

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

REGION 31

PRIME HEALTHCARE SERVICES - ENCINO,
LLC D/B/A/ ENCINO HOSPITAL MEDICAL
CENTER,

Case Nos. 31-CA-066061,
31-CA-070323,
31-CA-080554 and
21-CA-080722

Respondent,

SEIU LOCAL 121RN,

Union,

and

SEIU UNITED HEALTHCARE WORKERS-WEST,

Union,

PRIME HEALTHCARE SERVICES - GARDEN
GROVE, LLC D/B/A GARDEN GROVE
HOSPITAL & MEDICAL CENTER,

Respondent,

SEIU UNITED HEALTHCARE WORKERS-WEST,

Union.

**REPLY IN SUPPORT OF REQUEST
FOR SPECIAL PERMISSION TO APPEAL**

JUDITH A. SCOTT, General Counsel
NICOLE G. BERNER, Associate General
Counsel
Service Employees International Union
1800 Massachusetts Avenue, N.W.
Washington, D.C. 120036
Telephone (202) 730-7383

GLENN ROTHNER
JONATHAN COHEN
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101
Telephone: (626) 796-7555
grothner@rsglabor.com

Attorneys for Service Employees International Union, SEIU United Healthcare Workers - West
("UHW") and SEIU Local 121 RN

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. Because the ALJ's Decision Rested on an Error of Law, It Was an Abuse of Discretion	3
B. The Respondents Do Not Dispute That the Unions Have No Financial Stake In Kaiser	4
C. Contrary to the Respondents' Claim, the Board Has Repeatedly Rejected the Conflict Of Interest Defense Without a Hearing	6
D. The Respondents Implicitly Concede That Their Misguided Defense Is Not Supported By a Single Board Case	7
E. Contrary to Their Original Position, the Respondents No Longer Contend that the Unions' Campaign Against Them and Their Parent Company Was Unlawful	9
F. The Respondents Fail to Rebut the Argument That They Waived the Conflict of Interest Defense	10
III. CONCLUSION	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bausch & Lomb Optical</i> , 108 NLRB 1555 (1954)	4, 5, 8, 9
<i>CMT, Inc.</i> , 333 NLRB 1307 (2001)	5, 8
<i>Catalytic Industrial Maintenance Co.</i> , 209 NLRB 101 (1974)	8
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384 (1990)	3
<i>Encino Hosp. Med. Ctr.</i> , 359 NLRB No. 78 (2013)	11
<i>Garden Grove Hosp. Med. Ctr.</i> , 357 NLRB No. 63 (2011)	11
<i>Garrison Nursing Home</i> , 293 NLRB 122 (1989)	4
<i>Greyhound Lines, Inc.</i> , 319 NLRB 554 (1995)	6
<i>In Re Guess?, Inc.</i> , 339 NLRB 432 (2003)	6
<i>Koon v. United States</i> , 518 U.S. 81 (1996)	3
<i>Massachusetts Society for the Prevention of Cruelty to Children v. NLRB</i> , 297 F.3d 41 (1st Cir. 2002)	10
<i>Quality Inn Waikiki</i> , 272 NLRB 1 (1984)	5
<i>Roadway Package Sys., Inc.</i> , 292 NLRB 376 (1989)	5, 6, 6

TABLE OF AUTHORITIES
(Continued)

<u>Cases</u>	<u>Page</u>
<i>Supershuttle Int'l Denver, Inc.</i> , 357 NLRB No. 19 (2011)	5
<i>Universal Fuels, Inc.</i> , 270 NLRB 538 (1984)	5, 6
 <u>Statutes and Regulations</u>	
National Labor Relations Act	
Section 1, 29 U.S.C. § 151	5
Section 7, 29 U.S.C. § 157	3, 6, 11
Section 10280.2 (c), NLRB Casehandling Manual, Unfair Labor Practice Proceedings	1

I. INTRODUCTION

As the Unions¹ established in their opening brief, the Respondents'² theory is insufficient as a matter of law to support their conflict of interest defense. No Board case has ever held that a union's arm's-length collective bargaining relationship with the competitor of an employer, and simultaneous use of lawful economic weapons against that same employer, renders a union with a disabling conflict of interest. Because the Respondents' theory in support of their defense is insufficient as a matter of law, the subpoenas based on that defense should be revoked in full.

