

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

CEMEX, INC.

and

**Cases 28-CA-22165
28-CA-22169
28-CA-22220
28-CA-22313
28-CA-22409
28-CA-22534
28-CA-22699
28-CA-22711
28-CA-22726
28-CA-22967**

**GENERAL TEAMSTERS (EXCLUDING
MAILERS), STATE OF ARIZONA,
LOCAL UNION NO. 104, AN AFFILIATE
OF THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

CEMEX, INC.

and

**Cases 28-CA-22267
28-CA-22419
28-CA-22823
28-CA-22894**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 428, AFL-CIO**

**REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL FROM THE
ADMINISTRATIVE LAW JUDGE'S ISSUANCE OF PROTECTIVE ORDER
PROVISIONS CONCERNING DOCUMENTS SOUGHT BY COUNSEL FOR THE
ACTING GENERAL COUNSEL'S SUBPOENA DUCES TECUM**

Counsel for the Acting General Counsel (CAGC) requests special permission to appeal to the Board the issuance by Administrative Law Judge Burton Litvack (ALJ or Judge Litvack) of two of the provisions contained in protective orders covering documents sought by CAGC's subpoena duces tecum. The provisions at issue restrict the Charging Parties' representatives (other than counsel) from reviewing documents that have been ordered by the ALJ to be produced by Respondent and requires CAGC to return all "Confidential Information" used at the hearing -- whether produced by subpoena or not and whether part of the record or not -- to Respondent's counsel within 15 days after the record closes. Such provisions unfairly and unduly restrict the Charging Parties' right to fully participate at trial, impact on CAGC's presentation of its case, and deny CAGC and the Charging Parties the right to present and establish a full and complete record not only before the ALJ, but before the Board and reviewing courts as well. It is respectfully requested that the Board order the ALJ to rescind such provisions and to require Respondent to produce such documents without the burden of such restrictions.

I. BACKGROUND

A. Commencement of the Unfair Labor Practice Hearing and the ALJ's October 6, 2009 Protective Order

On September 14, 2009, the unfair labor practice hearing in this matter commenced before Judge Litvack. At that time, the hearing was based on the Order Further Consolidating Cases, Fourth Amended Consolidated Complaint and Notice of Hearing (Fourth Amended Consolidated Complaint), which had issued on June 30, 2009. The Fourth Amended Consolidated Complaint alleged, among other things, that Respondent violated Section 8(a)(1), (3), and (5) of the Act by, inter alia, transferring the work of its unionized workforce

in parts of Arizona to its non-unionized workforce, resulting in multiple layoffs and two plant closures.¹

During the early stages of the hearing, much time on the record was spent discussing Respondent's petition to revoke CAGC's September 4, 2009, subpoena duces tecum (the September 4 Subpoena). Respondent refused to produce certain documents sought by the September 4 Subpoena, including documents sought by CAGC in relation to the alleged unlawful transfer and diversion of Unit work. As a result, on October 6, 2009, the ALJ adjourned the hearing so that CAGC could seek enforcement of the September 4 Subpoena in United States District Court in the District of Arizona.² Before the ALJ hearing adjourned, however, Respondent submitted to the ALJ a Motion for Protective Order, which the ALJ granted in part and denied in part.³ Among the provisions granted by the ALJ is a provision

¹ Since that time, as discussed below, additional complaints have been issued and consolidated. The Fourth Amended Consolidated Complaint was based on charges and amended charges the Charging Parties filed between October 2, 2008, and June 30, 2009 in Cases 28-CA-22165, 28-CA-22169, 28-CA-22220, 28-CA-22267, 28-CA-22313, 28-CA-22409, 28-CA-22419 and 28-CA-22534. As discussed below, this complaint has since been further amended and further requests to consolidate other complaints have been granted by the ALJ.

