-CA-168085, 10-CA-153544, 10-CA-174418, 10-CA-177532, 10-CA-167330, 10-CA-150997, 10-CA-153336; 31-CA-167522, 31-CA-174673 and 31-CA-189833.



## Motions to Cancel August Hearing Dates

### Background

In late May 2018, the General Counsel expressed a renewed<sup>2</sup> interest in pursuing settlement negotiations that, if successful, would resolve this case as well as Case 08-CA-117890, et al. (“CHS 1,” pending before Judge Eleanor Laws). In light of that overture, the parties and judges scheduled an in-person settlement conference for July 24-26, 2018, with the expectation that the parties would engage in extensive settlement negotiations in the weeks leading up to the settlement conference.

In early July 2018, the parties reported little, if any, progress with settlement negotiations, in part because the General Counsel had yet to make an opening settlement offer. Accordingly, on July 11, 2018, Judge Laws and I issued an order that, among other things, directed the General Counsel to state, by July 18, 2018, whether it intended to pursue settlement negotiations or resume trial litigation in this case as scheduled on August 1-2, 7-9, 2018.

On July 17, 2018, the General Counsel requested permission to provide its settlement proposal to the parties by July 23, 2018. The General Counsel also indicated, however, that instead of participating in the July 24-26 settlement conference, it intended to resume litigation in this case as scheduled in August (while relying on telephone and/or email to discuss settlement with Respondents). Based on the General Counsel’s representations, on July 18, 2018, Judge Laws and I issued an order vacating the July 24-26 settlement conference, indicating that trial would resume in this case on August 1-2, 2018, and leaving it to the parties to pursue any settlement negotiations.

### Developments after order vacating settlement conference

Later on July 18, 2018, the General Counsel filed a request for special permission to appeal an order that I issued on April 19, 2018. In my April 19 order, I approved a consent settlement agreement that essentially dismissed the single/joint employer allegations against CHSPSC and CHSI, in exchange for CHSPSC’s agreement to serve as the guarantor for any remedies that the Board may order concerning the unfair labor practice allegations in this case. (CHSI accepted the terms of the consent settlement agreement and appointed CHSPSC to be its agent with respect to effectuating compliance with the agreement.)

On July 23, 2018, the General Counsel represented (via email) that it submitted its settlement proposal to Respondents. Respondents Bluefield and Greenbrier have indicated that in the same timeframe, the Charging Party expressed renewed interest in exploring the possibility of a non-Board settlement.

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<sup>2</sup> The parties devoted extensive time to exploring settlement in the late summer and fall of 2017.

## Motions to Cancel August Trial Dates

On July 23, Respondents Bluefield and Greenbrier filed a motion to cancel the August trial dates in this case, essentially to allow additional time for settlement negotiations. Respondents CHSPSC and CHSI also filed a motion to cancel the August trial dates, but did so in large part because the General Counsel's request for special permission to appeal my April 19, 2018 order raises the question (among others) of whether CHSPSC and CHSI need to be present at any future hearings to defend their interests, and counsel for those entities have pre-existing conflicts with the August trial dates. The General Counsel filed a memorandum opposing the Respondents' motions on July 25, 2018.

### Discussion

Collectively, Respondents assert that I should cancel the August trial dates because: (a) the parties should have additional time to pursue settlement negotiations without having the additional task of trial litigation; (b) my April 19, 2018 order dismissed the single/joint employer allegations against CHSPSC and CHSI,<sup>3</sup> and CHSPSC and CHSI should not be compelled to appear for trial until the Board resolves the General Counsel's request for special permission to appeal that order; and (c) counsel for CHSPSC and CHSI have scheduling conflicts that preclude them from attending the August trial dates. The General Counsel, meanwhile, asserts that canceling the August trial dates would cause unfair prejudice to its witnesses and to its case.

I find that Respondents' arguments concerning the scheduling conflicts of counsel for CHSPSC and CHSI have merit. The General Counsel's July 18<sup>th</sup> request for special permission to appeal my April 19 order in this case came as a surprise, seeing as how the General Counsel did not indicate, for a period of three months, that such an appeal might be forthcoming. Given the General Counsel's silence following my order, CHSPSC and CHSI understandably did not attend trial proceedings on May 3-4 or June 12-13, 2018, and made other commitments during the August 1-2 and 7-9, 2018 trial dates at issue here. Now that the General Counsel has decided to seek review of my April 19 order, and thereby potentially draw CHSPSC and CHSI back into the fray as alleged single/joint employers, I find that it is reasonable to provide CHSPSC and CHSI an opportunity to resume participating in the trial in this case to protect their interests. Accordingly, I shall grant Respondents' motions to cancel the August 1-2 and 7-9, 2018 trial dates in this case.<sup>4</sup>

With that said, I am not inclined to postpone this trial indefinitely while the parties engage in settlement discussions and/or while the Board considers the General

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<sup>3</sup> CHSPSC and CHSI assert that I dismissed them from the case in my April 19, 2018 order, but that assertion is incorrect. As my April 19, 2018 order indicates, I dismissed the single/joint employer allegations against CHSPSC and CHSI, but indicated that CHSPSC and CHSI would "remain in the case as parties for the purpose of ensuring enforcement of CHSPSC's guarantee of the remedies, if any, ultimately ordered against Respondent Hospitals."

<sup>4</sup> To the extent that the parties remain interested in exploring the possibility of a settlement, I encourage the parties to use the now-cancelled August trial dates for that purpose.

Counsel's request for special permission to appeal. Instead, to ensure that we continue to make progress with litigating this case, and to mitigate any prejudice to parties and witnesses who have an interest in having their day in court (to the extent that a settlement does not materialize), **I hereby set the following trial dates:**

**September 11-12, 2018 – Greenbrier (starting at 9:30 am)**

**September 18-20, 2018 - Bluefield (starting at 9:00 am)**

Counsel for all parties (including CHSPSC and CHSI) shall confer with each other to verify that they and their essential witnesses are available for these trial dates, and the General Counsel shall make any necessary arrangements to reserve the hearing locations and a court reporter. I will not be inclined to cancel the September trial dates noted above unless, by August 15, 2018, the parties present mutually agreeable alternative trial dates (of the same length or longer and in September or October 2018).<sup>5</sup>

### **Motion to Reconsider June 6, 2018 Order Granting Motion for Subpoena Sanctions**

#### Background

On May 10, 2018, the General Counsel filed a "Motion for Adverse Inference and to Preclude Regarding Respondent Bluefield's Failure to Produce Pursuant to Subpoena Duces Tecum B-1-VI7KG9" (hereafter referred to as the General Counsel's motion for subpoena sanctions). In its motion, the General Counsel alleged that Respondent Bluefield failed to comply with aspects of subpoena B-1-VI7KG9.

