

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In a Matter Between:)
)
NATIONAL NURSES ORGANIZING)
COMMITTEE- TEXAS/NATIONAL)
NURSES UNITED (BAY AREA)
HEALTHCARE GROUP, LTD. d/b/a) Case 16-CB-225123
CORPUS CHRISTI MEDICAL CENTER, an)
indirect subsidiary of HCA Holdings, Inc.)
Respondent,)
)
and)
)
ESTHER MARISSA ZAMORA, an Individual)
Charging Party.)
_____)

**RESPONDENT NATIONAL NURSES ORGANIZING COMMITTEE –
TEXAS/NATIONAL NURSES UNITED’S ANSWERING BRIEF TO GENERAL
COUNSEL’S EXCEPTIONS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 4

III. STATEMENT OF FACTS 6

IV. ARGUMENT 8

 A. The Judge Did Not Err in Finding the Union Was Not Obligated to Produce a
 Neutrality Agreement to Charging Party Zamora on the Basis that the Agreement
 Did Not Include Terms and Conditions of Employment and Was Therefore Not
 Relevant to Zamora’s Employment 9

 1. General Counsel Wholly Failed to Meet Its Burden that the Union
 Violated Section 8(b)(1)(A) under Existing Law 9

 2. The General Counsel Finally Reveals His Intent to Significantly Alter a
 Union’s Duty of Fair Representation.

 B. The Judge Did Not Err in Finding that a Neutrality Agreement Does Not Affect
 Charging Party Zamora’s Terms and Conditions of Employment 15

 C. The Judge Did Not Err in Concluding that Because a Neutrality Agreement Does
 Not Affect Terms and Conditions of Employment It Was Not Relevant to
 Charging Party Zamora..... 18

 D. The Judge Did Not Err in His Conclusion that the Union’s Response to Charging
 Party Zamora’s Information Request Was Not Unlawful..... 20

 E. The Judge Did Not Err in His Evidentiary Findings..... 21

 F. The Judge Did Not Err in His Revocation of the General Counsel’s and Charging
 Party’s Trial Subpoenas and by Not Issuing Sanctions against Respondent 25

V. CONCLUSION..... 27

TABLE OF AUTHORITIES

	Page
CASES	
FEDERAL CASES	
<i>Air Line Pilots Ass’n v. O’Neill</i> 499 U.S. 65 (1991).....	21
<i>Steelworkers v. Rawson</i> 495 U.S. 362 (1990).....	18
<i>Vaca v. Sipes</i> 386 U.S. 171 (1967).....	21
NLRB CASES	
<i>Caldwell Mfg. Co.</i> 346 NLRB 1159 (2006)	14
<i>Dentech Corp.</i> 294 NLRB 924 (1989)	12
<i>Electrical Energy Services, Inc.</i> 288 NLRB 925 (1988)	25, 26
<i>Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)</i> 260 NLRB 419 (1982)	19
<i>Lee Lumber & Bldg. Material</i> 334 NLRB 399 (2001)	12
<i>Letter Carriers Branch 529</i> 306 NLRB 408 (1992)	9, 10 , 14, 17
<i>Local 307, Nat’l Postal Mail Handlers Union</i> 339 NLRB 93 (2003)	11
<i>Miranda Fuel</i> 140 NLRB 181 (1962)	18
<i>OPEIU, Local 251 (Sandia Corp., d/b/a Sandia National Lab.</i> 331 NLRB 1417 (2000)	19

<i>Operating Engineers Local 324</i>	
226 NLRB 587 (1976)	20
<i>Operating Engineers Local 513 (Various Employers)</i>	
308 NLRB 1300 (1992)	19
<i>Standard Dry Wall Products</i>	
91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)	21, 22
<i>Weisser Optical</i>	
274 NLRB 961 (1985)	10

FEDERAL RULES

Fed. Rule Evid., rule 807	16
---------------------------------	----

FEDERAL STATUTES

29 U.S.C. § 158(a)(5).....	17, 25
29 U.S.C. § 158(b)(1)(A).....	passim
29 U.S.C. § 158(b)(3)	17
29 U.S.C. § 158(d)	14

OTHER AUTHORITIES

NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, Section 10068.3(a) (September 2020).....	25
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I. INTRODUCTION¹

Pursuant to Section 102.46(b) of the Board’s Rules and Regulations, Respondent (the “Union”) herewith files its Answering Brief to General Counsel’s Exceptions to the Administrative Law Judge’s Decision (“ALJD”). Contrary to General Counsel’s assertions, the Administrative Law Judge (the “ALJ” or “Judge”) correctly applied Board law to the facts in evidence in an overall extremely well-reasoned decision. The Board should affirm the rulings, credibility determinations, findings,² conclusions of law, and recommended Order of the ALJ, dismissing the complaint in its entirety.

The initial complaint in this case alleged the Union violated the Act by failing to provide Charging Party with a copy of a purported neutrality agreement with Bay Area Healthcare Group, LTD. d/b/a Corpus Christi Medical Center (the “Employer”). At hearing, General Counsel amended the complaint with allegations that the Union’s reply to Charging Party’s information request was made “in a manner that was arbitrary and/or in bad faith.” (GC Exh. 1(f)).

On its face, this case presents the very simple issue of whether an exclusive representative breaches its duty of fair representation in violation of Section 8(b)(1)(A) of the Act by failing to provide an agreement requested by a bargaining unit employee which neither reflects nor has any effect whatsoever on the employee’s terms and conditions of employment. The plain and unequivocal answer under long standing, well-settled Board law is that no such

¹ “Tr. ___” refers to the pages and line numbers of the transcript of the hearing in this matter. “GC Exh.” refers to General Counsel’s Exhibits. “R Exh.” refers to Respondent’s Exhibits. “CP Exh.” refers to Charging Party’s Exhibits. “Joint Exh.” refers to Joint Exhibits. “JD slip op. at ___” refers to the pages and line numbers of the Administrative Law Judge’s June 24, 2020 Decision. “GC Br. at ___” refers to the pages of the General Counsel’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

² The Union has filed limited cross exceptions concerning the Judge’s finding that a “neutrality agreement” exists on the record before the Judge, and therefore rather terms it an agreement.

duty exists under Section 8(b)(1)(A). The Administrative Law Judge stated the principle of law and application to the facts of this case very clearly:

The credited evidence fails to establish that any term or condition of employment of bargaining unit employees was determined, controlled, or affected by any agreement entered into by the Respondent other than the collective bargaining agreement between the Respondent and the Employer, together with the “side letters” and memorandum of understanding it references. The record further fails to establish that any other agreement or document related to, affected, or was affected by the Respondent’s exercise of its authority and/or discharge of its duties as the employees’ exclusive bargaining representative. The Respondent’s refusal to provide to a bargaining unit employee a copy of another document, not shown to relate to terms and conditions of employment or its responsibilities as the exclusive bargaining representative, not shown to relate to terms and conditions of employment or its responsibilities as the exclusive bargaining representative, did not violate Section 8(b)(1)(a) of the Act.