² Respondent refused to furnish (1) the profit and loss statements of each of its Arizona facilities since January 1, 2006, and (2) the "nature, identity, and volume of work assigned to each of Respondent's facilities." Regarding the latter, which concerned the work diversion allegations, during the subpoena enforcement proceedings, United States District Court Judge James A. Teilborg asked CAGC to explain, in a Joint Production and Costs Statement (filed jointly by CAGC and Respondent), which documents would fall under that category and the necessity for such documents. The parties complied with the District Court's request and, by Minute Entry dated January 22, 2010 (Exhibit A) and an Amended Order dated February 1, 2010 (Exhibit B), the District Court ordered Respondent to produce the profit and loss statements, but denied CAGC's request for all of the documents that would show the "nature, identity, and volume of work assigned to each of Respondent's facilities." CAGC filed an appeal to the United States Court of Appeals for the Ninth Circuit, but withdrew the appeal before appellate briefs were filed. The withdrawal of the appeal was approved without prejudice by the Ninth Circuit on April 29, 2010. At the same time, CAGC withdrew and rescinded its September 4 Subpoena. CAGC's other subpoena duces tecum, which was issued on September 11, 2009, was also withdrawn and rescinded at the same time.

³ Respondent's Motion for Protective Order, before ALJ Litvack, also sought to exclude the Charging Parties from the hearing when "confidential information" was being discussed. (Exhibit C, paragraph 2) The ALJ denied that provision in the motion, explaining that: (1) he believed he did not possess the authority to exclude the Charging Parties and (2) prohibiting the Charging Parties from the hearing room denies them the right to present its case-in-chief and any rebuttal evidence. (Tr. 637:7-20; 639:4-13) Notwithstanding the ALJ's

requiring the return of “Confidential Information” to Respondent after the hearing closed, to wit:

This Order will continue to be binding throughout and after the final disposition of this action. All Confidential Information shall be used only for the prosecution and/or defense of this action. Within fifteen days (15) after the close of the record, Counsel for the General Counsel shall return all Confidential Information and any copies thereof (including summaries and excerpts) to Respondent’s Counsel.

(Exhibit C, paragraph 4; Tr. 639:13-14; 640:16-18) This provision is one of the two provisions concerning which CAGC appeals to the Board.

B. Resumption of the Unfair Labor Practice Hearing and the ALJ’s Issuance of a Second Protective Order

After the District Court issued its orders, discussed above at footnote 2, and after CAGC withdrew and rescinded its prior subpoenas, including the September 4 Subpoena (also described above at footnote 2), the hearing before Judge Litvack resumed on July 20 and 21, 2010. During those two days of hearing, the ALJ and the parties discussed administrative and document production issues in preparation for the next scheduled hearing dates (the hearing before the ALJ is scheduled to resume on and after September 13, at which time witness testimony is anticipated).

Specifically, during the July trial dates, the ALJ granted CAGC’s Revised Second Motion to Consolidate Cases for Hearing;⁴ the parties argued their respective positions

ruling on that provision, Respondent sought a protective order in District Court in response to CAGC’s subpoena enforcement proceedings. On February 1, 2010, the District Court issued a protective order, despite the ALJ’s ruling concerning the Charging Parties’ access to the hearing during times when confidential documents are being examined, stating that the Charging Parties “shall be excluded from the hearing at times when Confidential Information is being discussed.” (Exhibit B, page 7) However, as discussed below, it is CAGC’s position that the Court’s order would apply, in a reading most favorable to Respondent, only to the profit and loss statements ordered by the Court to be produced, and of those only such documents found by the ALJ to be confidential. Respondent has not produced the profit and loss statements.

⁴ The ALJ granted CAGC’s Revised Second Motion to Consolidate, ruling that the three complaints issued since June 30, 2009, should be litigated at the same time as the Fourth Amended Consolidated Complaint.

regarding Respondent's petitions to revoke certain paragraphs of the new subpoena duces tecum which CAGC had caused to served on Respondent's custodian of records on July 6, 2010 (the July 6 Subpoena); argued positions regarding the Respondent's petition to revoke the subpoena duces tecum served on Respondent by the Charging Party Teamsters Union (the Teamsters' Subpoena); and addressed matters pertaining to the protective orders that had been issued by the ALJ and District Court Judge Teilborg.

