

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

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

**ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS
TO THE DECISION & RECOMMENDED ORDER
OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF CHARGING PARTY
HEALTH PROFESSIONALS & ALLIED EMPLOYEES, AFT/AFL-CIO**

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I. Answering Statement of Facts

This Answering Brief in Opposition to the Exceptions¹ of Respondent Meadowlands Hospital Medical Center (“Hospital”) to the Decision and Recommended Order of Administrative Law Judge Steven Davis (“ALJ”) in the above-captioned case is submitted on behalf of Charging Party Health Professionals & Allied Employees, AFT/AFL-CIO (“HPAE” or “Union”).

A. The Parties’ Bargaining Relationship

HPAE has been the certified bargaining representative of three bargaining units of employees at Meadowlands Hospital since before the Hospital’s current owners assumed control of the Hospital from Liberty Health System in or around December 2010. (ALJD 4:5-8, 7:3-7; Tr. 3385:9-25).² In 1999, the Union was certified as the representative

¹ The Hospital’s Brief in Support of its Exception fails to comply with the Board’s rules and should be disregarded. The Brief fails to set forth the Hospital’s objections with specificity, particularly with regard to Exceptions 132 through 152. Among other procedural infirmities the Brief fails to include the requisite “specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.” 29 C.F.R. § 102.46(c)(2). Other than citing those exceptions in a heading of its Brief, the Hospital does not connect its arguments in the body of the Brief to any of the Exceptions.

² The Decision and Recommended Order of the ALJ is referenced as “ALJD [page]:[line].” The transcript of the hearing in this matter is referenced as “Tr. [page]:[line].” Exhibits introduced by Counsel for the General Counsel are referenced as

of the RN and technical employee units, and was subsequently certified as the representative of the service employee unit. (GCX 74; *see* GCX 3; GCX 4, GCX 5). At the time of the 2010 transfer of ownership, the Hospital was losing approximately \$12 million annually. (Tr. 3385:23-25).

HPAE and the Hospital are parties to three contracts establishing terms and conditions of employment for those employees. The contracts were effective at all times relevant to the case, beginning on December 7, 2010. (ALJD 7:6-7).³

Each of those CBAs included the following agreement, listed as Article 7 and titled “No Strikes & Lockouts.” (GCX 7; GCX 8). Article 7 is at the crux of the Hospital’s affirmative defense in this case. The article is identical to that which appeared in HPAE’s predecessor agreements with Liberty Health System. (GCX 3; GCX 4; GCX 5).

“GCX;” exhibits introduced by the Hospital are referenced as “RX;” exhibits introduced by the Union are referenced as “CPX.”

Documents submitted by the Hospital are identified as “Resp.” The Hospital’s Exceptions are referenced as “Resp. Excep.” and the brief submitted in support of those Exceptions is referenced as “Resp. Br. in Support of Excep.”

Rulings on interlocutory appeals are referenced as “[Issuer] Order of [Date].” Interlocutory pleadings are referenced as Motions, Requests, or Oppositions as appropriate.

Hospital owners Richard Lipsky and Tamara Duneav, and Union representatives Ann Twomey, Jeanne Otersen, Harriet Rubenstein, and Adrien Dumoulin-Smith are referenced by their surnames.

³ The parties’ CBAs are referenced hereinafter in the singular.

Hospital owners had not read the existing Liberty contract or, in particular, Article 7 before they entered negotiations with the Union. (Tr. 3089:9-3090:12; 3459:8-16).

Article 7 is titled “Strikes & Lockouts” and provides:

Section 7.1

During the term of this Agreement there shall be no strikes, sympathy strikes, boycotts, picketing, work stoppages, slowdowns, sit-ins, other interference with the operations of the Hospital, or other economic pressure activity by the Union or any employee covered by this Agreement. A threat to commit any of the above acts shall be considered a violation of this article.

Section 7.2

During the term of this Agreement there shall be no lockouts by the Employer of its employees covered by this Agreement.

Section 7.3

The Employer shall have the right to maintain an action for damages resulting from the Union’s violation of this Article. Any claim by the Employer for damages resulting from any violation of this Article shall not be subject to the grievance and arbitration provision of this Agreement. While disciplinary action taken against employees for violating this Article or any other provision of this Agreement is subject to the grievance clause hereof, the Employer is entitled to seek injunctive relief against any strike in violation of this Article pending the decision of an arbitrator. Grievances over disciplinary action taken against employees found to have violated this Article shall be limited to the issue of whether or not the employee in question actually engaged in the prohibited activity. If the Arbitrator determines that an employee engaged in activity prohibited under this Article, any disciplinary measures taken by the employer against the employee must be left unmitigated.

Any individual employee who violates this section will be subject to immediate discharge.

(ALJD 116:21-117:117:4; GCX 6; GCX 7). Article 7 applies, on its face, to actions undertaken “by the Union or any employee covered by this Agreement.” Whatever Article

7 means—the question on which the Hospital’s affirmative defense turns—it must mean the same thing when applied both to the Union and its members. (ALJD 134:23-31).

The charges leading to the instant case were filed between August 7, 2012, and August 26, 2013, and allege ULPs occurring between February 2012 and July 2013. (ALJD 1:4, n.1; GCX 1).

B. The ALJ Correctly Found that the Union did Not Engage in Economic Pressure Activity in Violation of the Parties’ No-Strike Clause, and the Hospital’s Exceptions to the Contrary are Meritless.

The Hospital raised deferral as an affirmative defense in its answer to the Amended Complaint in this action. (ALJD 5:22-24). It subsequently raised a more novel defense, which is that (i) the Union breached Article 7 of the parties’ CBA by engaging in “other economic pressure activity” when it engaged in communications that contained “criticisms” of the Hospital “in the media, online, and before government agencies,” and that (ii) such breach excuses the Hospital from liability for the ULPs with which it is charged in this case. (ALJD 119:5-7, 16-19). In ruling on one of many interlocutory appeals, the Board held that there was “no dispute that the Union did engage in such communication.” (Board Order of Feb. 27, 2014).

The Hospital refers repeatedly to “the activity at issue” in its Exceptions but fails to name which communications or “activity at issue” it believes should be considered “economic pressure activity.” (Resp. Br. in Support of Excep. at 6-13). As specifically

stated by the ALJ, the Hospital's defense is that the Union engaged in "other economic pressure activity" within the meaning of the CBA by the following:

- (1) Engaging in a media campaign against the Respondent.
- (2) Engaging community organizations in a campaign against the Respondent.
- (3) Engaging in public demonstrations and communications against the Respondent.
- (4) Encouraging the Respondent's employees to refrain from using healthcare services provided by the Respondent and encouraging them to discourage members of the public from using such services.
- (5) Encouraging the Respondent's employees to refrain from referring individuals to it for employment.
- (6) Applying economic pressure on the Respondent through the filing of complaints with public agencies and causing such agencies to investigate the Respondent without cause or evidence of regulatory deficiencies or violations.
- (7) Attempting to influence or sway public officials against the Respondent, and
- (8) Other instances of applying economic pressure activity against the Respondent.

(ALJ Order of May 15, 2015 at 2).

The Hospital's affirmative defense was limited to the time period between January 1, 2011, to December 31, 2013, and the Hospital's discovery was particularized to Union communications with specific individuals and entities. (ALJ Order of May 15, 2015 at 2). These entities include New Jersey Citizen Action ("NJCA"); New Jersey Health Care Quality Institute ("NJHCQI"); New Jersey Appleseed Public Interest Law Center ("Appleseed"); New Jersey Association of Health Plans ("NJ AHP"); NJ AHP president Wardell Sanders; New Jersey state Senator Joseph Vitale; the Insurance Council of New Jersey ("ICNJ"); and "federal, state, and local 'elected' officials." (Resp. Opp. to Req. for Special Permission to Appeal, Exhs. C, D (Sept. 15, 2015)).

1. The Hospital's Evidence of "Other Economic Pressure Activity"

In its offer of proof, the Hospital pledged to "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 including web postings, candlelight vigils, complaints to the Department of Labor and the message was the same each time. The hospital puts profits ahead of patient care, patient safety and the employees' health and safety. And, those attacks have been ongoing and relentless and designed. The union can't say it's not designed to put economic pressure on the hospital. To dissuade the public from utilizing the hospital's services. . . . [T]hat's clearly economic pressure." (Tr. 15:17-23).

As the ALJ correctly found, the Hospital failed to introduce evidence supporting its offer of proof that the Union engaged in economic pressure activity in breach of the parties' no-strike clause, or, consequently, that the Hospital was privileged to violate the Act in response to the alleged, unproven breach. (ALJD 133:22-35).

The Hospital introduced no evidence that any of the Union's communications regarding the Hospital were false. As Hospital owner Duneav testified, the Union communicates with the "general public directly or indirectly" by taking action in public places, by issuing press releases, and through its website. (Tr. 3037:21-3038:8). Duneav characterized the Union's communications as "negative publicity," but as the ALJ found, Duneav conceded that the communications were in fact true. (ALJD 121:34-36, 122:5-6, 128:32-33, 133:41-43, Tr. 3100:100-17).

