

I. INTRODUCTION

Respondent MHA, LLC d/b/a Meadowlands Hospital Medical Center (“Respondent”) submits this Reply Brief in opposition to the Health Professionals & Allied Employees, AFT/AFL-CIO’s (“Union”) Answering Brief and in further support of its Exceptions to the September 20, 2016 Decision and Recommended Order of Administrative Law Judge Steven Davis (“ALJ”). The Union’s Answering Brief ignores the credible evidence in the record while, on at least one significant point, misconstrues well-established Board law.

For the reasons explained herein and in Respondent’s Brief in support of its Exceptions, the Board should sustain Respondent’s Exceptions, reverse the ALJ’s findings and conclusions of law, and dismiss the Complaint in its entirety.

II. ARGUMENT

A. The Union Engaged In “Economic Pressure Activity.”

The Union asserts that the ALJ’s findings must be affirmed as there is no dispute that the Union engaged in the communications at issue. (UB p. 4).¹ This argument is misleading as it is not the occurrence of the communications that is disputed, but rather, the *context* of the communications that rose to the level of “economic pressure activity” in violation of the parties’ No-Strike Clause. The Union’s conduct, in conjunction with its statements, demonstrates the Union’s intent to breach the CBA, disrupt operations, and place significant economic pressure on the Hospital--a violation of the parties’ No-Strike Clause. For example, the Union conceded engaging in extensive research efforts to dig up “dirt” on Respondent (Tr. 3168; 2970; 3302-03; R115); researching Respondent’s other business ventures, including its investors, with an intent to thwart their economic gain (Tr. 3251; 3253; 3323-25; R152 and R167); publishing negative information about the Hospital on its publicly-accessible website (Tr. 3187; 3250-51; 3311;

¹ Citations to the Union’s Answering Brief shall be referred to as “(UB p. __).” Citations to Respondent’s exhibits are (R__), General Counsel’s exhibits are (GC__), and Joint exhibits are (J-__).

GC11; R119 and R159); conferring with third-party advocacy groups and politicians to exert pressure on Respondent (Tr. 2945; 2971-72; 3056-57; 3439-40; R94; R110-R113; and R126-127); canvassing the town in which Respondent is located, going door-to-door, and distributing disparaging information about the Hospital to potential patients (Tr. 2932-35; 3056-57; 3221-22; 3224-25; 3439-40; 3453-54; R110-R113, R129 and R132); and distributing its research to media outlets (Tr. 2889-90; 2892; 2971-72; 3044-45; 3227-28; R82; R134; and GC89). That the Union carried out these activities is not in dispute.

The Union's contemporaneous conduct confirms its intent to place economic pressure on the Hospital. For instance, on March 19, 2013, Twomey sent an email to a reporter for The Bergen Record that described the sale of the Hospital as "opaque" (Tr. 2986; R83); issued press releases questioning the Hospital's financial viability (Tr. 2912-15; R87); conferred with a media reporter as to her intent to "dig deep on Lipsky and Dunaev next" to wit the Union responded that Lipsky and Dunaev are "our favorite topic" (Tr. 3233-36; 3319-22; 3341-42 R140-R144; R165-166); offered to send information it "had on" Dr. Lipsky and Dunaev to media outlets (Tr. 3234-35; 3319-22; R141; and R165-166); sought advice as to how "best to use" the Respondent's failure to obtain a license against the Hospital, and excitedly stated that the Union "can't wait to hit [the Hospital] with the ERISA suit" (D. 124:14-15; R163); and volunteered disparaging information about the Hospital to a media reporter, expressly stating that the Union did not want to be identified as the source of the information. (Tr. 3240; R146). The Union's attempt to disassociate itself from these activities is telling as it acknowledges that its conduct violated the parties' No-Strike Clause.

The Union's conduct, and the volume and extent of it, unequivocally show the Union's intent to place economic pressure on Respondent. Viewed in its totality, no rational factfinder

could conclude that the Union's intent was, as claimed by Twomey, to ensure the survival of the Hospital. (Tr. 2973:22-2975:6).

i. The Truthfulness And Source Of The Information Is Irrelevant

In an attempt to deflect from the overwhelming record evidence, the Union asserts that its statements were truthful, and that some of the information it disseminated was obtained lawfully through the "Open Public Records Act" (UB pp. 6-9). Even if true, this does not excuse the contractual violation. The No-Strike Clause is clear and unambiguous. It does not mandate notice of a breach as a prerequisite as the Union argues (UB pp. 10-11). It contains no safe-haven defense for violations resulting from the use of truthful or lawfully obtained information. The Union's argument is a red-herring and should be disregarded as such.

