

**CNN America, Inc. and Team Video Services, LLC, Joint Employers and National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 31, AFL-CIO and National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 11, AFL-CIO.** Cases 5-CA-31828 and 5-CA-33125 (formerly 2-CA-36129)

May 30, 2008

DECISION AND ORDER REMANDING  
PROCEEDING<sup>1</sup>

CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 24, 2007, the General Counsel served a 243-paragraph subpoena duces tecum on Respondent CNN America, Inc. (CNN) in connection with the above proceeding, and Charging Party NABET<sup>2</sup> Local 31 served CNN with a similar subpoena. Thereafter, a hearing opened before Administrative Law Judge Arthur Amchan of the National Labor Relations Board on November 7, 2007. CNN filed with the judge a petition to revoke the subpoenas, which the judge denied on the record.

Specifically, Judge Amchan stated: “I regard the subpoena as enforceable to the extent that I haven’t either revoked it or deferred making a decision on whether to grant the petition to revoke.” In response to CNN’s assertion that its documents were subject to the “reporter’s privilege” against disclosure, Judge Amchan ruled that CNN is required to produce requested documents, except that it is not required to disclose “confidential sources.”<sup>3</sup>

CNN’s Appeal

On December 7, 2007, CNN filed a request for special permission to appeal the denial of its petitions to revoke subpoenas, with a memorandum and exhibits attached.<sup>4</sup>

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>2</sup> National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 31, AFL-CIO.

<sup>3</sup> Judge Amchan defined “confidential sources” as “people that provide information to CNN on the condition that their identity be kept confidential” (citing *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003)).

<sup>4</sup> On April 17, 2008, the General Counsel filed a motion to bifurcate and expedite consideration of certain issues. On April 30, 2008, the Board granted this motion to bifurcate with respect to the documents

In its Special Appeal, CNN argues that the subpoena requests are overbroad and unduly burdensome to produce,<sup>5</sup> that the subpoenas seek irrelevant information, and that the First Amendment “reporter’s privilege” protects many of its documents from disclosure. In addition, CNN asserts that the subpoenas do not conform to the Federal Rules of Civil Procedure,<sup>6</sup> and, further, that they do not conform to the concepts regarding electronic discovery set forth in *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Second Edition (The Sedona Conference Working Group Series, 2007) (*The Sedona Principles*).<sup>7</sup>

The General Counsel argues, inter alia, that the judge correctly ruled that the subpoenas are enforceable, that they seek information relevant to the complaint allegations and CNN’s defenses thereto, and that CNN has failed to establish the elements of a reporter’s privilege, even assuming that such a privilege exists. Charging Party NABET Local 31 makes similar arguments in support of the judge’s ruling.

1. Discussion

1. *Relevancy and burdensomeness.* Section 11(1) of the Act states that the Board shall revoke a subpoena if:

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that CNN asserted are protected from disclosure by the attorney-client privilege and ordered CNN to produce the disputed documents to the judge for in-camera inspection. In addition, the Board denied the General Counsel’s motion to bifurcate consideration of the issue concerning the Respondent’s payroll records requested in the subpoena.

<sup>5</sup> CNN provided an estimate from an electronic discovery vendor stating that the cost to obtain and provide the requested information would be over 8 million dollars.

<sup>6</sup> Sec. 101.10(a) of the Board’s Rules and Regulations states that “[t]he rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling.” The Federal Rules of Civil Procedure (notably Rules 26 and 34) were amended on April 12, 2006 (effective December 1, 2006) to address emerging issues relating to electronically stored information. The reasonableness principle in Federal Rule 1 is given effect through Rule 26(b)(2)(C):

*When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative
- (ii) . . . or

- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

<sup>7</sup> *The Sedona Principles* is a publication of The Sedona Conference, which is “a nonprofit legal policy research and educational organization which sponsors Working Groups on cutting-edge issues of law. The Working Group on Electronic Document Production is [composed] of judges, attorneys, and technologists experienced in electronic discovery and document management matters.” *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 656 fn. 2 (M.D.Fla. 2007).

“the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.” In this proceeding, the documents requested by the subpoenas are plainly related to the matters under litigation.

It is well established that the party seeking to avoid compliance with a subpoena bears the burden of demonstrating that it is unduly burdensome or oppressive. See *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997). To satisfy that burden, the party must show that the production of the subpoenaed information “would seriously disrupt its normal business operations.” *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996) (quoting *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)).