Although the Hospital claims, among other things, that the Union's alleged economic pressure activity included the Union's "persistent sharing of its research," the Hospital's characterizing of this research as "not available to the general public" is undermined by the record evidence of the Hospital itself. (Resp. Br. in Support of Excep. at 11). Specifically, Hospital owner Lipsky admitted that the information the Union shared with third-parties had been obtained through an "Open Public Records Act," or OPRA request, for documents created by the Hospital itself and submitted to the Department of Health. (Tr. 3423:3-3428:1; *compare* CPX 17 *and* RX 126; CPX 18 *and* RX 127; *also see* CPX 20). Pursuant to New Jersey law, the documents were available to any member of the public who submitted such a request. N.J.S.A. 47:1A-1 *et seq.*

The Hospital took objection to the Department of Health's release of the information under OPRA, but introduced no evidence that the Union had not complied with OPRA requirements. (ALJD 136:19-22, 31-32; Tr. 3423:3-3428:1). The ALJ, accordingly, found that this constituted "legitimate inquiries by the Union which represents a large number of employees at the Hospital. The research involves information which was available to the public through OPRA requests and other information the Respondent supplied to the Union. . . . These inquiries were legitimate, lawful probes of the Hospital which represented a positive effort, not a negative effort, to ensure that the Hospital's fiduciaries were responsibly leading the facility." (ALJD 136:31-33).

The Union witnesses' testimony on the question of whether the organization's specific activities constituted "other economic pressure activity" was more detailed,

coherent, and rational than that of the Hospital's witnesses, which the ALJ affirmed when he credited their testimony over the vague allegations of the Hospital's witnesses. (ALJD 133:26-134:2).

Further, the Union witnesses' testimony was borne out in records made contemporaneously to the events. On March 31, 2013, Twomey sent an email to Union representatives and various associates, responding to an irreverent email from Union representative Levine, in which Levine joked that the Union should have a copy of an editorial calling for an independent monitor of the Hospital enlarged "and present[ed] . . . to Lipsky and Duneav for display in the entrance" of the Hospital. (CPX 4).

Twomey replied,

I know you speak in jest. We need to be careful and clear how this is presented to members. We want to save the hospital, not close it. The current owners have not been good stewards nor have they respected the rights, skills and long-term commitment of employees. I am sure the owners will go around condemning us for trying to close the hospital. Our message needs to be clear.

(CPX 4).

Twomey's testimony was consistent with her contemporaneous email. At the hearing, the Hospital's attorney asked Twomey whether the Union's communications were undertaken "with the intent of putting economic pressure on the hospital." Twomey responded that the union's intent was "just the opposite," and explained:

We see from the few financial statements that have come in, the hospital has shown profits.

And yet we see supplies going down, IV tubing for example as one example. Is replaced with a cheaper version that doesn't even fit the machines.

We're seeing people's schedules cut back, people being laid off and it's having a detrimental effect on the quality of patient care that our staff can give.

We see that there's a big push for certain types of care, such as pain management and parts of the rules and regulations under the Department of Health are not being followed.

Such as the cleaning of the operating rooms in between patients, such as the proper sterilization of equipment.

And we are raising the question why isn't this being done? Why isn't the staff being provided? Why is the equipment not being provided? And you want to look to see are they really cutting back because they're not financially sound, only to see that they are.

Now, they're not providing any financial information that they're supposed to be providing under the Department of Health under the attorney general's office.

So it's always been in our best interest and our members best interest to make sure that this hospital is financially sound.

And in order to be sound, you have to make sure that you're providing safe care and safe conditions.

So you are wrong that it's economic pressure to hurt the hospital.

We wanted to make sure that the hospital is doing what they're supposed to do to provide the care for the community as they promised to do.

(Tr. 2973:22-2975:6 (emphasis added)).

As Twomey's testimony makes clear, there is no logical reason why the Union would seek, in Duneav's words, "obviously to hurt" the Hospital. The Hospital employed hundreds of the Union's members, and the Hospital's financial viability was essential to

protect Union members' livelihoods and benefits. It has "always been in [the Union's] best interest and [its] members['] best interest to make sure that this hospital is financially sound." (Tr. 2974:22-24).

The ALJ credited this testimony and the Union witnesses' consistent explanations of the organization's "efforts . . . directed at ensuring that the Hospital met its obligations to the community, patients and employees." (ALJD 133:36-37). As the ALJ found,

The Union unquestionably engaged in legally permissible activities before legislative bodies, government agencies charged with oversight of the [H]ospital's finances and operations, and advocacy groups. As credibly testified by the Union's witnesses, all of its activities sought positive goals to ensure the financial stability of the Hospital for the benefit of its patients and employees.

(ALJD 133:26-30). The extensive record in this case belies the Hospital's claims and establishes the accuracy of what Twomey wrote long before the Hospital asserted its affirmative defense: the Union "wants to save the hospital, not close it." (CPX 4).

2. The Hospital's Response to "Other Economic Pressure Activity"

The Hospital conceded that it never informed the Union that the Hospital believed the Union was in violation of Article 7.1 by engaging in "other economic pressure activity." (Tr. 3110; CPX 8; CPX 9). The Hospital further admitted that it did not sue the Union for damages for breach of the No Strikes & Lockouts article. (Tr. 3094:3-13). Nor, as the ALJ noted, did it ever seek injunctive relief, a remedy for which Article 7 specifically provides. (ALJD 132:1-4; Tr. 3094:23-3095:4).

The Hospital did not raise its allegation that the Union was violating Article 7 during formal meetings with the Union, including one in the presence of state mediators during which the parties “were talking about making peace. . . . Peace is better than war. That was the theme of the meeting.” (Tr. 3462:21-24). Although the Union was the subject of discussion at Hospital board meetings during the three-year period relevant to the Hospital’s affirmative defense, the board never discussed the Union’s allegedly ongoing breach of the CBA. (Tr. 3463:4-3466:10).

Addressing the Union’s counsel, Lipsky testified,

I want you to understand how did we uncover Union’s activity. There is another litigation where I am suing Cigna, Cigna is suing is me, I am suing Cigna. It’s three cases.

During the document production in that litigation, we got a treasure trove of emails implicating Union of basically major conspiracy against the hospital. We started to receive those documents sometimes in early summer 2015. We requested more production. We got more production.

(Tr. 3500:16-3502:1). The Hospital had no knowledge of what it terms a “major conspiracy”—about which it threatened to sue the Union, on the record—before the summer of 2015, 18 months after the period of time relevant to its affirmative defense and three years after it began commissioning the unfair labor practices at issue in this case. (Tr. 3501:12-3592:1).⁴

⁴ See *in re Bochner* for a discussion of filing answers without “a reasonable inquiry into the facts or law relevant” to the matters asserted. 322 NLRB 1096, 1103 (1997) (citing *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986) (“In this case it was Mr. Sanchez’s own client that controlled the information Assuming arguendo that defendant refused to provide Mr. Sanchez with the relevant information or even lied

Given this logical and temporal disconnect, the ALJ correctly found that the Hospital “refused to bargain with the Union, as alleged, on matters wholly unrelated to the Union’s alleged violation of the no-strike clause,” and that the case presents “no issues concerning the continuation of bargaining which a cessation” of the Union’s alleged violation “may lead to.” (ALJD 135:17-18, 34-36). Indeed, the ALJ found that

[T]here was no connection whatsoever between the Union’s alleged violation of the no-strike clause and the Respondent’s refusal to bargain. In refusing to bargain with the Union over the numerous issues set forth above [as violations of Sections 8(a)(5) and 8(d) of the Act], the Respondent did not assert that it was doing so because of the Union’s alleged breach of the no-strike clause.

(ALJD 136:15-18). Despite the Hospital’s protestations to the contrary, the ALJ’s findings are amply supported by the record and must be affirmed.

II. Argument

A. The ALJ’s Findings are Supporteded by the Record.

1. The ALJ’s Credibility Resolutions Should Be Affirmed.

The Hospital criticizes what it characterizes as the ALJ’s “parsing” of the record, ignoring that an ALJ’s duty is exactly that: evaluating and weighing the evidence. (Resp. Br. in Support of Excep. at 9). It is clear that the ALJ appropriately credited the testimony of the Union’s witnesses, who appeared pursuant to subpoena, that the

to him, counsel still has a duty to independently investigate the facts of the case before representing its contents to a federal court.”)).

purpose of the communications the Hospital sought to classify as “economic pressure activities” was in fact to “save” the Hospital. (Tr. 2973:22-2975:6).⁵

As the ALJ found, the Union contacted legislators to seek “legislation which would provide greater transparency of the financing for all hospitals which receive public money.” (ALJD 124:29-31). The Union advocated for independent oversight of the Hospital because, as the ALJ found,

it was concerned about the Hospital’s financial stability, and believed that, based on financial information it received, the Hospital was not being operated adequately and safely for its patients and employees, that its owners were receiving an excessive amount of distributions of profits while at the same time layoffs of employees took place, and workers had an insufficient amount of equipment to work with. [Union witness] Otersen stated that the Union’s interest in advocating for a financial monitor was to ensure the Hospital’s continuation in business, not to put economic pressure on it.

