

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 CHARGING
PARTY’S EXCEPTIONS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES		ii
I. INTRODUCTION		1
II. PROCEDURAL HISTORY		2
III. STATEMENT OF FACTS		5
IV. ARGUMENT		7
A. The Judge Did Not Narrowly Construe the Union’s Fiduciary Duties in Error		7
B. The Judge Did Not Err in Holding the Complaint Did Not Allege the Existence of a Neutrality Agreement or in His Finding that the Union Provided an Adequate Answer or Denial to Complaint Paragraph 8.....		12
C. The Judge Did Not Err in Discrediting Ms. Zamora’s Testimony about what Decedent Michael Lamond Allegedly Told Her Concerning the Alleged Neutrality Agreement.....		13
D. The Judge Did Not Err in Questioning Ms. Zamora’s Motivation and Alleged Bias		16
E. The Judge Did Not Err in His Handling of the Subpoenas.....		17
F. The Judge Did Not Err by Failing to Make Negative Credibility Findings about Union Agent Bradley Van Waus		18
G. The Judge Did Not Err by Not Ruling on Charging Party’s Motion to Strike Portions of the Union’s Answer and Affirmative Defenses		19
V. CONCLUSION.....		20

TABLE OF AUTHORITIES

	Page
CASES	
FEDERAL CASES	
<i>Airline Pilots Ass’n v. O’Neill</i> 499 U.S. 65 (1991).....	19
<i>Steele v. Louisville & N.R.R. Co.</i> 323 U.S. 192 (1944).....	17
<i>Steelworkers v. Rawson</i> 495 U.S. 362 (1990).....	7
<i>Vaca v. Sipes</i> 386 U.S. 171 (1967).....	19
NLRB CASES	
<i>Dentech Corp.</i> 294 NLRB 924 (1989)	9
<i>Electrical Energy Services, Inc.</i> 288 NLRB 925 (1988)	17
<i>IATSE, Local 720 (Tropicana Las Vegas, Inc.)</i> 308 NLRB 1300 (1992)	11
<i>Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)</i> 260 NLRB 419 (1982)	11
<i>Lee Lumber & Bldg. Material</i> 334 NLRB 399 (2001)	9
<i>Letter Carriers Branch 529 (USPS)</i> 306 NLRB 408 (1992)	8, 10
<i>Local 307, Nat’l Postal Mail Handlers Union</i> 339 NLRB 93 (2003)	9, 10
<i>Miranda Fuel</i> 140 NLRB 181 (1962)	10

<i>OPEIU, Local 251 (Sandia Corp., d/b/a Sandia National Lab.</i> 331 NLRB 1417 (2000)	10
<i>Operating Engineers Local 324</i> 226 NLRB 587 (1976)	11
<i>Standard Dry Wall Products</i> 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)	13, 18
<i>Weisser Optical</i> 274 NLRB 961 (1985)	8
 FEDERAL STATUTES	
29 U.S.C. § 158(a)(5).....	1
29 U.S.C. § 158(b)(1)(A).....	1, 2, 3, 10, 19
 FEDERAL RULES	
Fed. Rule Evid., rule 807	14
 OTHER AUTHORITIES	
NLRB, Rules and Reg., Section 102.20.....	12, 13

I. INTRODUCTION¹

Pursuant to Section 102.46(b) of the Board's Rules and Regulations, Respondent (the "Union") herewith files its Answering Brief to Charging Party's Exceptions to the Administrative Law Judge's Decision ("ALJD"). Contrary to Charging Party'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. "Charging Party Brief at ____" refers to the pages of the Charging Party'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).

Charging Party, an outspoken opponent of unions and neutrality agreements, having testified before Congress against neutrality agreements, is represented by the National Right to Work Legal Defense Foundation, whose record in disparaging and opposing unions is well known. Together with General Counsel, Charging Party seeks to re-write the law concerning a union’s obligation to provide employees with requested information in order to meet the duty of fair representation and would require a union upon request to furnish employees “any and every contract their union (the agent) makes or has made with their employer.” (Charging Party Brief at 13). Applying existing Board law, the Judge correctly dismissed the complaint. 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 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)).