ii. The No-Strike Clause Is Enforceable As Written

The Union's assertion that the No-Strike Clause is unenforceable because a union cannot waive employees' Section 7 rights to communicate with third-parties, (UB pp. 36-38), is unavailing and refuted by applicable Board law. It is well-settled that a Union may waive its members' Section 7 rights, including the right to strike, and their constitutional rights guaranteed under the First Amendment, as part of the collective-bargaining process. See, e.g., NLRB v. Magnavox Co. of Tenn., 415 U.S. 322 (1974) (concluding that a union may waive the right to strike); DTM Corp., 358 NLRB 974, 974 (2012) (same); Leonard v. Clark, 12 F.3d 885, 889-90 (9th Cir. 1993) (union lawfully waived its members' First Amendment rights in a collective bargaining agreement, noting that "even if it were to conclude that such rights were violated, the Union voluntarily 'restricted or agreed to waive the full exercise of those constitutional rights' by entering into its labor agreement" and "if the Union felt that First Amendment rights were burdened by Article V [of the agreement], it should not have bargained them away and signed

the agreement.”); Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1096 (3d Cir. 1988); Lake James Cmty. Volunteer Fire Dep't v. Burke Cty., 149 F.3d 277, 280-82 (4th Cir. 1998).

The Union’s reliance on Ford Motor Co., 233 NLRB 698 (1977) is misplaced. In Ford Motor Co., the Board, in reliance on NLRB v. Magnavox Co. of Tenn., 415 U.S. 322 (1974), concluded that although a union is precluded from waiving its members’ rights to solicit and distribute literature both on and off company premises, a union may agree to “silence its own voice” with respect to distributing literature. 233 NLRB at 699-700. In Magnavox, the Supreme Court held that a union could not waive its members’ Section 7 rights to the extent it involved “the rights of the employees to exercise their choice of a bargaining representative.” Id. at 325. However, the Magnavox Court explicitly noted that a union may waive members’ Section 7 rights to engage in strikes, work stoppages, or other concerted activities that affected “rights in the economic area.” Id. Thus, the Board’s holding in Ford Motor Co. was limited to Section 7 rights that bear on an employee’s ability to freely select a bargaining representative – not “rights in the economic area.”

Here, the Union’s agreement to refrain from strikes and “other economic pressure activity” concerns a right squarely in the “economic area.” Unlike the right to communicate and distribute literature on non-working time and away from the company’s premises, the ability to engage in economic pressure activity against one’s employer has no bearing on the members’ ability to choose a bargaining representative. Thus, the holding in Ford Motor Co. is inapposite. Therefore, irrespective of First Amendment rights it may have had, the Union negotiated away any right to petition government and political representatives in an attempt to exert economic pressure against Respondent. The Union, having waived these rights in the Agreement, cannot now turn to the First Amendment to “recapture surrendered rights.” See Paragould Cablevision, Inc. v. Paragould, 930 F.2d 1310, 1314 (8th Cir. 1991).

iii. Respondent Was Privileged To Suspend Bargaining

The Union argues that Respondent was not privileged to suspend bargaining because this counter-measure was not narrowly tailored to remedy the Union's "economic pressure activity." (UB p. 12). In doing so, the Union ignores applicable Board law.

It is well-established that when one party commits a material breach of a collective bargaining agreement, the non-breaching party is entitled to suspend its bargaining obligation until the party in violation cures and remedies said breach. Arundel Corp., 210 NLRB 525, 527 (1974). The Board's decisions in Arundel Corp. and United Elastic Corp., 84 NLRB 768 (1949) are instructive. In Arundel Corp., the union struck in violation of the no-strike provision in the parties' collective bargaining agreement. In response, the employer refused to bargain. The Board dismissed the complaint, finding "the Respondent was under no obligation to meet and bargain with the Charging Party so long as the strike . . . continued and its conditioning of bargaining with the Charging Party on the latter's abandonment of this strike was not unlawful." Id. at 527. The Board noted that a violation of the no-strike clause was a material breach of the parties' collective bargaining agreement that privileged the employer to suspend its bargaining obligation. The Board did not conclude that the employer was only privileged to suspend bargaining as to certain provisions related to the union's strike. Similarly, in United Elastics Corp., the Board held that the employer lawfully suspended its bargaining obligation with the union for as long as such wrongful strike continued. 84 NLRB at 772-73. The Board reasoned that to permit one party to shirk its contractual obligations would "impart[] futility to a bargaining process hopefully developing in the interest of industrial peace." Id. at 773.