(ALJD 125:1-8). Similarly, the ALJ found that a Union vigil “was not intended to disrupt hospital operations,” but rather to “show . . . support by Union members employed at other hospitals for the Respondent’s nurses who experienced a difficult work environment.” (ALJD 128:41-44).

These findings stand in contrast to the ALJ’s credibility findings based on the testimony of Hospital witnesses. Hospital owner Duneav, the ALJ found, testified “without details” about alleged “economic pressure,” and “conceded . . . that she had no evidence that any specific patient did not use the Hospital’s services because of the

⁵ Documentary evidence, also produced pursuant to subpoena, which was created contemporaneously with what the Hospital claimed were “economic pressure activities,” corroborated this testimony. (CPX 4).

Union’s economic pressure activity, nor did she know of any nurses who quit because of such activity, or that, in fact, the Union caused employees to discourage others from applying for employment at the Hospital, or that the Union discouraged the Hospital’s employees from using its services”—all elements that were at the core of the Hospital’s affirmative defense. (ALJD 129:31-35).

The ALJ found that Lipsky, another owner, conceded that he had nothing more than a “firm belief” that the Union’s complaints to regulatory agencies were the impetus behind Department of Health inspections—routine oversight that the Hospital also sought to characterize as “economic pressure activity.” (ALJD 131:4-6). Lipsky also “conceded that he had no evidence that the Union communicated with . . . insurance brokers” who he claimed—despite having “no evidence”—were then unwilling to accept the Hospital’s insurance plan. (ALJD 131:43-45).

When the ALJ concluded, based on his findings as cited above, that the Union’s witnesses had “credibly testified” that “all of its activities sought positive goals to ensure the financial stability of the Hospital for the benefit of its patients and employees,” he discredited the contradictory testimony of the Hospital’s owners. (ALJD 133:28-30). “It is well established that explicit credibility findings are unnecessary when a judge has implicitly resolved conflicts in the testimony by accepting and relying on the testimony of one party’s witnesses.” *Am. Coal Co.*, 337 NLRB 1044, 1044 n.2 (2002) (quoting *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1330 (7th Cir. 1978) (internal quotations and modifications omitted)). The ALJ properly concluded that there was “no evidence

that any of the Union's efforts constituted economic pressure activity against the Respondent." (ALJD 133:31-32).

In its exceptions, the Hospital attacks the ALJ's sound credibility resolutions, arguing that the ALJ should have credited Lipsky's testimony that the Union wanted to "dig up dirt" on the Hospital's owners and business associates over the extensive Union testimony that its purpose was improved oversight, working conditions, and financial stability. (ALJD 137:8-13, 30-34; Resp. Br. in Support of Excep. at 10).⁶

The Hospital claims that the ALJ's credibility resolutions are "contrary to the record and logic." (Resp. Br. in Support of Excep. at 13). It is, of course, well-established that the Board will defer to an ALJ's credibility resolutions unless a clear preponderance of the evidence establishes that they are unsupportable. *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, at *1 n.3 (2016) (applying standard where exception to credibility finding was implicit) (citing *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)).

Here, the ALJ properly credited Union witnesses' consistent testimony, supported by record evidence, that its advocacy and communications with third parties were intended to "ensure the survival of the Hospital," against the Hospital owner's "firm belief," unsupported by specific examples, that the opposite was true. (Tr. 3467:4-3472:18). When the Hospital attacks the Union witnesses' testimony as "vague and incomplete" it is seeking reversal of the ALJ's credibility determinations without pointing

⁶ The Hospital's Brief is unclear on this point, but the only testimony about "dirt" or "digging" came from the Hospital's own witness. (See Tr. 3405:14-17, 3411:16-17).

to evidence, much less a preponderance thereof, that the determinations are unsupportable. (Resp. Br. in Support of Excep. at 17).

2. The Union's Contracts with Unrelated Employers Are Irrelevant to the Construction of the Parties' Contract at Issue in This Case.

The Hospital takes the position that the Union's other collective bargaining agreements with unrelated employers should be relevant to the interpretation of its own agreement with the Union. The Hospital cites no decisions relying on such evidence to interpret contracts, and the record does not support relying on such attenuated parole evidence. Most importantly, the Hospital introduced no evidence that the parties referenced the Union's collective bargaining agreements with third-party employers, or that the Hospital was even aware of these agreements when negotiating the CBA at issue here. (Tr. 3403:21-3405:4) (testimony of Hospital owner Lipsky about why he agreed to the no-strike clause, with no reference to third-party agreements); (Tr. 3037:14-20, 3122:20-3123:13) (testimony of Hospital owner Duneav, same).⁷

⁷ Lipsky later testified that it was in fact the Hospital that proposed the no-strike clause:

Q But you knew what article 7.1 said before you entered negotiations?

A No. Article 7.1 reflects what we demanded in our negotiations; peace and tranquility. No disturbance.

Q Okay. So it's your testimony that it was the hospital that proposed article 7.1?

Indeed, the Hospital's only testimony about its intent in agreeing to the no-strike clause concerns what it told its attorney to convey to the Union, that "there would be no strike, no economic harm, no activities—any questions they have to be amicably

A Yes. The verbiage maybe was put by the Union, but it was a clear, clear intent on the part of the hospital to enter in negotiations to have a peaceful, fruitful, cooperative relationship with the Union.

(Tr. 3459:4-13). Hospital owner Duneav testified that she did not know who drafted the contract, and when questioned did not testify that the parties had referenced any third-party agreements when discussing the no-strike clause:

Q . . . Was there any discussion in the September, 2010, [contract negotiations] about Article 7.1 that you can recall?

A With whom? I did not tell the discussions directly, but we instructed the Attorney specifically, there would be no strike, no economic harm, no activities—any questions they have to be amicably resolved.

Q Okay.

A So the discussions -- so the meetings -- like at, you know actually provisions here.

Q Okay. Now . . . you had received the Union Contract and reviewed the Union Contract with Liberty prior to the September, 2010 negotiations; correct?

A I don't know which Contract you're talking about. I don't know what Contract was it.

Q Okay.

A I did receive the Contract from [Hospital attorney and negotiator] Mike Miller, and I don't know who drafted the Contract. Was it by drafted by Liberty or for Liberty or by Mike Miller or by HPAE legal counsel, but I seen the Contract.

(Tr. 3122:20-3123:13).

resolved.” (Tr. 3122:22-25). There is no reference even in the Hospital’s testimony about any contemporaneous internal intent vis-à-vis third-party contracts.

With no evidence that the parties discussed the third-party contracts together or reviewed them individually, there is no reason to consider them as probative evidence of the parties’ intent in agreeing to their own no-strike clause. Such third-party contracts are not even presumptively relevant when parties are engaged in negotiations unless the parties specifically reference those contracts when drafting their own. *Teamsters Local Union No. 688 (Coca-Cola Bottling Co.)*, 302 NLRB 312, 312 n.2 (1991) (relevance of third-party contracts in information request context dependent on express and repeated reference to those agreements during negotiations).

The Hospital admits that the activity described in the parties’ no-strike clause constitutes statutory “protected activity,” but points to no evidence in the parties’ own bargaining history that would meet the Board’s requirement that “the matter at issue” was “fully discussed and consciously explored during negotiations” and that the union “consciously yielded or clearly and unmistakably waived its interest in the matter.” *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). (Resp. Br. in Support of Excep. at 9).⁸ The Hospital’s argument that the contracts constituted important record evidence fails.

⁸ The Hospital suggests that it does not carry the burden of persuasion on its affirmative defense, which is obviously incorrect. (Resp. Br. in Support of Excep. at 8). *Victor Prod. Corp.*, 99 NLRB 516, 523 (1952) (“The burden of proof in this case, as in all unfair labor practice proceedings, is the General Counsel’s; this burden does not

B. None of the ALJ's Evidentiary Rulings Prejudiced Respondent.

The Hospital claims that the ALJ's evidentiary rulings—which, it bears recalling, required the Union and unrelated third parties to produce approximately 650 pages of documents and several witnesses for testimony—represented a denial of due process significant enough to “mandate[] reversal.” (Resp. Br. in Support of Excep. at 18; ALJ Order of May 5, 2016 at 3 (Dumoulin-Smith Order)).⁹

The Hospital is wrong when it implies that any limitation on discovery, no matter how reasonable, amounts to a denial of due process:

extend, however, to matters recognized as affirmative defenses in this field.”); *also see Alliedsignal Aerospace*, 330 NLRB 1216, 1228 (2000) (“Proof of a contractual waiver is an affirmative defense which must meet a high standard.”).

