

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

**SOUTHERN OCEAN MEDICAL
CENTER,
JERSEY SHORE UNIVERSITY
MEDICAL CENTER,
PALISADES MEDICAL CENTER,
AND THE HARBORAGE,
A DIVISION OF HMM HOSPITALS
CORP.,**

Respondent,

and

**HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES,**

Charging Party.

Case Nos. 22-CA-223734

22-CA-223942

RESPONDENTS' REPLY BRIEF IN SUPPORT OF EXCEPTIONS

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Respondent HMH¹ files this reply brief in support of its exceptions to Administrative Law Judge Benjamin W. Green (“ALJ”) April 24, 2020 Decision (“ALJD”) in this matter. As explained in HMH’s opening brief, the ALJ erroneously concluded that HMH had unlawfully “dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by announcing its desire to changes their terms and conditions of employment without providing the Union adequate advanced notice and bargaining proposals.” (ALJD at 18:3-5) HMH’s May 22, 2018² communication to its entire 33,000 workforce describing anticipated changes to its *non-union team members’* employment terms as of January 1, 2019 (the “harmonization communications”) was privileged and did not violate the National Labor Relations Act (“NLRA” or “Act”). To the contrary, HMH appropriately notified in advance Charging Party Health Professionals and Allied Employees (“HPAE” or “Union”), which represented 3,000 of HMH’s 33,000 team members, of these harmonization communications.

I. CONTRARY TO THE CGC’S ARGUMENTS, HMH DID NOT COMMUNICATE UNLAWFULLY WITH ITS UNION-REPRESENTED TEAM MEMBERS.

The Counsel for the General Counsel’s (“CGC”) argument in Section III, Point 1 (A-D) of his Answering Brief (“AB”) is based on two false premises: (1) HMH was required to communicate with each discrete bargaining unit before publishing the harmonization materials; and (2) prior to making economic bargaining proposals to the Union, HMH made *de facto* economic proposals directly to Union-represented Team Members. (AB at 1-2) HMH addresses each flawed argument, in turn.

¹ The individual Respondents in this case are affiliated with Hackensack Meridian Health (“HMH”). Respondents are collectively referred to as “HMH.” HMH refers to its employees as “team members” and that term will be used herein.

² All dates herein are in 2018, unless otherwise specified.

A. HMH Provided The Union – HPAE – With Advance Notice Of The Harmonization Communications.

The CGC repeatedly suggests that HMH was required to provide advance notice of the harmonization communication directly to each of the four HPAE-represented bargaining units involved in the case³ and/or the lead negotiator for each unit. (AB at 28-30, 32-34) This argument misstates the law and ignores both the complaint allegations and the ALJ’s legal conclusions.

The complaint in this matter alleged that HPAE – not its four local union affiliates or their lead negotiators – was *the* labor organization with which HMH was obligated to deal. (Complaint at caption, ¶¶ 7, 10, 16, 18). Based on this allegation (admitted by HMH), the ALJ specifically found that HPAE, not any of its local affiliates, was the labor organization HMH was required to bargain with. (ALJD at 2 n. 3, 17 (Conclusions of Law 2 and 3), 18 (Order, ¶1(a)) Further, the collective bargaining agreements (“CBA”) between HMH and the JSUMC, Palisades and The Harborage bargaining units are between each Respondent and HPAE. (GC-2 at 1; GC-12 at 2; GC-13 at 1; GC-14 at 1; and GC-15 at 1). Based on the ALJ’s unsurprising conclusion on this point (to which there are not exceptions), HMH was obligated to deal with HPAE only and not separately with the local bargaining committees or their HPAE-employed lead negotiators, as the CGC now suggests.

The ALJ’s conclusion is completely consistent with established Board law, which requires an employer to deal exclusively with a bargaining unit’s designated bargaining representative and no other entity, including affiliated local unions.⁴ “The National Labor

³ Jersey Shore Local 5058 (RNs); Southern Ocean Local 5138 (RNs); The Harborage Local 5097 (Service and Maintenance); Palisades Local 5030 (RNs, Technical, and Service and Maintenance). ALJD at 2.

⁴ “As we have acknowledged, a local union affiliate, for purposes of the exclusivity of bargaining requirement, is an entity separate and distinct from its international parent.” *NLRB v. Media Gen. Operations, Inc.*,

Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive [...] it exacts ‘the negative duty to treat with no other.’” *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 683-84 (1944), *see also Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1385 (9th Cir. 1984).

Here, HMM gave advanced notice of the harmonization communications to HP AE, the designated bargaining representative of each of the four bargaining units at issue in this case. At the time of the events giving rise to this case, Fred DeLuca was HP AE’s Director of Member Representation. In that role, he was responsible for each of the HP AE locals and he supervised both Richard Halfacre and Djar Horn – the HP AE-employed staff representatives acting as the lead negotiators for each bargaining unit. (ALJD 3:30-35) As the Director of Member Representation, Mr. DeLuca “attended a number of bargaining sessions and corresponded with [HMM lead negotiator Joseph C.] Ragaglia about certain matters.” (ALJD 3:34-35) On May 19, Mr. Ragaglia informed HP AE of the upcoming harmonization communications via an email to Mr. DeLuca. Mr. DeLuca promptly forwarded his email exchange with Mr. Ragaglia to his subordinates, Mr. Halfacre and Ms. Horn. (GC-26 at 2) These communications discharged HMM’s obligation to communicate with HP AE, the designated bargaining representative of all of the bargaining units, regarding the imminent harmonization communications. HMM had no separate obligation to communicate about the harmonization communications with the individual bargaining units.

