UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FREDERICK J. CALATRELLO, REGIONAL DIRECTOR, REGION 8 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,	
Petitioner,	**CASE: 5:13-cv-01538-JRA**
and	
DHSC, LLC, D/B/A AFFINITY MEDICAL CENTER,	
Respondent.	

MEMORANDUM IN OPPOSITION
TO PETITION FOR INJUNCTIVE RELIEF UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT

Respondent, DHSC, LLC, d/b/a Affinity Medical Center ("Affinity"), by Tracy C. Litzinger of Howard & Howard Attorneys PLLC, for its Memorandum in Opposition to Petition for Injunctive Relief under Section 10(j) of the National Labor Relations Act, tenders the following.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

This case is about a unique agreement between Affinity and the California Nurses Association / National Nurses Organizing Committee ("C.N.A." or the "Union"). The Regional Director of Region 8 ("Petitioner") of the National Labor Relations Board ("NLRB" or the "Board") has omitted a number of critical factors relevant to this Court's analysis of his Petition for Injunction under Section 10(j) of the National Labor Relations Act ("Petition"). As indicated by the documents filed in support of the Petition, Administrative Law Judge, Arthur J. Amchan ("ALJ"), deprived Affinity of the ability to present evidence relevant to its affirmative defenses. While the ALJ's decision will be subject to review through the administrative process, this matter immediately affects the analysis of matters presented by the Petition due to the nature of the remedy sought by the Petitioner. The Petition should be denied because the relief requested does not meet the just and proper standard required by the Sixth Circuit and because the Petitioner does not satisfy the requisite reasonable cause burden. Section 10(j) of the National Labor Relations Act (the "Act") does not warrant the remedy sought by the Petitioner.

ARGUMENT

I. The Court's Analysis Involves both Assessment of Reasonable Cause and the Propriety and Justice of the Remedy Sought

A request for relief under Section 10(j) of the Act represents an effort to preserve the "status quo pending the completion of the [Board's] regular procedures." *Gottfried v. Frankel*, 818 F.2d 485, 494 (6th Cir. 1987). In resolving a 10(j) request for relief, the court may grant relief that it considers just and proper. 29 U.S.C. §160(j). Any award for relief must follow a determination that reasonable cause exists to believe that an unfair labor practice occurred. *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.2d 208, 212 (6th Cir. 1995). If the Petitioner fails to establish either element (reasonable cause or just and proper relief), the Court

must deny the petition. *Id* (citation omitted). Injunctive relieve under 10(j) must be "reserved for the extraordinary cases where the likelihood of ultimate remedial failure by the Board . . . is unusual when compared to the every other case before the Board." *Fleishut v. Nixon Detroit Diesel*, 859 F.2d 26, 30 n. 4 (6th Cir. 1988). Where the Board's final order is likely to as effective as injunctive relief, the court should reject such requested relief. *Gottfried*, 818 F.2d at 495. Because this case involves both a failure to demonstrate adequate cause as well as a request for improper and unjust relief, the Petition should be denied.

In determining appropriate relief, the Court should consider the "special characteristics of health care institutions . . . ." *Frye v. District 1199*, 996 F.2d 141, 145 (6th Cir. 1993)(citing *Beth Israel v. NLRB*, 437 U.S. 483, 505-06 (1978)). Hence, when fashioning an appropriate remedy in the *District 1199* case, the court considered potential disruption to patient services caused by picketing activity of the union. 996 F.2d at 145. The crux of the inquiry as to the justice and propriety of relief sought turns on whether such relief "is necessary to return the parties to [the] status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA, and whether achieving [the] status quo is possible." *Frankel*, 818 F.2d at 495. Injunctive relief should be denied where, as here, the relief sought is overly broad, unnecessary to preserve the ultimate remedial authority of the Board, and unduly burdensome to the employer. *Automatic Sprinkler*, 55 F.2d at 214-15.

II. The Petition Should be Denied Because the Relief Sought by the Petitioner is Neither Just Nor Proper

A. The Relief Sought by the Petition Seeks to Supplant the Intent of the Parties to be Subject to Binding Arbitration for Conduct that Forms the Basis of the Board's Administrative Action

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (2011), mandates arbitration as a remedy, to the exclusion of other forms of relief, including a 10(j) petition. In

actions under Section 301 for specific performance of collectively-bargained arbitration agreements, arbitration *must* be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). The parties were subject a collective bargaining agreement, which arose in 2012 (the "Agreement"), the time during which the alleged unfair labor practices occurred. Hence, by requesting 10(j) relief, the Petitioner would have the Court ignore the intent of the parties, and grant relief that an arbitrator, the NLRB, or an appellate court might not otherwise award. The Petitioner's action deprives Affinity of the benefit of its bargain with the C.N.A. (after the C.N.A. reaped the benefit of its bargain), which bargain requires that issues relating to the conduct of the parties during organizing, during the election, during the post-election period, and during bargaining shall be resolved exclusively and with finality by arbitration.