The ALJ mentioned the presence of Respondent's counsel as a potential tie-breaker, someone who could have offered evidence resolving the contrary intentions expressed by the Hospital's owner and the Union's president, but who did not. The ALJ considered the party witnesses' testimony, and the Union's contract with the Hospital's previous owners—which contained the same prohibition on economic pressure activity—and concluded that the most compelling explanation for the inclusion of the language in the parties' CBA was its presence in the predecessor agreement. (ALJD 132:35-41). The Hospital missed this analysis. (“The ALJ dismissed the evidence without explanation” (Resp. Br. in Support of Excep. at 8)).

⁹ The ALJ issued two evidentiary rulings on May 5, 2016; the first concerned a subpoena issued to former Union employee Adrien Dumoulin-Smith and the second concerned a subpoena issued to non-party David Knowlton, formerly associated with non-party New Jersey Health Care Quality Institute. Those orders are differentiated as either the “Dumoulin-Smith Order” or the “Knowlton Order.”

[I]t is well settled that parties to judicial or quasijudicial proceedings are not entitled to discovery as a matter of a constitutional right. Furthermore, the Administrative Procedure Act does not confer a right to discovery in Federal administrative proceedings. Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures.

Kentucky Riv. Med. Ctr., 352 NLRB 194, 199 (2008), *aff'd* 355 NLRB 594 (2010) (citing *Starr v. Cmm'r of Internal Revenue*, 226 F.2d 721, 722 (7th Cir. 1955), cert. denied 350 U.S. 993 (1956); *Friette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. *en banc* 1974), cert. denied 421 U.S. 980 (1975); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), cert. denied 402 U.S. 915 (1971); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951) (internal citations omitted)).

Moreover, in discovery disputes, “the Board affirms an evidentiary ruling of an administrative law judge unless it constitutes an abuse of discretion.” *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), *enf'd* No. 05-75515, 2008 WL 216935 (D.C. Cir. Jan. 28, 2008). The Hospital has presented no case that that the ALJ abused his discretion here.

1. The Hospital Misrepresents the Previously Uncontested Fact that the ALJ Did Issue a Subpoena to Adrien Dumoulin-Smith.

The Hospital is knowingly untruthful when it claims that “the ALJ outright refused to issue [a] subpoena[] to . . . Adrien Dumoulin-Smith.” (Resp. Br. in Support of Excep. at 16). The statement is false and the falsehood is ridiculous. The Hospital has admitted both in previous filings with the Board and in the Brief in Support of Exceptions itself that a subpoena was issued to Adrien Dumolin-Smith; the false statements in brief that

the subpoena was not issued are sanctionable. 29 C.F.R. § 102.177. (Resp. Br. in Support of Excep. at 15; Resp. Req. for Special Permission to Appeal at 16 (May 24, 2016) (“Judge Davis revoked the subpoena issued to Adrien-Dumoulin-Smith . . .”); *also see* ALJ Order of May 5, 2016 (Dumoulin-Smith Order)). The arguments based on those falsehoods are, for obvious reasons, specious.

2. The Hospital Was Not Prejudiced by the ALJ’s Refusal to Issue a Subpoena to David Knowlton.

The only subpoena that the ALJ refused to issue was a subpoena for the testimony of David Knowlton, the former head of the advocacy organization New Jersey Health Care Quality Institute (“HCQI”). The ALJ explained, responding to the Hospital’s request,

[The Hospital’s] letter of May 5, 2016 requests that I issue a subpoena *ad testificandum* to David Knowlton so that he may provide testimony regarding his interactions and the interactions of the New Jersey Health Care Quality Institute (NJHCQI) with the Union as they relate to Respondent’s affirmative defense.

You assert that in light of my Order [partially] revoking the Respondent’s subpoena *duces tecum* to non-parties dated April 22, 2016, due process requires that the Respondent be able to present evidence through Mr. Knowlton to prove that the Union’s interactions with him amount to engaging in economic pressure activity in violation of the parties’ no-strike clause.

Based on the reasons set forth in my April 22, 2016 Order I deny your request that I issue a subpoena requiring the testimony of Mr. Knowlton. I further note that, as set forth in the Union’s April 12, 2016 opposition to your request to institute enforcement proceedings, certain documents regarding Mr. Knowlton were provided to you by NJHCQI.

(ALJ Order of May 5, 2016 (Knowlton Order)). Specifically, the Hospital had previously subpoenaed documents from HCQI's custodian of records; the Hospital admits that HCQI complied by producing responsive documents. (Resp. Req. for Special Permission to Appeal at 4 n.3; Exh. L (May 24, 2016)). The Hospital's Exhibits 128, 132, 133, 135, 136, 147, 149, 151, and 155 were all documents that HCQI produced to the Hospital pursuant to its subpoena for documents. (Resp. Req. for Special Permission to Appeal, Exh. O at 9-10; Exh. P at 6-7 (May 24, 2016); ALJ Order of April 11, 2016 at 2)).

The Hospital makes much of the fact that the ALJ refused to issue an additional, subsequent subpoena to David Knowlton in his individual capacity, after HCQI, the organization with which he was affiliated at the time of its relevant contact with the Union, had already complied and produced responsive documents. (*See* ALJ Order of May 5, 2016 (Knowlton Order)). The Hospital's objections are unavailing and certainly do not support the conclusion that it was prejudiced by the ALJ's ruling. Refusing to issue a subpoena is not grounds for modifying the ALJ's Decision and Order when the refusal is not prejudicial. *Canova v. NLRB*, 708 F.2d 1498, 1503 (9th Cir. 1983). Refusing to issue a subpoena for Knowlton's testimony did not prejudice the Hospital, and this Exception must be rejected.

The Hospital applied for the issuance of a subpoena to Knowlton on May 5, 2016, (i) almost four years after the underlying unfair labor practice charge in the case was filed, (ii) more than two-and-a-half years after the Hospital served a subpoena for substantially the same information on the Union, (iii) one year after the ALJ ordered the Union to produce documents in response to that subpoena, and (iv) three months after

the Hospital served a subpoena *duces tecum* for substantially the same information to Knowlton's former employer, HCQI. (Resp. Motion to Dismiss at 2 (Oct. 21, 2013); Resp. Req. for Special Permission to Appeal at 2 (May 24, 2016)).

The Hospital admits that the relevant information it sought both from Knowlton and HCQI concerned a single meeting on October 18, 2012, and it admits that not only did third parties HCQI and New Jersey Association of Health Plans and the Union produce documents regarding and memorializing the meeting, and documents that were distributed at the meeting, in response to subpoenas, but also that two subpoenaed Union witnesses testified as to their first-person knowledge of what happened at the meeting. (Resp. Req. for Special Permission to Appeal at 10-13, Exh. N (Resp. Opp. To HCQI's Petition to Revoke at 2-4) (May 24, 2016)).

The Union did not contest the authenticity of any of the documents the third parties produced, and did not appeal the ALJ's order that it produce its own agents to testify in response to the Hospital's subpoenas. (ALJ Order of Apr. 22, 2016 at 5). For that reason, on the same late date on which the Hospital subpoenaed Knowlton, the ALJ revoked a nearly-identical subpoena for testimony issued to the Union's former employee, Dumoulin-Smith, explaining:

The Respondent asserts that Dumoulin-Smith received several email communications involving non-parties and government authorities, including one in which the sender stated that he met on October 18, 2012 with Dumoulin-Smith, and five other people including Jeanne Otersen and Harriet Rubenstein at which they discussed matters which the Respondent asserts constitute economic pressure activity.

Otersen and Rubenstein testified on three days in April, 2016, as to this email and their participation in the meeting. During those three days of hearing, the Respondent offered 77 exhibits, all of which were received. However, it is not satisfied with their testimony, asserting that it was “vague and incomplete.” Accordingly, the Respondent seeks an opportunity to examine Dumoulin-Smith as to that meeting. The Respondent argues that Dumoulin-Smith’s testimony would not be cumulative or duplicative because no testimony of substance was given by the two Union officials. The Respondent also asserts that it seeks to question Dumoulin-Smith, the Union’s “researcher” as to the “instructions the Union gave him as to the scope of research he was to perform; the reason for the research and the goal the research sought to achieve.”

As set forth above, the Respondent now seeks to examine Dumoulin-Smith as to the precise matter, the October 18, 2012 meeting, that the two Union officials have already testified about. Dumoulin-Smith’s testimony would be cumulative and duplicative of their testimony.

In addition, the Respondent’s proposed examination of Dumoulin-Smith as to his assignment, scope, reason and the goal sought in conducting his research are all outside the scope of the issue here — did the Union engage in “economic pressure activity” against the Respondent.

Inasmuch as “there is no dispute that the Union did engage in such [economic pressure activity] communications” and that the Respondent’s defense is a “legal defense” (Board’s Order of February 27, 2014[]), the documents sought are cumulative and duplicative.

It must also be noted that, pursuant to my previous Orders on subpoenas, the Union had provided to the Respondent about 600 pages of documents concerning its affirmative defense, and the Respondent had received about 50 documents from other sources.