(JD slip op. at 1).

The General Counsel wholly failed to meet its burden to prove the violations alleged in the Complaint and Amended Complaint filed at the close of hearing. Why? Because the record and the General Counsel’ exceptions and brief in support thereof reveal that General Counsel has no actual interest in the case as alleged in the complaint and amended complaint, but instead is pursuing a secret prosecution of an entirely new and fundamentally different standard of a Section 8(b)(1)(A) violation of the duty of fair representation.

This is despite General Counsel’s representations to the Union and the Judge that it was prosecuting the Union under existing Board law, not seeking to change it. As Counsel for the General Counsel asserted in his opening statement at hearing, “General Counsel’s not trying to use this case to advance some grand change to the policy. We’re going to rely solely on existing Board precedence [sic]. It’s a very straightforward case.” (Tr. 61:20-23). General Counsel’s exceptions and brief in support reveal, however, General Counsel has been hiding the ball from the Judge and the parties since the beginning of this case, finally revealing the grand changes he

wishes the Board to make in this area of duty of fair representation law.

The keystone of existing Board law on the issue presented is the threshold requirement of the relevance of a bargaining unit employee's request for information to the employee's terms and conditions of employment. For the first time in its exceptions to the ALJD, the General Counsel has now openly admitted that the purpose of this prosecution is to establish a new rule that "the Board should not require such a specific showing of relevance because such agreements are presumptively relevant to bargaining unit employees. Thus, absent some compelling reason to the contrary, a union should be required to provide, upon request by unit members, documents concerning their union's relationship to the employer, such as easily accessible neutrality agreements." (GC Brief at 20).

The Union urges the Board to engage in reasoned decisionmaking and affirm the Judge's dismissal of the complaint in light of the absence of any evidence to support a violation of the Act. Otherwise, the Board would be forced to create a new rule of law that does not require a showing of relevance from a bargaining unit member with regard to requests for a copy of a "neutrality agreement" or other unspecified documents, thereby requiring unions to furnish such information whenever asked in order to meet the duty of fair representation. As explained herein, such a drastic change in the law flies in the face of long held Board and court precedent; and in this case, where the General Counsel has engaged in a secret prosecution of this new theory of a duty of fair representation violation, such action by the Board would deny the Union and all similar stakeholders any semblance of due process.

And, as the record evidence does not support in any manner that the Union violated Section 8(b)(1)(A) under existing law, by not providing a copy of a purported "neutrality agreement" to Charging Party Zamora, the Board (if not improvidently announcing a change in

law and reversal of precedent in these circumstances as emphasized above) would need to apply a standard of proof that differs significantly from the legal standard it has formally announced in this doctrinal area. In so doing, a Board decision reversing the Judge's dismissal of the complaint would not be supported by substantial evidence. As such, the Board is urged to adopt the Judge's recommend Order, dismissing the amended complaint in its entirety.

II. PROCEDURAL HISTORY

The unfair labor practice charge in this case was filed on August 6, 2018, by the National Right to Work Legal Defense Foundation on behalf of Charging Party Esther Marissa Zamora, alleging various violations of Section 8(b)(1)(A) by the Union. (GC Exh. 1(a)). The charge was dismissed in its entirety by Region 16's Regional Director on December 28, 2018. (GC Exh. 1(c)). On September 13, 2019, the General Counsel issued a letter sustaining Charging Party's appeal in part. (GC Exh. 1(e)).

Complaint and notice of hearing issued on October 31, 2019, alleging the Union violated Section 8(b)(1)(A) by refusing to provide Charging Party a copy of "its neutrality agreement with the Employer, as requested on or about July 10, 2018." (GC Exh. 1(f)). As the Judge stressed in the ALJD, "neither the complaint nor the amended complaint separately and specifically alleges that a neutrality agreement exists. Rather, both paragraph 8 of the original complaint and paragraph 8(a) of the amended complaint simply *assume* the existence of such a document by alleging that the Respondent has failed to provide a copy of "its neutrality agreement. . ." (JD slip op. at 5:21-24).

The Union filed its answer to the complaint on December 5, 2019 (GC Exh. 1(f)). Answering paragraph 8 of the complaint, the Union *explained*, inter alia, pursuant to Section 102.20 of the Board's Rules and Regulations that the allegations failed to describe the alleged

conduct with sufficient specificity and detail to enable the Union to understand what the General Counsel was alleging and the issues to be met. (GC Exh. 1(h)). The Union subsequently filed a Motion for a bill of particulars, asserting that the skeletal complaint allegation did not provide sufficient notice to Respondent Union as to the basis for the allegation that the Union violated the Act, given the allegation's inconsistency with Board law concerning a union's duty to provide information requested by a bargaining unit member. (Joint Exh. 8(b)). On January 9, 2020, Deputy Chief Administrative Law Judge Amchan denied the Union's motion for a bill of particulars, but also stressed that "[t]he General Counsel must prove that Respondent refused to give the Charging Party a copy of the neutrality agreement and that this violates the Act as a matter of law." (GC Exh. 1(k)). This, the General Counsel has not done.

