

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

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WILKES-BARRE BEHAVIORAL HOSPITAL	:	Case No. 04-CA-215690
CO., LLC d/b/a FIRST HOSPITAL WYOMING	:	
VALLEY	:	
	:	
<i>and</i>	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL	:	
UNION HEALTHCARE PENNSYLVANIA	:	

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**RESPONDENT’S REPLY BRIEF TO COUNSEL FOR THE GENERAL  
COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS**

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For all of the following reasons, the National Labor Relations Board (hereafter, the “Board”) should reject the arguments set forth by the Answering Brief filed by Counsel for the General Counsel of the Board (hereafter, the “General Counsel”) in response to the Exceptions and Brief in Support of the Exceptions filed by the Respondent, Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley (hereafter, the “Hospital”) in response to the November 5, 2019 Decision of Administrative Law Judge Geoffrey Carter (hereafter, the “Decision”).<sup>1</sup>

## **ARGUMENT**<sup>2</sup>

### **1.) The General Counsel Downplays Unresolvable Issues and Impasse**

The General Counsel’s Answering Brief first attempts to downplay the various outstanding bargaining issues that the parties were unable to resolve, which led to impasse, in an attempt to convey either that those issues were “unimportant”, or that the parties could have made further progress with continued bargaining. See AB 16. The General Counsel’s arguments in this regard must fail. When the record is viewed in its entirety, it is clear that the parties were deadlocked on seven issues:

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<sup>1</sup> For purposes of this Reply Brief, the Hospital shall employ the same shorthand references used by the Hospital’s Brief in Support of Exceptions. Citations to the Hospital’s Brief in Support of Exceptions shall be notated “BSE”, and citations to the General Counsel’s Answering Brief shall be notated “AB.”

<sup>2</sup> The General Counsel’s Answering Brief begins its argument with the claim that certain of the Hospital’s Exceptions were not encompassed by the Hospital’s Brief in Support of Exceptions. AB 15. Without belaboring this meritless point, the Hospital responds that each and every Exception that it took is addressed in some manner by its Brief in Support of Exceptions.

bifurcation of contracts, holidays, employee training / orientation, Union access, health insurance, pulling / floating, and wages. In fact, the Hospital's position on those issues had not changed since April 2017 (four months before the Hospital declared the parties had reached impasse), and the Union had offered only *de minimis* movement on only some of those seven issues over the during the same period of time. <sup>3</sup> See R. Exs. 5, 35, 38, 39; G.C. Exs. 3-6, 10, 18.

*a.) Allegedly "Unimportant" Unresolved Issues*

The General Counsel's Answering Brief first claims that the open issues of bifurcation, holidays, and employee orientation / training were "minor" and "less significant" (AB 9, 14) to the parties, and appears to extrapolate from that claim that it did not matter that neither party was making any further movement with regard to bargaining on those subjects. See AB 9, FN 15, AB 16. Not only is this claim factually disproven by the evidentiary record, but it is also legally unsound. First, the General Counsel's claims that these issues were unimportant to the parties and were either "readily bridgeable" or "tabled" (AB 14, 16) are disproven by the record. As a practical matter, the very fact that the issues remained outstanding and unresolved, after a year of bargaining, fifteen bargaining sessions, and twenty-two

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<sup>3</sup> The Answering Brief also wrongly claims that the parties reached tentative agreements after April 25, 2017, on the subjects of union security and the grievance procedure (AB 5) – the parties actually reached tentative agreement on those subjects on March 9, 2017 and April 25, 2017 respectively. See R. Exs. 30, 33, 36.

