

Wal-Mart Stores, Inc. and United Food and Commercial Workers International Union, Local Union 99R, CLC and United Food and Commercial Workers International Union, CLC.¹ Cases 28–CA–16832, 28–CA–17141, 28–CA–17774, and 28–CA–17774–2

September 29, 2006

ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On July 6, 2005, the National Labor Relations Board issued an Order Severing and Remanding and Notice to Show Cause why the Respondent's production of certain documents and files in an unrelated State court proceeding should not be found to constitute a waiver of the attorney-client privilege.² On July 20, 2005, the Respondent submitted its response to the show cause notice, and on August 1, the General Counsel submitted a reply.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the responses to the show cause notice and finds, as explained below, that any privilege with respect to the documents and files in issue has been waived and that the Respondent must now produce them to the extent they are relevant to the allegations of the complaint.³

¹ We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

² The Board severed and remanded for the purpose of settlement that portion of the case dealing with the Respondent's maintenance of certain language in its associates' benefits book that the judge found was unlawful.

³ The Respondent's request for oral argument, made in conjunction with its response to the General Counsel's exceptions, is denied as the record, exceptions, briefs, and memoranda adequately present the issues and the positions of the parties. Additionally, UFCW Local 120's motion for reconsideration of the Board's decision to sever is denied on the basis that Local 120 lacks standing, the Board having previously denied its motion to intervene in this proceeding. In any event, the motion raises nothing not previously considered.

Local 120 has also filed a motion to modify notice posting remedy or alternatively to remand, which the General Counsel and the Respondent oppose, and Local 120's counsel submitted a *Reliant Energy* request to the Board which was opposed by the Respondent. Inasmuch as Local 120 was denied intervenor status in our July 6, 2005 Order Severing and Remanding, it lacks standing to file motions and make other submissions in this proceeding. See *Reliant Energy*, 339 NLRB 66 (2003) (authorizing “parties in unfair labor practice cases . . . to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed”) (emphasis added). Accordingly, we deny Local 120's motion and request.

After the General Counsel filed its opposition to Local 120's motion to modify notice posting remedy, the Charging Party filed a notice that it joined in the motion. The Charging Party asserts therein that the Board should modify its standard notice posting remedy by requiring

Background

During the underlying unfair labor practice hearing in these cases, the General Counsel served the Respondent with a subpoena duces tecum requiring it to produce, among other things, documents and electronic files from the Respondent's “Remedy System” for the years 2000 through 2002.⁴ The Respondent moved to quash those portions of the subpoena on the basis that the documents and files in the Remedy System were protected from disclosure by the attorney-client privilege and as attorney work product. Administrative Law Judge Gregory Z. Meyerson found that Remedy System documents and files were subject to the attorney-client privilege and granted the motion to quash. The judge reiterated that ruling in his decision and recommended Order, which issued on February 28, 2003.

The parties filed timely exceptions to the judge's decision and supporting and responsive briefs. Among other things, the General Counsel's exceptions take issue with the judge's ruling on the subpoena issue.

the Respondent to post a remedial notice on its intranet. The Respondent, in its motion to strike and opposition [to the Charging Party's notice], argued that because “there are no intervenors to join . . . there is no Motion to Modify properly before the Board.” Assuming arguendo, that the Charging Party's notice is itself a motion to modify the notice, we deny it because the Charging Party failed to raise this issue in the underlying proceeding. See *Nordstrom, Inc.*, 347 NLRB No. 28, slip op. at 1 (2006) (citing *International Business Machines Corp.*, 339 NLRB 966 (2003)). Further, this remedial issue is beyond the scope of this Order Remanding, which only concerns the admission into the record of relevant documents and files from the Remedy System. Accordingly, the Respondent's motion to strike is denied as moot.

Member Liebman adheres to her view in *Nordstrom*, supra, that it would be appropriate to address the issue of intranet posting of notices in compliance proceedings. She recognizes under the current law, the issue should have been raised to the judge in the initial proceeding. Given that the case is being remanded to the judge for reopening of the record, however, no purpose would be served by denying the Charging Party the opportunity during those proceedings to put on evidence as to the appropriateness of issuing a remedial order requiring intranet posting.

⁴ A corporate document describes the Remedy System as a “database designed to record union activity incidents, run reports summarizing union activity, and track activity occurrences.” According to Senior Labor Manager Vicky Dodson, incidents of union activity at the Respondent's stores are first reported to a paging system called the “Hotline.” Labor managers answer the pages, give advice to local store managers, and then write a summary of the incident and any advice given. Those summaries are transcribed by clericals into the Remedy System. A number of managers have access to the Remedy System. Dodson testified that in-house counsel review every entry. She said she receives four to seven calls a week from in-house counsel, seeking clarification about the information entered into the system and giving additional or corrected advice from that already given by labor managers. Unlike the initial advice that a labor manager may give someone calling the Hotline, any additional direction from in-house counsel is not recorded into the Remedy System. Dodson said the Remedy System is also used for open-door calls from associates or managers seeking answers to questions or concerns.

While the case was pending at the Board on August 26, 2004, the Respondent filed a motion to supplement the record, which advised that, in January 2004, pursuant to a court order in an unrelated State court proceeding, the Respondent had produced the Remedy System documents subpoenaed by the General Counsel. Pursuant to a motion by the General Counsel, the Board issued a Notice to Show Cause why the asserted privilege should not be deemed waived. In doing so, the Board specifically directed the Respondent to address the circumstances surrounding its disclosure of the subpoenaed documents and files in the State court proceeding and directed the General Counsel to file a responsive document addressing the relevance of the subpoenaed documents and files to the complaint allegations in light of the current status of the litigation and exceptions pending before the Board. The Board also gave the Respondent leave to address the relevance issue.