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 state 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

Like the General Counsel, Charging Party is asking the Board to drastically 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 a union upon request to furnish "any and every contract their union (the agent) makes or has made with their employer." (Charging Party Brief at 13). Such a sea change in the law is unwarranted and should be soundly rejected by the Board.

A. The Judge Did Not Narrowly Construe the Union's Fiduciary Duties in Error.

As the Judge correctly emphasized, a union's failure or refusal to furnish a bargaining unit member with requested documents 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).

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.

In this regard, 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. With regard to the first factor, Charging Party's request had nothing to do with a grievance filed under the collective bargaining agreement's grievance and arbitration procedure. Ms. Zamora'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, nothing in the record establishes bargaining unit employees enjoyed a condition of employment to post materials in an enclosed bulletin board.

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.³

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.

Charging Party gives only passing notice to the *Letter Carriers Branch 529* test, because the record evidence does not show Ms. Zamora's request triggered any duty on the part of the Union under that test to furnish information to her.

And the Judge did not narrowly construe the duty owed to Ms. Zamora by the Union, a duty which "is in a sense fiduciary in nature" because of 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 and any alleged neutrality agreement clearly did not limit such a non-existing term and condition

³ 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.

of employment. 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.

There is nothing in Board or court law that suggests a limitless duty to furnish each and every agreement between a union and employer to a bargaining unit employee upon request in order for a union to meet its duty of fair representation. Charging Party's request that the Board alter the law in this regard is wholly disconnected from existing precedent, bears no relation to the Union's representational role, and should be rejected by the Board.

The cases cited by Charging Party do not in any manner support the notion that a Union's duty to furnish information to a requesting employee could extend to each and every agreement between a union and an employer, as each involved requests that had direct bearing on an employee's 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.

Charging Party's citation to an exclusive hiring hall case, *IATSE, Local 720 (Tropicana Las Vegas, Inc.)*, 308 NLRB 1300 (1992), in support of the argument that a union should have a per se duty to furnish any agreement between an employer and union, without a showing of relevance, to a requesting employee 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, Charging Party’s claim that the duty of fair representation requires a per se rule that a union must furnish any and all agreements between a union and employer is fanciful, bearing no relation to Board and court precedent. The Board should soundly reject Charging Party’s requested change in the law.

B. The Judge Did Not Err in Holding the Complaint Did Not Allege the Existence of a Neutrality Agreement or in His Finding that the Union Provided an Adequate Answer or Denial to Complaint Paragraph 8.

The Judge also did not err in finding that the Complaint failed to allege the existence of a neutrality agreement and that 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 this regard, the Judge stressed that “[i]f the complaint had alleged that a neutrality agreement existed instead of assuming that fact, the Respondent clearly would have been required to admit or deny such a document’s existence (JD slip op. at 5:27-29).

This is not mere “word games” with no substantive distinction as Charging Party erroneously argues. To illustrate, if Jack was alleged not to have shared his ham sandwich with Jill, when, in fact, Jack did not have a ham sandwich but rather had a tuna fish sandwich (that he did not share with Jill), when pressed for an admission or denial as to the allegation that he did not share his ham sandwich with Jill, Jack could not simply admit or deny this allegation. To answer accurately, Jack would need to specifically deny that he failed to share his ham sandwich with Jill and otherwise provide an explanation. Charging Party is surely mistaken that “[i]t is hard to imagine a less ambiguous allegation” than complaint subparagraph 8(a). (Charging Party Brief at 16).

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. 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.

C. The Judge Did Not Err in Discrediting Ms. Zamora’s Testimony about what Decedent Michael Lamond Allegedly Told Her Concerning the Alleged Neutrality Agreement.

