

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

MHA, LLC d/b/a MEADOWLANDS HOSPITAL MEDICAL CENTER	:	Case Nos.	22-CA-086823
	:		22-CA-089716
	:		22-CA-090437
Respondent	:		22-CA-091025
	:		22-CA-091521
and	:		22-CA-092061
	:		22-CA-096650
	:		22-CA-097214
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, AFT/AFL-CO	:		22-CA-099492
	:		22-CA-100324
	:		22-CA-106694
Union	:		

**HEALTH PROFESSIONALS' REQUEST FOR SPECIAL PERMISSION TO APPEAL
BRIEF IN REPLY**

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INTRODUCTION

The Health Professionals and Allied Employees submits this REPLY in support of its position that a Meadowlands Hospital Medical Center defense should be stricken, and a Meadowlands' subpoena provision demanding the production of Union documents should be revoked.

ARGUMENT

A. Standard of Review Supports Reversal

At the outset, Meadowlands contends that the Board may only reverse the ALJ for an abuse of discretion, and argues that Health Professionals has failed to show an abuse of discretion.

As explained by the Health Professionals in its Request for Special Permission to Appeal, Judge Davis erred in failing to weigh the interests of the parties when he ordered the production of the Health Professionals' privileged communications. Meadowlands' specious affirmative defense 111 should be stricken, and the Union appeals Judge Davis' failure to strike 111.¹ But even if the Board does not order the defense stricken, the Union should not be required to turn over its communications because of the strong confidentiality interest at stake, and the Board's prior order that the Union need not produce these communications. See Berbiglia, Inc., 233 NLRB 1476 (1977). The Union's interest in non-disclosure outweighs Meadowlands' interest in disclosure. This weighing of the interests of the parties is required of the Judge and was not done in this case.

¹ This economic harm defense was pled as affirmative defenses 121 and 122, clarified on the record on December 10, 2013, and re-filed as defense 111.

B. Balancing of Interests Weighs Against Production

In a subpoena dispute, an ALJ must balance the interests of the parties, here the Employer's desire for the disclosure of documents versus the Union's interest in confidentiality, as required by the Supreme Court and Board law. Detroit Edison, 440 US 301, 314-215 (1979); See e.g. Jung Sun Laundry, Case 29-CA-29946 (2010) (not reported in Board volumes). Failure to do so is reversible error. When labor relations privilege is involved, the interest in maintaining confidentiality is significant. See Berbiglia, Inc., 233 NLRB 1476, 1495 (1977) ("requiring the union to open its files...would be inconsistent with...the very essence of collective bargaining...[P]arties must be able to formulate their positions and devise strategies without fear of exposure.").

In Jung Sun, the Board reversed an ALJ who failed to weigh the interests of the parties. Jung Sun Laundry, *supra*. The documents at issue fell under the labor relations privilege, and included communications exchanged with third parties, such as meeting minutes. In reversing the ALJ for failing to weigh the interests of the parties and in failing to find that the union's interest in non-disclosure trumped the employer's demand for documents, the Board said

[I]n light of the Respondent's failure to establish that its need for these documents outweighs the Union's interest in their confidentiality, we find that the Union's interests outweigh those of the Respondent, and that the documents need not be produced even under the protocol [a privilege log] set out by the judge. Therefore, we find that the judge erred in ordering the Union to produce these documents.

[Jung Sun, *supra*.]

Here the Meadowlands subpoena is very broad, seeking all of the Union's communications since September 2010 with media groups, community organizations, communications relating to public demonstrations by the Union, complaints to regulatory agencies, communications with

government and elected officials and even communications between the Health Professionals and its members. In fact, the Meadowlands' March 18, 2014, clarification letter contains catch-alls, essentially seeking all communications relating in any way to Meadowlands Hospital, such as:

8. [A]ll documents and communications between or among any representatives, agents, employees or members of HPAE that mention or relate Meadowlands Hospital Medical Center concerning HPAE activities as described above or any activity concerning HPAE's engaging in economic pressure activity against Meadowlands Hospital Medical Center.

[March 18, 2013 letter, attached to the Health Professionals Special Appeal as Exhibit K.]

Although Meadowlands claims to have narrowed the documents it seeks in clarification letters it submitted to the Union in March 2014, the subpoena is still broad in a way that infringes on the Meadowlands employees' Section 7 rights as well as the Union's rights. Judge Davis did not weigh the interests of the parties, namely whether the Employer's specious legal argument that it was privileged to make unilateral changes over a three year period because the Union was in violation of an "economic harm" provision, trumps the Union's interest in keeping confidential its communications. Meadowlands equates the "economic harm" provision in the parties' CBA to a strike, and relies on a 40 year old case for support of its position that public criticism amounts to an unlawful strike, which is a material breach, and therefore Meadowlands was justified in suspending its bargaining obligations with the Union at the Hospital.