The evidence needed to pursue the complaint allegations in this case is necessarily quite broad, considering CNN’s extensive news-gathering operations in Washington, D.C. and New York, New York, as well as the large number of employees alleged in the consolidated complaint to have been unlawfully discharged. The subpoenas also raise complex issues due to their requests for electronically stored information “in native form, with all metadata and attachments intact.”

In light of these considerations, we grant CNN’s request for special permission to appeal with respect to this issue. With respect to the merits of the parties’ positions, we find, without reaching whether CNN’s estimates of the costs of electronic document production in this case are accurate or whether another form of production might be less burdensome, that CNN makes a plausible argument that production of certain types of information in electronic form could be disruptive of its business operations.

A. *Balance of interests.* Accordingly, under the particular circumstances of this case, we find it necessary to strike a balance between the competing interests of the parties in the relevancy and necessity of the information and the potential cost and burdensomeness of its production in the form requested. We find that such a balance can best be struck by applying the Federal Rules of Civil Procedure and utilizing *The Sedona Principles* as a useful structure for analysis. The *Sedona Principles* establish a multifactor framework for analyzing a large-scale request for documents, including electronically stored information. This document suggests an analysis that balances the potential disruption of business operations and other factors against the need for and relevance of the requested information.

B. *Appointment of a Special Master.* In addition, we find that the extensive analysis required under the Federal Rules and *The Sedona Principles* would most effectively be accomplished by ordering the appointment of an administrative law judge to serve as a special master to consider the parties’ arguments and to aid them in resolving their disputes. Accordingly, we grant CNN’s request for special permission to appeal Judge Amchan’s ruling, and we shall authorize the chief administrative law judge to assign another administrative law judge to serve as a special master to resolve issues concerning the subpoenas. This judge shall work with the parties concerning production of subpoenaed documents, including balancing the cost and burdensomeness of producing documents with the relevance of the documents to the matters under litigation, using the framework set forth in the *Sedona Principles* for guidance. If necessary, this judge shall also make recommendations to the Board concerning issues that cannot be resolved. We believe that this approach will minimize disruptions to the ongoing unfair labor practice hearing and allow Judge Amchan to focus on the litigation of the unfair labor practices alleged in the consolidated complaint.

## 2. Reporter’s privilege

A. *Parties’ positions.* In its Special Appeal, CNN also argues that the judge should have revoked the subpoenas to the extent that they require disclosure of information protected by “journalists’ privilege” (hereinafter referred to as “reporter’s privilege”). Judge Amchan interpreted the privilege as applying only to information from confidential sources.<sup>8</sup> CNN argues that the judge erred in applying Seventh Circuit precedent<sup>9</sup> in so concluding. It asserts that the documents at issue here were created or utilized in New York and the District of Columbia, and that the United States Courts of Appeals for the Second and District of Columbia Circuits have recognized a qualified privilege not only for confidential sources, but also for editorial and newsgathering processes.<sup>10</sup>

CNN further contends that the Board should use the balancing test developed by these circuits to analyze whether a qualified reporter’s privilege shields subpoenaed documents. Applying this test to the present case, CNN argues that the privilege applies because the General Counsel failed to demonstrate that (1) the information sought is not obtainable from alternative sources, (2) the information is crucial to his claim, and (3) the General Counsel’s need for the information outweighs

<sup>8</sup> Tr. at 108, attached to CNN’s brief, Tab 6.

<sup>9</sup> *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

<sup>10</sup> Citing *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

CNN's interest in protecting the substance of its newsgathering.

The General Counsel argues that the information sought in the subpoena is critical to his case because CNN itself placed its method of newsgathering at issue by raising defenses that depend on details of its newsgathering techniques. The General Counsel also argues that the equities weigh more heavily in favor of disclosure when, as here, the news gatherer is a party in the case; and that privilege is more easily overcome when, as here, non-confidential information is at issue.

Local 31 argues that the judge properly rejected CNN's invocation of the reporter's privilege, as neither Supreme Court nor Board precedent recognizes a reporter's privilege, and that even if such a privilege exists, CNN has waived it by raising its newsgathering techniques as a "sword" in its defense. The Union further asserts that CNN is the sole source for information relating to its newsgathering and editorial processes.

*B. Analysis.* We grant CNN's request for special permission to appeal on this issue, and, upon careful consideration, we deny on its merits CNN's appeal from the judge's ruling. We find it unnecessary to resolve whether the claimed privilege applies because, even assuming that it does, it appears that the General Counsel can overcome the privilege under the balancing test urged by CNN.