Regarding the protective orders, the ALJ concluded that, inasmuch as the District Court's orders, described above in footnote 2, applied to the September 4 Subpoena, and that both the September 4 Subpoena and CAGC's later subpoena of September 11 had been withdrawn, he was not bound by the protective order previously issued by the District Court. Among the issues discussed was the District Court's denial of access to the Charging Parties, their representatives, and their attorneys to the hearing room when confidential information was being discussed. The ALJ reasoned that, under Board law, the Charging Parties, its counsel, and its representatives, have the full right to participate in a hearing, including viewing confidential information. Equal in importance, the Charging Parties' attorneys, as well as CAGC, may have a non-attorney in the hearing -- often the Charging Parties' representative -- helping to explain or interpret documents that may be produced as part of the subpoenaed material. Thus, the ALJ concluded, any protective order that diminishes the

(Tr. 695:18-696:15). These three complaints, issued on November 30, 2009, March 31, and May 28, 2010 were based on charges filed by the Charging Parties in Cases 28-CA-22699, 28-CA-22711, 28-CA-22726, 28-CA-22823, 28-CA-22894 and 28-CA-22967.

rights of the Charging Parties to conduct its business during a trial would deny the Charging Parties their due process rights. (Tr. 719:8– 721:23; 804:20-805:21; 823:6-824:3)⁵

Despite the ALJ's appropriate ruling assuring the Charging Parties' representatives' right to be present in the hearing at times when confidential documents are shown, at the same time, on July 21, the ALJ also issued a protective order that denied the Charging Parties their due process rights in other respects.

In short, the protective order issued by ALJ, which applies to documents to be produced pursuant to CAGC's July 6 Subpoena (a copy of which is attached hereto and is marked as Exhibit D) and Teamsters' Subpoena (a copy of which is attached hereto and marked as Exhibit E), prohibits the Charging Parties' representatives, other than counsel, from being present when reviewing certain documents are presented by Respondent for inspection at its facility. The documents at issue, which are sought by CAGC's July 6 Subpoena and the Teamsters Subpoena, are essentially the same,⁶ and include documents that are relevant and material to establishing the crux of the unfair labor practice allegations at issue, i.e., Respondent's diversion or work from its union facilities to its non-union facilities and the scope of the Unit represented by the Unions. (Exhibits D and E, paragraphs 21(a) through 21(d), 33 to 35, 38, and 39.)

⁵ As stated above, the ALJ concluded that the District Court's protective order became moot when CAGC withdrew its subpoena enforcement proceeding, the September 4 Subpoena, and the subpoena caused to be served by CAGC on September 11 (Tr. 720:5-17; Tr. 821:6-822:3).

⁶ Because the subpoenaed documents were duplicative, the ALJ ordered Respondent to produce one set of documents, only for the CAGC. (Tr. 826:22-827:13)

1. The ALJ's Restriction of Charging Parties' Access to Subpoenaed Documents

In particular, the provision of the protective order restricting the Charging Parties' representatives' access to the subpoenaed documents for purposes of review (which naturally results in restrictions on CAGC's ability to present its case) to which CAGC objects applies to the documents sought in the Subpoenas' paragraphs 21(a) through 21(d), 33 to 35, 38, and 39. As to these documents, which relate to work diversion allegations, Respondent represented that there are thousands of such documents. (In sum, such documents include, generally speaking, job tickets/assignments for each of Respondent's facilities that show (i) the geographical location of the job, (ii) the type and amount of work performed, (iii) the name of Respondent's facility from where the product was delivered to or used at the job site, and (iv) the dollar amount of the job charged to Respondent's customer.)

To address Respondent's burdensomeness arguments, the ALJ ordered that Respondent would not yet have to *physically* produce such documents, and instead permitted Respondent to submit a chart which would show the essential information contained in such documents. If CAGC is not satisfied with such charts and states grounds for needing to see the actual documents, CAGC will be allowed to go to Respondent's facilities where the documents are kept so as to view the documents. (Tr. 746:1 – 748:3) However, in connection with such a procedure, the ALJ issued a protective order that prohibits the Charging Parties' representatives from accompanying CAGC to Respondent's facilities to view and inspect the subpoenaed documents, including the representative from the Charging Party Teamsters Union, a party which has subpoenaed the same documents. Instead, the ALJ limited access to

the Charging Parties' attorneys only.⁷ (Tr. 804:20 -805:13; 833:15-834:24) In response to the Charging Party Teamsters' objection to such an order, the ALJ invited the Charging Party Teamsters to appeal this provision of the protective order:

This is what you're going to get from me. If you don't like it, in fact, I'm almost inviting you to take it into an appeal, and that way if you do that, you may get something that [Respondent's counsel] can take to Judge Teilborg and show him. So if that's what you want to do, be my guest to do it.