In an order dated June 6, 2018, I granted in part and denied in part the General Counsel's motion for subpoena sanctions. In support of my ruling that Respondent Bluefield failed to comply with the subpoena, I explained as follows:

In my March 23, 2017 order regarding subpoena B-1-VI7KG9, I permitted Respondent Bluefield to target its search for [electronically stored information (ESI)] by "focusing on the files of supervisors, agents and employees who have some connection to one or more of the allegations in the complaint, and by using appropriate key words to search for responsive materials." I also instructed Respondent Bluefield to disclose to the General Counsel "the parameters that Respondent [Bluefield] used for its search, including but not limited to the names of the supervisors/agents/employees whose files were searched, and the key words used for the searches."

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<sup>5</sup> I recognize that, at times, it has been a challenge to schedule trial dates in this case. There is ample time, however, for the parties to adjust their schedules as needed to be available for trial on the September dates that I have specified, and/or to identify alternative trial dates that meet the criteria I have set forth in this order. For the parties' reference, I note that I am not available for trial on the following dates: September 24-25, 28 and October 9-10, 2018.

In April 2017, the General Counsel asked Respondent Bluefield to provide the parameters and search terms that it used to locate ESI in response to the subpoena. That request was consistent with my order, and was also timely, since Respondent Bluefield represented, in early April 2017, that its subpoena production was complete. Respondent Bluefield, however, did not answer the General Counsel's simple question, even though the General Counsel reiterated its request in May, June and December 2017.

In January 2018, the General Counsel again renewed its request for ESI parameters and search terms. On January 25, 2018, Respondent Bluefield provided some limited information about its search for archived ESI for four individuals, but did not provide the names of, or search parameters for, the other twelve individuals whose files it searched until February 7, 2018. At the General Counsel's request (made on February 22, 2018), Respondent Bluefield agreed to add three more individuals to its ESI search, but refused to search the files of any other supervisors, agents or employees.

I find that Respondent Bluefield fell well short of complying with my March 23, 2017 order regarding disclosing ESI parameters and search terms to the General Counsel. First, it took Respondent Bluefield nine months to provide the General Counsel with any information about its ESI search terms and parameters. Respondent Bluefield offered no explanation for that lengthy delay. Second, when the General Counsel (consistent with my order) asked Respondent Bluefield to search the files of additional personnel for ESI, Respondent Bluefield refused to do so beyond three individuals, without any attempt to negotiate with the General Counsel about the scope of an additional search. Given those circumstances, I will grant the General Counsel's motion and provide the relief described in the remedy section of this order.

June 6, 2018 Order at p. 8; see also *id.* at pp. 10–11 (ordering Respondent Bluefield to search for additional documents and, as a sanction for subpoena noncompliance, applying the “exclusionary rule” to preclude Respondent Bluefield from introducing or otherwise using during trial any documents covered by subpoena B–1–VI7KG9 that Respondent Bluefield failed to produce before March 1, 2018, unless either the General Counsel or Charging Party elected to introduce the document into evidence.)

On June 13, 2018, Respondent Bluefield verbally requested that I reconsider my June 6, 2018 order. In support of its request, Respondent Bluefield maintained that the General Counsel did not meet its burden of demonstrating that Respondent Bluefield acted contumaciously or otherwise refused to obey the subpoena. Specifically, Respondent Bluefield asserted that to meet its burden, the General Counsel needed to show that there are additional individuals who had records related to allegations in the complaint, and show that Respondent Bluefield refused to search the files of those additional individuals. Respondent Bluefield maintained that subpoena sanctions were not warranted because the General Counsel did not meet that burden of proof. (Tr. 4488–4491, 4496.) In response, the General Counsel referenced the arguments that it presented

in its motion for subpoena sanctions, and maintained that it satisfied the burden of proof required for a finding of subpoena noncompliance. (Tr. 4493.) After hearing the parties' arguments, I denied Respondent Bluefield's motion to reconsider my June 6, 2018 order concerning the General Counsel's motion for subpoena sanctions. (Tr. 4495–4497.)

### Discussion

I fully stand by my previous rulings concerning the General Counsel's motion for sanctions. However, I write now to make it clear that I disagree with Respondent Bluefield's arguments that: (a) to meet its burden of proving subpoena noncompliance, the General Counsel needed to show that Respondent Bluefield refused to search the files of specific individuals who had responsive documents; and (b) the General Counsel's refusal to accept Respondent Bluefield's offer to settle the subpoena dispute undercuts the General Counsel's motion for sanctions.

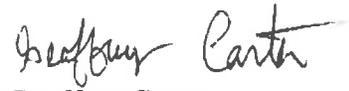
In its communications with Respondent Bluefield about its subpoena production, the General Counsel explicitly asked Respondent Bluefield to search the files of supervisors, managers and charge nurses for responsive documents. The General Counsel's request was consistent with my March 23, 2017 order concerning Respondent Bluefield's petition to revoke subpoena, and I do not find that the General Counsel needed to take the additional step of providing the names of specific individuals who might have responsive records. Requiring the General Counsel to take that step would in all likelihood result in an underinclusive list of individuals, since the General Counsel does not have access to Respondent's roster of current and former employees or information about their various job responsibilities. By contrast, it was well within Respondent's capability to create a list of supervisors, managers and charge nurses whose files should be searched (e.g., by consulting its personnel files to identify employees who worked in those classifications during the relevant time period and, based on their job duties, might have documents related to one or more allegations in the complaint), and I do not find it to be unusual for a subpoenaed party to take steps of that nature to comply with a subpoena.

Respondent Bluefield also faulted the General Counsel for rejecting its offer, made on or about May 29, 2018, to search the records of additional individuals on a case-by-case basis upon request of the General Counsel, if the General Counsel agreed to withdraw its motion for subpoena sanctions. In so arguing, Respondent Bluefield maintains that it was the General Counsel, rather than Respondent Bluefield, that refused to negotiate about the subpoena dispute. (Tr. 4490-4491.) I do not find Respondent Bluefield's position on those communications to be persuasive. Respondent Bluefield's May 29 communication to the General Counsel was essentially an offer to settle the issues that the General Counsel raised in its May 10 motion for subpoena sanctions. The General Counsel was under no obligation to accept Respondent Bluefield's offer. When the General Counsel rejected Respondent Bluefield's offer, the dispute was presented to me to determine, in my discretion, whether subpoena sanctions were warranted based on Respondent Bluefield's conduct. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 394–396, 398 (2004) (finding that the judge did not abuse her discretion in

imposing sanctions for subpoena noncompliance, even though the employer offered to produce three boxes of documents to the General Counsel after the judge determined that subpoena sanctions were warranted, and the General Counsel rejected the employer's offer), *enfd.* 156 Fed. Appx. 386 (2d Cir. 2005). As I have explained above and in my previous rulings, I find that by refusing to search the files of employees in the classifications that the General Counsel specified, Respondent refused to obey the subpoena, and thereby provided ample foundation for the subpoena sanctions that I imposed.<sup>6</sup>

IT IS SO ORDERED.

Dated: July 25, 2018  
Washington, D.C.