As noted above, the balancing test developed by those courts which recognize a qualified reporter's privilege can be generally stated as follows: 1) the information sought is not obtainable from alternative sources, 2) the information is crucial to establish the claim, and 3) the need for the information outweighs the interest in protecting the substance of the reporter's newsgathering.<sup>11</sup>

Applying this balancing test to the facts before us, initially it appears that the information sought by the subpoena is not available from alternative nonmedia sources. As the Union points out, only CNN would possess information relating to its newsgathering and editorial processes directly implicated in its defenses, and the only way to obtain this information is to request it from CNN.<sup>12</sup> Second, it appears that the information sought is critical to the General Counsel's case because CNN has placed its method of newsgathering at issue by raising defenses that depend on details of its newsgathering

techniques. Third, we find that the General Counsel's need for the information outweighs the interest in protecting the substance of the reporter's newsgathering. In balancing the General Counsel's need for the subpoenaed information against CNN's assertions that the subpoenas intrude upon protected First Amendment rights, we find it significant that CNN does not allege that the information sought was obtained through a promise of confidentiality or that disclosure of the information would likely lead to the discovery of confidential information or sources. In these circumstances, the burden on CNN of production and the concomitant chill on the free flow of information are relatively slight. Hence, a lesser showing of need and materiality may be required to overcome the claimed privilege.<sup>13</sup>

Accordingly, even assuming that the information sought is covered by a qualified privilege, we conclude that the General Counsel's need for the information outweighs any possible intrusion on the newsgathering process.

Finally, we note that although CNN argues that information pertaining to its newsgathering and editorial processes is protected by the reporter's privilege, CNN has not carefully distinguished between assertedly privileged news content and its business methods of assembling news stories. Thus, to the extent that CNN describes proprietary interests in the confidentiality of the subpoenaed information, such interests should not be confused with asserted public policy interests in the confidentiality of editorial and newsgathering sources. Moreover, the courts have held that the government's interest in obtaining this type of business information generally outweighs confidentiality or privacy interests. See, e.g., *St. Luke's Regional Medical Center, Inc. v. U.S.*, 717 F.Supp. 665 (N.D. Iowa 1989). Here, CNN has asserted no basis for finding otherwise.<sup>14</sup>

#### Conclusion

The Respondent's request for special permission to appeal concerning the burdensomeness of complying with the subpoena is granted, and we shall remand this aspect of the proceeding and authorize the chief administrative law judge to assign another administrative law

<sup>11</sup> See, e.g., *Zerilli v. Smith*, 656 F.2d 705, 713-714 (D.C. Cir. 1981).

<sup>12</sup> The General Counsel and the Union correctly note that a party cannot invoke the privilege as both a sword and a shield. See, e.g., *Anderson v. Nixon*, 444 F.Supp. 1195, 1199, 1200 (D.D.C. 1978) (rejecting plaintiff's "attempt[ ] to use the First Amendment simultaneously as a sword and a shield" and finding that "where the information sought to be protected goes to the heart of the defense, the privilege must give way").

<sup>13</sup> A number of circuits, including the Second Circuit, while explicitly extending the privilege to include nonconfidential information, have implied that a lesser showing of need and materiality may be required to obtain such information. See, e.g., *Gonzales v. NBC*, supra; *NLRB v. Mortensen*, 701 F.Supp. 244, 248-249 (D.D.C. 1988), citing *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), cert. denied 449 U.S. 1126 (1981), and *Continental Cablevision Inc. v. Storer Broadcasting Co.*, 583 F.Supp. 427, 434 (E.D. Mo. 1984).

<sup>14</sup> If CNN is concerned about disclosure of business information to third parties, it may seek a confidentiality agreement from the General Counsel.

judge to serve as a special master in resolving the issues described above. The Respondent's request for special permission to appeal with respect to the reporter's privilege is also granted, and, upon careful consideration, we find that CNN has failed to establish the elements of such a privilege, even assuming that such a privilege applies.

IT IS ORDERED that the Respondent's request for special permission to appeal the judge's ruling is granted, and the issues raised in this appeal, except as noted be-

low, are remanded to the chief administrative law judge for assignment of an administrative law judge who shall serve as a special master to resolve issues concerning the subpoenas duces tecum in the manner described above. The Respondent's appeal is denied with respect to the assertion that certain information is protected from disclosure by a journalist's or reporter's privilege.