The Respondents' opposition does not assert that any existing Board case mirrors, or even resembles, their conflict of interest theory. Nor does their opposition bother to rebut the Unions' argument that recent Board cases have expressly rejected the claim that a cooperative bargaining relationship with a competitor of an employer renders a union with a disqualifying conflict of interest. The opposition does not even attempt to address the argument that each case cited by the ALJ in support of the ruling on the Unions' petitions to revoke is patently distinguishable from the present scenario. It seems that the Respondents, having failed to meaningfully address any of the arguments in the Unions' appeal, are satisfied to simply point out that they prevailed in an earlier appeal.

Of course, something critical changed following that first appeal, even if the Respondents ignore it in their opposition. The Respondents' conflict of interest defense was initially based in

¹ Service Employees International Union ("SEIU"), and charging parties SEIU United Healthcare Workers – West ("UHW") and SEIU Local 121 RN ("121 RN"), are hereinafter collectively referred to as the "Unions."

² Respondents Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center ("Encino Hospital") and Prime Healthcare Services - Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center ("Garden Grove Hospital") are hereinafter collectively referred to as "Respondents."

part on the assertion that the Unions had a direct financial stake in Kaiser Permanente, a hospital with which the charging parties have a collective bargaining relationship and which is an alleged competitor of the Respondents. Under existing Board law a union may have a disqualifying conflict of interest if it has a direct financial stake in an enterprise that is in competition with an employer. The Respondents therefore subpoenaed, and the ALJ allowed them to obtain, information related to the Unions' ownership or financial stake in Kaiser.

Following the first appeal, however, SEIU partially responded to the subpoena and established that it had no ownership or financial stake in Kaiser. That is the critical changed circumstance that warrants reconsideration of the Board's prior ruling. Indeed, the Respondents do not dispute the Unions' assertion that they have no ownership or financial stake in Kaiser. Nor have the Respondents offered to prove anything to the contrary.

The Respondents are undeterred by the fact that the Unions have no ownership or direct financial stake in Kaiser. They claim that the allegedly arm's-length collective bargaining relationship between Kaiser and the Unions is itself sufficient to establish a conflict of interest, especially when viewed alongside the Unions' alleged simultaneous use of economic weapons against the Respondents and their parent company, Prime Healthcare Services, Inc. ("Prime"). As noted above, no Board case has ever come anywhere close to suggesting that such a scenario would render a union with a disqualifying conflict of interest.

Because the Respondents have failed to articulate a sufficient basis for their conflict of interest defense under existing Board law, they should be prevented from using that same defense to obtain highly invasive discovery about the Unions' use of economic weapons against them. Allowing the Respondents to obtain such information, which would intrude on the Unions'

Section 7 and First Amendment protected activity, is simply not justified by a single case cited by the Respondents or the ALJ.

For these reasons and those that follow, the Unions respectfully request that their Request for Special Permission to Appeal be granted and that the outstanding subpoenas be revoked in full.

II. ARGUMENT

A. Because the ALJ's Decision Rested on an Error of Law, It Was an Abuse of Discretion

The Respondents argue that the Unions cannot explain how the ALJ abused his discretion, noting that the ALJ “reviewed each party’s argument, analyzed Board case law, and evaluated [the Unions’] claims of substantial compliance” with the outstanding subpoenas (Opposition, at 3).

Conspicuously absent from their argument is any citation to or discussion of a single Board decision that supports their bogus defense. As the Unions established in the opening brief, the theory underlying the Respondents’ conflict of interest defense is in direct opposition to Board precedent. Accordingly, the ALJ’s ruling, allowing the Respondents to subpoena information on the basis of an invalid and unsupportable defense, was an error of law. It should be plain enough that a ruling based on an error of law is an abuse of discretion. *See Koon v. United States*, 518 U.S. 81 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .”).