Like the strike activity in Arundel Corp. and United Elastic Corp., the Union's breach of the No-Strike Clause here was material. As such it privileging Respondent to suspend bargaining for as long as the unlawful conduct continued.

iv. The ALJ's Credibility Determinations Are Not Supported

Contrary to the Union's argument, the ALJ's credibility findings are inconsistent with the record evidence. (UB pp. 12-16). In particular, with respect to Respondent's Affirmative Defense, the ALJ found the Union's witnesses' testimony credible, concluding that the Union's intent for engaging in the admitted conduct was to "ensure the survival of the Hospital." (UB p. 15). The ALJ ignored the credible record evidence. See Paragraph II (A), supra. As an example, Twomey testified that the Union's purpose for creating a separate banner on its website dedicated solely to issues and disputes between the Union and Respondent, which was available for the general public to view, was "to keep our membership aware of what's going on." (Tr. 2877). Twomey's testimony was not credible in that she acknowledged that other information on the website was limited to "members only" and, as such, was not publicly accessible (Tr. 2877). Had the Union intended to use the information to educate its members, it would have restricted access to this page accordingly. Similarly, the ALJ credited the testimony of Jeanne Otersen in which she denied any participation in the NJCA's door-to-door canvassing of Secaucus, NJ residents. However, Otersen's testimony is contradicted by a March 29, 2013 e-mail from Phyllis Salowe-Kay, Executive Director of NJCA, to Otersen prior to NJCA's canvassing, in which Otersen wrote, "write exactly what you want it to say with quotes you think are important and decide who we are telling people to contact." (R132). Otersen was referring to the flyers that were later handed out during the canvassing. The record is replete with similar inconsistencies.

The ALJ credited the testimony of the Union witnesses at face value without any analysis or reasoning explaining why he did so. See, e.g., E. S. Sutton Realty Co., 336 NLRB No. 33

(2001) (reversing ALJ where ALJ did not fully address all inconsistencies in record, relying instead on witnesses testimony that was contradicted by record evidence); Stevens Creek Chrysler Jeep Dodge Inc., 353 NLRB 1294 (2009) (remanding decision where ALJ failed to address conflicting testimony); PPG Aerospace Indus., Inc., 353 NLRB 223 (2008) (remanding decision where ALJ failed to adequately explain why he credited employee over supervisor).

v. **The Union's Other Contracts Are Relevant And Probative**

The Union asserts that the ALJ properly disregarded the Union's 22 collective-bargaining agreements with other employers—none of which included similar “economic pressure” language -- determining that the language was likely “included because it was included in the Liberty contract.” (UB pp. 16-18) (D. 132:35-41). Contrary to the Union's assertion and the ALJ's findings, the CBAs are relevant as they shed light on the Parties' intent in negotiating the express language in the No-Strike Clause prohibiting “economic pressure activity.” The uniqueness of the language at issue is strong evidence of the Union's intent to waive its right to engage in “economic pressure activity.” Furthermore, the fact that the Union drafted this language and was aware of it as a result of its dealings with Respondent's predecessor, is relevant for interpretive purposes. See Cal. Offset Printers, 349 N.L.R.B. 732, 735 (2007) (concluding that “ambiguity in the scope of any term, and absent past practice or extrinsic evidence to illuminate the parties' intent, [the Board] construe[s] such ambiguity against the drafter”) (citing Lafayette Park Hotel, 326 NLRB 824, 828 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999)). Therefore, the absence of the relevant language from the Union's 22 other collective-bargaining agreements should have been considered by the ALJ.

B. The ALJ's Evidentiary Rulings Were Highly Prejudicial To Respondent

The Union argues that the ALJ's evidentiary rulings revoking subpoenas to various third-parties and, on one occasion, outright refusing to issue a subpoena constituted "harmless error." (UB pp. 19-35). The opposite is true.

i. The ALJ's Revocation And Refusal To Issue Third-Party Subpoenas

The Union asserts that the ALJ's sua sponte refusal to issue a subpoena to David Knowlton and the ALJ's decisions to revoke the subpoenas to Adrien Dumoulin-Smith and other third-party entities did not prejudice Respondent as the information sought was "cumulative and duplicative." (UB pp. 19-27). The record evidence contradicts the Union's argument.