In early July 2012, Affinity and the C.N.A. formed the Agreement, whereby Affinity afforded the C.N.A. an opportunity to organize the Registered Nurses (the "RNs") employed by Affinity.[1] The Agreement, although not reduced to writing, meets all requirements of an implied-in-fact contract, and thus legally binds the parties, Affinity and C.N.A. *Beck v. Gannett Satellite Informational Network, Inc.*, 124 Fed. Appx. 311, 318-19 (6th Cir. 2005); *see also Point E. Condominium Owners' Assn. v. Cedar House Assn.*, 104 Ohio App. 3d 704, 712, 663 N.E.2d 343, 348-49 (1995)(holding that under Ohio law, the parties' meeting of the minds is

[1] Similar agreements are being litigated in other pending cases, including *Hospital of Barstow, Inc. d/b/a Barstow Cmty. Hosp. v. Calif. Nurses Ass'n,* Case No. 13-cv-1063 (C.D. Ca.)(wherein the court scheduled a hearing on the defendant's motion to dismiss the 301 complaint for August 26, 2013), and *Fallbrook Hosp. Corp. d/b/a Fallbrook Hosp. v. Calif. Nurses Ass'n*, Case No. 13-cv-1233 (S.D. Ca.)(hearing on defendant's motion to dismiss set for September 27, 2013). Each of these cases also had a companion Section 10(j) proceeding.

demonstrated by the surrounding circumstances, such as party conduct). As the *Beck* Court acknowledged, "We have long recognized that a section 301 labor contract may exist between an employer and a labor union in the absence of a formal, written collective bargaining agreement." *Id* at 319 (citing *Int'l Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers – Local 1603 v. Transue & Williams Corp.*, 879 F.2d 1388, 1392 (6th Cir. 1989)). In this case, the parties to the Agreement engaged in conduct that expressly manifested their consent to the Agreement. *See Beck*, 124 Fed. Appx. at 319-20 (citing *Bobbie Brooks, Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987)).

The Agreement contained both a "labor relations" component as well as an "election procedures" component. (Carmody Dec., ¶¶4-8.)[2] In relevant part, the Agreement resulted in the following conduct demonstrating a clear meeting of the minds: the C.N.A. notified Affinity of its intent to bargain within the time limitation imposed by the Agreement; throughout the seventy-five day period to which the parties consented to for organizing, Affinity demonstrated neutrality as required by the Agreement; the parties presented a joint public announcement to Affinity employees in the voting group regarding the organizing activities and election; the parties conducted a joint orientation/training session for all supervisors, managers, and union organizers who would be involved in organizing at Affinity; the parties pre-screened literature used during the organizing effort; Affinity granted the C.N.A. enhanced access to break rooms, cafeteria, conference rooms, and bulletin boards, which benefits do not arise under the law; Affinity granted a request for unpaid leave by an employee within the C.N.A.'s identified bargaining unit for organizing purposes; the parties identified and deployed "rapid response teams" to the Affinity facility as contemplated by the Agreement; and the parties executed and tendered a

[2] A copy of Mr. Carmody's Declaration is attached to this Memorandum as Exhibit 1.

"consent agreement" to the NLRB for the election. (Carmody Dec., ¶10.) For the period after the election, and also pursuant to the Agreement, Affinity and the C.N.A. agreed to continue enhanced access and communication terms. (*Id.*) As late as September 28, 2012, the C.N.A. continued to assert its entitlement to dispute resolution provisions in the Agreement. (*Id.* at ¶13.) The Agreement between the parties included provisions establishing a framework for, and certain components of, collective bargaining, in the event the C.N.A. prevailed in a representation election, including a duty to recognize the C.N.A. and to negotiate in a good faith effort to reach a collective bargaining agreement. (*Id.* at ¶¶16-18.)

Importantly, under the Agreement, Affinity and the C.N.A. agreed that an arbitrator (the "Arbitrator") would hold exclusive jurisdiction to resolve any disputes regarding compliance with or construction of the Agreement, including the resolution of the challenges and objections to the election. (Carmody Dec., ¶11.) The Agreement further provided that, should an election take place and should the Union prevail in the election, the Arbitrator would possess exclusive jurisdiction to resolve any disputes that arose as part of the parties' efforts to agree upon an initial contract. (*Id.* at ¶¶10, 13, 16-18.) The authority of the Arbitrator included awarding compensatory damages, equitable relief, attorneys' fees and costs, and requiring Affinity to recognize and issue a bargaining order with the C.N.A. (*Id.*) Notably, both parties availed themselves of the arbitration provision in the Agreement. The C.N.A. tendered twenty-five complaints pursuant to the procedure defined by the Agreement, and Affinity submitted four complaints pursuant to the same procedure. (*Id.* at ¶10.) The disputes of the parties subject to arbitration obtained various outcomes including resolution, arbitrator decision, and effective withdrawal.