(Tr. 807:2-7)

2. The ALJ's Order Requiring the Return of Confidential Documents

As to the second provision subject to this special appeal, i.e., the provision requiring the return of "confidential documents" within 15 days of the close of hearing, during the July trial dates, the ALJ did not revoke or modify his October 6, 2009, protective order which requires CAGC to return all confidential documents to Respondent within 15 days of the close of the hearing. As a result, that provision remains in effect.

After the hearing adjourned on July 21, Respondent filed in United States District Court, District of Arizona a Motion to Confirm Validity of the Court's Protective Order in On-Going Agency Proceeding and Request for Expedited Consideration. (Exhibit F) Through this motion, Respondent beseeched the District Court to rule that the protective order it issued on February 1, 2010, remains binding on the ALJ, notwithstanding the ALJ's belief that it did not. CAGC is this date submitting an opposition to Respondent's motion. A hearing on Respondent's District Court motion is to be held on September 2, 2010.

⁷ The ALJ issued a protective order with a similar "attorneys-only" restriction with respect to Respondent's profit and loss statements. While CAGC does not raise the issue at this time – partly because Respondent's position before the District Court is the same as the ALJ's ruling on the profit and loss statements – CAGC respectfully preserves its ability to raise this issue before the Board in the future.

II. ARGUMENT

A. The ALJ's July 21, 2010, Protective Order Denies the Charging Parties Their Due Process Rights Afforded to Them Under Board Law

It is settled Board law that the Charging Parties are entitled to “participate fully” in the underlying unfair labor practice hearing because, by virtue of filing an unfair labor practice charge, they are deemed a “party” under the Board’s Rules and Regulations. See the Board’s Rules and Regulations (“Board’s Rules”), Section 102.8 (“[t]he term ‘party’ as used herein shall mean . . . any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under that act[.]”); *Rickert Carbide Die, Inc.*, 126 NLRB 757 fn.1 (1960); *John L. Clemmey Company, Inc.*, 118 NLRB 599, 600 fn.1 (1957).

Various sections of the Board’s Rules elaborate on the particular rights afforded to the Charging Parties, in order to ensure they are not denied due process during the hearing of their unfair labor practice charges. First and foremost, all parties have the right, under Section 102.38 of the Board’s Rules, “to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence[.]” Stated differently, the Charging Parties have the right to present their case (including submitting rebuttal evidence) for a “full and true disclosure of the fact.” See NLRB Statements of Procedure, Section 101.10.

Charging Parties may also issue subpoenas -- seeking both testimony and documents -
- in support of their case. Board’s Rules, Section 102.31(a) (“[t]he Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control.”). Such

subpoenas may even request the same information that the General Counsel seeks in its subpoena. In addition, Charging Parties are entitled to request that the Board seek enforcement of their subpoenas in federal court. See the Board's Rules, Section 102.31(d) (“[u]pon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the Act.”); see also *Hydro Conduit Corp.*, 274 NLRB 1293 (1985).

All of the above-mentioned due process rights are jeopardized by the ALJ's protective order. The ALJ recognized that the Charging Parties' representatives are used by their attorneys in helping them to decipher and understand documents that may be introduced at trial, especially subpoenaed material. In other words, the ALJ acknowledges that attorneys are often not as well versed, or not familiar with, documents that Charging Parties' representatives regularly see and deal with on a daily basis. Notwithstanding this fact, the ALJ's protective order denies the Charging Parties the benefit of the assistance rendered by its representatives -- and denies the same benefits to the General Counsel -- by prohibiting the representatives from viewing the subpoenaed material. By so doing, the protective order denies and infringes upon the Charging Parties' rights to “participate fully” in the unfair labor practice hearing.