I have the authority to regulate the course of the hearing and take any other action necessary. Board’s Rules and Regulations Section 102.35. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by “considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Federal Rules of Evidence 403.

The Board has so held. Following the introduction of substantial evidence on an issue, the presiding official properly refused to permit the

introduction of additional, cumulative evidence. *Burns Security Services*, 278 NLRB 565, 566 (1986). “The judge acted within his broad discretion when he balanced burdensomeness against probity and imposed a reasonable limitation on the respondent’s ability to cross-examine claimants. *Parts Depot, Inc.*, 348 NLRB 152, fn. 6 (2006).

(ALJ Order of May 5, 2016 at 2-3 (Dumoulin-Smith Order)). When the ALJ refused to issue an additional subpoena to Knowlton later that day, he was in the same position as the judge in *Canova*, who refused to issue a subpoena to one California state agency when a differently state agency had immediately before successfully petitioned to revoke a similar subpoena, also for records related to workers compensation. *Canova v. NLRB*, 708 F.2d 1498, 1501-03 (9th Cir. 1983)

When considering the respondent’s subsequent petition to vacate the Board’s order in *Canova*, the Court of Appeals for the Ninth Circuit reasoned that the judge had expected that the second state agency “would assert the same statutory privilege” in opposition to the subpoena that the first state agency had asserted successfully. *Id.* at 1503. “Therefore, the ALJ may have issued the subpoena only to revoke it once the [second agency] petitioned for revocation on the basis of privilege.” *Id.*

Further, in *Canova*, the injured employee himself—to whom the workers compensation proceedings related—“had already testified and been cross-examined extensively about his condition,” and the parties had also introduced expert testimony about his condition. *Id.* Accordingly, the court held that “[a]lthough the ALJ should have issued the subpoena and awaited a petition to revoke,” the employer “was not prejudiced by the failure to issue the subpoena; thus we will not refuse enforcement of the Board’s order on that basis.” *Id.*

Similarly, in *Woodcrest Health Care Center*, where the employer subpoenaed eight witnesses who it claimed would offer testimony of “objectionable conduct,” but “failed to adduce any testimony supporting its objections” from the first three of those witnesses, the hearing officer “ruled that he would not issue . . . six additional subpoenas or allow the eight already subpoenaed witnesses to testify, as these witnesses would be ‘exploratory in nature.’” *Woodcrest Health Care Ctr.*, 359 NLRB No. 48, at *2 (2013).

The Board found that any error in not issuing the subpoenas “was harmless,” because the employer was not prejudiced. The employer had already been “given significant leeway by the hearing officer,” and none of the ten witnesses who it had already examined had “presented competent evidence of objectionable conduct.” *Id.*

Here, the Union produced 600 pages of documents in response to a nearly identical subpoena, subpoenaed third parties produced an additional 50 documents, and Union agents themselves testified on precisely the issue about which the Hospital sought testimony from Knowlton. (ALJ Order of May 5, 2016 at 3 (Dumoulin-Smith Order). As in *Woodcrest*, “it is reasonable to conclude that even had the [ALJ] issued the requested subpoenas, he would have refused to permit the witnesses to testify or, if presented with a petition, would have revoked those subpoenas. Consequently, the hearing officer’s error was harmless, and we find no merit in the Employer’s exceptions.” *Id.* At *2.

The Hospital’s exceptions are meritless because the Hospital has made no showing that it was prejudiced when the ALJ refused the Hospital’s request for a

subpoena which would have been revocable on identical grounds as a nearly identical subpoena revoked on the same day the Hospital made the instant request.

3. The Hospital Misrepresents that the Third Parties Who Were Subpoenaed Complied with the Subpoenas.

The Hospital seeks to obscure the record when it asserts that the ALJ “revoked Respondent’s other third-party subpoenas.” (Resp. Br. in Support of Excep. at 16). The Hospital’s own filings with the Board confirm that the third parties to whom the Hospital issued *subpoena duces tecum* supplied records responsive to those subpoenas. (Resp. Req. for Special Permission to Appeal at 4 (May 24, 2016)). The ALJ revoked those subpoenas only “to the extent not already complied with” on April 22, 2016, two months after the subpoenas were served. (ALJD 117:2-23; ALJ Order of Apr. 22, 2016 at 5 (emphasis added); Resp. Req. for Special Permission to Appeal at 3 (May 24, 2016)).

Before partially revoking those subpoenas, the ALJ had already expressed skepticism about the scope of the Hospital’s discovery demands. On March 11, 2016, the ALJ issued an Order partially enforcing and partially revoking the subpoenas to the subpoenaed third parties, Twomey, Otersen, and Rubenstein. (ALJ Order of Mar. 11, 2016). He “directed the production of non-privileged documents” while holding that “the documents sought are cumulative of the Respondent’s need for them.” (ALJ Order of Mar. 11, 2016 at 6).

In support of that holding, the ALJ observed “the Board’s February 27, 2014 Order has already stated that ‘there is no dispute that the Union did engage in such

communications' and that the Respondent's defense is a 'legal defense;'" in light of this, the ALJ "question[ed] . . . the Respondent's need for cumulative evidence on this matter if it already has evidence as to which there is 'no dispute,' and the matter is, indeed, a legal question." (ALJ Order of Mar. 11, 2016 at 6-7).

Despite the absence of any material factual dispute regarding the Hospital's affirmative defense, "extensive testimony was adduced by the Respondent from the Union's witnesses and from its own witnesses. In addition, the Respondent subpoenaed numerous documents from the Union and 20 from third-parties. Pursuant to the subpoenas, the Union and third-parties produced a large number of documents. At hearing the Respondent offered and [the ALJ] received those documents in evidence. Following the receipt in evidence of those documents [the ALJ] ruled that further documents would be cumulative and duplicative and granted certain petitions to revoke the subpoenas." (ALJD 117:18-25).

In issuing his partial revocation of the subpoenas "to the extent not already complied with," the ALJ held that testimonial evidence from the subpoenaed third parties' custodians of record was cumulative, because "the Union's witnesses already provided extensive testimony concerning the documents obtained by the Respondent, including evidence of the meetings and communications with the non-parties, the subject of the subpoenas to the non-parties." (ALJ Order of Apr. 22, 2016 at 5).

The ALJ noted that the question before him "is whether economic pressure activity occurred, whether that alleged activity breached the parties' no-strike clause, and whether the alleged breach permitted the Respondent to refuse to bargain with the

Union.” (ALJ Order of Apr. 22, 2016 at 5). In light of that, he held, “any further evidence, either documentary or testimonial, sought by Respondent’s subpoenas would be cumulative and duplicative.” (ALJ Order of Apr. 22, 2016 at 5).

The ALJ’s Order revoking the third-party subpoenas to the extent not already complied with correctly relied upon recent Board precedent. In *McDonalds USA*, the Board held that the presiding judge “did not abuse her discretion in granting the petitions to revoke McDonald’s subpoenas served on” third parties because the subpoenas “were cumulative and duplicative and therefore imposed an undue burden on non-parties.” *McDonalds USA, LLC*, 363 NLRB No. 144, slip op. at *1 n.2 (2016).

The third parties in *McDonalds USA* were entities who “were retained by, or worked with, the Charging Parties in connection with their campaign to organize employees at McDonald’s and the Franchisee Respondent’s restaurants,” and a “survey research firm which conducts public interest surveys and focus group interviews for public and private clients.” *Id.*, slip op. at *15, 18. McDonalds sought the information to support its affirmative defense.

In circumstances remarkably analogous to those presented here, Judge Esposito revoked the subpoenas. In so doing, she relied on federal court precedent in which “courts have delineated ‘a heightened regard for the burden to be imposed on a third party’ in determining whether to quash a subpoena served upon a non-party to the case. In particular, the federal courts have quashed subpoenas to third parties when the information sought would be available from parties to the litigation.” *Id.*, slip op. at *15 (citing *In re Subpoena to Goldberg*, 693 F. Supp.2d 81, 88 (D.D.C. 2010); *Schaaf v.*

Smithkline Beecham Corp., 233 F.R.D. 451, 453 (E.D.N.C. 2005); *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 412 n.6 (C.D. Cal. 2014) (internal citations omitted)).

Judge Esposito reasoned that in addition to the subpoenas McDonalds had served on third parties,

McDonald's has also served Subpoenas Duces Tecum on [the Charging Parties] in this matter. As the Non-Parties argue, the Subpoenas served on them by McDonald's seek information which is materially identical to the information McDonald's seeks in its Subpoena served on . . . a party to the proceeding. Other information sought by McDonald's from the Non-Parties is also the subject of subpoenas served on the . . . other Charging Parties. As a result, I find that the majority of the information sought by McDonald's in its Subpoenas to the Non-Parties, to the extent it is to be produced at all, can be obtained from another source—namely [the Charging Parties]. In particular, I find that the Charging Parties would be a more convenient, less burdensome source for the information sought. The Subpoenas issued by McDonald's to the Non-Parties, which reiterate demands for materials also directed to [Charging Parties], are therefore cumulative and duplicative in nature. Pursuant to this standard, the Subpoenas present an undue burden on the Non-Parties, and their Petitions to Revoke on this basis are granted.