On January 3, 2020, Charging Party moved to strike portions of the Union's answer, and on January 9, 2020, General Counsel also filed a motion to strike portions of the Union's answer. On January 10, 2020, Deputy Chief Administrative Law Judge Amchan granted General Counsel's motion (GC Exh. 1(l)), and on January 29, 2020, the Union filed an amended answer to the complaint. (GC Exh. 1(m)). In its amended answer to the complaint, the Union answered paragraph 8 of the complaint (this allegation later became called subparagraph 8(a) of the amended complaint in light of General Counsel's complaint amendment at hearing) as follows: "Answering Paragraph 8 of the Complaint, Respondent specifically denies that it failed or refused to provide Charging Party with a copy of a neutrality agreement with the Employer that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party's July 11, 2018 letter to Respondent." (GC Exh. 1(m)).

At the close of the hearing, the Judge granted an oral motion by Counsel for the General Counsel to amend the complaint. (Tr. 225:11-25). Respondent Union counsel objected to the

amendment (Tr. 224:120), denied the new allegations, and moved for the Judge to dismiss the complaint on the grounds that the General Counsel had wholly failed to adduce record evidence establishing a prima facie case of a violation of the duty of fair representation. (Tr. 226:5-10). In response to the Union's motion to dismiss the complaint, the Judge states that "[a]t this point, the Motion to Dismiss is considered by assuming all of the facts that are most favorable to the non-moving party, and it would appear to me, at this point, that – that there is enough evidence to proceed to deny the Motion to Dismiss. But I will take it under advisement." (Tr. 226:11-12)

By General Counsel's amendment to the complaint, paragraph 8 became subparagraph 8(a), and a new substantive allegation was added to the complaint at subparagraph 8(b), which alleges that Respondent's reply to Charging Party's request was arbitrary and/or in bad faith. Subparagraph 8(c) alleges that by the conduct alleged in subparagraphs 8(a) and 8(b), Respondent violated the duty of fair representation.

On June 24, 2020, the Judge issued the ALJD in this case, dismissing the complaint in its entirety. (JD slip op. at 27:33).

III. STATEMENT OF FACTS

Since June 7, 2010, the Union has been the certified Section 9(a) collective bargaining representative of a bargaining unit of Registered Nurses ("RN Unit"), employed by the Employer at its Corpus Christi, Texas, facilities. (Joint Exhs. 1 and 2). The Union and Employer have been parties to successive collective bargaining agreements since that time. The two most recent of which are the September 21, 2015 – June 30, 2018 (Joint Exh. 5) and the October 20, 2018 – June 30, 2021 collective bargaining agreements. (Joint Exh. 6).

Charging Party Esther Marissa Zamora is an RN who has been employed in the RN unit since about July 2017. She was employed in a management position by the Employer from

about February 27, 2012 to July 2017. (Tr. 73-75). As the record reveals, on July 11, 2018, Charging Party Zamora, by letter to the Union, requested a copy of a purported “neutrality agreement” that she said she believed controlled how the Employer could deal with her and vice versa. (Joint Exh. 3).

As reflected in Joint Exh. 4, on July 25, 2018, Union Labor Representative Bradley Van Waus replied to Charging Party Zamora, thanking her for her letter, stating that there is no agreement other than the then-current collective bargaining agreement that controlled how the Employer could deal with her as an employee of the Employer, provided her a copy of the collective bargaining agreement, and invited Charging Party Ms. Zamora to follow up with him if she had concerns about her terms and conditions of employment. (Joint Exh. 4).

Ms. Zamora declined to follow-up with Mr. Van Waus regarding any issues or concerns involving her terms and conditions of employment (Tr. 103:15-16), leading the Union to reasonably believe that Charging Party was satisfied with the information provided. Charging Party did not renew her information request, but instead filed the unfair labor practice charge in this proceeding on August 6, 2018, alleging, inter alia, that Respondent failed to provide Charging Party with “a neutrality agreement with the employer that controls Charging Party’s and other employees’ terms and conditions of employment and limits how the employer can deal with the Charging Party and other employees.” (GC. Exh. 1(a), Charge Against Labor Organization, Case No. 16-CA-225123, Basis of Charge 2(5), filed August 6, 2018).

At hearing, Counsel for General Counsel solicited testimony from Charging Party that her concern leading to her request for a copy of Respondent’s purported “neutrality agreement” is her complaint that the Employer denied her request to be afforded a private enclosed bulletin board privilege in order to encourage and assist decertification of the Union as exclusive

representative. (Tr. 98:14-18; GC Exh. 2).

On its face, this incredible claim of right to a personal enclosed bulletin board for decertification of the Union is not conceivably related to Charging Party's terms and conditions of employment. There is no evidence in the record of a condition of employment or past practice of employees being afforded their own personal protected enclosed bulletin boards. And, of course, if the Employer were to agree to Ms. Zamora's requested condition of employment of an enclosed bulletin board to facilitate decertification of the Union, such conduct would be unlawful.

IV. ARGUMENT

Despite the Counsel for the General Counsel claiming falsely to the Judge and parties that the General Counsel was not seeking to change existing law, General Counsel is now very transparent in his argument to the Board about his intentions to change the law in a manner that is nothing short of breathtaking. The General Counsel is directly asking the Board to overrule existing Board law as to when a union violates its duty of fair representation concerning a bargaining unit member's information request, by requiring the union furnish agreements between employers and unions (neutrality agreements in particular), irrespective of whether there is any evidence that the information has any relation to an employee's terms and conditions of employment. This is of course a serious departure from existing Board law. In order to attempt to achieve these doctrinal goals, in its exceptions brief General Counsel falsely frames this secret prosecution of a heretofore hidden theory of a violation of Section 8(b)(1)(A) as exceptions to errors by the ALJ, who in fact clearly applied existing Board law to the facts before him in an overall extremely well-reasoned decision.

General Counsel's brief groups together six main arguments in support of its exceptions,

which will be addressed below in turn.