While Judge Davis acknowledged in his order on the record on March 13, 2014, that Meadowlands may be seeking privileged information, he stated that the reason he fell on the side of disclosure was to prevent future reversal of his decision, stating, "If I do not permit Respondent to prove its affirmative defense, then we'll be back here after some reviewing Board says that we should have. Rather than be back here in five years, I'd rather deal with this now and have the

affirmative defense heard and decided, rather than have the case remanded to me and to go through this again at a later period of time. It would not benefit any of us here.” (Tr. at 2221). The interest of the Union in protecting the communications and identities of those it communicates with was virtually ignored. Judge Davis further stated on the record that he had to consider the interest of Meadowlands, which felt that it needed more of the Union’s communications to make its case. (Tr. at 2216). But while Meadowlands made this argument to the Board in its Request for Special Permission to Appeal in this case, which the Board rejected, Meadowlands never made this argument to Judge Davis. Given that Meadowlands never articulated a reason why its interest in production should outweigh the Union’s strong interest in confidentiality *for what is a legal argument*, Judge Davis abused his discretion.

It is relevant, in reviewing the discretion exercised by Judge Davis with respect to the subpoena issue, that he reversed himself of his own accord *sua sponte*, without seeking input from the parties, after his decision revoking the subpoena paragraph in question was upheld by the Board, contravening the principle of the Law of the Case Doctrine as well as general procedural fairness. Judge Davis also summarily rejected the Union’s motion for reconsideration of this reversal and motion to strike affirmative defense 111 on his own without input from Meadowlands. Meadowlands subsequently issued several “clarification” letters to the Health Professionals, naming, *inter alia*, individuals and organizations that it believed Health Professionals communicated with, arguably privileged and sensitive communications. Judge Davis has had no objection to these clarification demands.

C. The Communications Sought Are Not Relevant Because There Was No Strike and No Material Breach. No Privilege Log Warranted.

The documents sought are not relevant and there is no support for production. Meadowlands' allegation that the Health Professionals' public criticism was the equivalent of economic harm and permitted Meadowlands to commit Section 8(a)(5) failure to bargain violations should be rejected as lacking a legal basis. A waiver of union rights must be explicit and cannot be read into an agreement; it must be clear and unmistakable to be valid. The Englehard case stands for this basic principle. Englehard Corp., 342 NLRB 46 (2004), enf. denied 636 F.2d 1352 (3d Cir 1980). Meadowlands states that Englehard is not relevant because the CBA language considered by the judge in that case was different. But the Englehard case is about waivers, and when and how a waiver applies, namely that it must be clear and unmistakable. If not explicit, then no waiver of rights. Hence, in Englehard "no picketing" language was not read to bar picketing outside of the plant. And inasmuch as Meadowlands argues that petitioning activity is akin to a boycott, the waiver cases support the notion that vague language is not enough to constitute a waiver and proscribe otherwise lawful conduct. Health Professionals has never asked for a boycott and no communications exist seeking a boycott of any kind. The Employer suggests that otherwise lawful conduct can be proscribed *by analogy* in a waiver of rights clause. In fact, it bases its entire position on this notion. It is simply wrong and should be rejected.

Meadowlands' reliance on Arundel for support of its position that the Health Professionals' conduct (outreach to third parties, petitioning of government for support of its members) can be analogized to a strike or a boycott is misplaced because the Union is not accused of being on strike. Arundel Corp., 210 NLRB 525 (1974). And again, if the proscription is not explicit – clear and unmistakable – it cannot be read into the document. Assuming *arguendo* that a waiver exists based on the vague language in the parties' CBA, the continuing viability of Arundel, permitting an

employer to suspend bargaining during a strike, is questionable at best, particularly given cases like Aztec Bus Lines, 289 NLRB 1021 (1988). In Aztec the Board held that an employer's duty to bargain during a strike is not suspended. Meadowlands ignores these cases in its opposition.

There are no communications in which Health Professionals seeks to cause economic harm to Meadowlands. The Union has admitted that it publicized the harm Meadowlands inflicted upon its employees; the Union reached out to government bodies including the NLRB; and the Union publicized its own petitioning activities in this regard.² Indeed, Meadowlands has even complained about the Union's filing unfair labor practice charges with the NLRB. These are all protected activities and are not proscribed by the parties' agreement. In any case, the Board took note of the Union's admission of its activities in the Board's order dated February 25, 2014. The Board noted that Meadowlands was making an "essentially legal" argument and approved of the Judge's allowing for an offer of proof on the record on December 10, 2013, without further production of the Union's communications.