In early July of 2012, the C.N.A.'s organizing campaign at Affinity began. (Tr. 422-23.)[3] On or about August 20, 2012, the Union filed a Petition for Certification of Representative with Region 8 of the NLRB. After the parties entered into the Consent Election Agreement required the Agreement, the NLRB conducted a representation election at Affinity's facility on August 29, 2012. (Tr. 430.) That same day, the Regional Director of Region 8, acting through the Board Agent who oversaw the election, issued a Tally of Ballots, which showed one hundred (100) "yes" votes for the Union, ninety-six (96) "no" votes against the Union, and seven (7) challenges (the "Challenges"), obviously sufficient in number to affect the outcome of the election.

In the wake of the election, due to the C.N.A.'s violations of the Agreement and the Act, Affinity filed Objections to the Election (the "Objections") with the Arbitrator and Region 8, as required by the Agreement. Affinity requested that the NLRB hold the Challenges and elections Objections in abeyance, as required by the Agreement. (Carmody Dec., ¶11.) As also was required by the Agreement, however, Affinity did not initially provide the Region with any of the evidence that the Hospital possessed in support of the Objections or any evidence that related to the Hospital's position on the Challenges. Contrary to the Agreement, C.N.A. provided evidence and argument in support of its position as to the Challenges.

On September 21, 2012, the Regional Director issued a Report on Challenged Ballots and Objections, in which he found that four (4) of the seven (7) challenged ballots should be opened and counted, and also determined that, because Affinity had not provided any supporting evidence, the Objections should be overruled. (Joint Ex. 3, pages 7-12.)[4] On September 27, 2012, the Regional Director, acting through one of the Board's Agents, issued a revised Tally of

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[3] Citations to "Tr. ___" reference the transcript filed by the Petitioner as Docket #1-9.

[4] See the Joint Exhibits filed by Petitioner in Docket #1-6.

Ballots, which showed one hundred and three (103) "yes" votes for the Union, ninety-seven (97) "no" votes against the Union, and three (3) sustained challenges.

On October 5, 2012, the Board, acting through the Regional Director, issued a Certification of Representative (the "Certification") in favor of the C.N.A., which later requested that Affinity recognize and bargain with the Union as the exclusive bargaining representative of the RNs. Due to the fact the Objections had not yet been heard, or resolved by the Arbitrator, Affinity declined the Union's requests. Ignoring the fact that the parties' entry into a Consent Election Agreement arose from their pre-existing mutual contractual obligations, the ALJ refused to accept evidence relevant to the Agreement, by granting the C.N.A.'s Motion in Limine.

As indicated, the parties entered into an Agreement, which included provisions that overlap the allegations of the Petition as well as the remedy sought. Specifically, the allegations claiming a failure to recognize the C.N.A. and bargain with it, as well as the purported limitation of access post-election involve matters expressly addressed by the Agreement. Affinity should receive the full benefit of its bargain with regard to the arbitration remedies provided in the Agreement. *United Steelworkers of Am.*, 363 U.S. at 582-83. Because the Petition seeks to circumvent the Agreement and the intent of the parties to resolve their disputes regarding compliance with or construction of the Agreement by binding arbitration, the relief sought should be denied as unjust and improper. The requested relief as to these components is overly broad, unnecessary to preserve the ultimate remedial authority of the Board, and unduly burdensome to the employer, and thus the Petition should be denied as to these issues. *Automatic Sprinkler*, 55 F.2d at 214-15.

Moreover, returning the parties to the "status quo," the state of affairs prior to the alleged unfair labor practices, would require adherence to the Agreement. *Gottfried*, 818 F.2d at 494. As

indicated in the attached Declaration of Attorney Don T. Carmody, the parties continued to manifest their intent to adhere to the Agreement as late as September 28, 2012. (Carmody Dec., ¶13.) The earliest charges were filed on September 26, 2012 (regarding Ms. Wayt), and September 27, 2012 (regarding facility access). This juxtaposition of facts demonstrates the crux of the injustice and impropriety of the relief requested: at the same time the C.N.A. invoked the Agreement for the purpose of conflict resolution, it violated the Agreement by seeking alternate resolution outside the binding arbitration provision. Hence, awarding the relief sought by Petitioner would *not* return the parties to "status quo," and for this reason alone, the Petition should be denied. *See Frye v. Pony Exp. Courier Corp.*, 1994 WL 758335, at *4-5 (S.D. Ohio July 7, 1994)(denying injunctive relief because it would not return the parties to the status quo and was not essential to preserve the Board's remedial powers). Contrary to the fundamental purpose of Section 10(j), Petitioner's requested relief would not preserve but materially alter the status quo.