  
Geoffrey Carter  
Administrative Law Judge

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<sup>6</sup> As the General Counsel and Respondent Bluefield are aware, in my June 6 order, I directed Respondent to search for additional documents and provide them to the General Counsel on or before August 31, 2018. That timetable remains in place. However, to the extent that the General Counsel and Respondent Bluefield agree to postpone the deadline for disclosing the additional documents, they may do so without my intervention.

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
Region 5

HAMPTON ROADS SHIPPING ASSOCIATION

and

Cases 05-CA-176015  
05-CA-185358

FRANK ADKINSON, SR., an individual

FREDERICK WILLIAMS, an individual

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
LOCAL 1248 (HAMPTON ROADS SHIPPING ASSOCIATION)

05-CB-176206

05-CB-177894

FRANK ADKINSON, SR., an individual

05-CB-180605

05-CB-182251

FREDERICK WILLIAMS, an individual

05-CB-183262

EDWARD HILL, an individual

ROBERT WEAVER, JR., an individual

SHERROD BLOW, an individual

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
LOCAL 970 (HAMPTON ROADS SHIPPING ASSOCIATION)

and

Cases 05-CB-184590  
05-CB-185108

FRANK ADKINSON, SR., an individual

FREDERICK WILLIAMS, an individual

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION  
(HAMPTON ROADS SHIPPING ASSOCIATION)

and

Cases 05-CB-184690  
05-CB-185298

FRANK ADKINSON, SR., an individual  
FREDERICK WILLIAMS, an individual



**RESPONDENTS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO  
GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND  
APPEAL OF RULINGS OF THE ADMINISTRATIVE LAW JUDGE**

Respondents, by and through counsel, and pursuant to Section 102.26 of the Board's Rules and Regulations, submit the following Consolidated Memorandum in Opposition to the General Counsel's ("GC") Request for Special Permission to Appeal and Appeal of the Rulings of the Administrative Law Judge ("ALJ"):

**I. PROCEDURAL HISTORY AND FACTS**

**A. The ALJ's Rulings on Respondents' Petitions to Revoke GC's Trial Subpoenas Regarding Training and Transfers.**

On October 4, 2017, GC served trial subpoenas on Respondents, who petitioned to revoke, in relevant part, the document requests concerning training, transfers of local union membership, and transfers of work jurisdiction within the Port of Hampton Roads.

When the hearing opened on October 25, the ALJ orally ruled that training fell outside of the allegations of the consolidated complaint. ("October 25 Pre-trial Order"). *See* Tr. 18:9-11 ("I don't think training is encompassed in this."); 49:22-50:2 ("I don't think that the complaint covers an allegation based on training. And I don't think training, because it leads to hiring, is all part of a hiring allegation."); 51:3-8 ("I'm going to sustain the petition to revoke with respect to the training material. That's not to say that if somebody refers to it in their testimony in some way that provided background that I'll necessarily sustain an objection to it. But I don't see it as being covered by the complaint."). GC did not object to this ruling of the ALJ.

By written order dated November 24, the ALJ sustained the Respondents' Petitions to Revoke GC's Subpoenas as they related to union transfers and work jurisdiction transfers. *See* ALJ Ex. 2 ("November 24 Pre-trial Order"). Specifically, the ALJ stated, "I find that the

requested information about transfers ‘does not relate to any matter under investigation or in question in the proceedings,’ and therefore revoke the subpoena paragraphs seeking such information.” *Id.* at 2. The ALJ further elaborated:

Notably there is no allegation in the Complaint that any of the Respondents acted discriminatorily or otherwise unlawfully with respect to the transfer of employees’ local union membership and/or their geographic work assignment. To the contrary, during the hearing on October 25, 2017, the General Counsel confirmed that ‘[w]e’re not alleging that the transfer themselves or any action that the locals took to approve or deny the transfer is a violation of the Act.’

*Id.* The ALJ also cited a prior finding of the Acting Regional Director on April 25, 2014, in a case involving Respondent ILA Local 1248 and a member of ILA Local 846, that in the absence of evidence that ILA Local 1248 acted discriminatorily, arbitrarily, or in bad-faith, the local union membership transfer process is “solely an internal union matter not covered by the Act.”

*Id.* (citing Decision of the Acting Regional Director Steve L. Shuster in Case 05-CB-122914).

The decision of the Acting Regional Director was upheld on appeal. *Id.*

Finally, the ALJ emphasized that the GC was unable to explain how the subpoenaed information about the transfers process could lead to evidence about the alleged discrimination in referrals and hiring. *Id.* Rather,

[t]he best the General Counsel could do was state a desire to show that, as a result of the allegedly unlawful operation of the hiring system, longshoremen attempt to transfer in order to improve their work opportunities. ... However, transfer attempts would at best be evidence that longshoremen’s work opportunities are better in some work jurisdictions than in others, not that those differences in work opportunities were the result of hiring or referrals that were discriminatory or otherwise in violation of the Act. *At any rate, evidence of transfer attempts by longshoremen, and the motivation for their attempts, can be obtained through the testimony of such longshoremen.*

*Id.* (emphasis added, citation omitted).

**B. The ALJ’s Rulings on Trial Testimony about Training and Transfers.**

The trial resumed on December 4, 2017. The first witness called was Roger Giesinger, who is the President and Chief Negotiator for Respondent HRSA. His testimony continued into December 5, which is when GC first sought to inquire about training, Tr. 340:4-341:23. The ALJ sustained an objection to a question about training opportunities without further comment from GC. *Id.* Thereafter, GC again tried eliciting transfer testimony and was strongly admonished by the ALJ for continuing to “get into things that ... are [not] subjects of the complaint.” Tr. 359:22-362:17. When GC yet again sought to elicit testimony about transfers, the ALJ again sustained the objections and clarified that GC may elicit testimony “that people do try to transfer and that they-because they’re looking to get to either the center of to the jurisdiction that-where there’s more work.” Tr. 368:10-13. He further clarified by stating, “[b]ut again, getting into the transfers and why-whether people are-how people get transferred or don’t get transferred is what I’ve ruled is not part of the case.” Tr. 368:13-371:16. It was only after Mr. Giesinger’s testimony resumed after the lunch break on December 5 that GC indicated a desire to challenge the ruling on the transfer issue (both intra-union and geographic work jurisdiction transfers). Tr. 417:1-418:6. It is noteworthy that GC did not include the training issue in her request. *Id.*

During the testimony of the next witnesses, Floyd Keller, GC again raised the transfer issue. Thereafter, GC was permitted to ask questions about transfers within the parameters set by the ALJ. Tr. 570:22-571:1; 580:6-581:5, 776:17-794:16, 858:1-858:3, 893:2-893:17, 1059:15-1061:12 (allowing transfer testimony over objection), 1066:10-1069:14.

The ALJ’s limitations placed on transfer testimony is consistent with what GC previously stated at the October 25, 2017 hearing: “We’re not alleging that the transfer themselves or any action that the locals took to approve or deny the transfer is a violation of the Act.” ALJ Ex. 2. Despite this earlier representation, on December 6, 2017, GC argued that transfers of local

membership affect terms and conditions of employment, “[s]o that’s what takes the transfer of local union membership outside of what is normally within – excluded from the NLRA, and it brings it back in to what is covered by the Act...” Tr. 788:11-21. The ALJ promptly ruled that such allegations were not in the Complaint despite the fact that they could have been alleged. Tr. 789:1-8.