Meadowlands argues that the Law of the Case Doctrine does not apply to the Board's previous ruling in this matter because Meadowlands' offer of proof on the record is different from its Affirmative Defense 111, contending that 111 was not previously before the Board. But the economic harm defense was clearly considered by the Board in the decision dated February 25, 2014. And indeed, the offer of proof made on the record in support of Defenses 121 and 122 is the same as 111, which is really no more than a clarification. Counsel for Meadowlands stated in his offer of proof on December 10, 2013, an argument of economic harm:

But, that collective bargaining agreement, Your Honor, contains a provision where the union has agreed that during the term of the agreement there shall be no strikes, boycotts, picketing, work stoppages, slowdowns, other interference with the operations of the

² The Union denies engaging in a strike, sympathy strike, boycott, picketing, work stoppage, slowdown, or sit-in.

hospital, or other economic pressure activity by the union or any employee covered by this agreement. And, we would in support of that affirmative defense put on evidence that despite the current ownership agreeing to a fair and reasonable transition and despite the union's promise to refrain from economic -- economic pressure activity, the union continued in its quest and even escalates - escalated its opposition to the current ownership in media and public campaigns...”

[Tr. at 16 (emphasis added).³]

Further, given that Meadowlands did not appeal the striking of 121 and 122, its subpoena appeal previously before the Board would have been based on nothing if not 111.

The Law of the Case Doctrine applies. And given that there was no demonstration of extraordinary circumstances reflecting a “clearly erroneous” previous decision, which would work a “manifest injustice” it was error for Judge Davis to reverse his prior decision *sua sponte* after the Board ruled against disclosure.

D. This Is a Fishing Expedition – Plain and Simple.

Even if the Health Professionals’ conduct is sufficiently analogous to the conduct in Arundel, and the language in the instant parties’ CBA is deemed to constitute a waiver, Meadowlands fails to identify a nexus between the suspension of its bargaining obligations and the Union’s conduct. Essentially, it seeks the Union’s internal communications for an *ex post facto* analysis to support its position that it was justified in not bargaining before making unilateral changes. This should not be permitted.

There must be a connection shown *at the time* between the Employer’s failure to bargain and the Union’s conduct. See Greyhound Lines, 319 NLRB 554, 555-557 (1995), United Elastic Corp., 84 NLRB 768 (1949). To allow otherwise permits an unlawful fishing expedition. See Flaum

³ Meadowlands’ Offer of Proof, December 10, 2013.

Appetizing Corp. and Local 460/640, Industrial Workers of The World a/k/a Industrial Workers of The World, New York City General Membership Branch, 357 NLRB No. 162, 17 (2011); See Securities & Exchange Commission v. Rosenfeld, 1997 U.S. Dist. LEXIS 10159, 1997 WL 400131 (S.D.N.Y. 1997); Piccone v. U.S., 407 F.2d 866, 876, 186 Ct. Cl. 752 (Ct. Cl. 1969) (must be more than a mere theoretical argument, not merely a “fishing expedition”); see also Securities & Exchange Commission v. Rosenfeld, 1997 U.S. Dist. LEXIS 10159, 1997 WL 400131 (S.D.N.Y. 1997). The Board noted in Flaum a long line of cases in which the Board had struck affirmative defenses plead solely in the hope of finding supporting evidence through subpoenas. Flaum, supra 19, fn 7; See, e.g., Master Slack and/or Master Trousers Corp., 221 NLRB 894, 897 (1975).

E. Subpoena is Overbroad and Burdensome in Addition to Seeking Privileged Information.

The Board ruled that the Employer’s offer of proof constitutes a sufficient evidentiary basis for a ruling on the material breach defense. Given that the federal rules permit the exclusion of relevant evidence (assuming the instant subpoena seeks relevant evidence), the cost and burden of reviewing emails and producing a privilege log is needless. (FRE 403). Rule 403 specifically permits courts to exclude evidence if its probative value is outweighed by unfair prejudice, confusing the issues, undue delay, wasting time, or cumulative evidence.

In Voith Indus. Servs., Inc., 9-CA-075496 (2012) (not reported in Board volumes), the Board acknowledged the general rule that a party seeking to quash a subpoena may demonstrate that compliance is “unduly burdensome or oppressive” and that this requirement is satisfied if production would disrupt the party’s “normal business operations.” Given this general principle, the Union explained that there are over 30 Union staff throughout the State of New Jersey, located in different

offices, whose communications would need to be reviewed. Given that this review would be for nearly four years of communications, this is a great undertaking that would necessitate pulling staff from other assignments.

Meadowlands argues that it narrowed its subpoena by its naming of individuals and organizations with whom it believes the Union communicated. These paragraphs naming individuals all contain the phrase “including but not limited to.” There has been no narrowing whatsoever.

CONCLUSION

For the foregoing reasons, the Health Professionals respectfully requests that its Request for Special Permission to Appeal be granted, and that Subpoena ¶ 33 be revoked in full, and that the Motion to Strike Affirmative Defense 111 be granted.

Respectfully submitted,



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Dated: May 19, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, a copy of this reply was served by electronic mail upon the following parties:

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