B. The Relief Sought by the Petition Raises Serious Health and Safety Concerns and thus is Neither Just Nor Proper

The Petitioner requests relief in the form of reinstatement for Ann Wayt, whose employment with Affinity terminated on September 26, 2012. (General Counsel Ex. 7-1(a), p. 8.)[5] At all relevant times, Ms. Wayt worked in the Orthopedic Department. (Tr. 210.) Affinity advised Ms. Wayt of its decision to terminate her employment well after the election (August 29, 2012), and before the certification of the C.N.A. (October 5, 2012). At the time that Affinity made the decision to terminate Ms. Wayt's employment, and at the time it advised her of its decision, the outcome of the election had not been determined. The final tally of votes occurred

[5] General Counsel Exhibits are referred to as "G.C. Ex.__." This document appears in Docket #1-4, filed with the unsigned Petition on July 16, 2013.

on September 27, 2012. Shortly before the election, Ms. Wayt's photograph appeared on a pro-union flyer, which also contained the photographs of thirty-three other RNs. (Tr. 222; G.C. Ex. 11).[6] She may have supported the Union, but while it was fighting for her job, the C.N.A. described her only as "**a** supporter" as opposed to a strong, vocal, strident, zealous, or leading supporter. (Resp. Ex. 8)(emphasis added).[7] While reinstatement may be an appropriate remedy in some 8(a)(1) and/or 8(a)(3) circumstances, this case does not warrant such relief.

The evidence demonstrates that Ms. Wayt made repeated, deliberately false entries to the patient's medical records, and as a corollary, failed to provide the patient with basic nursing care. (Tr. 44, 60-63, 927-28; G.C. Ex. 7-1(a).) Ms. Wayt concedes that for the duration of her shift on August 28, 2012, she was responsible for the patient's care. (Tr. 285.) The evidence supports Affinity's conclusion that Ms. Wayt failed to assess a patient, failed to include the patient in regular rounding, failed to administer medical attention as directed, and inaccurately recorded her patient care activities on multiple occasions.

Specifically, the evidence reflects that Ms. Wayt initially reported completing a "head to toe" patient assessment at 9:00 a.m. on August 28, 2012. (Tr. 68-69, 112, 185-86; G.C. Ex. 7-1(a), pp. 18-25.) Head to toe assessments, which involve physical interaction with the patient to establish a baseline of numerous health indicators, are particularly important for orthopedic patients with traumatic injury and high acuity, such as the elderly patient in question. (Tr. 279, 835, 927-28.) Ms. Wayt subsequently admitted that she did not see the patient until at least 10:00 a.m., despite reporting that she had, at 9:00 a.m., completed an assessment of the patient. (Tr. 227, 230, 243, 288; G.C. Ex 7, pp. 18-25.) In fact, Ms. Wayt falsely documented the timing of

[6] This exhibit appears marked as "G.C. 11" in Docket #1-5, filed with the unsigned Petition. Please note that it appears between G.C. Ex. 13 and G.C. Ex. 16.

[7] Filed by Petitioner as part of Docket #1-7 with the unsigned Petition.

the following baseline matters on the patient's 24-hour Assessment Form: psychosocial, neuromuscular, pulmonary, cardiovascular, genitourinary, gastrointestinal, and integumentary. (G.C. Ex. 7-1(a), pp. 16-25.) Affinity determined the falsity of this report, in part, because the patient in question did not leave the Emergency Department until 9:10 a.m. on August 28, 2012. (Tr. 62-63; G.C. Ex. 7-1(a), p. 10)("**0910** – Pt left ED; **0915** – Pt. arrived to Ortho . . . .")(emphasis added)). Ms. Wayt did not work in the Emergency Department, and thus the timing she entered on the 24-Hour Assessment Report was patently false. (Tr. 150.) Ms. Wayt admitted, later, that (if she performed any assessment at all), she did not do so until 11:00 a.m., despite her written report to the contrary. (Tr. 227, 230, 243, 288; G.C. Ex 7, pp. 18-25.) Hence, from the outset, Affinity identified a materially false statement in the medical records regarding this patient.

Another employee, Ms. Rhonda Smith, who occupied the patient's room for a large portion of that day as a "sitter," confirmed to Affinity that Ms. Wayt *never* performed any such assessment. (Tr. 572, 602, 605, 607; G.C. Ex. 7-1(a), p. 14.) The other sitter, who provided lunch coverage for Ms. Smith, was Ms. Jonalee Lesjak. (Tr. 634.) Affinity assigns sitters, due to the patient's condition (such as dementia or Alzheimer's), to help deter self harm and insure safety. (Tr. 634, 661.) Ms. Smith advised Affinity that the only time Ms. Wayt provided any care to the patient included administration of pain medication around noon. (Tr. 62-63; G.C. Ex. 7-1(a), p. 10.) According to Ms. Lesjak's testimony, and consistent with that of Ms. Smith, Ms. Wayt never performed an assessment on the patient, appearing in the room only once, during Ms. Smith's lunch break, to adjust IV tubing. (Tr. 634, 639-40.)