Id., slip op. at *15-16 (emphasis added).

McDonald's is especially persuasive because, like the subpoenas issued to non-parties in that case, the subpoenas issued to the third parties here were substantially identical to those issued to the Union and its agents. The Union and the Union's agents have complied with those subpoenas, affording Meadowlands access to evidence it claims is relevant without the need to burden third parties, who in any event complied by producing documents.

The Board expressly adopted the portion of Judge Esposito’s decision concerning the appropriate burden on non-parties. *Id.*, slip op. at *1 n.2. Its holding supports the ALJ’s partial revocation of the subpoenas here, because it endorses the federal court standard of heightened scrutiny of discovery directed to third parties. Finding merit to the Hospital’s exceptions would be inconsistent with this recent, applicable Board law.

Moreover, the partially-revoked subpoenas request irrelevant evidence. As the ALJ observed in an earlier discovery order, the Hospital “asserts that communications establishing the application of economic pressure activity is sufficient to prove its affirmative defense.” (ALJ Order of Mar. 28, 2016, at 2). As the ALJ discussed, the Union and its agents Twomey, Otersen, and Rubenstein testified and produced documents in response to subpoenas identical to those issued to the third parties. (ALJ Order of Apr. 22, 2016 at 1).

The Hospital does not claim in its Exceptions that the additional testimonial evidence it sought from the third parties would in any way contradict the testimonial evidence of those witnesses or the more than 600 pages of documentary evidence produced by the Union and the third parties. *Spartan Dep’t Stores*, 140 NLRB 608, 611 (1963) (“[I]n view of Intervenor’s failure to offer evidence or otherwise indicate that the testimony sought would tend to refute that already in the record, it is apparent that the subpoena [sic] in question was in furtherance of a ‘fishing expedition’ and intended to unduly delay the proceeding. Accordingly, and because enforcement of the subpoena would be inconsistent with the policies of the Act, we affirm the hearing officer’s ruling

and deny Intervenor's request for enforcement."'). Such evidence would be merely cumulative, and effectively immaterial to proving the Hospital's defense.

Despite this, the Hospital insists that it had "no way to garner the truth except from individuals keenly interested in the outcome;" the Hospital argues that the ALJ's credibility findings crediting the Union's witnesses should be reversed. (Resp. Br. in Support of Excep. at 18). The Hospital would seek more and more evidence even though there is "no dispute that the Union engaged in [the] communication" that the Hospital contends constituted economic pressure activity. (Board Order of Feb. 27, 2014 (emphasis added)). *Morrison Turning Co.*, 83 NLRB 687, 689 (1949) (where employer sought evidence of "collusion" and "fronting" in subpoenaed communications between labor organizations, subpoena revoked because "[t]o the extent that the evidence sought by the Employer consists of proof of aid to the Petitioner by other labor organizations and payment for such assistance, we deem it immaterial. Moreover, the record, the Employer's brief, the petition, and the offer of proof in support of the request for subpena [sic], furnish no facts, directly or inferentially, upon which we may reasonably believe that the desired records contain evidence of a collusive arrangement. Under these circumstances, we are satisfied that the Employer's broad and inclusive request for the production of records is a mere 'fishing expedition' for which it is not entitled to a subpena from the Board."').

It was appropriate for the ALJ to acknowledge the third-party status of the subpoenaed entities when determining that the subpoenas issued to them should be revoked to the extent they were not already complied with. Federal courts appropriately

protect non-parties like Appleseed, NJCA, NJHCQI, and NJAHP from overreaching discovery requests, and the same principles are applicable here. Meadowlands should not be permitted to continue mining “shadow zones of relevancy” that are at most tangentially related to its affirmative defense. *In re Fontaine*, 402 F. Supp. 1219, 1221 (E.D.N.Y.1975).

The Hospital effectively concedes the speculative nature of its demand for testimonial evidence from the third parties’ custodians of record when it asserts without support that “[c]learly the record would have benefitted from documents”—which were produced—”and testimony from the third parties.” (Resp. Br. in Support of Excep. at 18). Much like the plaintiff in *Bamberger v. Rohm & Haas Co.*, the Hospital, “in an effort to prove that something fishy [is] occurring,” takes the position that the ALJ should have permitted it “to engage in a fishing expedition, but [seeks] to drain the pond and collect the fish from the bottom.” *Claude P. Bamberger Int’l, Inc. v. Rohm & Haas Co.*, No. 96-cv-1041, 1998 WL 684263, at *4 (D.N.J. Apr. 1, 1998) (internal citations omitted).¹⁰

¹⁰ The cases cited in *Bamberger* illustrate the limits of the federal rules, in particular in this District. “Bamberger argues that Judge Cavanaugh improperly required plaintiff to prove its case before being entitled to relevant discovery. . . . The Court disagrees. ‘[D]iscovery is not intended as a fishing expedition permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action.’ *Zuk v. Eastern Pa. Psychiatric Inst. of Med. College*, 103 F.3d 294, 299 (3d Cir.1996).

Particularly in light of the Board's recent endorsement of the federal standard for reviewing subpoenas to third parties in *McDonald's*, reversing the ALJ's partial revocation of the subpoenas would be inconsistent with the policies of the Act. *See McDonalds USA, LLC*, 363 NLRB No. 144 (2016).

4. The ALJ Correctly Found that in Addition to Being Privileged, the Communication with Attorney Kenneth Pringle Was Irrelevant.

The ALJ correctly held that one subpoenaed communication between attorney Kenneth Pringle and the Union was privileged from disclosure, and not relevant to the Hospital's affirmative defense. No prejudice could have resulted from withholding of an irrelevant document, and the ALJ's decision cannot be disturbed on this ground.

See also Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318, 1326 (Fed. Cir. 1990) ('The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim. That the discovery might uncover evidence showing that a plaintiff has a legitimate claim does not justify the discovery request') (footnote omitted) (citations omitted); *Strait v. Mehlenbacher*, 526 F.Supp. 581, 584 (W.D.N.Y.1981) ("[I]t appears that defendants are attempting to utilize the discovery rules as a 'fishing expedition' to find some basis of their civil rights claim. This is plainly in violation of the Federal Rules.") (citations omitted); *Lamar Printing, Inc. v. Minuteman Press Int'l, Inc.*, No. C 81-05 A, 1981 WL 2080, at *3 (N.D.Ga. May 14, 1981) ("Discovery under the Federal Rules of Civil Procedure is intended to narrow the scope of the issues and to prevent surprise at trial; it is not intended to allow a plaintiff to go on a fishing expedition to see if the speculative complaint that he has filed has any basis in fact.").

The Hospital asserts, without citing to any specific line of the Judge's decision, that the ALJ failed to include "an explanation or description of the communications with Pringle." (Resp. Br. in Support of Excep. at 19). In making this assertion, the Hospital ignored the Judge's clear and uncontested finding that "the subject matter of the communications has no bearing on the Respondent's affirmative defense, but rather [is] related to the Union's support of New Jersey Senate Bill 1468." (ALJD 118:35-37). That bill was introduced on February 22, 2010, ten months before the Hospital's owners took control of the Hospital and ten months before the parties entered into the CBA that gives rise to the Hospital's affirmative defense. *See* S.B. 1468, 214th Leg., Reg. Sess. (N.J. 2011), *available at* http://www.njleg.state.nj.us/2010/Bills/S1500/1468_11.HTM.

As the ALJ found, crediting Union agent Rubenstein:

Rubenstein stated that in 2010 the Union advocated for legislation requiring for-profit hospitals to report their financial data. The bill, entitled "Requires for-profit hospital to report certain information to the Department of Health and Human Services" was introduced on February 22, 2010. The Hospital was purchased by the Respondent ten months later, on December 7, 2010.

(ALJD 1265:44-126:2). The Union's support of N.J. Senate Bill 1468 in 2010 and 2011 was explored during the hearing, both in testimony and through documentary evidence. (*See* ALJD 125:27-43 (discussing the Union's public support of the bill, including by quoting a public press release); Tr. 3360:10-3362:2 (testimony of Union agent Rubenstein regarding the Union's support of the bill in 2010 and before it was formally introduced, and the fact that the bill would "impact all the for profit hospitals in the state"))).

The Hospital has made no showing that the Union's redaction of a two-page communication with an attorney regarding NJ Senate Bill 1468 prejudiced its ability to prove its affirmative defense; in addition to being privileged for the reasons stated in the ALJ's decision, the communication was irrelevant.

C. Article 7.1 Is Not a Waiver of the Union's Constitutional Right to Advocate With Government Authorities on Behalf of Its Views, Communicate With the Press as to Its Dispute With the Hospital, or to Join With Advocacy Groups in Support of Its Positions.

1. The ALJ Relied on Well-Established Precedent in Construing the Parties' No-Strike Clause in a Manner that Made it Both Lawful and Enforceable.