B. The Respondents Do Not Dispute That the Unions Have No Financial Stake In Kaiser

The Respondents do not challenge the Unions' claim that they have no ownership or financial stake in Kaiser Permanente. That concession, which undermines the only viable basis of the Respondents' defense, cannot be overstated.

The concession establishes the important changed circumstance between this appeal and the previous one. In their opposition to the previous appeal, the Respondents emphasized the importance of obtaining information related to the Unions' alleged financial interest in Kaiser (Respondents' Opposition to First Special Appeal, at 8). They argued that such evidence was "especially significant" in this case because a union's financial interest in a competitor can be the basis for a disqualifying conflict of interest (*id.* (citing *Garrison Nursing Home*, 293 NLRB 122 (1989))). In his underlying order, the ALJ allowed Respondents to obtain such evidence.

After the Unions' first appeal, SEIU addressed this "especially significant" evidence by partially responding to its subpoena and establishing that it had no ownership or financial stake in Kaiser.

The Respondents' opposition studiously downplays, if not altogether ignores, this partial response to the subpoena as though it changed nothing about the merits of their conflict of interest defense. In fact, it changed everything and warrants reconsideration of the Board's denial of the first Request for Special Permission to Appeal. Now that the Respondents have finally conceded that the Unions have no ownership or financial stake in Kaiser, it is undisputed that the Respondents cannot establish the sort of hallmark conflict of interest scenario in which a union owns or has a direct financial stake in a competitor of the employer. *See Bausch & Lomb Optical*, 108 NLRB 1555 (1954).

Hoping that the Board overlooks their partial retreat, the Respondents insist that they can nevertheless establish the charging parties' conflict of interest, not because of the charging parties' financial stake in Kaiser, but because of their run-of-the-mill arm's-length collective bargaining relationship with Kaiser, the Respondents' alleged competitor. The Respondents do not dare, however, equate that relationship with the scenario addressed in *Bausch & Lomb Optical*. That would be a dead-end since the Board has repeatedly rejected the argument that a cooperative collective bargaining relationship between a union and a competitor of the employer poses a conflict of interest. See *Supershuttle Int'l Denver, Inc.*, 357 NLRB No. 19 (2011); *CMT, Inc.*, 333 NLRB 1307 (2001); *Roadway Package Sys., Inc.*, 292 NLRB 376 (1989).³

Instead, the Respondents offer the feeble response that there is no "simple bright line rule" that can be applied here (Opposition, at 5). Needless to say, that is but another way of conceding that they have no authority for their hopelessly misguided defense. Given that the burden of proving the defense is not an ordinary one, but a "heavy one," *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), the Respondents must do more than simply shrug off the imperative to cite a Board case to support their defense. That is especially the case given that the Respondents have

³ The Respondents argue that *Supershuttle Int'l Denver* and *Roadway Package System, Inc.* are distinguishable because those cases did not address the claim made here that, in addition to cooperating with a competitor, the Unions "abused the bargaining process or otherwise demonstrated hostility to the employer." (Opposition, at 7 n.3). For one thing, the Respondents have never asserted, despite repeated opportunities, that the charging parties with whom they bargain have done something to "abuse the bargaining process." Hence, that assertion, newly minted, is a baseless and entirely unsupported one. Moreover, the notion that some amorphous "hostility" of a union against an employer could render a union disqualified to represent the employer's employees is, at best, a laughable one. Hostility between unions and employers is part and parcel of collective bargaining and is part of the basis of the National Labor Relations Act itself, not something inimical to it. See *Universal Fuels, Inc.*, 270 NLRB 538, 540 (1984); see also 29 U.S.C. § 151 (acknowledging "the refusal of some employers to accept the procedure of collective bargaining" and the "industrial strife" that follows).

invoked the defense to embark on a highly invasive fishing expedition into the Unions' Section 7 and First Amendment-protected activities.⁴

C. Contrary to the Respondents' Claim, the Board Has Repeatedly Rejected the Conflict Of Interest Defense Without a Hearing

Next, the Respondents incorrectly argue that each of the cases cited by the Unions was decided "on the merits after [an] evidentiary hearing" (Opposition, at 5). Apparently, the Respondents did not read the cases cited by the Unions.