A. The Judge Did Not Err in Finding the Union Was Not Obligated to Produce a Neutrality Agreement to Charging Party Zamora on the Basis that the Agreement Did Not Include Terms and Conditions of Employment and Was Therefore Not Relevant to Zamora’s Employment.³

1. General Counsel Wholly Failed to Meet Its Burden that the Union Violated Section 8(b)(1)(A) under Existing Law.

Under existing law, the Board considers the following factors in determining whether a union has violated the Act by not providing bargaining unit members information requested from their union: whether documents pertain to a grievance filed by the employee; whether the employee has a legitimate general interest in obtaining the documents; whether the employee communicated to the union a particular legitimate interest in the information requested; whether the union has raised a substantial countervailing interest in refusing to provide the documents requested; the ability of the union to provide the information; and the relative ease in complying with the request. *Letter Carriers Branch 529 (USPS)*, 319 NLRB 879, 881-882 (1995).

Applying these factors to the record evidence, it is indisputable that Charging Party Zamora’s request did not satisfy the Board’s test, which explains why the General Counsel now openly admits his heretofore secret prosecution of a new standard for finding a violation of the duty of fair representation by a union’s failure or refusal to furnish a neutrality agreement to a bargaining unit employee. (Again, Counsel for General Counsel misled the tribunal that this case is a garden variety case under existing Board law, not an attempt to re-write the law). With regard to the first factor, where requested information pertains to a grievance being processed by a union on behalf of the bargaining unit member, General Counsel ignores existing law by asserting that a complaint to an employer is somehow tantamount to a request for information

³ Because the Union has filed limited cross exceptions concerning the Judge’s finding that a “neutrality agreement” exists on the record before the Judge, the Union does not refer to “the neutrality agreement” and rather terms it an agreement.

regarding a grievance a union is processing. This is not the law, and General Counsel cites no authority for the proposition that it is the law. Again, Charging Party's complaint to the Employer concerned why it was refusing to engage in what would be unlawful conduct by declining to furnish her a dedicated enclosed bulletin board to aid her in her attempt to decertify the Union. Charging Party Zamora's request for such a protected bulletin board undeniably seeks to engage the Employer in providing unlawful assistance to support a decertification campaign. See, e.g., *Weisser Optical*, 274 NLRB 961 (1985). Charging Party's complaint is surely not a "grievance" under *Letter Carriers Branch 529*.

Regarding the next two factors, Charging Party Zamora did not communicate even a legitimate general interest in the information requested. She expressed a belief that a "neutrality agreement" existed that controls how her employer may deal with her, but without any reason as to why she believed a neutrality agreement impacted her terms and conditions of employment or the terms and conditions of other bargaining unit employees. (Joint Exh. 3). With regard to whether Charging Party Zamora established a legitimate interest in what she asserts is a neutrality agreement, General Counsel falsely asserts the record establishes bargaining unit employees enjoyed a condition of employment to post materials in an enclosed bulletin board, but that this right was only afforded to "pro-union" employees and that this right is limited by the purported neutrality agreement. (GC Brief at 30). But the record is absolutely devoid of any such evidence. General Counsel cites only to Union bargained-for bulletin boards for the disingenuous claim that employees enjoy some condition of employment to post notices in enclosed bulletin boards. That allegation, however, claiming viewpoint discrimination by what may be posted, was alleged in the charge, dismissed by the Regional Director, and not sustained on appeal by the General Counsel. (GC Exhs. 1(a) and 1(e)). There is nothing in Board law that

remotely stands for the proposition that a union achieving through bargaining the use of an employer's enclosed bulletin boards establishes some individual right for bargaining unit employees to similarly post materials on an employer's enclosed bulletin boards. This argument is patently frivolous under Board law. Moreover, there is zero evidence in the record of any practice of such a term and condition outside of the collective bargaining agreement between the Union and Employer.

Charging Party Zamora has also not communicated a particular legitimate interest to be furnished with a copy of the putative "neutrality agreement" (such as where a bargaining unit employee seeks documents from a grievance file pertaining to a grievance filed on behalf of that employee). See *Local 307, National Postal MailHandlers Union*, 339 NLRB 93, 93-94 (2003) (holding employee did not have a legitimate particular interest, despite having a general legitimate interest in witness statements from his grievance file, in that his asserted particular interest that he wanted to see the statements as they related to backpay was not legitimate because there was already a binding settlement under which the employee would not receive backpay). Here, Charging Party Zamora's stated particular interest to the Union was that she believed that there was such an agreement that impacted the way the Employer could deal with her and vice versa without any explanation. As her testimony reveals, Ms. Zamora's intention was clear. She was looking for unlawful Employer assistance that would provide her with an enclosed bulletin board to advertise to other employees her efforts to decertify the Union. Though she purported in her testimony to believe this restriction stemmed from a neutrality agreement that limited the Employer's ability to provide such unlawful assistance, irrespective of whether such an agreement existed, the purpose was not legitimate because the purpose is unlawful. It is axiomatic that an employer may not lawfully provide more than ministerial

assistance to an employee attempting to decertify their collective bargaining representative. See, e.g., *Lee Lumber & Bldg. Material*, 306 NLRB 408, 410, 418 (1992), enforced in rel. part, 117 F.3d 1454 (D.C. Cir. 1997); *Dentech Corp.*, 294 NLRB 924, 926-28 (1989).

As to the countervailing interest factor, under existing law there should be no need to address whether the Union has a countervailing interest not to provide a copy of the putative “neutrality agreement” to Charging Party, as she has not communicated a legitimate interest, either general or particular, as to her entitlement to the document she has requested.⁴

Nevertheless, it must be stressed that whatever document Employer counsel was referring to in GC Exh. 7, he emphasized it was confidential, which establishes a countervailing interest.