Affinity held serious concerns both as to the timing of any such assessment *and* as to whether it had been performed at all. Prior to her termination, the C.N.A. acknowledged the

inaccuracy of Ms. Wayt's medical documentation, after conferring with Ms. Wayt about the matter. (Tr. 372, 434-35; Resp. Ex. 8, p. 4)("Apparently, Ann entered the wrong time for her assessment on the chart – she put in some time in the morning although she had not actually done the assessment until mid-day.")) Affinity's view of the actual assessment differs substantially. Affinity's Risk Manager and Patient Safety Officer, Ms. Pat Kline, reviewed the medical documentation for the patient and noted a series of incidents that reflected substandard care and false documentation. (Tr. 1106, 1115, 1118.)

Ms. Kline identified the fact that Ms. Wayt failed to document heart rhythm, pulses, edema, and capillary refill. (Tr. 1118-19; G.C. Ex. 7-1(a), p. 19.) The gravity of such failure is magnified by the fact that the documentation from the Emergency Department, which Ms. Wayt admittedly received in the morning of August 28, 2012, showed a history of congestive heart failure for this patient. (Tr. 280-82, 1118-20; Resp. Ex. 2.)[8] This was not the only indication that Ms. Wayt had not performed any assessment. Despite being provided with information regarding the patient's catheter status in the morning of August 28, 2012 (Tr. 278), by the afternoon, Ms. Wayt had forgotten (Tr. 603; G.C. Ex. 7-1(a), p. 14.) At approximately 2:00 p.m., Ms. Wayt indicated total ignorance of catheter status, a fact she also should have noted had she performed the requisite head to toe assessment. (Tr. 604-05.) Ms. Kline's report to Affinity, coupled with the reports of Ms. Smith and Ms. Lesjak, raised the frightening specter that a nurse with many years of experience, who should know far better, failed to perform any assessment of this patient during her shift.

Ms. Wayt's documentation of this patient's condition differed from the observations of other health professionals in another marked fashion. Ms. Wayt admits having failed to perform

[8] Respondent's Exhibit 2 is included in Petitioner's July 16, 2013 filing, at Docket #1-7.

a skin assessment, and the 24-Hour Assessment Form confirms that admission. (Tr. 72, 245; G.C. Ex. 7-1(a), p. 22.) Affinity policy requires notation of conditions such as a skin tear, which existed on this patient. (Tr. 143-44, 71, 1116-18.) Further, Ms. Wayt reported the patient's cough as "absent," when another Affinity employee observed a "harsh" cough upon the patient's admission to Orthopedics. (Tr. 148-49, 672; G.C. Ex. 7-1(a), p. 19.) The evening nurse also reported a cough. (G.C. Ex. 7-1(a), p. 19.) Further, as evidenced by Ms. Wayt's documentation, she apparently failed to perform any pain assessment on a patient with a broken hip. (Tr. 339, 347-48, 276; G.C. Ex. 7-1(a), p. 23.) In fact, pain medication would not have been administered during that day, but for Ms. Lesjak's request. (Tr. 339, 601, 642-43.) As indicated, Ms. Smith and Ms. Lesjak confirmed Affinity's conclusion that no assessment had been completed for the time period they occupied the patient's room. (G.C. Ex. 7-1(a), pp. 10, 14-15.) When coupled with the other facts it had gathered, Affinity feared the worst.

Hourly rounding involves assuring the patient's comfort, as well as providing an opportunity to assess any material change in the patient's condition. Rounding involves making basic determinations about the patient's bathroom needs, pain status, comfort in their position, and access to their possessions. (Tr. 345-48, 836.) Affinity requires hourly rounding, and Ms. Wayt received training on the procedure. (Tr. 344; 906-07.) Pursuant to Affinity policy, the sitter is entitled to expect that hourly rounding will be performed by the assigned RN. (Tr. 902; Resp. Ex. 21.)[9] As indicated, Ms. Wayt admitted her personal responsibility for the patient and conceded that she did not delegate that responsibility to either sitter. (Tr. 286-87.) No arrangements had been made for a "sitter" to provide patient care. (Tr. 156-57.)

[9] *See* Docket #1-7.

Contrary to the medical documentation Ms. Wayt completed, she neither rounded nor provided any direct patient care until nearly 11:00 a.m. (G.C. Ex. 7-1(a), p. 23; Tr. 107-11, 571-574, 576.) Ms. Wayt admitted that the portion of the medical records reporting that she rounded at 7:00, 8:00, and 9:00 a.m., were false. (G.C. Ex. 7-1(a), p. 23; Tr. 247.) As noted, the patient did not arrive in the Orthopedic Department until after 9:00 a.m. (Tr. 62-63; G.C. Ex. 7-1(a), p. 10.) As Ms. Smith and Ms. Lesjak testified, Ms. Wayt did not perform any rounding as to this patient prior to 3:00 p.m. (Tr. 62-63, 572, 576-88, 602, 605, 607, 639-40.) Contrary to the defense asserted by Ms. Wayt, the information Affinity possessed with regard to the presence of the sitters strongly indicated that neither woman left the room during their coverage. (Tr. 934-35, 1055-56.)