Charging Party argues that the Judge should have credited Zamora’s testimony concerning decedent Lamond’s statements.⁴ Ms. Zamora’s testimony about the late Mr. Lamond’s purported statements were hearsay, however, and there is no applicable hearsay exception as Charging Party argues. Yes, Mr. Lamond was unavailable to testify having died, but the statements that Ms. Zamora attributes to the late Mr. Lamond were not “statements

⁴ 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, which is clearly not so here. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

against interest” under the Federal Rules of Evidence and were not those of a party opponent as the Employer is not a party to the case, and even if it were, as the Judge ruled, the record does not establish Lamond was an agent of the Employer. (JD slip op. at 9:10-12). Contrary to Charging Party’s assertion, the fact that Ms. Zamora also filed an unfair labor practice charge against the Employer in a separate case, which was dismissed, does not make the Employer a party to this case. Charging Party’s assertion that the Union and Employer were in collusion not only gets Charging Party nowhere in claiming the Employer is a party to the case, it is also an outlandish lie and should be stricken from Charging Party’s brief.

The residual exception cannot be raised now when it was not raised prior to or during hearing. No notice was provided by Charging Party or General Counsel to the Union, prior to or during the hearing, that General Counsel or Charging Party intended to introduce hearsay testimony through witness Zamora concerning what Ms. Zamora claims Mr. Lamond stated about an alleged neutrality agreement.

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 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.

Moreover, the Judge correctly found that 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 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).

D. The Judge Did Not Err in Questioning Ms. Zamora’s Motivations and Alleged Biases.

The Judge did not find Ms. Zamora to be a credible witness for several reasons, which are explained clearly in the ALJD. The Judge 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).

Charging Party’s outrageous attack on the integrity of the Judge for properly considering whether she had an “axe to grind” in assessing Ms. Zamora’s credibility should be stricken from the Charging Party’s brief. Charging Party’s implicit suggestion that the Judge making such a

finding is tantamount to criticizing Mr. Steele for filing *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192 (1944) “to rid his workplace of racial discrimination” (Charging Party Brief at 23) is a gratuitous and offensive attack on the Judge that only adds to the proof that Charging Party does have an axe to grind by such open hostility to an administrative law judge just doing his job.

E. The Judge Did Not Err in His Handling of the Subpoenas.

The Judge committed no error in his handling of the subpoenas, correctly applying Board law to revoke them. 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, in light of the posture of this case where General Counsel and Charging Party adduced no admissible or creditable evidence to establish a violation of existing Board law, 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 is even stronger. The Charging Party apparently believes the purported document is necessary to prove the violation to obtain a Board order *after* General Counsel issued complaint, highlighting the improper prosecution of the Union throughout these proceedings. Clearly, the Judge did not err in his handling of the subpoenas.

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

Counsel asserts the Judge should have imposed. Charging Party's argument that the non-party Employer's refusal to furnish a copy of the alleged neutrality agreement should have led the Judge to issue evidentiary sanctions *against the Union*, because the Union could presumably "have sued HCA for a breach of contract had it complied with the ALJ's order" to produce the agreement the Employer referenced in GC Exh. 7 is wholly unsupported by Board law or procedure.

F. The Judge Did Not Err by Failing to Make Negative Credibility Findings about Union Agent Bradley Van Waus.

Union Labor Representative Bradley Van Waus testified forthrightly under extensive cross examination, and the Judge correctly took no issue with Mr. Van Waus's credibility. 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). In any event, although Mr. Van Waus testified forthrightly and without guile precluding the possibility that he should be discredited, the testimony has no bearing on the Judge's correct decision to dismiss the complaint, as General Counsel failed to establish a prima facie case as to a violation of the duty of fair representation by Mr. Van Waus's response to Ms. Zamora.

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.

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.

G. The Judge Did Not Err by Not Ruling on Charging Party's Motion to Strike Portions of the Union's Answer and Affirmative Defenses.

The Judge is correct that a ruling on Charging Party's motion to strike portions of the Union's answer and affirmative defenses was a moot point, because the Judge rendered his decision without considering those portions of the Union's defenses and arguments in its answer or amended answer. (JD slip op. at 25:1-4). This is so irrespective of whether the Board affirms or reverses the Judge, because the recommended dismissal of the complaint did not rely on arguments by the Union that the Charging Party finds objectionable in its motion to strike.

V. CONCLUSION

For all the foregoing reasons, the Board should overrule the Charging Party's exceptions, affirm the ALJ's rulings, findings,⁵ 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

⁵ 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