The decisions in Canova v. NLRB, 708 F.2d 1498 (9th Cir. 1983) and McDonalds USA, 363 NLRB No. 144 (2016) are inapposite. In Canova, the ALJ refused to issue a subpoena to the Workers' Compensation Appeals Board for production of the employees' deposition transcript. The Court of Appeals for the Ninth Circuit affirmed, finding the failure to issue the subpoena harmless for the following reasons: (1) any records would be subject to the statutory privilege and prohibition against disclosure under California law; (2) the employee's deposition testimony would not be probative of his actual condition, and Canova introduced medical expert reports that addressed this issue; (3) despite being in possession of a portion of the deposition transcript, Canova failed to use any portion of it on cross-examination; and (4) Canova could have obtained the deposition transcript from its insurance carrier--a less obtrusive means. Id. at 1502-03. Similarly, in McDonalds USA, the Board reasoned that the subpoenas "sought information which was 'materially identical to the information' the respondent sought in its subpoena to the charging party union, and 'reiterated demands for materials also directed to the [union].'" Id. at *2-3.

Unlike Canova and McDonalds USA, the information Respondent subpoenaed was not cumulative or duplicative. Rather, the subpoenas sought evidence that was both relevant and critical to Respondent's Affirmative Defense; in particular, testimony and documents related to an October 18, 2012 e-mail from Wardell Sanders listing the subpoenaed parties and the Union's agents as recipients, confirming that the parties met to discuss the Union's labor disputes with Respondent. (Tr. 3189-90; Tr. 3203-04; Tr. 3406-09; R121, R126, and R127). At the hearing, the Union's witnesses provided vague and incomplete testimony when questioned as to the events outlined in Sanders' October 18, 2012 e-mail. (Tr. 3189-90, 3203-3211:2; 3217:17-321; R121, R126, and R127).

Moreover, unlike Canova and McDonalds USA, Judge Davis expressly held that the subpoenas sought evidence that was both relevant and "critical" to Respondent's affirmative defense, not in Charging Party's possession, and "not obtainable from another source." (J1-S p. 8). Further, there is no indication that the information was subject to a statutory privileged as in Canova. Notwithstanding, the ALJ improperly revoked the subpoenas without even conducting an in camera review. See Ozark Auto. Distribs., Inc., 779 F.3d 576, 581-82 (D.C. Cir. 2015) (reversing Hearing Officer based on failure to conduct in camera review prior to revoking subpoenas, noting that "she did not know what the documents would have shown [y]et the company's need for the documents necessarily depended on what the documents would have tended to prove").

For these reasons, the ALJ's evidentiary rulings, denying Respondent the opportunity to question Knowlton and Smith under oath, resulted in a deprivation of due process and, therefore, constitutes reversible error. See Ozark Auto. Distribs., Inc., 779 F.3d at 585-86 (vacating the Board's Order as the Hearing Officer's revocation of the subpoenas was prejudicial to the

employer's ability to establish its defense, as well as obtain truthful information from witnesses upon cross-examination).

ii. The Union's Communications With Kenneth Pringle

The Union argument that its January 5, 2011 e-mail to Kenneth Pringle was properly designated as attorney-client privileged is belied by the record evidence. First, the email, opening with: "You probably don't remember me, but I worked with you about 15 or so years ago in my capacity as the mayor of Belmar during the nurse's strike at Jersey Shore Medical center," is not indicative of an attorney-client relationship. (J1-J and J1-L). In fact, Pringle was retained by the Union in August 2012, 20 months after this e-mail. (D. 118:11-14).

Second, even assuming the conversation "related to the Union's support of New Jersey Senate Bill 1468," this does not transform the conversation into one of privilege. At no time does the Union even allege it sought Pringle's legal advice or assistance with its support of New Jersey Senate Bill 1468. (UB pp. 34-35). Thus, even accepting the Union's arguments as true, there is no legal basis for finding the communications privileged.

III. CONCLUSION

For the foregoing reasons, and those set forth in Respondent's Brief in Support of its Exceptions, the Board should sustain Respondent's Exceptions, reverse the ALJ's findings and conclusions of law, and dismiss the Complaint in its entirety.

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CERTIFICATE OF SERVICE

The undersigned affirms that on February 24, 2017, Respondent’s Reply Brief in Further Support of its Exceptions to Administrative Law Judge Steven Davis’ Decision was filed with the National Labor Relations Board using the e-filing system at www.nlr.gov, and that copies were served on the following individuals by electronic mail:

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