The ALJ properly concluded that in contravention of Affinity policy regarding appropriate patient care, Ms. Wayt did not round at 1:00, 2:00, or 3:00 p.m. on August 28, 2012, in conflict with her written report. (ALJ Dec., p. 27; G.C. Ex. 7-1(a), p. 23.)[10] While the ALJ characterized this failure as a "shortcut[]," as the entity responsible for providing patient care, Affinity viewed these failures as a much more serious matter. (ALJ Dec., p. 27). Notably, the ALJ did not acknowledge that by making this finding, he confirmed Affinity's conclusion about the falsity of the 24-Hour Assessment Report. That document, which Ms. Wayt testified she completed, showed rounding at 1:00, 2:00, and 3:00 p.m. (G.C. Ex. 7-1(a), p. 23.) As Ms. Smith testified, she found herself responsible for performing rounding tasks at noon "because [she] didn't see anyone else coming in the room to do it." (Tr. 583-84.) Hence, according to the evidence available to Affinity, as corroborated by Ms. Wayt, Ms. Smith, and Ms. Lesjak: at no time prior to 3:00 p.m. did Ms. Wayt either assess the patient or perform hourly rounding.

[10] The Petitioner filed the ALJ's decision as part of Docket #1-3.

In further derogation of her duties, Ms. Wayt failed to timely administer Vitamin K, despite the "now" order to do so. (Tr. 331, 340-41; Respondent Ex. 7.)[11] Hence, because Affinity received information confirming that Ms. Wayt provided false information in the medical records, that she performed *no* patient assessment, and that she *never* rounded before 3:00 p.m., and that she failed to administer medical attention as directed, it deemed her to have engaged in substandard patient care and improper record documentation. Ms. Wayt's conduct represents a transgression that, by the General Counsel's admission, would have warranted the imposition of disciplinary action. (*See* Tr. 12-13.)

These events constitute serious offenses, as evidenced by the fact that either type of conduct may result in immediate termination pursuant to Affinity's relevant policies. (*See* Charging Party's Ex. 5; Tr. 1064-65.)[12] When Affinity began a review of the patient's chart, it interviewed Ms. Wayt, who indicated that the chart containing her entries was accurate. (ALJ Dec., p. 14; Tr. 370.) She made this statement despite being advised that Affinity was auditing the medical records. (Tr. 768-69.) To her further discredit, when asked to confirm the accuracy of her recordings, she "initialed" multiple false entries again during Affinity's interview. (Tr. 770-73; G.C. Ex. 7-1(a), pp. 18, 23-25.) During a second investigatory interview, with a Union representative present, Ms. Wayt again defended herself, stating that the record was "fact" when, clearly, such is not the case. (Tr. 788-89; G.C. Ex. 7-1(a), p. 11.) Hence, Ms. Wayt's statements to Affinity during the investigative interviews constituted separate false representations.

The Court is not obligated to adjudicate the merits of the unfair labor practice case, and in fact such duties fall outside the scope of a 10(j) proceeding. *Schaub v. W. Mich. Plumbing &*

[11] Also contained in Petitioner's filings, Docket #1-7.

[12] A true an accurate copy of Charging Party Exhibit 5 is attached to this pleading as Exhibit 2, although the attached lacks the exhibit notation on the face of the document.

Heating, Inc., 250 F.3d 962, 969 (6th Cir. 2001). However, the Court must consider the propriety of the remedy requested, and in doing so, evaluate the potential consequences of such remedy. As the Sixth Circuit has held, health care facilities may require special consideration given the concerns with patient care and service. *District 1199*, 996 F.2d at 145. For example, when applying the "just and proper" analysis to a reinstatement of a patient care provider, the District of New Jersey determined that such reinstatement would be *improper* given the potential threat to patient safety. *Lightner v. 1621 Route 22 West Operating Co., LLC*, 2012 WL 1344731, at *53 (D.N.J. Ap. 16, 2012). In that case, although the court used a more traditional injunctive relief analysis to determine the propriety of the remedy sought, it concluded that the employer's provision of health care services would be "negatively impacted" by reinstatement and thus such remedy would neither be just nor proper. *Id.* at *53. The court refused reinstatement to a particular employee, Wells, despite the fact that she had made pro-union comments, had her photograph appear on a union leaflet, and participated in a pro-union YouTube video, which the court acknowledged indicated her support for the union. *Id* at *9.

As in the *Lightner* decision, Affinity would be negatively impacted by the reinstatement of Ms. Wayt due to the potential risk to its provision of health care services. Like the care giver in *Lightner*, Ms. Wayt failed to provide appropriate patient care and included factually inaccurate reporting in the medical records she prepared.[13] As Affinity's Chief Nursing Officer testified, during his tenure in that position, he had never witnessed the combined events Ms. Wayt committed on August 29, 2012: omitting patient care and falsification of records. (Tr. 928-29.)