2. The General Counsel Finally Reveals His Intent to Significantly Alter a Union’s Duty of Fair Representation.

General Counsel’s utter failure to establish a violation of Section 8(b)(1)(A) under extant Board law is not surprising because his true intention to create a new rule of law has finally come into sharp focus in his exceptions brief. In this regard, Counsel for the General Counsel asserts, “[a]lthough in this case Zamora established that the neutrality agreement *may* contain provisions concerning her terms and conditions of employment, the Board should not require such a specific showing of relevance because such agreements are presumptively relevant to bargaining unit employees. Thus, absent some compelling reason to the contrary, a union should be required to provide, upon request by unit members, documents concerning their union’s relationship to the

⁴ As a unanimous three-member Board panel of then-Chairman Battista, and then-Members Acosta and Liebman pointed out in *In re Local 307*, 339 NLRB 93 (2003), when finding the Union did not violate Section 8(b)(1)(A) by not furnishing information to a bargaining unit employee, “Member Liebman agrees that the Union did not act arbitrarily in denying Yax’s request for the witness statements. Because Yax communicated no legitimate interest in the statements to the Union, there is no need to reach the question of whether the Union had a countervailing interest in refusing to provide Yax with the statements.” *Id.* at fn. 7. There was no disagreement with then-Member Liebman’s view articulated by then-Chairman Battista and Member Acosta; however, the unanimous majority referenced the union’s countervailing interest as further justification that the union did not violate the Act by refusing to provide the requested information to the employee.

employer, such as easily accessible neutrality agreements.” (GC Brief at 20, italicized for emphasis).

General Counsel misrepresented that the prosecution of the Union was only seeking to establish a violation of the Act based on existing law, yet here General Counsel reveals what he has been pursuing – a new rule of law establishing that a bargaining unit member’s request for a neutrality agreement (and other unspecified documents) is presumptively relevant, irrespective of whether it reflects or impacts in any way bargaining unit members’ terms and conditions of employment, and that the Union must furnish this to any bargaining unit employee upon request, absent some compelling unspecified reason to excuse not furnishing the document. General Counsel’s denial of due process to the Union, by hiding the ball throughout the prosecution of this case until now is frankly stunning and should not be countenanced by the Board in entertaining General Counsel’s attempt to make new law, after misleading the Judge and the parties that it was not doing so.

Arguing for this new standard concerning a union’s duty to avoid a finding by the Board that it has violated Section 8(b)(1)(A) by not providing a neutrality agreement pursuant to a bargaining unit employee’s request, General Counsel argues that the Judge “inappropriately burdened Zamora with establishing a legitimate interest in the neutrality agreement.” General Counsel absurdly reasons that “[w]ere the Board to uphold such a distribution of burdens, the results would be predictable. Few employees would be able to establish their interest in a document they had never seen.” (GC Brief at 21). What the General Counsel is asking the Board to do here though would be a sea change in the law to create a per se rule that every union that is party to a neutrality agreement must furnish it (and potentially a trove of other unspecified documents) to any bargaining unit member upon request, whether or not there is any evidence

the document has any effect on terms and conditions of employment, or whether the employee even knows of its existence. For example, General Counsel’s proposed new rule of law would presumably entitle any bargaining unit member to any and all documents concerning their union’s relationship to the employer, including any neutrality agreement, irrespective of any impact or relation to terms and conditions of employment without being required to demonstrate a general or particular interest in the requested documents. General Counsel is thus asking the Board, without stating it directly, to overrule the *Letter Carriers Branch 529* test for determining whether a union has met its duty of fair representation with regard to furnishing documents to a bargaining unit member.

Attempting to justify his proposed change to the law, the General Counsel likens such requests by bargaining unit members to information requests between unions and employers that involve the duty to bargain under Section 8(d). Such an analogy has no relation to the duty of fair representation. Concerning information requests between unions and employers, the Board utilizes, as the General Counsel states, a “broad discovery-type standard in determining relevance in information requests.” (GC Brief at 22, citing *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006)). The analogy, however, reveals the breadth of the change in law General Counsel is seeking, attempting to impose the broad discovery-like standard to requests for information by bargaining unit employees. Such a legal framework would in effect create “mini-bargaining relationships” between unions and individual bargaining unit members, as opposed to the current regime, since the inception of the Act, of the representation of bargaining unit members for purposes of collective bargaining. As the Judge correctly emphasized, a union’s failure or refusal to furnish a bargaining unit member with requested document can only implicate the duty of fair representation if the requested information “has something to do with [the union’s]

representation function, that is, with [the union's] discharge of its responsibilities as exclusive bargaining representative. The General Counsel bears the burden of proving such a connection.” (JD slip op. at 25:1-4). And the General Counsel has not met this burden.

B. The Judge Did Not Err in Finding that a Neutrality Agreement Does Not Affect Charging Party Zamora's Terms and Conditions of Employment.

Charging Party Zamora has furnished no evidence demonstrating that a putative neutrality agreement has affected, reflects, or relates in any way to her terms and conditions of employment, or any evidence that any putative neutrality agreement has impacted in any manner how the employer can deal with her or other bargaining unit employees.

As the credited evidence established, and as the Judge stressed, Charging Party Zamora's “testimony, that she ‘felt’ that the neutrality agreement must have some effect on working conditions, amounts to nothing more than speculation. . . I find, to the contrary, that the collective-bargaining agreement alone established the Employer's bulletin board policy. Further, the record does not establish that the neutrality agreement prescribed or affected any other terms and conditions of employment of bargaining unit employees.” (JD slip op. at 25:13-23).

General Counsel's assertion that it provided “convincing evidence that the neutrality agreement did, in fact, impact Zamora's terms and conditions of employment, or at least that Zamora had a reasonable basis to conclude such” is nonsensical. (GC Brief at 23). The supposedly “convincing evidence” General Counsel adduced at hearing that the putative neutrality agreement impacted Zamora's terms and conditions of employment was actually inadmissible hearsay from a decedent, as described by Zamora during her testimony, that does not fall within a hearsay exception, as the Judge properly ruled.

In his exceptions brief, the General Counsel argues that the Judge should have admitted

Zamora’s testimony concerning decedent Lamond’s statements and only now points to the “residual exception” to the Federal Rules of Evidence’s exclusion of hearsay. The residual exception cannot be raised now when it was not raised prior to or during hearing. No notice was provided by General Counsel to the Union, prior to or during the hearing, that General Counsel intended to introduce hearsay testimony through the witness Zamora concerning what Ms. Zamora claims Mr. Lamond stated about an alleged neutrality agreement, continuing the “hide the ball,” “trial by ambush” approach General Counsel has taken throughout this prosecution of the Union. And if General Counsel subpoenaed Mr. Lamond only to learn that he had passed away, as improperly represented now in the brief (GC Brief at 23) but not reflected in the record, General Counsel surely had time to write to Union counsel of the intention to introduce such hearsay testimony not covered by an exception, through Charging Party Zamora, as required by Rule 807. The residual exception provides:

Rule 807 – Residual Exception

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant’s name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

And aside from the lack of notice, the testimony is not supported by sufficient guarantees of trustworthiness. Ms. Zamora, as discussed herein, was not a credible witness, as the Judge correctly found, making the residual exception entirely inappropriate to rely upon on exceptions

to the Judge's ruling.