package proposals passed between the parties, in and of itself, illustrates the importance of these specific issues to each party – if they were not important, they would have been abandoned or conceded by one party or the other. Additionally, the importance of the issues was made clear by various witnesses at the hearing, and the documents that were created contemporaneous with the parties’ bargaining. See (Tr. 139-41, 294-95, 368-69); R. Exs. 4, 5, 21, 24, 27, 32, 38, 39; G.C. Exs. 3, 4, 6 (Bifurcation); (Tr. 295-96, 371-72); R. Ex. 29 (Holidays); (Tr. 165-66, 168, 295, 372-73); R. Ex. 29 (Orientation / Training). By contrast, there is absolutely no evidence to support the contention that any of these issues had been “tabled” by the parties. AB 14, 16. Furthermore, the General Counsel’s theory is legally unsound. As explained above, the General Counsel’s contention that these issues were “less significant” (AB 14) is not drawn from the factual record, but instead from the General Counsel’s own opinion of what issues should and should not be of import to the parties in negotiations – which is entirely improper. See NLRB v. American Ntl. Ins. Co., 343 U.S. 395 (1952) (The Board may not [...] sit in judgment upon the substantive terms of collective bargaining.”)

*b.) Placing the Blame on Union Access*

Next, in connection with proposals concerning Union access to the Hospital, the General Counsel attempts to blame the Hospital for injecting the issue into the parties’ bargaining (See AB 5, 9), but fails to recognize the seriousness of the issue,

as well as the fact that the issues were introduced in negotiations long before the Hospital declared impasse, giving the parties plenty of time to discuss and resolve those issues, if such resolution was going to be possible. The Hospital introduced proposals on Union access on June 14, 2017 – four months and four bargaining sessions before declaring impasse. (Tr. 36, 318-19, 393-94, 428); R. Exs. 38, 39. The proposals were made because Union organizers had begun to abuse the access provisions of the 2014-2016 CBA - particularly concerning in a behavioral health facility with restricted public access and a volatile inpatient population – and so, the Hospital believed that changes to the access language were necessary. (Tr. 29, 320, 429-431); R. Exs. 38, 39; C.P. Ex. 1.

The General Counsel’s attempts to rewrite the Hospital’s proposals as having been made in bad faith (See AB 9) must fail. First, it is worth noting that the issue of Union access was introduced when the parties still had not reached agreement on any of the other six remaining, key issues which remained unresolved as of the Hospital’s declaration of impasse. Therefore, the General Counsel’s insinuation that the issue of Union access was injected by the Hospital to *create* the circumstances leading to impasse must be rejected – the parties did not agree on many other important, outstanding issues, and impasse would have been declared even if the parties had not additionally reached a stalemate on the question of Union access. Similarly, the General Counsel’s insinuation that, because the Hospital did not

grieve an access violation by the Union until September 2017, the Hospital could not truly have had concerns about Union access (AB 5, 9, 16-17) is wholly without merit. Sincich testified specifically regarding this point, and explained that the Union's practice did not technically violate the parties' 2014-2016 CBA, and therefore the fact that the Hospital did not file grievances concerning the Union's actions in fact underscores the logic underlying the Hospital's proposed revisions to the CBA's access provisions. (Tr. 430-431).

*c.) Maximization of De Minimis Movement*

Finally, with regard to those issues where the General Counsel did not attempt to deny the importance of the issue to the parties – namely, floating / pulling, health insurance, and wages <sup>4</sup> – the General Counsel claims that the negligible “movements” made by the Union in its latter proposals were sufficient to support the claim that the Union was not at the end of its bargaining rope, and the parties

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<sup>4</sup> The General Counsel's Answering Brief includes alternative theories advanced by the General Counsel as to why the Hospital's declaration of impasse violated the law, including the assertion that the Hospital was obligated to provide information concerning the market adjustments to the Union before implementation, and the claim that the Hospital's market adjustments were separately unlawful because they were not proposed during negotiations. AB 23-25. ALJ Carter's Decision did not pass upon these alternate theories advanced by the General Counsel (See Decision 26, FN 14), and the General Counsel filed Cross-Exceptions to the Decision on these grounds. For the reasons more fully discussed by the Hospital's Answering Brief to the General Counsel's Cross-Exceptions, the Hospital believes that both alternative theories advanced by the General Counsel are without merit and must be rejected by the Board.