Roadway Package System, Inc., 292 NLRB 376 (1989), in which the Board affirmed an ALJ's rejection of a conflict of interest argument strikingly similar to the one the Respondents make here (*see* Opening Brief, 21-22), was decided on offers of proof, not following an evidentiary hearing related to the defense. *See id.* at 426. Similarly, *Greyhound Lines, Inc.*, 319 NLRB 554 (1995), in which the Board affirmed an ALJ's rejection of the employer's conflict of interest defense, was decided in the context of a motion to strike, not following an evidentiary hearing. *See id.* at 555. Finally, *Universal Fuels, Inc.*, 270 NLRB 538 (1984), in which the Board affirmed the ALJ's rejection of the employer's conflict of interest defense, was decided on the basis of stipulations, record colloquy, and documentary evidence received subject to motions to strike the evidence, since "[e]ssentially only questions of law [were] presented." *Id.* at 538-39.

All this is to say that the mere invocation of the conflict of interest defense is no talisman magically entitling the Respondents to a full-blown evidentiary hearing on their defense. If their

⁴ The Respondents mistakenly assert that the Unions argue that the sought-after information is subject to an absolute privilege (Opposition, at 8-9). The Unions did not argue for an "absolute privilege." Instead, they argued that, balancing the Respondents' frivolous defense against their highly invasive discovery requests, the balance tipped in favor of non-disclosure (Opening Brief, at 29-32). *See, e.g., In Re Guess?, Inc.*, 339 NLRB 432, 433-34 (2003).

conflict of interest theory is insufficient to sustain the defense, a hearing, let alone a far-ranging and extraordinarily invasive fishing expedition with Board subpoenas, is unnecessary.

What is more, contrary to the Respondents' claim that the Unions have not moved to strike the defense (Opposition, at 5), the Unions *did* file such a motion which was denied by the ALJ on December 4, 2013. Thus, the legal issue presented here -- independent of the underlying subpoena dispute -- will be squarely presented to the Board in due course. In fact, the Unions have asked that the instant appeal be held in abeyance pending a probable appeal from the proceedings on the motion to strike. *See* NLRB Casehandling Manual, Unfair Labor Practice Proceedings, Sec. 10280.2 (c) ("Generally, if such motion is denied by the Administrative Law Judge, counsel for the General Counsel should request special permission of the Board to appeal.").

Finally, the Respondents' desperate claim that rejecting their defense without a hearing would amount "to a trampling of their due process rights" (Opposition, at 6), is plainly without merit. As indicated above, the Board has rejected the defense without a hearing on several occasions. Nor will denying their defense without a hearing prevent Respondents from arguing for a good faith extension or change in existing law -- their position is in the record and will be preserved for appeal.

D. The Respondents Implicitly Concede That Their Misguided Defense Is Not Supported By a Single Board Case

The Respondents argue that the Unions have wrongly described the conflict of interest defense as limited to two discrete scenarios: (1) where a union directly competes with the employer; or (2) where a union takes overt acts to cause the complete dissolution of an existing

bargaining unit (Opposition, at 5). According to the Respondents, “the Board . . . has found disqualifying conflicts of interests in a variety of contexts beyond those two scenarios” (*id.*).

The Respondents’ argument is remarkable for several reasons. As noted above, they have given up on arguing that the Unions have a direct financial stake in Kaiser, meaning that *Bausch & Lomb Optical* and its progeny have no application here. It appears that they also have given up on arguing that the Unions have taken any steps to cause the complete dissolution of the Garden Grove Hospital or Encino Hospital bargaining units, meaning that *Catalytic Industrial Maintenance Co.*, 209 NLRB 101 (1974), and its progeny, relied on heavily by them and the ALJ, have no application here.⁵ Nothing else can explain their sudden need to rely on unidentified cases arising in contexts “beyond those two scenarios.”