**C. The ALJ’s Ruling Regarding the Order of Witness Testimony.**

GC initially agreed to the ALJ’s ruling on the order of trial testimony without objection.

At the conclusion of GC’s direct examination of Mr. Giesinger, the ALJ noted the following:

During our off-the-record discussions, ... the subject was raised of the Respondents reserving their examination of this witness on the subjects covered by the General Counsel until the Respondents' case in chief, at which time they would examine him on the subjects that they wish to cover as part of their defense and on the subjects that were covered by the General Counsel's examination, and *there was no objection to proceeding that way*, and I'm going to permit the parties to proceed that way.

And the other Respondents indicated to me, the International Local 1248 and Local 970, that to the extent that their party representatives were called as 611(c) witnesses, they were also asking for permission to proceed in the way we're proceeding with this witness, and I indicated that I was going to grant -- I was granting the permission to proceed in that way subject to the concern raised by the General Counsel, which was that when she rests her case in chief, they will not have questioned this witness about the subjects raised in her examination of the witness or the witnesses. And so to the extent that she rests at that time, she'll be resting -- *the agreement was*, subject to any additional examination she does on the subjects she already covered in response to the cross-examination or the examination of these witnesses on the subjects that were part of the General Counsel's examination of the witnesses as 611(c) witnesses.

Tr. 423:15-424:20 (emphasis added). The ALJ explained that the witness and counsel could confer in preparation for subsequent testimony, but not for the purpose of rebutting testimony that the GC had elicited from the witness. *Id.* at 424:22-426:5. GC did not object at that time and in fact agreed to this procedure. *Id.* at 423:22-23 (“there was no objection to proceeding that way”), 424:10 (“the agreement was”).

Notwithstanding GC's earlier agreement and acquiescence to this procedure, the following day, GC objected to this procedure for the first time, primarily because cross-examinations of the Respondents' principal witnesses would occur after GC rested. *Id.* at 556:16-557:5. The ALJ reiterated that when the GC rested, it would be "subject to any redirect of those witnesses who are cross-examined for the first time during the Respondent[s'] case ... and I would try to accommodate you in any way possible with respect to that." *Id.* at 557:6-12. Subsequently, GC conducted the direct examination of Ron Rascoe and Jonathan Coley, who are the party representatives of Local 1248 and Local 970, respectively, and the Respondents each reserved their cross examinations of those witnesses pursuant to the ALJ's ruling. *Id.* at 834:15-22, 973:22-974:11.

The trial adjourned on December 8, 2017, and is scheduled to resume on March 5, 2018.

## II. ARGUMENT

### A. GC's Request For Special Permission To Appeal Should Be Denied Because It Was Not Filed Promptly And Would, If Granted, Substantially Delay The Hearing And Prejudice Respondents.

GC's grossly tardy request for special permission to appeal should be denied, because granting it would substantially delay the hearing and prejudice Respondents. "Requests to the Board for special permission to appeal from a ruling ... of the Administrative Law Judge ... must be filed in writing *promptly and within such time as not to delay the proceeding...*" NLRB Rules and Regulations § 102.26, 29 C.F.R. § 102.26 (emphasis added). "Although the term 'promptly' is not specifically defined, common sense dictates that it be defined by the circumstances of each particular case." *Lewis Foods of 42nd St., LLC, A McDonalds Franchisee, & McDonalds USA, LLC, Joint Employers, et al.*, 02-CA-093893, et al., 2015 WL 1815276, at \*1 n.2 (Apr. 21, 2015). Although this necessitates a case-by-case analysis, a request for special

permission to appeal is not “prompt” if, as here, granting the appeal would delay the hearing or prejudice the opposing parties. *See* NLRB Rules and Regulations § 102.26, 29 C.F.R. § 102.26 (special request to appeal should be filed so as not to delay the proceeding); NLRB Case Handling Manual ¶ 10404 (“Ordinarily, the hearing should not be delayed because a party seeks special permission to appeal a ruling or order.”).

**1. GC’s appeal of the ALJ’s Orders concerning job training and union transfers is not prompt because they could have been appealed well before the trial commenced.**

The GC seeks review of the two Pre-trial Orders, which were issued well before the formal trial portion of the hearing began. The first Pre-trial Order was made orally on October 25, 2017—nearly six weeks before the trial commenced—and sustained Respondents’ petitions to revoke concerning job training, except to use as background information. *See* Tr. 51:3–51:21. The second Pre-trial Order was made on November 24, 2017—nearly two weeks before the trial commenced—and sustained Respondents’ petitions to revoke regarding internal union transfers and transfers of work jurisdiction, except to use as background information. *See* ALJ Ex. 2. GC never attempted to specially appeal the Pre-trial Orders before the formal trial began, although GC could have done so.<sup>1</sup>

Instead, GC tried flouting the Pre-trial Orders at trial. *See, e.g.*, Tr. 340:4–341:1, 359:22–362:17 (sustaining objection to broad questions about internal union transfers that were outside the scope of the complaint’s allegations “for purposes of keeping this already very unwieldy case on track”), 367:13–371:16, 373:21–375:20, 377:21–378:12, 380:3–381:19, 383:1–385:20. Only after the ALJ repeatedly refused to overrule himself did GC finally state an intention to specially

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<sup>1</sup> A party may file an interlocutory appeal from an oral ruling by an administrative law judge. *See Smithfield Packing Co.*, 334 NLRB 34 (2001). Accordingly, GC could have specially appealed the order relating to training immediately after the October 25, 2017 conference.

appeal the Pre-trial Orders.<sup>2</sup> *See* Tr. at 417:4–417:10. Notably, GC never sought clarification of the Pre-trial Orders before the trial began, despite participating in numerous pre-trial teleconferences. GC’s tactical error in believing that the ALJ would overrule himself at trial does not excuse this appeal’s delay.

And, indeed, entertaining this appeal would substantially “delay the proceeding[.]” NLRB Rules and Regulations § 102.26. GC asked nearly all the witnesses directly examined thus far about job training, union transfers, or work jurisdiction transfers. *See supra* n.2. Presumably, if the Board granted the requested relief, GC would recall *every* one of these witnesses, which would further delay an already “unwieldy case”—to borrow ALJ Bogas’s description. Tr. 362:10–362:17.

A Board decision in GC’s favor would also subject Respondents to substantial additional costs and prejudice their defenses. Trials are expensive. GC has already utilized a full week and plans to call an additional fifteen (15) witnesses. Tr. 1195:1–1195:17. It is, therefore, reasonable to assume that GC’s case-in-chief will, at the very least, extend an additional week. And if the Board decides this untimely appeal in GC’s favor, GC’s case-in-chief will likely extend into a third week, due to the numerous witnesses likely to be recalled. It is simply unjust to force the Respondents to incur the substantial additional costs that such an extension would pose, all because GC *chose* not to appeal the Pre-trial Orders “promptly[.]” NLRB Rules and Regulations § 102.26.