were not at impasse. This contention is unsupported by the evidentiary record and the Board's precedent. On all three topics, the Union's final "moves" were so nominal as to not qualify as "movement" at all.<sup>5</sup> Furthermore, the thrust of the General Counsel's argument, as it applies to all three topics of negotiation, is that for so long as the Union kept making these *de minimis* movements, or even simply asserted that the parties were not at impasse, then the parties could never reach impasse. See AB 4, 14, 19, 22-23. This assertion is not supported by the case law, which does not accept pretextual "movement" as the kind of "progress" (AB 19) that would prevent parties from reaching impasse, but instead declares such proposals "surface bargaining" - "employing the forms of collective bargaining without any intention of concluding an agreement." U.S. Ecology Corp., 331 NLRB 223, 225 (2000).

No matter what incremental movements toward the Hospital the Union made, it knew full well that unless it conceded on the open subjects, the parties would be

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<sup>5</sup> The General Counsel's assertion that the parties were not "actually" far apart on wages, because the Hospital eventually provided MHTs with a market adjustment (AB 6, FN 11, AB 19), is logically untenable. The General Counsel's continued conflation of wage increases with the proposal on market adjustments illustrates that the General Counsel does not understand that the two are entirely separate methods of increasing compensation, which follow different rationales and support separate objectives. See Also AB 11 (Describing market adjustments as "wage increases" "greater" than the wage increases proposed by the Union); AB 27 (Suggesting that the Union's proposals for additional market adjustments were not regressive because the Union previously sought across-the-board wage increases).

unable to reach agreement. Knowing this to be the case, the Union's continued advancement of proposals that fell well short of the Hospital's bottom line had no likelihood of moving the parties toward agreement, and therefore cannot be styled as the kind of movement that would work to prevent a declaration of impasse.<sup>6</sup> This is true even when the parties are "relatively" or even "very" close (AB 8, 19) to agreement – being close to agreement is not mutually exclusive with having reached a point of impasse, as the General Counsel's Answering Brief suggests (AB 8). For all these reasons, it is clear that the parties were as deadlocked on these subjects as they were on the remaining four open areas of negotiations.

*d.) The Hospital's Declaration of Impasse*

Finally, like ALJ Carter, the General Counsel attempts to downplay the record evidence that the Hospital had declared impasse at the parties' October 6, 2017 bargaining session (See AB 8, 18) – a factual underpinning highly relevant to the question of whether the Hospital's subsequent implementation of wage increases and market adjustments was lawful.<sup>7</sup> The General Counsel claims that ALJ Carter's credibility determination was "balanced", and under precedent, entitled to

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<sup>6</sup> The facts in this case are thus distinguishable from the facts in the "one-sided impasse" cases cited by the General Counsel. See AB 23-24.

<sup>7</sup> Unlike ALJ Carter, however, the General Counsel concedes that that the Union rejected the Hospital's proposal to implement wage increases and continue bargaining (AB 8), which is precisely what prompted Sincich's declaration of impasse - *not*, as the Judge concluded, that the issue was left open at the close of bargaining on October 6, 2017. See Decision 16, *but compare* Tr. 63-66, 155-156.

“substantial deference”. AB 18. This claim ignores longstanding cases such as Red’s Express, which explain that substantial deference to a judge’s credibility determinations is limited to circumstances where the credibility determination is based upon witness demeanor, rather than other factors. 268 NLRB 1154, 1155 (1984). In the case at bar, ALJ Carter’s finding is thus not entitled to deference as the General Counsel contends, because it contradicts Sincich’s wholly uncontroverted testimony, in favor of a shaky inference drawn on the premise of faulty underlying logic about what someone would or would not record in their bargaining notes.