Calling Zamora's testimony "convincing evidence" surely does not make it so when it is neither convincing nor evidence. General Counsel's assertion in the same sentence that this "convincing evidence" led Zamora to have a reasonable basis to conclude the alleged neutrality agreement impacted her terms and conditions of employment fails for the same reasons. Nor does a professed reasonable belief on the part of Charging Party Zamora that a neutrality agreement impacted her terms and conditions of employment have any relevance to a union's duty to fairly represent her by furnishing information that reflects or relates to her terms and conditions of employment.

General Counsel is again attempting to change the law by this "reasonable belief" exception to a legitimate general and particular interest by a bargaining unit member in certain information, which is not part of the *Letter Carriers Branch 529* test. General Counsel is throwing everything but the kitchen sink at the Union in this attempt to shape the law as he sees fit, suggesting the situation is analogous to the requirement that an employer pleading poverty in bargaining provide financial information to its union bargaining partner to verify its claims of inability to pay. (GC Brief at 25). That dog won't hunt as they say in Texas. This is not a Section 8(a)(5) complaint against the Employer, nor is it a Section 8(b)(3) complaint against the Union. It is a Section 8(b)(1)(A) duty of fair representation complaint that, no matter how the General Counsel attempts to dress it up, cannot hide the fact that General Counsel was not substantially justified in issuing complaint against the (Texas local) Union.

Furthermore, the supposed term and condition that Ms. Zamora testified she believed Mr. Lamond to discuss was a restriction on posting flyers within an enclosed bulletin board in support of a decertification effort, which, again, the record (and General Counsel at times in his

shifting exceptions brief tacitly admits) does not establish was a condition of employment or past practice for individual employees. Stating the obvious, nor does the law allow such a condition of employment that would specifically provide for unlawful employer assistance for a decertification campaign. See, e.g., *Weisser Optical*, 274 NLRB 961 (1985).

For all of these reasons, contrary to General Counsel’s assertions, the Judge did not err in finding that there is no evidence that a neutrality agreement affected Charging Party’s terms and conditions of employment.

C. The Judge Did Not Err in Concluding that Because a Neutrality Agreement Does Not Affect Terms and Conditions of Employment It Was Not Relevant to Charging Party Zamora.

As the Judge correctly emphasized, a union’s failure or refusal to furnish a bargaining unit member with requested document can only implicate the duty of fair representation if the requested information “has something to do with [the union’s] representation function, that is, with [the union’s] discharge of its responsibilities as an exclusive bargaining representative. The General Counsel bears the burden of proving such a connection.” (JD slip op. at 25:1-4). And the General Counsel has not met this burden.

A union of course has a statutory duty to represent fairly all bargaining unit employees, “both in its collective bargaining. . . and in its enforcement of the resulting collective bargaining agreement.” *Steelworkers v. Rawson*, 495 U.S. 362, 372 (1990) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). These seminal cases concerning the duty of fair representation make clear that the duty is directly tied to a union’s representational role. This duty is not some abstract fiduciary duty as General Counsel argues (GC Brief at 18), but “is in a sense fiduciary in nature” given a union’s ability to impact terms and conditions of employment by its exclusive representational role. See *Miranda Fuel*, 140 NLRB 181, 189 (1962), enf. denied 326 F.2d 172

(2d Cir. 1963) (quoting *International Union of Elec., Radio and Machine Workers, AFL-CIO, Frigidaire Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962)). As such, the Board may find a Section 8(b)(1)(A) violation only where the employer-employee relationship or a policy of the Act, such as the ability to file an unfair labor practice charge or testify in Board proceedings, is impacted by a union's conduct. See *OPEIU, Local 251 (Sandia Corp., d/b/a/ Sandia National Laboratories)*, 331 NLRB 1417 (2000).

As set forth above, there is no evidence that Charging Party Zamora's relationship with the Employer was affected in any manner by the conduct alleged in the amended complaint, as there is no condition of employment providing individual employees an enclosed bulletin board. Nor is there any evidence that any policy of the Act, including Ms. Zamora's right to file a decertification petition, has been affected by the allegations in the amended complaint or record evidence.

The cases cited by the General Counsel in support of this frivolous argument actually support the long held rule that a union's duty to provide documents requested by a bargaining unit member is limited to those that reflect or affect her terms and conditions of employment. *Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB 419 (1982) involved a union's failure to furnish a bargaining unit employee with a copy of the collective bargaining agreement.

General Counsel's citation to an exclusive hiring hall case, *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300 (1992), in support of this argument is entirely inapt due to the unique doctrinal considerations pertaining to exclusive hiring halls and employees' dependence on the hall to work at all for an employer. Nonetheless, exclusive hiring hall case law still supports the proposition that a union's duty to furnish information requested by a

bargaining unit member must reflect or relate to terms and conditions of employment as all terms and conditions of employment may be impacted in the exclusive hiring hall context. See *Operating Engineers Local 324*, 226 NLRB 587, 587 (1976) (“In *Miranda Fuel Company, Inc.*, the Board defined the scope of a union’s duty of fair representation as ‘the right [of employees] to be free from unfair or irrelevant or invidious treatment. . . in matters affecting their employment.’” (internal footnotes omitted)).

Clearly, General Counsel’s argument that the Judge erred in concluding, that because the alleged neutrality agreement did not include terms and conditions of employment that it could not be relevant to Ms. Zamora, is wholly without merit.

D. The Judge Did Not Err in His Conclusion that the Union’s Response to Charging Party Zamora’s Information Request Was Not Unlawful.