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<sup>2</sup> However, ALJ Bogas allowed ample testimony about transfers and job training, by way of background. *See* Tr. at 231:23–232:9, 238:14–239:4, 242:7–243:11, 305:13–306:6, 432:9–433:9, 471:15–471:17, 473:18–473:22, 488:19–489:12, 521:21–523:12, 537:19–541:11, 542:6–544:17 (allowing training testimony in over objection), 568:25–569:571:1 (allowing transfer testimony in over objection), 578:23–579:15, 580:6–581:8 (allowing transfer testimony in over objection), 776:17–794:16, 858:1–858:3, 893:2–893:17, 1059:15–1061:12 (allowing transfer testimony in over objection), 1066:10–1069:14.

Quite aside from saddling the Respondents with unnecessary costs, granting GC's appeal at this stage would also prejudice Respondents' defenses. Respondents have spent weeks preparing their defenses in accordance with the Pre-trial Orders and the record currently established. An order overruling the Pre-trial Orders, the last of which was made nearly *three months ago*, would require Respondents to re-prepare their party representatives, review copious documents they believed were outside the scope of the Consolidated Complaint, and prepare pertinent cross-examination questions. Indeed, GC could have brought this special appeal closer to when the first week of trial concluded, thereby mitigating any prejudice resulting from a favorable Board ruling. Instead, GC waited *nearly two months afterwards* to file this appeal.

If the promptness requirement of Section 102.26 is to have any teeth, GC's special appeal of the Pre-trial Orders must be rejected.

**2. GC's appeal of the order concerning the order of the examination of party representatives is likewise not prompt.**

GC also seeks review of the ALJ's ruling during trial concerning the order of the examination of party representatives. *See* GC Br. at 20–23. GC initially agreed to this ruling and did not object until the day after the first party representative, Mr. Giesinger, had testified pursuant to the ALJ's ruling. Tr. 423:15–424:15 (ALJ's ruling noting that "there was no objection to proceeding this way" and that there was an "agreement" on this procedure); *id.* at 538:16-557:5 (GC's belated objection). GC now would have the Board reverse this prudential order over two months after it was issued. For many of the same reasons that the Board should reject GC's request to appeal the Pre-trial Orders, it should also do so with respect to this ruling.

To be sure, unlike the Pre-trial Orders, the ALJ's ruling on the order of trial testimony could not have been resolved before the trial portion of the hearing commenced. Nonetheless, by delaying over two months to appeal the Trial Order, GC did not act "promptly[.]" NLRB Rules

and Regulations § 102.26. Respondents have already prepared for many weeks based on the ALJ's ruling on the order of trial testimony. Indeed, GC never indicated at trial that that ruling would be appealed. Respondents have focused on preparing for the other fifteen (15) witnesses that GC plans on calling. In reliance on the ALJ's ruling, they have not prepared cross-examination questions for the party representatives who have been called.<sup>3</sup> This is especially so because GC stated that its case-in-chief would likely not be resolved by the end of the second week of trial. *See* Tr. at 1194:15–1195:18. A third week has not been scheduled. Thus, before this appeal, there was no reason for Respondents to believe that they would be cross-examining the various party representatives.

Accordingly, due to the prejudice Respondents would face if the Board granted GC's grossly delayed appeal of the ruling concerning the order of witness testimony, the appeal should be rejected.

**B. The ALJ Did Not Err When He Revoked Those Portions Of The Trial Subpoenas Concerning Transfers Of Local Union Membership, Transfer Of Work Jurisdiction, And Training, Or By Sustaining Objections To The Introduction Of Evidence Related To Transfers And Training.**

In order to protect the due process rights of Respondents in actions under the Act, the General Counsel of the Board is required “to clearly define the issues and advise [respondents] charged with a violation . . . of the specific complaint he must meet . . . [and failure to do so] is . . . to deny procedural due process of law.” *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1074 (1<sup>st</sup> Cir. 1981). Respondents in Board actions are “entitled to due process. That is, entitled to know ahead of time what alleged violations it must defend.” *SFTC, LLC d/b/a Santa Fe Tortilla Company*,

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<sup>3</sup> GC has conducted direct examination of the party representatives of Respondents HRSA, ILA Local 1248, and ILA Local 970.

360 NLRB 130 at 2 n.9, 10 n.6 (June 13, 2014) (affirming ALJ decision to dismiss allegations on due process grounds).

Furthermore, the Administrative Procedure Act, Board Rules, the Board's Casehandling Manual, and the NLRB Division of Judges Bench Book all require that a Complaint fairly notifies Respondents of the facts and law at issue. This is necessary to ensure that Respondents have adequate opportunity and notice to prepare a defense. *See* Administrative Procedure Act, 5 U.S.C. § 554(b)(3) ("Persons entitled to notice of an agency hearing shall be timely informed of ... matters of fact and law asserted"); NLRB Rules and Regulations § 102.15 ("The complaint shall contain ... a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed"); NLRB Casehandling Manual § 10268.1 (The Complaint "sets forth ... the facts relating to the alleged violations by the respondent"); NLRB Division of Judges Bench Book (August 2010) § 3-230 ("a rough rule of thumb is that a complaint should allege the 4 Ws: who committed the act, what was done, when it was done and where").

In this case, the GC chose not to include any allegations concerning transfers of union membership, transfers of work jurisdiction, or training in the Complaint. The ALJ found as much in the November 27 Pretrial Order. ALJ Ex. 2 at 2 ("I find that the requested information about transfers 'does not relate to any matter under investigation or in question in the proceeding.'") This ruling was confirmed on the record on December 6, 2017. As stated by the ALJ, "[t]ransfers aren't in the complaint. If you'd put them in the complaint, if the Region believed that they should have been in the complaint, they could be in the complaint. And they're not in the complaint." Tr. 798:4-8.

Additionally, the Respondents each filed Motions for Bills of Particulars. The Motions for Bills of Particulars, the GC Response, and the Division of Judge's Ruling were made part of the record as ALJ Exhibit 3. Tr. 1192:16-1194:14; ALJ Ex. 3. The Division of Judges considered the GC's complaint and noted the specific factual allegations allegedly taken by the Respondents in violation of the Act. Critically, there was no finding that the GC alleged the Respondents violated the Act relating to access to training or transfers.

Accordingly, the ALJ properly found that testimony (and the information subpoenaed) relating to training or transfers was outside of the scope of the Complaint and not permitted. To now allow such testimony would violate the Due Process rights of the Respondents and conflict with the representations made by the GC at the October 25, 2017 hearing.