## **2.) The General Counsel Mischaracterizes the Union’s Bad Faith Behavior**

The General Counsel’s Answering Brief next attempts to defend the bad faith actions taken by the Union throughout the parties’ negotiations, which further justified the Hospital’s implementation of its final offer.<sup>8</sup> The General Counsel’s attempts to absolve the Union of bad faith in light of its regressive and surface bargaining tactics must fail. The General Counsel’s claim that the Union had proposed market adjustments for classifications other than MHTs prior to December 2017 (AB 3, FN 9; AB 6) appears to be based on the General Counsel’s abject

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<sup>8</sup> Contrary to the assertions of ALJ Carter and the General Counsel (AB 26-27), Board precedent does support the Hospital’s right to implement its best and final offer where the Union’s bad faith bargaining impeded progress. See Serramonte Oldsmobile, 318 NLRB 80 (1995); Paperworkers Locals 1009, 311 NLRB 41 (1993).

failure to grasp that there is a distinction between across-the-board wage increases (which the Union sought for all classifications) and market adjustments (which the parties had suggested only for MHTs prior to December 2017). In connection with the Union's regressive October 6, 2017 proposal for a one-year contract, instead of a three-year contract as both parties had been proposing throughout negotiations, the General Counsel claimed repeatedly that the Union made the proposal to "allow time" for a market adjustment. AB 7, 22, 27. This claim was explicitly rejected by ALJ Carter, who did not credit Hefty's testimony on this specific point. Decision 15, FN 7. Similarly, the General Counsel's claim that the Union's January 2018 proposal on floating / pulling constituted "compromise" (AB 9) rather than surface bargaining is laughable, where the proposal rendered at most only two to five additional employees, in a unit of approximately 149 employees, available to float. (Tr. 86, 164, 370)

Finally, the General Counsel attempts to review each bad faith action taken by the Union in isolation, contrary to the "totality of evidence" standard set by the Board for the consideration of a party's good or bad faith. See, e.g. AB 3, FN 7 (Union's tardiness did not amount to bad faith bargaining)<sup>9</sup>; AB 7, FN 13 (Delay

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<sup>9</sup> The General Counsel's claim that the "parties" both routinely caucused at the outset of bargaining sessions (AB 3), is entirely disproven by the evidentiary record, which illustrates that only the *Union* engaged in this dilatory tactic. See, e.g., R. Ex. 15, (Tr. 305).

in communicating results of ratification vote “had nothing to do” with impasse)<sup>10</sup>; AB 27 (Reviewing each alleged incident of bad faith conduct in isolation). In so doing, the General Counsel fails to recognize that the Union’s bad faith actions, working in conjunction with one another, all furthered the common purpose of delaying the parties’ bargaining to avoid the inevitable declaration of impasse. The Board has long held that such actions constitute unlawful, bad-faith bargaining.

### CONCLUSION

For all the reasons set forth above, the Hospital respectfully requests that the Board reject the arguments set forth by the General Counsel’s Answering Brief, sustain the entirety of the Hospital’s Exceptions, and dismiss the entirety of the underlying Complaint.

Dated:       April 2, 2020  
              Atlanta, Georgia

Respectfully submitted,

/s/ \_\_\_\_\_

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<sup>10</sup> The fact that the results of the vote were posted at the Hospital is irrelevant, where neither Sincich nor Nottelmann, the Hospital’s two bargaining representatives, worked within the Hospital. See (Tr. 395-396) (Sincich’s office is located in Warren, Ohio); R. Ex. 42 (Nottelmann’s office was located at Wilkes-Barre General Hospital).

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**CERTIFICATE OF SERVICE**

As an attorney duly admitted to the practice of law, I do hereby certify that, on April 2, 2020, I served a copy of the document above on the following *via* e-mail:

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Dated: April 2, 2020  
Atlanta, Georgia

Respectfully submitted,

/s/ \_\_\_\_\_

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