There is no dispute that Charging Party Zamora requested by letter to the Union what she purported to believe was a neutrality agreement that she claimed affected how the Employer could deal with her and vice versa. It is also undisputed that Union Labor Representative Bradley Van Waus replied to Charging Party Zamora, thanking her for her letter, informing her that there is no agreement other than the then-current collective bargaining agreement that controlled how the Employer could deal with her as an employee of the Employer, provided her a copy of the collective bargaining agreement, and invited Charging Party Ms. Zamora to follow up with him if she had concerns about her terms and conditions of employment.

Ms. Zamora declined to follow-up with Mr. Van Waus regarding any issues or concerns involving her terms and conditions of employment (Tr. 103:15-16), leading the Union to reasonably believe that Charging Party was satisfied with the information provided.⁵

⁵ Mr. Van Waus testified forthrightly under extensive cross-examination, and Judge correctly took no issue with Mr. Van Waus’ credibility. The Board’s long established policy is not to overrule the Judge’s credibility resolutions

A union breaches its duty of fair representation, and thereby violates Section 8(b)(1)(A) of the Act, by engaging in conduct concerning a bargaining unit employee that is arbitrary, discriminatory, or in bad faith. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union’s actions are considered arbitrary only if the union has acted “so far outside ‘a wide range of reasonableness’ as to be irrational.” See *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Clearly, that is not the case herein, by the Union’s response to Charging Party Zamora, and her failure to make any effort to follow up with him regarding any concerns she may have.

E. The Judge Did Not Err in His Evidentiary Findings.

The Judge’s evidentiary findings were correct and well-reasoned, except for his finding that an agreement referred to in the Employer’s position statement in another case (GC Exh. 7) constituted a “neutrality agreement,” which is the subject of limited cross exceptions by the Union. Inconsistently, the General Counsel seeks to uphold the Judge’s finding that there was a neutrality agreement between HCA Holdings and the Union or affiliate of the Union, based on hearsay in that position statement by Employer counsel, but simultaneously argues that the Judge erred by adopting hearsay conclusions about the document by Employer counsel. In support of this argument, General Counsel argues that conclusions about “duties imposed by contracts are legal conclusions” that may not be relied upon. (GC Brief at 37). However, to form the opinion that a “neutrality agreement” exists requires the same interpretation of duties imposed. General Counsel’s argument in this regard is nonsensical and should be rejected by the Board. General Counsel argues that the Judge should instead have relied on Zamora’s hearsay testimony

unless the clear preponderance of all the relevant evidence convinces the board that they are incorrect. That is certainly not the case here-in. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

concerning the alleged neutrality agreement. (GC Brief at 41-43). Ms. Zamora, however, was not a credible witness.

The Judge did not find Ms. Zamora to be a credible witness for several reasons, which are explained clearly in the ALJD.⁶ When testifying about a conversation she purports to have had with the late Michael Lamond, who Zamora testified worked for the Employer, as to why she believed some “neutrality agreement” existed between the Union and Employer, the Judge found the “vagueness of Zamora’s testimony “diminishes its credibility.” (JD slip op. at 10:5). The Judge explained meticulously why he formed this impression, emphasizing that Ms. Zamora “did not quote Lamond as saying that there was something in a neutrality agreement that prevented her from posting on the locked bulletin boards but only testified that *she felt* there was. Moreover, she is less than clear about whether Lamond told her that there had been a neutrality agreement which had expired or whether he said that part of it had expired.” (JD slip op. at 10:5-9).

As the Judge reasoned upon hearing and observing Ms. Zamora testifying, “Zamora considered access to the locked bulletin boards a matter important enough to raise with the Employer’s vice president of human resources, who referred her to Lamond. She testified that she talked with Lamond ‘at great length’ and protested that she was being treated unfairly. Certainly, she would have considered her conversation with Lamond important.” (JD slip op. at 10:13-16). These observations reasonably led the Judge to conclude that:

People tend to remember conversations concerning matters they consider important more than they do discussions about subjects they believe trivial or inconsequential. Similarly, when a person is seeking redress for perceived unfair treatment, emotion burns the matter into memory. Without doubt, Zamora had strong feelings about the bulletin

⁶ The Board’s long established policy is not to overrule the Judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

board issue. Otherwise, she would not have contacted [HR VP] Goodwine and Lamond and spoken with the latter ‘at great length.’ Yet Zamora’s description of this conversation is nebulous and nonspecific. This inconsistency creates the impression that either the witness is not telling the full story or that her memory is too sketchy to be reliable.

(JD slip op. at 10:18-25).

The Judge also found noteworthy that “in January 2010, Zamora gave testimony about neutrality agreements before a Congressional committee” and that “[t]his history raises the possibility that Zamora, not Lamond, raised the matter of neutrality agreements and that she did so because of a longstanding opposition to such agreements in general and not because a neutrality agreement somehow had precluded her from posting a flyer on a protected bulletin board.” (JD slip op. at 10:40-43). At hearing, Ms. Zamora tried to conceal that she had a history of opposition to neutrality agreements, this fact only coming out on cross examination. Ms. Zamora had claimed to have had to research about neutrality agreements, suggesting she did not really understand what they were, testifying on direct examination from Charging Party counsel, “[i]n preparation for my in-services, I wanted to take some information. I did some research looking for -- about Neutrality Agreements.” (Tr. 109:16-18). On cross examination, Ms. Zamora admitted, however, to have testified before Congress in 2010 in opposition to neutrality agreements. (Tr. 114-115:16-4).

Accordingly, the Judge understandably was “somewhat concerned that Zamora is attempting to make this case a vehicle for obtaining a precedent establishing that a union has a duty to furnish employees, on request, a copy of an existing neutrality agreement when, in fact, the neutrality agreement had nothing at all to do with the Employer’s decision denying Zamora access to the protected bulletin boards.” (JD slip op. at 11:1-4). The judge correctly found “Zamora’s testimony about what Lamond said constitutes hearsay which cannot be used to

establish the truth of the matters Lamond asserted. But even apart from being hearsay, Zamora's nebulous testimony would fall short of establishing that the Employer had entered into a neutrality agreement with the Respondent or that such agreement was the reason why the Employer would not allow her to use the locked bulletin boards." (JD slip op. at 11:15-19).