More remarkable still, the Respondents cannot cite a single case arising in a context “beyond those two scenarios.” Presumably, if those cases existed, and more importantly, if such cases at all resembled the Respondents’ conflict of interest theory, they would have made the minimal effort of actually citing them. Furthermore, to state the obvious, the mere fact that conflict of interest cases have arisen in other contexts is meaningless if none of those cases is like the instant one.⁶

⁵ The Unions have argued repeatedly that the Respondents cannot identify a single act taken by the Unions, at the bargaining table or elsewhere, that directly threatened the job security of employees at either Garden Grove Hospital or Encino Hospital. See *CMT, Inc.*, 333 NLRB at 1308. The Respondents have failed to counter that argument at all by identifying a single instance of any such “overt act.” Thus, they have once again conceded the futility of their defense.

⁶ Even assuming that the Respondents are impliedly relying on those cases cited by the ALJ, the Unions have already distinguished those cases (Opening Brief, at 18 n.16). The Respondents’ complete failure to offer any counter-argument about the applicability of those cases should be construed as their agreement that the cases relied on by the ALJ are indeed inapposite.

E. Contrary to Their Original Position, the Respondents No Longer Contend that the Unions' Campaign Against Them and Their Parent Company Was Unlawful

The Respondents argue that the lawfulness of the Unions' alleged use of economic weapons against them and their parent company is a "red herring" (Opposition, at 6). According to the Respondents, the union's operation of a competing company in *Bausch & Lomb Optical* was lawful too; thus, "[u]nlawful conduct has never been an element of the conflict of interest defense" (*id.*).

To be clear, the Unions have never argued that a conflict of interest would exist if their use of economic weapons against the Respondents or their parent company was unlawful. Instead, the Respondents have argued that the charging parties' allegedly cooperative collective bargaining relationship with Kaiser, combined with their allegedly simultaneous use of various economic weapons against the Respondents and their parent company, renders the charging parties with a disqualifying conflict of interest. In their opposition to SEIU's petition to revoke, the Respondents argued that the Unions' campaign is "openly hostile" to them and their parent company, and that such "hostility transcends any legitimate bargaining objective or economic pressure privileged by labor law." (Respondents' Opposition to SEIU Petition to Revoke, at 4).

As the Unions established in their opening brief, the allegedly "hostile" campaign described by the Respondents is nothing more than the alleged use of lawful and traditional economic weapons (Opening Brief, at 23-28). The Respondents have apparently forgotten their original claim and have, like so many of their specious arguments, abandoned it. Directly contrary to their original rhetoric insisting that the Unions' alleged campaign "transcend[ed] any legitimate . . . economic pressure privileged by labor law," in their opposition they now argue

that the lawfulness of the activity is irrelevant. When pressed to substantiate their frivolous defense, the Respondents have completely given up.

Furthermore, the Respondents' opposition misses the point entirely. They fail to explain how something as fundamental to the structure of the Act as a union's use of lawful economic weapons to gain leverage in collective bargaining could render a union disqualified to represent employees. That premise, as outrageous as it is, cannot stand side-by-side with settled Board precedent, if not the language and purpose of the Act itself, which sanctions strikes, boycotts, lobbying and other activity designed to place maximum economic pressure on an employer. Such activity is completely different from a union's operation of a for-profit business enterprise that competes with an employer with which it bargains.

At its essence, the Respondents' argument is that if a union is highly effective at using lawful economic weapons against an employer, it should be disqualified from representing employees of the employer. Surely, no Board cited by them or the ALJ supports that spurious conclusion

F. The Respondents Fail to Rebut the Argument That They Waived the Conflict of Interest Defense

The Respondents argue that they have not waived their conflict of interest defense since the case cited by the Unions, *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41 (1st Cir. 2002), "held that the employer was free to raise its affirmative defense" following a certification proceeding (Opposition, at 7).