The ALJ correctly interpreted the parties' no-strike clause to permit the types of communication with journalists, the public, and public interest groups that the Hospital later claimed were breaches of the no-strike clause. Regarding this interpretation, the ALJ's "notion" is not "preposterous." (Resp. Br. in Support of Excep. at 9).

Instead, what the Hospital would characterize as a "notion" is well-supported, long-standing precedent. "The Board has consistently held that an incumbent union may silence its own voice by waiving the right to distribute its own institutional literature, but that it is powerless to waive the employees' right to distribute literature pertaining to matters concerning their working conditions and other conditions of employment." *Ford Motor Co.*, 233 NLRB 698, 699 (1977). The Hospital does not discuss the ALJ's

reliance on *Ford Motor* or attempt to distinguish that case, in which a union was found powerless to waive the right of bargaining unit employees to communicate regarding layoffs. *Id.*

The Hospital mischaracterizes the ALJ's reasoning as being based on the protected nature of the "negative or critical" communications in which the Hospital claims its employees had no right to engage. (Resp. Br. in Support of Excep. at 11); *Technicolor Servs.*, 276 NLRB 383, 388 (1985) ("protection may not be stripped from employees simply because their activity may include public criticism of an employer") (citing *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808 (2d Cir. 1980)). However, the ALJ's analysis is supported by the breadth of the purported waiver and not the mere fact that it would apply to protected activity. (ALJD 134:26-32).

If the Hospital's formulation of the no-strike clause were accepted, then even "in an effort to promote legislation and cause government agencies to more effectively monitor the Hospital employees would be prohibited from communicating with the news media, lawmakers, government agencies and advocacy groups." (ALJD 134:28-31). Even the maintenance of such a rule, and even when it has been collectively bargained, violates the Act. *Dreis & Krump Mfg. Co. Inc. v. NLRB*, 544 F.2d 320, 325, 325 n.6 (7th Cir. 1976), enf'g 221 NLRB 309, 316 (1975) ("The Union's approval does not render the rule valid as it is not within the power of the Union and the Respondent to take away basic employee rights under Section 7 of the Act." (citing *NLRB v. Magnavox Co.*, 415 U.S. 322, 325-26 (1974)); *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974)

(rule prohibiting only distribution is still “invalidly broad on its face” if it is not “confined either to working time or working areas”).

In light of this precedent, the Hospital’s definition of “economic pressure activity” would render the entire no-strike clause unlawful and unenforceable. When contract language is not clear on its face, it must be interpreted in ways that give the disputed language meaning that is reasonable, effective, and above all, lawful.

The Board and courts recognize that “ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable.” *NLRB v. Local 32B-32J*, 353 F.3d 197, 202 (2d Cir. 2003) (quoting *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977)); *Teamsters Local No. 654 (Active Trans.)*, 335 NLRB 830, 834 (2001) (interpreting agreement “to require no more than what is allowed by law”).

In this case, the Judge’s decision construed the contractual prohibition on “economic pressure activity” in a manner that made it both legal and enforceable. The Hospital’s exceptions to his construction are meritless.

2. The ALJ Correctly Concluded that Even if the Parties’ No-Strike Clause Applied to the Union Communications at Issue Here, the Hospital was Not Privileged to Ignore its Bargaining Obligation.

The Hospital, rejecting the ALJ’s well-supported ruling that the Union did not at any time act in breach of the parties’ no-strike clause, makes the additional argument that it was privileged to disregard all of its statutory and contractual obligations under

the Act while the Union engaged in what it maintains were “economic pressure activities.” (Resp. Br. in Support of Excep. at 13-14). The Hospital’s legal analysis is misguided and its conclusion is unsupported by the record and the law.

The Hospital purports to base its affirmative defense on Board *dicta* that “[a]s a general rule of law, one party to a contract need not perform if the other party refuses in a material respect to do so. The same rule applies to labor contracts.” (Resp. Br. in Support of Excep. at 13 (quoting *Arundel Corp.*, 21 NLRB 525, 527 (1974))). That principle, which the Board characterized only as a “general rule of law” applicable to contractual breaches, is inapplicable here. *Id.*

The Hospital cites a variety of cases that purportedly support its position that “an actual strike is not necessary to invoke this affirmative defense” that the Hospital was “privileged to suspend bargaining for as long as the [Union’s] unlawful conduct”—presumably referring to the Union’s alleged breach of the no-strike clause—“continued.” (Resp. Br. in Support of Excep. at 13-14). None of these cases support the Hospital’s position, and each is distinguishable.

Moreover, even if the Union had engaged in a work stoppage violative of the CBA’s no-strike clause, such conduct would not privilege the Hospital’s refusal to bargain. The “unclean hands” doctrine is not a defense to allegations of unfair labor practices. *Crimptex, Inc.*, 211 NLRB 855, 857 (1974). In *Crimptex*, the Board adopted the ALJ’s concurrence that the unavailability of an unclean hands defense to unfair labor practices “reflects a correct statement of the general rule in labor law.” *Id.*

The Board has been consistent in applying that rule. For example, in *Plumbers Local 457*, it explained:

The present case is no different from any other case in which the respondent as a defense to its own unfair labor practices asserts that the charging party has also been guilty of unfair labor practices, or even that its own unlawful conduct was undertaken with a view to forcing correction of unfair labor practices by the charging party. One unfair labor practice does not excuse another. If a respondent believes that a charging party is guilty of unfair labor practices, the proper procedure is for the respondent to file unfair labor practice charges against the charging party and not to resort to unfair labor practices in justification or excuse.

Plumbers Local 457 (Bomat Plumbing & Heating), 131 NLRB 1243, 1246 (1961) (emphasis added).

More recently, the Board continued its unwavering rejection of the defense of “unclean hands”:

We also adopt the judge’s finding, for the reasons set out in his decision, that the Respondent violated Section 8(a)(5) and (1) by refusing to meet and bargain with the Union from July 9 to August 10, 2009 without the presence of a Federal mediator. Even assuming that the Union’s refusal to continue bargaining with a mediator constituted a breach—or even a total repudiation—of the ground rules established by the parties’ January 22, 2009 “Interim Agreement,” and even assuming that such conduct amounted to a violation of the Union’s duty to bargain in good faith, the Respondent’s own duty to meet and bargain in good faith remained intact. Consequently, the Respondent’s refusal to meet and bargain with the Union was unlawful.

Quality Roofing Supply Co., 357 NLRB No. 75, slip op. at *2 (2011) (emphasis added).

The Board will also not allow employer misconduct to excuse unlawful union conduct. In a recent case, an ALJ found that a union’s refusal to bargain was excused by

the employer's "ongoing derogation of its threshold duty to recognize" the union, but the Board overruled the judge on that issue. *A.W. Farrell & Son, Inc.*, 362 NLRB No. 142, slip op. at *2 (2015). In that consolidated case, involving complaints issued against both the employer and the union, the Board rejected the employer's defense that "two wrongs do not make a right," meaning that the employer's refusal to recognize a union did not excuse the union's obligation to bargain. *Id.*

Instead, in *A.W. Farrell*, the Board affirmed the judge's dismissal of the charge only on the ground that the union's refusal to bargain had occurred during a time when the parties had a valid collective bargaining agreement. *Id.* It was not the employer's misconduct that privileged the refusal to bargain, but the existence of a valid CBA.

Indeed, the only cases in which an employer's otherwise unlawful activity has been even partially excused by union conduct are ones in which (a) the employer gives clear notice to the union that it is conditioning bargaining on cessation of specific union conduct it considers a contractual breach or (b) the employer narrowly tailors its otherwise unlawful activity to the scope of the union's alleged breach, again giving the union clear notice of the conduct to which it objects. The Hospital makes no claim that it satisfied either prerequisite in the instant case, even as it purports to rely on cases affirming that precedent.

Member Fox set forth the sequence of events necessary before an employer is privileged to refuse to bargain:

. . . under settled law, once it was clear that the Union was refusing to meet unless the Respondent excluded its lawyer, who was one of its

selected bargaining representatives, from the negotiations, the Respondent would have been free to declare an impasse in the negotiations, implement its final offer, and advise the employees of what it was doing. But the Respondent did not follow this lawful course, which would have required that it continue to recognize the Union and remain ready to resume bargaining should the Union drop its demand that the Respondent's lawyer be excluded.

New Brunswick Gen. Sheet Metal Works, 326 NLRB 915, 917-18 (1998) (Fox, dissenting in part) (emphasis added) (internal citations omitted) (citing, *inter alia*, *La. Dock Co.*, 293 NLRB 233, 235-36 (1989), *enfd.* in relevant part 909 F.2d 281, 286-87 (7th Cir. 1990)); *also see Uppco, Inc.*, 288 NLRB 937, 948 (1998) ("The Board has long held that an employer's bargaining obligation is suspended only so long as unprotected conduct continues").

a. The Hospital Failed to Give the Union Notice of the Alleged Breach that it Now Claims Justifies the NLRA Violations Alleged Here.