HMM went further, sharing the harmonization materials with the Union prior to their publication. (ALJD at 22-28 (citing R-5, R-6)) Shortly after these materials were finalized, Mr. Ragaglia shared the harmonization materials with The Harborage bargaining committee, which

360 F.3d 434, 446 (4th Cir. 2004) (citing *United Elec., Radio & Mach. Workers (UE) v. NLRB*, 986 F.2d 70, 75 (4th Cir. 1993)).

included both Mr. DeLuca and Mr. Halfacre. (ALJD at 5:13-44) Finally, in addition to these preview sessions for HPAE bargaining committees, HMH provided links to the live TeamHMH.com website to HPAE staff before its public release to the team members.⁵ (GC-6, R-3, and R-6, *see also* Tr. 231:22-25) In fact, HPAE had enough advanced notice of the website that it notified its members about the upcoming publication of the harmonization materials via a Facebook post *before* the website went live. (R-1)⁶

B. The Harmonization Materials Were Not *De Facto* Proposals.

The CGC goes to great, but unavailing, lengths to characterize the harmonization materials as *de facto* proposals intended to change the terms and conditions of HPAE’s members. (AB at 14-15) Importantly, the CGC failed to cite the key admission by HPAE staff representative Halfacre that he did not consider the harmonization materials to be a “proposal.” (Tr. 108:25-109:19, 113:5-14, 117:10-13, 118:8-119:9, 119:25-120:24, 131:15-132:7, 140:13-141:17). Mr. Halfacre’s testimony could not have been any clearer:

Q (by Mr. Murphy, Counsel for HMH): Okay. You didn’t – you didn’t think [GC-8] was a formal proposal?

A (by Mr. Halfacre): *That’s correct.*

(Tr. 141: 15-17) (emphasis added). Mr. Halfacre’s understanding that the harmonization materials were *not* proposals by HMH is supported by his agreement with Mr. Ragaglia that the parties would not exchange economic proposals until later in the summer. (Tr. 108:25-109:13, 125:11-17)

⁵ Mr. Ragaglia shared a link to the live website with Mr. DeLuca and Mr. Halfacre the morning of May 22. (R-3) Simultaneously, Victoria Rivera Cruz, an HMH agent, shared that same information with Ms. Horn, emailing her a link to the website before it went live on May 22. (GC-6 at 1)

⁶ Ms. Horn posted to the HPAE Facebook page at 9:15 AM on May 22, establishing that she had knowledge of the teamHMH website and its contents even before HMH’s email to her on May 22, which wasn’t sent until 9:41 AM. *Id.*, *see also* GC-6.

Importantly, the ALJ found that, consistent with parties' agreement, HMM made comprehensive economic proposals to HPAE for all the bargaining units a couple of months, after the release of the harmonization materials. (ALJD at 4:1-10) Simply put, the harmonization materials were not bargaining proposals to change the economic terms contained in the various CBAs. (ALJD at 4:9-10, 14:30-33; Tr. 120:8-10, 131:23-132:2, 140:24-141:17)

II. THE ALJ IMPROPERLY EXCLUDED R-9.

The ALJ should not have excluded R-9 under the best evidence rule. (ALJD at 6) The TeamHMM.com website as it existed on May 22 did not exist at the time of the hearing and, therefore, could not be produced. HMM did not act in bad faith by failing to anticipate that the website as it existed on May 22 would later be the subject of litigation.

HMM's good faith on this point is supported by Mr. Ragaglia's testimony. He testified compellingly regarding his drafting of the disclaimer contained on R-9 and the reasons he included it. (Tr. 194:17-196:4, 228:24-229:5) Mr. Ragaglia detailed how the website changed as circumstances changed – the disclaimer that was on the "Tomorrow" page existed on the benefits page at the time of the hearing, but not at later dates. (Tr. 236:10-21) In short, Mr. Ragaglia's uncontradicted testimony demonstrated that the fulsome disclaimer in R-9 – an exact replica of the PowerPoint presentation shared with the Union – appropriately reflected what was on the TeamHMM.com website at its launch on May 22. Plainly, HMM's lack of foresight to preserve an image of the website on May 22 (two years prior) was not a result of any bad faith on its part. Consequently, R-9 should have been admitted.

III. CONCLUSION.

For the foregoing reasons, Respondents Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades Medical Center and The Harborage respectfully urge the

Board to find merit in their Exceptions to the Administrative Law Judge's Decision, and to dismiss the Complaint in its entirety.

Dated: August 31, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Reply Brief in Support of Respondents' Exceptions to the Administrative Law Judge's Decision was served via electronic mail, this 31st day of August 2020, upon the following:

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