GC concedes that the ALJ used the appropriate legal standard when ruling on the petitions to revoke and does not contend that transfers or the actions of the Respondents in approving or denying transfers has violated the Act. Nevertheless, GC repeatedly asserts that the information sought by the subpoenas is relevant to the complaint's allegations, without articulating how the subpoenaed information can reasonably be expected to either provide necessary background—beyond what the ALJ has allowed—or lead to evidence about the alleged discrimination in referrals and hiring. As stated by the ALJ in his November 24 Pre-trial Order, “transfer attempts would at best be evidence that longshoremen's work opportunities are better in some work jurisdictions than in others, not that those differences in opportunity were the result of hiring or referrals that were discriminatory or in violation of the Act.” ALJ Ex. 2.

GC cites to two cases in support of its position that local union transfers can be relevant to allegations of discrimination on the basis of union membership in the operation of hiring halls, *Teamsters, Local 70*, 188 NLRB 305 (1971) and *Teamsters Local 509 (ABC Studios)*, 357 NLRB

1668 (2011). In both cases unfair labor practices were found because local unions refused to refer non-members. The particular *transferring* procedures between locals had nothing to do with the unlawful *hiring* procedures and GC did not allege in the complaint that the Respondents violated the Act through discrimination concerning union transfers. If the local unions in those cases had refused to refer non-union members—persons with no desire to transfer into a union, let alone the “right” local—that would not have altered the analysis. Likewise, the focus in this case is on alleged unlawful *hiring* practices, not intra-union *transferring* practices. GC would have a stronger argument if the Consolidated Complaint alleged that union members were discriminated against precisely because they sought to transfer locals. But the Consolidated Complaint makes no such allegation; nor does it claim that the charging parties’ rights were violated in any way by a rejected transfer request.

GC makes a similar argument with regard to transfer of work jurisdiction. By its own argument, however, GC concedes that its allegations lack merit. On the one hand, GC asserts that “Respondents assert that the work jurisdiction assignment made by HRSA at the time of hire is different from local union membership and that there are separate procedures for requesting a transfer of each. If their assertions are correct, then the ALJ and/or Board might conclude that at least some of the allegations lack merit.” GC Br. at 17. On the other hand, GC cites to the testimony of HRSA’s representative when it concedes that work jurisdiction assignments are made by HRSA at the time of entry into the industry. *Id.* at 16, citing Tr. 226, 232-233. GC fails to cite, however, the remainder of the testimony which clearly establishes that the Respondents’ assertion is correct. *See* Tr. at 362:18-365:4; 776:17-794:16 (testimony of Ron Rascoe re: intra-union transfers); 894:8-899:8 (testimony of Jonathan Coley re: intra-union transfers); 1063:11-14

(testimony of Gordan Smith, acknowledging that work jurisdiction and union membership are “two different things”).

As for the training materials sought by GC, the ALJ orally ruled at the October 25 hearing that the training materials were not related to any issue in question. It is undisputed that the Consolidated Complaint fails to allege that any of the Respondents acted discriminatorily or otherwise unlawfully with respect to training. There is no contention that any member of the former ILA Local 846 was denied training opportunities *because of* his or her membership in ILA Local 846 or *because of* his or her non-membership in ILA Local 1248 or ILA Local 970. Information related to training opportunities is thus simply irrelevant to these proceedings.

**C. The ALJ Did Not Abuse His Discretion By Permitting The Respondents To Defer Questioning Of Respondents’ Witnesses.**

GC’s request for special permission to appeal the ALJ’s ruling on the order of trial testimony is meritless. GC ignores the ALJ’s broad discretion to control the trial and determine the order of witness examination. GC also fails to identify any prejudice to GC that would warrant a finding that the ALJ abused his discretion. Further, given the lateness of GC’s request for special permission to appeal, even if there was an abuse of discretion, there is no means to rectify that now: three of the four Respondents’ principal representatives have testified in GC’s case already, with additional examination being reserved until the Respondents’ case.

The ALJ has broad authority to “[r]egulate the course of the hearing,” NLRB Rules and Regulations § 102.35(a)(6), and “*wide discretion* to allow witnesses to testify out-of-turn, for example, to save time, avoid confusion, or accommodate the schedule of a critical witness.” NLRB Bench Book (Jan. 2018) § 16-611.1 (emphasis added). The ALJ’s discretion extends to “control over the mode and order of examining witnesses and presenting evidence.” FRE 611(a); NLRB Bench Book § 16-611. *See generally United States v. Baptista-Rodriguez*, 17 F.3d 1354,

1371 (11th Cir. 1994) (“Neither the Confrontation Clause nor the Due Process Clause restricts a trial judge’s broad discretion to exercise reasonable control over the order in which litigants interrogate witnesses and present evidence.”). The ALJ may allow cross-examination to exceed the scope of direct examination by allowing “‘inquiry into additional matters as if on direct examination’ ... to develop a full record without recalling witnesses[.]” NLRB Bench Book § 16-611.2 (citing FRE 611(b)). The ALJ “has broad discretion in deciding whether rebuttal and surrebuttal testimony would be helpful in developing the evidence, or whether it would inappropriately and unnecessarily prolong the trial.” NLRB Bench Book § 16-611.3 (emphasis added). *See Garden Ridge Mgmt., Inc.*, 347 NLRB 131 n.3 (2006) (“the admissibility of evidence on rebuttal is within the discretion of the judge, even if the evidence is not technically proper rebuttal evidence”), *citing Water’s Edge*, 293 NLRB 465 n.2 (1989) (judge did not abuse his discretion by admitting testimony by a GC witness on rebuttal, even though it was technically not proper rebuttal because it was not introduced to refute evidence provided by the respondent’s witness), *enfd. in part* 14 F.3d 811 (2d Cir. 1994).

Given the ALJ’s “broad discretion” to control the trial, the order of witnesses, the mode and scope of witness examination, GC would have to show an abuse of discretion for the ALJ’s ruling to be reversed. The “abuse of discretion” standard is “highly deferential” and “[a]biding by that standard is essential to permit the judge to fulfill his duty under Sec. 102.35 of the Board’s Rules and Regulations to ‘regulate the course of the hearing.’” *MHA, LLC d/b/a Meadowlands Hosp. Med. Ctr. & Health Professionals & Allied Employees, Aft/AFL-CIO*, 22-CA-086823, 22-CA-, 2014 WL 722108, at \*1 n.2 (DCNET Feb. 25, 2014) (citing *F. W. Woolworth Co.*, 251 NLRB 1111, 1111 n.1 (1980), *enfd.* 655 F.2d 151 (8th Cir. 1981), *cert. denied* 455 U.S. 989 (1982)).