The Judge also did not err in finding that the Union's answer to the subparagraph 8(a) of the amended complaint satisfies Section 102.20 of the Board's Rules and Regulations. Section 102.20 provides that the a "respondent must admit, deny, or explain each of the acts alleged in the complaint, unless respondent is without knowledge, in which case the respondent must so state..." By its amended answer, the Union specifically denied that it "failed or refused to provide Charging Party with a copy of a neutrality agreement that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party's July 11, 2018 letter to Respondent." (GC Exh. 1(m)). The Judge observed that because neither the complaint nor amended complaint alleged the existence of a neutrality agreement, and rather assumed the existence of such, he had concerns that the Union was not adequately placed on notice. (JD slip op. at 5:27-30).

In any event, by this denial, as found by the Judge, the Union responded in a manner that also "explained" pursuant to Section 102.20 its position regarding the factual allegation. This is evident given the common understanding of the term "neutrality agreement," is an agreement establishing a democratic process where it may be determined (with employer neutrality) whether a majority of employees in an appropriate unit wish to be represented by a particular union. For General Counsel to omit a critical allegation and then accuse the Union of failing to provide a sufficient answer to amended complaint subparagraph 8(a) is hypocritical to say the least.

The Union's amended answer to subparagraph 8(a) of the amended complaint clearly comported with Section 102.20, as found by the Judge. If the Board were to find otherwise, it would not be following its own rules and regulations.

F. The Judge Did Not Err in His Revocation of the General Counsel's and Charging Party's Trial Subpoenas and by Not Issuing Sanctions against Respondent.

In arguing that the Judge erred in revoking the subpoenas duces tecum issued to the Union and Employer seeking production of the alleged neutrality agreement, the General Counsel makes a stunning admission highlighting the errors in the handling of this case against the Union – that production of the alleged neutrality agreement is necessary to determine whether a violation of the Act on the part of the Union occurred. (GC Brief at 44). As is clear, the General Counsel had no evidence of a prima facie violation of the Act when issuing the complaint. There is absolutely no evidence that any agreement between the Union and Employer reflects or impacts terms and conditions of employment except the parties' collective bargaining agreement, and General Counsel now amazingly argues after hearing and in its exceptions brief that production of the disputed alleged neutrality agreement by subpoena is necessary to prove the violation. General Counsel's position flies in the face of Section 10068.3(a) of the Board's Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (September 2020), which provides that complaint will issue in cases deemed to have merit. How can production of a disputed alleged neutrality agreement be necessary to determine whether a violation of the Act has occurred at this extremely late stage of the proceedings? Because the General Counsel did not and does not have evidence of a prima facie violation of the Act, and has attempted to use this case to advance his doctrinal goals despite the absence of evidence.

In *Electrical Energy Services*, the respondent employer was charged with a Section 8(a)(5) violation for failing to provide “certain requested information that is relevant to and necessary” for the union’s duty of representation. A subpoena duces tecum was served on the employer “attempting to obtain each and every document placed in issue by the complaint.” *Id.* at 931. The Board adopted the ALJ’s decision which found:

In the instant case, the General Counsel is attempting to use the subpoena duces tecum as a substitute for the Board order sought by the complaint. Not only is this procedure improper, but it is an abuse of the subpoena power because it would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question. *Id.*

If anything, this argument by the General Counsel reinforces, rather than undermines, the reasoning of *Electrical Energy Services, Inc.*, 288 NLRB 925, 931 (1988) that a subpoena duces tecum cannot be used as a substitute for the Board order sought by the complaint. That General Counsel believes the purported document is necessary to prove the violation to obtain a Board order *after* issuing complaint and issuing its subpoena duces tecum it at hearing to attempt to prove the violation is nothing short of flabbergasting. And the Judge’s conclusion that the Employer and Union had a legitimate interest in keeping the purported agreement confidential is not mere surmise, as General Counsel asserts, but is supported by record evidence. That evidence is the Employer’s position statement (GC Exh. 7), the same document that General Counsel cherry picks from, supporting the Judge’s finding of a neutrality agreement between HCA Holdings and the Union or affiliate of the Union, based on hearsay in that position statement by Employer counsel, but ignoring Employer counsel’s emphasis in the same document that whatever agreement he was referring to was confidential. Clearly, the Judge did not err in his ruling revoking General Counsel’s and Charging Party’s subpoenas.

As such, there are no grounds for evidentiary sanctions on Respondent, as General

Counsel asserts the Judge should have imposed. Respondent has not misled the tribunal; rather General Counsel has misled the tribunal by proceeding without prima facie evidence to support his complaint against the Union while seeking to re-write Board jurisprudence in this area after taking the position before the Judge and the parties that General Counsel was prosecuting the Union under existing Board law, not seeking to change it. (Tr. 61:20-23).

V. CONCLUSION

For all the foregoing reasons, the Board should overrule the General Counsel's exceptions, affirm the ALJ's rulings, findings,⁷ credibility determinations and conclusions, and adopt the recommended Order of the ALJ, dismissing the amended complaint in its entirety.

DATED: October 14, 2020

Respectfully submitted,

NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED (NNOC/NU)
LEGAL DEPARTMENT

/s/ Micah Berul

Micah Berul
Counsel for Respondent, NNOC-Texas/NU

⁷ That is, except for the finding that a "neutrality agreement" between the Union and HCA exists on the record before the Judge, concerning which the Union has filed limited cross exceptions.

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, not a party to the within action and that my business address is 155 Grand Avenue, Oakland, California 94612.

On the date below, I served the foregoing document entitled

**RESPONDENT NATIONAL NURSES ORGANIZING COMMITTEE –
TEXAS/NATIONAL NURSES UNITED’S ANSWERING BRIEF TO GENERAL
COUNSEL’S EXCEPTIONS**

**RESPONDENT NATIONAL NURSES ORGANIZING COMMITTEE –
TEXAS/NATIONAL NURSES UNITED’S ANSWERING BRIEF TO CHARGING
PARTY’S EXCEPTIONS**

**RESPONDENT’S LIMITED CROSS EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE’S DECISION**

**RESPONDENT’S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

via Electronic Mail as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 14, 2020, at Oakland, California.

/s/ Tym Tschneaux
Tym Tschneaux