B. The ALJ's October 6, 2009 and July 21, 2010, Protective Orders Will Result in an Incomplete Record for the Board and Appellate Courts to Issue Rationale Decisions.

For the Board to issue a cogent, well-reasoned decision that a Court of Appeals will uphold, the Board's decision must be supported by substantial evidence on the record as a whole, and have a "reasonable basis in law." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The ALJ's protective order requiring the return of "confidential documents" within 15 days of the close of hearing will prevent the submission of a complete record to the Board upon which it may base its decision. The practical impact of such an order is significant. First, any party to this hearing filing exceptions to the Board will be handcuffed in arguing why and how the ALJ may have erred as to issues of fact or law. Without a complete record -- which will result if documents deemed confidential are pruned from the record after the close of hearing -- the Board and the courts will be unable to perform their respective functions. Second, similarly, such an incomplete record may result in the matter being remanded by the Board, or the federal appellate court remanding the case back to the Board, for additional evidence. Such outcomes will merely result in lost time, additional expense, and significant administrative delay.

Moreover, the Agency is required by the Federal Records Act, 44 U.S.C. § 3301 et seq., and regulations promulgated by the National Archives and Records Administration (NARA), to preserve and maintain Agency "records." Accordingly, the Agency maintains records disposition standards that have been approved by NARA. Most, if not all of the

evidence collected -- although CAGC has not been able to view any of it thus far because Respondent has not produced anything -- would likely fall into the broad definition of “records,” and therefore would have to be preserved by the Agency. Indeed, “[t]o meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

- (a) Document the persons, places, things, or matters dealt with by the agency.
- (b) Facilitate action by agency officials and their successors in office.
- (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
- (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
- (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
- (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22 (emphasis added). Any protective order issued must take into account the NLRB’s duty to preserve the records at issue.

For instance, in *United States v. Northwest Airlines Corp.*, 1999 WL 34973961, at *7-8 (E.D. Mich.1999), the Court, taking into account the Justice Department’s obligations under the Federal Records Act and other statutes, ordered that the DOJ could, “subject to taking appropriate steps to preserve the confidentiality of such material, [] disclose material designated as Confidential or Highly Confidential to employees of the Executive Branch outside the Department of Justice, and may use such information for any valid law enforcement purpose . . . or any other applicable law.” The ALJ’s order requiring CAGC to

return confidential information 15 days after the close of the ALJ hearing is thus on its face contrary to the Agency's federal record preservation requirements.

III. CONCLUSION

Based on the foregoing, CAGC requests that the Board order that the ALJ rescind the protective orders issued by him insofar as such orders: (a) restrict the rights and opportunities of the Charging Parties' representatives to assist their counsel and CAGC when reviewing documents produced by CAGC's July 6 Subpoena (which correspond to the documents sought by the Teamsters' Subpoena) and (b) requiring the return of confidential documents to Respondent within 15 days of the close of the hearing. It is respectfully requested that the Board order that the documents at issue sought by CAGC's July 6 Subpoena be produced in a manner that will afford Charging Parties' representatives to assist their counsel and CAGC in reviewing and understanding such documents, and to order that the confidential documents produced by Respondent, including documents proffered and/or admitted into the record and/or otherwise produced pursuant to the July 6 Subpoena, not be ordered to be returned to Respondent's counsel, but rather, to the extent deemed appropriate, be held after the close of the hearing under seal, for the use of the parties to this proceeding, the ALJ, the Board and any reviewing Court as needed for the prosecution, defense and adjudication of the unfair labor practice proceedings.

Dated at Phoenix, Arizona this 16th day of August 2010.

Respectfully submitted,

/s/Chris J. Doyle

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CERTIFICATE OF SERVICE

I hereby certify that a copy of REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S ISSUANCE OF PROTECTIVE ORDERS in CEMEX, INC., Cases 28-CA-22165 et al., was served by E-Gov, E-Filing, e-mail and overnight delivery via United Parcel Service on this 16th day of August 2010, on the following:

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