The ALJ's ruling dovetails with the case law. In a jury trial in *Argentine v. United Steelworkers of America*, AFL-CIO, 287 F.3d 476 (6th Cir. 2002), the plaintiffs called as a witness in their case in chief the defendant's auditor. *Id.* at 486. The trial judge did not allow the defendant to cross-examine the auditor at that time because "the court concluded he was essentially a [defendant's] witness." *Id.* Instead, the court required the defendant to call the auditor as a witness in its case in chief. *Id.* On appeal, the defendant argued that this ruling had deprived the defendant of its "right to cross-examine witnesses directly after direct examination and [that] the delay in [cross-examination] created jury confusion." *Id.* The Sixth Circuit, while acknowledging that "[c]ross-examination is a trial right," rejected this argument because "[sometimes] cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent." *Id.* (quoting Fed. R. Evid. 611, Advisory Committee Notes). The Sixth Circuit concluded that the trial judge acted within his discretion to "order the witnesses" and "control ... the order of the evidence" and that it was not an abuse of discretion to move the defendant's "cross-examination" of its witness to its direct examination of that witness in its case in chief. *Id.*

Here, too, the Respondents' cross-examination of their principals will be "cross-examination in form only and not in fact." *Id.* GC will have a full opportunity for examination after the Respondents' examination of their witnesses. There was no prejudicial confusion or delay in the *Argentine* case, which was a jury trial; the risk of confusion and delay is even less in this case because there is no jury and the parties will all have transcripts of the earlier testimony when the Respondents' principals are called in the Respondents' cases.

GC has not come close to showing an abuse of discretion. There is none. GC's examination of the Respondents' witnesses was not interrupted or curtailed in any way. When

GC rests her case, it will be subject to the continued examination of the Respondents' representatives. It is quite common for judges to alter the order and mode of witness examination, as recognized by the rules. *See* Fed. R. Evid. 611(a); *see also Argentine*, 287 F.3d at 486. The ALJ's ruling streamlines the hearing. Under the procedure GC demands, the Respondent's principals each would be subject to a minimum of twelve rounds of questioning: in the GC's case in chief, direct examination, the four Respondents' cross-examinations, and the GC's re-direct examination, and then in the Respondent's case in chief, direct examination, cross-examination by the three other Respondents and GC, and re-direct examination, plus any additional cross- or direct-examination as is commonly allowed. The ALJ's ruling compresses this procedure into seven rounds of questions, without curtailing any party's questioning of the witness.

GC questions her ability and the Charging Parties' ability to police the sequestration order,<sup>4</sup> but the ALJ anticipated potential issues regarding the sequestration order and instructed counsel accordingly. Tr. 424:22-425:25. Further, the NLRB Bench Book anticipates and condones that counsel may confer with party witnesses during lengthy breaks in testimony. The NLRB Bench Book notes that while the ALJ has "discretion to instruct party witnesses party witnesses not to confer with counsel during a short recess between direct and cross-examinations," the witness should be allowed to confer with counsel during longer breaks in testimony, even as brief as overnight. NLRB Bench Book § 11-210; *see also Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117 (5th Cir.) (holding that trial judge erred in barring witness from conferring with counsel during seven-day period in which he testified), *cert. denied* 449 U.S. 820 (1980).

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<sup>4</sup> Policing the sequestration order is the ALJ's role.

Finally, GC's belated request for special appeal prevents any change to the procedure at this stage. Three of the four Respondents' principals have testified already pursuant to the ALJ's ruling: Giesinger, Rascoe, and Coley. It would be cumbersome, inefficient, and time-consuming to recall them to the witness stand for their cross-examination now, especially given that each will be called again in the Respondents' case. As there was no abuse of discretion, the ALJ's procedural ruling on witness testimony should stand. The Board should deny GC's request for special appeal.

### III. CONCLUSION

WHEREFORE, Respondents respectfully requests that the Board DENY the GC's Request for Special Permission to Appeal and Appeal of the Rulings of the Administrative Law Judge.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL  
1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
LOCAL 970, HAMPTON ROADS SHIPPING ASSOCIATION, AND  
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

By: /s/ SuAnne Hardee Bryant  
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*Counsel for Respondent ILA Local 970*

CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of February 2018, a copy of the foregoing document was filed electronically using the NLRB's e-file system and was sent, via electronic mail to the following:

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/s/ SuAnne H. Bryant  
SuAnne H. Bryant

**Hudson, Robert D.**

---

**From:** Sukert, Aaron <Aaron.Sukert@nlrb.gov>  
**Sent:** Monday, July 2, 2018 11:13 AM  
**To:** Carmen DiRienzo; Bryan Carmody; Andrew Lammers; Don Carmody; Hudson, Robert D.; chsi-nlrb-hh@howardandhoward.com; Isachs@howardandhoward.com; pmccarthy@howardandhoward.com; wouthier@rwjplc.com; jjacobson@rwjplc.com; Mearns, Timothy; White, Joel; Banks, Ashley L.; Schafhauser, Sarah B.; Mervin, Joelle; Laufer, Amanda W.; Garber, Noah; MacKay, Robert; Katherine R. Cloud, Esq. R  
**Cc:** Choudhury, Rudra; Pincus, Stephen M.; Sobczak, Megan Orazio  
**Subject:** RE: CHS I and CHS II Backpay Calculations (interest calculated through 6-22-18) - Revised for Greenbrier -7/2/18 Version  
**Attachments:** Backpay Spreadsheet.6-28-18.interest thru 6-22-18.revised version.sent.7-2-18..pdf; Backpay Spreadsheet.6-28-18.interest thru 6-22-18.revised version.sent.7-2-18..xlsx  
**Importance:** High

Dear Counsel:

Please see the revised attachments which reflects adjustments to the CHS II – Greenbrier backpay amounts, and accordingly the revised totals. Below are the revised totals:

Attached are the approximate current backpay calculations for CHS I, CHS II and the compliance specification for Fallbrook based upon the information currently in General Counsel’s possession. General Counsel reserves the right to and will modify these figures based upon the receipt of any supplemental information, as necessary. Unless otherwise indicated, adjustments were made for interim earnings where appropriate. Interest has been computed through 6/22/18. As you know, interest continues to accrue thereafter. The backpay calculations take into account all of General Counsel’s amendments to the complaints in CHS I and CHS II until the present. The figures are complete, unless as noted below. If you have follow up questions, please let us know, and we can include the particular Counsel for General Counsel involved in those allegations as part of those discussions.

Here are the approximate backpay calculations:

CHS I: \$1,041,005.40  
CHS II: \$3,153,999.09

**TOTAL (CHS I + CHS II): \$4,195,004.49**

Fallbrook Compliance: \$23,938.68

**TOTAL (CHS I + CHS II + FALLBROOK COMPLIANCE CASE): \$4,218,943.17**

For CHS I:

Bluefield – the figure includes interest and excess tax liability, but backpay, interest and excess tax are not broken down in the spreadsheet.

Fallbrook – for both the CNA and SEIU allegations, to determine the Transmarine remedy, a two-week period was used, based on the parties reaching an overall settlement.



For CHS II:

Bluefield – the figure includes interest and excess tax liability, but backpay, interest and excess tax liability are not broken down in the attached spreadsheet. General Counsel withdrew Paragraph 44(C) (the PTO unilateral change allegation), and it is listed as having 0 backpay.

Greenbrier – General Counsel withdrew Paragraph 38(C) (unilateral change to method of obtaining work and work hours in Cath lab) and it is listed as having 0 backpay.

As indicated, for CHS II, negotiation expenses for Bluefield and Greenbrier still need to be calculated.