Here, despite numerous opportunities to put the Union on notice of what it now claims was its belief that the Union was in material breach of the CBA, the Hospital did nothing. Its owners' tardy assertions of this belief lack credibility and are abundantly convenient. The cases on which the Hospital relies do not offer legal support for its position.

The Hospital's reliance on *Laura Modes*, for example, is entirely misplaced. *Laura Modes Co.*, 144 NLRB 1592 (1963). In that case, the Board found that the employer had breached its duty to bargain as alleged, but refused to issue a remedial bargaining

order only because the union had committed its own violent ULPs, as formally charged by the employer. *Id.*

The Hospital attempted a similar recourse to the Board's processes here when it filed a ULP against the Union, but its arguments were dismissed. (CPX 6; NLRB Case No. 22-CB-103687). The Hospital did not appeal that dismissal, and its affirmative defense is based only on "communications," not violence. (ALJ Order of Mar. 28, 2016, at 2 ("Respondent asserts that communications establishing the application of economic pressure activity is sufficient to prove its affirmative defense.")). As the ALJ observed, the "Board has held that the absence of violence is an acceptable reason for not applying *Laura Modes*." (ALJD 135:L38-40). For that reason alone the Hospital's reliance on the case in its Exceptions must fail.

Similarly, in *Arundel Corp.*, the employer specifically conditioned its return to bargaining on the union's cessation of a strike in violation of the parties' no-strike agreement. 210 NLRB 525 (1974). Here, the ALJ did not find and the Hospital does not even contend that it ever notified the Union of its later-professed belief that the Union was violating the no-strike clause or that the Hospital would be ignoring the mandates of the NLRA in response.

b. The Hospital Failed to Narrowly Tailor Any of its Statutory or Contractual Violations to the Union's Alleged Contractual Breach.

The ALJ correctly held that “there must be a nexus between the Union’s violation of the no-strike clause and the Respondent’s refusal to bargain.” (ALJD 136:8-9). The Hospital failed to show a nexus between the Union’s alleged “economic pressure activity” and the unfair labor practices that are the subject of this proceeding.

The Hospital admitted that it never cited the Union’s “economic pressure activity” as an explanation for its refusal to bargain during the time period in which the ULPs arose. Indeed, the Hospital has admitted that it did not have knowledge of the activities it now contends breached the parties’ CBA until the summer of 2015, years after it committed the myriad ULPs to which it responds here. The Hospital’s silence regarding this later-raised defense denied the Union an opportunity to cure what Meadowlands now characterizes as a work stoppage, an effect that is anathema to the principles of collective bargaining.

The Board has affirmed the principle that a “nexus” between one party’s misconduct and the misconduct another party seeks to have excused is “a necessary predicate for such an affirmative defense.” *Greyhound Lines, Inc.*, 319 NLRB 554, 556 (1995).

This rule is applied even in cases of much clearer misconduct than that which the Hospital alleges here—for example, an employer’s hiring of permanent replacements was

excused only when “the evidence in that case clearly showed” a connection to the union’s plant sabotage. *Id.* (citing *Johns-Manville Prods. Corp. v. NLRB*, 557 F.2d 1126, 1132 (5th Cir. 1977)). In *Greyhound*, the employer’s affirmative defense was rejected because “not only did [the employer] Respondent not rely on union violence as a reason for the” ULPs that were the subject of that case, “but there [was] no natural connection between the violence and the conduct alleged to have been unlawful.” *Id.* at 557.

Similarly, an employer was excused from bargaining with the union when it did so “specifically . . . because of the union threats and violence.” *Id.* (citing *Union Nacional de Trabajadores*, 219 NLRB 862, 863 (1975)). Here, the Hospital has confessed that it had no knowledge of the Union conduct it now seeks to use as an excuse until the summer of 2015, long after the trial on its misconduct began.

The doctrine on which Meadowlands attempts to base its defense is intended to encourage productive bargaining, and not intended to excuse one party’s indefinite refusal to bargain altogether. An employer may not sit on its hands during months of what would otherwise be blatantly illegal conduct and then attempt to justify that conduct with a claim that certain union activities—of which the employer never before complained—justified the employer’s willful disregard of its bargaining obligations.

The precedent on which the Hospital relies in its Exceptions to the ALJ’s decision are consistent with this principle. For example, *Times Publishing Co.* concerned a union’s “complete disregard of the oral agreement” providing for arbitration with the publisher employer. *Times Publ’g Co.*, 72 NLRB 676, 678 (1947). It was only in *dicta*, cited by the Hospital in its Exceptions, that the Board observed that “a union’s refusal to

bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested." *Id.* at 683 (emphasis added). (Resp. Br. in Support of Excep. at 14).

The Board's actual holding, wholly mischaracterized in the Hospital's Exceptions and supporting Brief, undermines the Hospital's position:

Although contemporaneous conduct of a union in connection with bargaining may well be a factor to be considered in determining if an employer has refused to bargain, the Act plainly does not contemplate that a refusal by a union to bargain at one time operates to absolve an employer from obeying the mandate of the Act to bargain collectively on any subsequent occasion. Even assuming, *arguendo*, a "refusal to bargain" by the Union about an arbitration clause and I. T. U. laws on August 1, 1945, such fact alone could not eliminate the duty of the employer to bargain on January 12, 1946.

Id. Similarly, here, the Hospital has failed to make out a case that the Union's "negative" communications about the Hospital's owners' failure to exercise responsible stewardship of the Hospital were coherently related to the Hospital's myriad, asynchronous unfair labor practices, which range from unlawful layoffs to unilateral changes to health insurance.

The other cases on which the Hospital relies are equally distinguishable. *Continental Nut*, on which the Hospital relies, stands only for the proposition that a union's "Boulwareism," or unwavering insistence that its own opening proposal would be the only proposal to which the union would agree. *Cont'l Nut Co.*, 195 NLRB 841, 858 (1972). In that particular context, the Board held that the employer was not guilty of bargaining in bad faith when it declared impasse. *Id.*

Similarly, in *New Brunswick Sheet Metal*, “the Union’s bad-faith refusal to permit the Respondent to choose a member of its own bargaining team had already created and sustained what the Union itself declared to be a deadlock in bargaining.” *New Brunswick Gen. Sheet Metal Works*, 326 NLRB 915, 917 (1998). The Hospital has made no such allegation of Union intransigence here; indeed, the Hospital’s entire affirmative defense is based on how the Union dealt with third parties.

In *Young & Hay*, another case on which the Hospital relies, the Board held only that the employer had no duty to comply with a union’s request that it recognize and bargain with “a unit differing both from the certified unit and from any unit which is described in or contemplated by the multiemployer contract.” *Young & Hay Transp. Co.*, 214 NLRB 252, 253 (1974). The narrow holding of *Louisiana Dock Co.* is distinguishable on identical grounds. *La. Dock Co., Inc.*, 293 NLRB 233, 235 (1989), enf’d in relevant part 909 F.2d 281 (7th Cir. 1990) (“by conditioning bargaining on the Respondents’ recognition of a single unit, the Union was demanding bargaining in a unit other than the recognized unit, and the Respondents had no duty to comply with this demand”).

In *Phelps Dodge*, a case with an equally narrow holding, the Board approved the employer’s refusal to enter bargaining negotiations only during the exact days of a six-day work slow-down, but only when the employer “resumed negotiations as soon as the [u]nion called off the slowdown.” *Phelps Dodge Copper Prod. Corp.*, 101 NLRB 360, 367 (1952).

Finally, the Hospital continues to insist that *United Elastic Corp.* is analogous to the instant case, despite the ALJ's thorough analysis distinguishing it. (ALJD 135:11-24). In that case, the employer explicitly "refus[ed] to confer with the Union during the pendency of the strike." *United Elastic Corp.*, 84 NLRB 768, 776 (1949).

As the Board's decision repeatedly emphasizes, during the unlawful strike in *United Elastics* the employer was privileged only to refuse to bargain "concerning matters related to the strike." *Id.* at 774. *Also see Carroll Contracting*, 247 NLRB 890, 891 (1980), rev'd on other grounds 636 F.2d 11 (5th Cir. 1981) (where the employer could not point to a particular time period in which an alleged unlawful slowdown occurred, the employer's "affirmative defense raise[d] no litigable issues" because "the bargaining obligation would be suspended only so long as the unlawful conduct continued).

Here, in the absence of any contemporaneous assertion regarding what the Hospital considered a breach of the parties' CBA and in the absence of any current arguments linking particular failures to bargain to specific Union activities, the Hospital's argument that it was privileged to ignore its bargaining obligation must fail, and the ALJ's decision on these points must be affirmed.

III. Conclusion

The Union respectfully requests that the Board reject the Hospital's Exceptions to the Decision and Recommended Order of the Administrative Law Judge and affirm his Order on the issues and for the reasons stated herein.

Dated: February 10, 2017

Respectfully submitted,
s/ Emma R. Rebhorn

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Answer in Opposition to Respondent's Exceptions were e-filed, sent by U.S. mail, and/or served electronically on February 10, 2017, to the following:

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