[13] As indicated by G.C. Exhibit 7-1(a), Affinity reported Ms. Wayt to the Ohio Board of Nursing with regard to these incidents. Upon information and belief, the Ohio Board of Nursing has undertaken an investigation of these facts and has not yet rendered a decision.

For all of the reasons set forth, reinstatement would neither be just nor proper, and Affinity requests the Court deny the Petition in this respect.

III. The Regional Director Fails to Establish Reasonable Cause to Believe that Affinity Engaged in Unfair Labor Practices

A. Petitioner Fails to Establish Reasonable Cause that Affinity Violated the Act by Failing to Bargain with the C.N.A. Because the Certification Lacks Legal Validity

The Board must maintain a quorum of at least three members in order to have the authority to act. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644 (2010); see also 29 U.S.C. § 153(b) ("[T]hree members of the Board shall, at all times, constitute a quorum of the Board . . . .") In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013), the court invalidated President Obama's January 4, 2012 recess appointments of Sharon Block, Terence F. Flynn, and Richard F. Griffin to the Board. *See also NLRB v. New Vista Nursing and Rehabilitation*, 2013 WL 2099742 (3d Cir. May 16, 2013) (same). As noted above, in the case now before the Court, the Certification of Representative was issued on October 5, 2012. At that time, putting aside Members Block, Flynn, and Griffin, the Board was left with only two (2) Members, namely Chairman Mark Pearce and Member Brian Hayes, who, as made clear by *New Process Steel, L.P.*, could not satisfy the quorum requirements of Section 3(b) of the Act. For this reason, the Certification previously issued by the Board has been rendered invalid and the Regional Director lacks any basis to request that Affinity be compelled to bargain with the Union.

As demonstrated, the fact the Board lacked a quorum at the time the Certification was issued has rendered the Certification invalid and deprives the Regional Director of grounds to seek relief under 10(j). With respect to Petitioner's anticipated response (that Affinity waived its right to argue that the Board lacks a quorum), he is incorrect. The *Noel Canning* decision

involves the statutory jurisdiction of the Board to lawfully conduct its business, including the issuance of a "Certification of Representative" to the C.N.A. at Affinity by the Regional Director, acting on behalf of the Board by delegation, and being "jurisdictional," a party has the right to raise such a jurisdictional challenge at any stage of a proceeding. Hence, the Petitioner fails to establish reasonable cause to support these elements of the Petition and the Petition should be denied.

B. Petitioner Fails to Establish Reasonable Cause that Affinity Violated the Act by Failing to Recognize and Bargain with the C.N.A. Because the C.N.A. Caused Affinity's Response by Breach of the Agreement

As set forth in Section II.A., at all relevant times Affinity and the C.N.A. were parties to an implied-in-fact Agreement. The terms of the Agreement imposed obligations upon both Affinity and the C.N.A. as to pre-election organizing; the conduct of the election, including processing of the Objections and Challenges to the election; post-election access; and collective bargaining. The C.N.A. breached those contractual obligations, which presented serious concerns as to the validity of the outcome of the election and subsequent certification. Specifically, by failing to arbitrate matters expressly subject to the exclusive jurisdiction of an arbitrator, the C.N.A. violated the Agreement. While the ALJ made a series of rulings as to the validity of Affinity's affirmative defenses, which precluded the assessment of evidence relevant to the Agreement and the consequences of the C.N.A.'s breach, these matters are relevant to the Court's analysis of the issues presented in a 10(j) proceeding. Hence, no reasonable cause exists to determine that Affinity committed an unfair labor practice, when viewed against the backdrop of the Agreement. For these reasons, also, the Petition should be denied.

C. Petitioner Fails to Establish Reasonable Cause that Affinity Engaged in an Unfair Labor Practice with Regard to Ms. Wayt

As set forth in detail in Section II.B., the record evidence establishes that Ms. Wayt engaged in substandard delivery of patient care and provided false documentation to Affinity in the 24-Hour Assessment form. While the burden Petitioner bears to establish "reasonable cause" is not particularly high, the record before the Court demonstrates sufficient basis to determine the absence of such cause. Specifically, the Petitioner must demonstrate both that its legal theory is "substantial and not frivolous" and that the facts of the case are consistent with the Petitioner's theory. *Schaub*, 250 F.3d at 969 (quoting *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988)).For this reason as well, the Petition should be denied.