Please contact us with any further questions. Please also cc any Counsel for General Counsel from any particular Regions for the respective Hospitals involved.

Sincerely,

Aaron Sukert and Stephen Pincus,  
Counsel for General Counsel

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\*\*\*\*\* (see 6/28/18 Email Below With the  
Prior Totals)  
PRIOR TOTALS FROM 6-28-18

**From:** Sukert, Aaron

**Sent:** Thursday, June 28, 2018 2:30 PM

**To:** 'Carmen DiRienzo' <cdirienzo@carmodyandcarmody.com>; 'Bryan Carmody' <bcarmody@carmodyandcarmody.com>; 'Andrew Lammers' <alammers@carmodyandcarmody.com>; 'Don Carmody' <dcarmody@carmodyandcarmody.com>; 'Hudson, Robert D.' <rHUDSON@fbtlaw.com>; 'chsi-nlrh-hh@howardandhoward.com' <chsi-nlrh-hh@howardandhoward.com>; 'lsachs@howardandhoward.com' <lsachs@howardandhoward.com>; 'pmccarthy@howardandhoward.com' <pmccarthy@howardandhoward.com>; 'wouthler@rwjplc.com' <wouthler@rwjplc.com>; 'jjacobson@rwjplc.com' <jjacobson@rwjplc.com>; Mearns, Timothy <Timothy.Mearns@nlrb.gov>; White, Joel <Joel.White@nlrb.gov>; Banks, Ashley L. <Ashley.Banks@nlrb.gov>; Schafhauser, Sarah B. <Sarah.Schafhauser@nlrb.gov>; Mervin, Joelle <Joelle.Mervin@nlrb.gov>; Laufer, Amanda W. <Amanda.Laufer@nlrb.gov>; Garber, Noah <Noah.Garber@nlrb.gov>; MacKay, Robert <Robert.MacKay@nlrb.gov>; 'Katherine R. Cloud, Esq. R' <kcloud@rwjplc.com>

**Cc:** Choudhury, Rudra <Rudra.Choudhury@nlrb.gov>; Pincus, Stephen M. <Stephen.Pincus@nlrb.gov>

**Subject:** CHS I and CHS II Backpay Calculations (interest calculated through 6-22-18)

**Importance:** High

Dear Counsel:

Attached are the approximate current backpay calculations for CHS I, CHS II and the compliance specification for Fallbrook based upon the information currently in General Counsel's possession. General Counsel reserves the right to and will modify these figures based upon the receipt of any supplemental information, as necessary. Unless otherwise indicated, adjustments were made for interim earnings where appropriate. Interest has been computed through 6/22/18. As you know, interest continues to accrue thereafter. The backpay calculations take into account all of General Counsel's amendments to the complaints in CHS I and CHS II until the present. The figures are complete, unless as noted below. If you have follow up questions, please let us know, and we can include the particular Counsel for General Counsel involved in those allegations as part of those discussions.

Here are the approximate backpay calculations:

**CHS I: \$1,041,005.40**

**CHS II: \$3,132,011.10**

**TOTAL (CHS I + CHS II): \$4,173,016.50**

**Fallbrook Compliance: \$23,938.68**

**TOTAL (CHS I + CHS II + FALLBROOK COMPLIANCE CASE): \$4,196,955.18**

For CHS I:

Bluefield – the figure includes interest and excess tax liability, but backpay, interest and excess tax are not broken down in the spreadsheet.

Fallbrook – for both the CNA and SEIU allegations, to determine the Transmarine remedy, a two-week period was used, based on the parties reaching an overall settlement.

For CHS II:

Bluefield – the figure includes interest and excess tax liability, but backpay, interest and excess tax liability are not broken down in the attached spreadsheet. General Counsel withdrew Paragraph 44(C) (the PTO unilateral change allegation), and it is listed as having 0 backpay.

Greenbrier – the figure includes interest, but backpay and interest are not broken down in the attached spreadsheet. General Counsel withdrew Paragraph 38(C) (unilateral change to method of obtaining work and work hours in Cath lab) and it is listed as having 0 backpay.

As indicated, for CHS II, negotiation expenses for Bluefield and Greenbrier still need to be calculated.

Please contact us with any further questions. Please also cc any Counsel for General Counsel from any particular Regions for the respective Hospitals involved.

Sincerely,

Aaron Sukert and Stephen Pincus,  
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CHS II					
AFFINITY					
ALLEGATION	DESCRIPTION	BACK PAY	INTEREST	EXCESS TAX	TOTAL
NO BACK PAY FOR CHS II					

BARSTOW					
ALLEGATION	DESCRIPTION	BACK PAY	INTEREST	EXCESS TAX	TOTAL
NO BACK PAY FOR CHS II					

BLUEFIELD					
ALLEGATION	DESCRIPTION	BACK PAY	INTEREST (through 6/22/18)	EXCESS TAX	TOTAL
23(a), 44(a)	CRNA discharges	\$ 2,425,481.00	includes	includes	\$ 2,425,481.00
44 ( C )	PTO Unilateral Change Allegation	\$ -	includes		\$ -
23(C) & (D)	Adams' suspension	\$ 21,629.00	includes	includes	\$ 21,629.00
<b>TOTAL</b>		<b>\$ 2,447,110.00</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ 2,447,110.00</b>

ALLEGATION	DESCRIPTION	BACK PAY	INTEREST	EXCESS TAX	TOTAL
p.58	Bluefield Negotiation Expenses	Needs to be calculate	\$ -	\$ -	\$ -
<b>TOTAL</b>		<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>

GREENBRIER CHS II					
ALLEGATION	DESCRIPTION	BACK PAY	INTEREST (through 6/22/18)	EXCESS TAX	TOTAL
38(A)	About Oct 24, 2018, R GB changed policies re paid time off, mand time off and staffing	\$ 524,026.05	\$ 20,961.04	\$ 15,505.00	\$ 560,492.09
38 (B)	Since o/a February 2015, R GB removed relief	\$ 130,788.00	\$ 9,318.00	\$ 6,291.00	\$ 146,397.00

38 (C)	About Feb 2015,R GB changed the method by which nurses obtained work and work hours	\$ -	\$ -	\$ -	\$ -
<b>TOTAL</b>		\$ 654,814.05	\$ 30,279.04	\$ 21,796.00	\$ 706,889.09

ALLEGATION	DESCRIPTION	BACK PAY	INTEREST	EXCESS TAX	TOTAL
p.58	Negotiation Expenses (p. 58)	Needs to be calculate	\$ -	\$ -	\$ -
<b>TOTAL</b>		\$ -	\$ -	\$ -	\$ -

WATSONVILLE CHS II					
ALLEGATION	DESCRIPTION	BACK PAY	INTEREST	EXCESS TAX	TOTAL
NO BACK PAY					

BACK PAY	INTEREST	EXCESS TAX	TOTAL
\$ 3,101,924.05	\$ 30,279.04	\$ 21,796.00	\$ 3,153,999.09