The Respondents fail to address the full holding of that case. The decision held that an employer may be permitted to raise the defense in post-certification proceedings where there is newly discovered evidence establishing a union's conflict of interest. *See id.* at 50-51. The

Respondents fail to cite any such newly discovered evidence – most of their allegations relate to the charging parties’ decades-old collective bargaining relationship with Kaiser, and various alleged campaign activity, most dating back to 2010 and 2011 (*see* ALJ’s Order on Unions’ Petitions to Revoke, Special Appeal, Ex. I, at 3-4).

Moreover, the Respondents never explain how they can simultaneously assert that the charging parties have a conflict of interest that disqualifies them from representing their employees, and yet continue to bargain with the charging parties over successor contracts. The most they can say is that the Unions waived the waiver argument by not raising it sooner (Opposition, at 4). In fact, the argument *was* raised in the first appeal (*see* SEIU United Healthcare Workers – West’s Request for Special Permission to Appeal, at 25-26; filed May 16, 2013). In addition to the points raised above, it was shown that the Respondents, in unfair labor practice proceedings involving *these very same parties*, never raised the defense. (*id.*, citing *Encino Hosp. Med. Ctr.*, 359 NLRB No. 78 (2013); *Garden Grove Hosp. Med. Ctr.*, 357 NLRB No. 63 (2011)). Such evidence further cements the conclusion that the Respondents have waived the conflict of interest defense, choosing now to raise it as a convenient ploy to obtain highly invasive discovery related to the Unions’ Section 7 and First Amendment-protected activities.

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III. CONCLUSION

For the foregoing reasons, SEIU, UHW and 121 RN respectfully request that the instant Request for Special Permission to Appeal be granted, and that the subpoenas be revoked in full.

Dated: December 9, 2013

JUDITH A. SCOTT, General Counsel
NICOLE BERNER, Associate General Counsel
SERVICE EMPLOYEES INTERNATIONAL UNION

By _____ /s/
JUDITH A. SCOTT

GLENN ROTHNER
JONATHAN COHEN
ROTHNER SEGALL & GREENSTONE

By _____ /s/
GLENN ROTHNER

Attorneys for Service Employees International Union,
SEIU United Healthcare Workers - West and SEIU
Local 121 RN

Re: Encino Hospital Medical Center
Case Nos. 31-CA-066061, 31-CA-070323, 31-CA-080554 and 21-CA-080722

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On December 9, 2013, I served the foregoing document described as **REPLY IN SUPPORT OF REQUEST FOR SPECIAL PERMISSION TO APPEAL** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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



DOROTHY A. MARTINEZ

Re: Encino Hospital Medical Center
Case Nos. 31-CA-066061, 31-CA-070323, 31-CA-080554 and 21-CA-080722

SERVICE LIST

Jeffrey D. Wedekind
Administrative Law Judge
Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103-1735

Served electronically via filing at www.nlr.gov

Juan Carlos Ochoa Diaz, Board Agent
NLRB, Region 31
11500 West Olympic Boulevard, Suite 600
Los Angeles, CA 90064-1824

E-mail: juan.ochoadiaz@nlrb.gov

David Adelstein
Bush Gottlieb Singer Lopez Kohanski Adelstein & Dickinson
500 North Central Avenue, Suite 800
Glendale, CA 91203-3345

E-mail: davida@bushgottlieb.com

Monica Guizar
Weinberg, Roger & Rosenfeld
800 Wilshire Boulevard, Suite 1320
Los Angeles, CA 90017

E-mail: mguizar@unioncounsel.net

Colleen Hanrahan
Joseph A. Turzi
DLA Piper LLP
500 Eighth Street, NW
Washington, D.C. 20004

E-mail: colleen.hanrahan@dlapiper.com

E-mail: joe.turzi@dlapiper.com