Positions of the Parties

In its response to the notice to show cause, the Respondent concedes, for purposes of this proceeding, that the State court disclosure constituted a prospective waiver of the privileges. The Respondent contends, however, that the January 2004 waiver in an unrelated proceeding cannot operate retroactively to compel disclosure of the records that Judge Meyerson had already ruled in the unfair labor practice proceeding were privileged from disclosure. It contends that the Board's Rules and Regulations call for the evidentiary record to close with the issuance of the judge's decision, citing Section 102.45(b), which defines what constitutes the record in the case. In this connection, the Respondent argues that the only issue before the Board is whether Judge Meyerson's ruling on the motion to quash was proper based on the facts existing at the time the ruling was made. Regarding relevance, it contends that in the event that the Board decides a waiver occurred, the waiver should only affect the General Counsel's exception to the judge's dismissal of a single alleged 8(a)(1) violation concerning the Respondent's transfer of the store manager.⁵

The General Counsel contends that Judge Meyerson's ruling was in error and that, in any event, the Respondent's waiver of the asserted privilege requires production of the subpoenaed Remedy Systems documents in this proceeding. He contends that the judge's decision was not a final one, and, accordingly, that the admitted waiver is effective in this proceeding because it occurred

⁵ The Respondent also contends that there is no need to reconvene the hearing to allow additional testimony because the only possible additional evidence would be references in the Remedy System files to the store manager's transfer, if such references exist.

during the litigation of this matter, while the case was pending on exceptions before the Board. The General Counsel points out that the Respondent was aware that the judge's evidentiary ruling with respect to the Remedy System documents and files was the subject of exceptions. With respect to relevance, the General Counsel contends that the subpoenaed material bears on his exception to the judge's dismissal of the 8(a)(1) allegation and to the Respondent's exceptions to the judge's finding of several 8(a)(1) and (3) violations.

Analysis

Once waived, the attorney-client privilege is lost in all forums for proceedings running concurrent with or after the waiver occurs. See, e.g., *Genentech, Inc. v. U.S. International Trade Commission*, 122 F.3d 1409, 1416-1417 (Fed. Cir. 1997) (waiver in district court proceeding operated as a waiver in concurrent International Trade Commission proceeding). See also *Centuori v. Experian Information Solutions, Inc.*, 347 F.2d 727, 729 (D. Ariz. 2004). Here, as stated earlier, the Respondent concedes that the production of the subpoenaed documents and files in the State court proceeding constituted a waiver of applicable privileges. It argues, however, that the waiver can have no effect in this proceeding because it occurred months after the judge here ruled that the documents were privileged. We disagree.

The Respondent's admitted waiver in the State court proceeding operates concurrently here, and not retroactively (as the Respondent argues), because the judge's ruling was not final when the waiver took place. In Board proceedings, a judge's decision and *recommended* order do not become final until after the time for the filing of exceptions expires, provided that no exceptions are filed. Board's Rules and Regulations, Section 102.48(a) and (b). Here, the General Counsel filed timely exceptions to the judge's decision, including his evidentiary ruling on this issue, thereby preserving the issue for Board review.⁶ The Respondent's disclosure took place while the case was pending before the Board on exceptions. Because litigation of this unfair labor practice case is an ongoing matter, the Respondent's waiver of the privilege in the State court proceeding precludes the Respondent from asserting it in this unfair labor practice proceeding.

The Respondent fares no better with its contention that the judge's evidentiary ruling must be evaluated in light

⁶ See *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir. 1984), in which the court found that the employer, the prevailing party in the Regional Director's decision regarding the supervisory status of certain employees in a representation case, "acted at its peril" and violated the Act by discharging the employees before an appeal (request for review by the Board) of the supervisory status issue was concluded.

of the facts existing at the time of the ruling. The judge ruled that the Remedy System files and documents were protected by the attorney-client privilege. It is unnecessary for us to decide whether that ruling was correct. We find only that, because of its actions in the State court proceeding, the Respondent may no longer assert the privilege that it once claimed over the Remedy System documents and files in this pending matter.⁷

With respect to relevance, we disagree with the Respondent's contention that relevance is to be assessed only in regard to the General Counsel's exceptions. In our view, relevance is to be assessed in regard to the en-

⁷ The Respondent's argument that the record closed upon issuance of the judge's decision is incongruent with its own August 2004 motion—which the Board granted—to supplement the record. It is also inconsistent with the Respondent's representation in that motion that it wished to call the Board's attention to the state court disclosures "to ensure that the Board's decision on this matter . . . is based on a full factual record." Parties may also file a motion to reopen the record after it has closed based on newly discovered evidence. Rule 102.48(d)(1).

tire case pending before the Board, i.e., the General Counsel's exceptions and the Respondent's exceptions.

Inasmuch as the Remedy System is a part of a corporate network for reporting union activity at the Respondent's facilities, it is entirely possible that the documents and files contain information relevant to the exceptions that the General Counsel and the Respondent filed with the Board. See *NLRB v. North Bay Plumbing*, 102 F.3d 1005, 1008 (9th Cir. 1996). Accordingly, we reverse the judge's ruling quashing the subpoena, and we shall remand this proceeding to the judge to reopen the record to receive relevant evidence and make findings with respect thereto.

IT IS ORDERED that this proceeding is remanded to the judge for the purpose of reopening the record to receive relevant evidence, making findings, and taking further appropriate action.