D. Petitioner Failed to Establish Reasonable Cause that Affinity Engaged in an Unfair Labor Practice by Denying a Single Union Representative Access to Facility

The allegation at issue in this claim revolves around Affinity's decision to prohibit a single union organizer, Michelle Mahon ("Ms. Mahon"), access to its facility. Before reviewing the reasonable cause basis, a brief review of the Health Insurance Portability and Accountability Act ("HIPAA") is warranted. HIPAA compliance is of paramount importance to every acute health care facility in the nation. Affinity designated a Privacy Officer, Ms. Kline, who has held that position for more than ten years. (Tr. 1073, 1106.) Federal regulations clearly designate an employer's Privacy Officer as the individual qualified to reach a conclusion as to whether HIPAA has been violated by virtue of the disclosure or misuse of "protected health information." *See* 45 C.F.R. §164.530(a)(1). "Protected health information" is defined by regulation as "individually identifiable health information," which covers any information from which "there is a reasonable basis to believe the information can be used to identify" a patient. 45 C.F.R. §160.03. Other than exceptions not relevant to this case, HIPAA's Privacy Rule mandates and

explains that protected health information can only be disclosed for three reasons: (1) billing purposes, (2) the provision of health care services, or (3) hospital operations. *See* 45 C.F.R. §160.502(a)(1). Employers face serious consequences for violation of these protections, such as fines and criminal sanctions levied by the Department of Health and Human Services. *See* 45 C.F.R. §160.402; 42 U.S.C. §1320(d)(5). In addition, employers face the threat of loss of federal Medicare and Medicaid funding, as well as loss of accreditation by the Joint Commission, as a result of HIPAA violations. 42 C.F.R. §482.11; Joint Commission Standard CT-1. Compliance with HIPAA remains of vital importance to an acute care facility.

During her work as an organizer at Affinity, Ms. Mahon received materials regarding HIPAA (Resp. Ex. 10), and acknowledged both her receipt of the materials as well as her understanding of her obligations outlined in those materials (Resp. Ex. 11).[14] (Tr. 464-66.) The training materials include a number of prohibitions regarding the disclosure of patient identifying information, including: use beyond clinical or business need to know and disclosure outside of the hospital. (Resp. Ex. 10.) These prohibitions against disclosure apply to other employees at Affinity, such that the training materials state, "Share PHI only with those with a clinical or business need to know" and limits internal disclosures to "need to know." (*Id.*)

On or about September 19, 2012, Ms. Mahon drafted a letter to Affinity regarding the conduct of Ms. Wayt. (Resp. Ex. 8.) Ms. Mahon prepared this letter on a hotel computer in Massillon, Ohio. (Tr. 495.) Ms. Mahon provided copies of the letter to Roy Hong, James Moy, and the "Affinity Medical Center RN Bargaining Council." (Tr. 461-62; Resp. Ex. 8.) Ms. Kline received a copy of this letter, and it caused her concern about potential HIPAA violations. (Tr. 1132-33.) Specifically, Ms. Kline identified a series of patient identifiers, which if disclosed

[14] Respondent's Exhibits 10 and 11 are included in Docket #1-7, filed by Petitioner on July 16, 2013.

beyond the strict limitations of the Privacy Rule, would pose the threat of serious ramifications to Affinity. The patient identifiers Ms. Kline evaluated included: (1) the patient's admission date, (2) the fact that the patient was admitted to the Hospital through the Emergency Room, (3) the fact the patient resided at a nursing home, (4) the name of the patient's admitting physician, (5) the patient's transfer to Orthopedics, (6) the patient's room number, and (7) diagnostic information about the patient. (Tr. 1133-34.)

Ms. Kline followed up her initial assessment with an interview of Ms. Wayt and Ms. Mahon. (Tr. 1135.) She concluded that Ms. Mahon's letter, which copied a number of persons who had no obvious or explained "need to know" the details associated with this patient's treatment while at Affinity, presented serious concerns. (Tr. 1135-37.) In particular, because the letter was delivered to some of Ms. Wayt's colleagues in the Orthopedic Department who served on the RN Bargaining Council, the risk of the patient being identified was very real, as one of these RNs easily could have come up with the identity of the patient. (Tr. 1153.) Ms. Kline concluded that a result of this disclosure, Ms. Mahon should not be permitted to return to the facility. (Tr. 1138.) Notably, the records contain no evidence of any discriminatory motive on the part of Ms. Kline. Hence, no "reasonable cause" exists to suggest that Affinity violated the Act by excluding an individual who, with prior acknowledgement of her HIPAA responsibilities, disclosed such detailed information to persons with no need to know.

CONCLUSION

For the reasons set forth in this Memorandum in Opposition, as supported by the record evidence before the Court and the governing law, Affinity respectfully requests that the Court enter an Order denying the relief requested in the Petition in its entirety. Alternatively, Affinity requests that the Court deny the relief requested in the following paragraphs of the Petition, as

such relief would either not return the parties to any status quo that existed before the alleged unfair labor practices or would be unjust and improper: Paragraph 1(b), Paragraph 1(c), Paragraph 1(d), and Paragraphs 2(a)- 2(e).

Dated: August 12, 2013.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING
AND CERTIFICATE OF SERVICE

I, Tracy C. Litzinger , do hereby certify that on August 12, 2013, I electronically filed a true and correct copy of the foregoing document with the Clerk of this Court using the CM/ECF system, which sent notification of such filing to the following:

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