UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SABO, INC., d/b/a HOODVIEW VENDING CO.

and Case 36-CA-10615

ASSOCIATION OF WESTERN PULP AND PAPER WORKERS UNION affiliated with UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND RESPONSE TO RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL FROM DECISION OF ADMINISTRATIVE LAW JUDGE TO THE NATIONAL LABOR RELATIONS BOARD

On September 2, 2010, Counsel for the Acting General Counsel issued Subpoena B-622715, requesting documents for a hearing commencing on September 21, 2010.[1] Respondent timely filed a Petition to Revoke with the Regional Director on September 7, 2010, arguing, *inter alia*, that Item 4 of the Subpoena requested documents that were work-product and/or protected by the attorney-client privilege. The matter was then referred for decision by the Administrative Law Judge. On September 9, 2010, Administrative Law Judge Lana H. Parke issued her ruling, holding, in part, that to the extent any of the documents producible in response to Item 4 of the subpoena are either work-product or privileged, those documents may be presented to her at hearing for review.

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[1] Accordingly, Counsel for the Acting General Counsel requests expedited consideration of this request.

On September 14, 2010, Counsel for SABO, Inc. d/b/a Hoodview Vending Company ("Respondent" or "SABO") filed a request for special permission to appeal the decision made by Administrative Law Judge Lana H. Parke. Specifically, SABO objects to Judge Parke's offer to conduct an in camera inspection of the documents SABO claims are privileged or work-product. In its Request for Special Permission to Appeal From Decision of Administrative Law Judge, Respondent contends that the Administrative Law Judge does not have the authority to conduct an *in camera* review of disputed documents and that only a Federal court may engage in *in camera* inspection of documents. Further, Counsel warns that the NLRB risks reversal by the Courts of a Preclusion Order or adverse inference should Respondent not provide the subpoenaed documents.

It is the position of Counsel for the Acting General Counsel that the Board should reject SABO's request for special appeal, overturn the ALJ's order requiring an *in camera* inspection, and simply reject SABO's privilege claims -- without requiring an inspection. An *in camera* inspection is only appropriate where a *prima facie* factual showing of privilege has been made by a party, and the privilege dispute can not otherwise be resolved by review of a privilege log or other reliable evidence. Here, however, SABO did not submit any facts or privilege log to the ALJ either (i) to identify what documents are responsive to the Acting General Counsel's subpoena for which a privilege is asserted, or (ii) sufficient to make out a *prima facie* showing that a privilege applies. Accordingly, there is no need for an *in camera* inspection; the privilege assertions should be denied.

Moreover, contrary to Counsel for Respondent's contentions, the subpoena served on it does not seek and has never sought privileged documents or documents invading work product. The documents sought in Item 4 primarily concern a period of time when SABO was represented, with respect to NLRB proceedings, by a non-attorney Labor Consultant.[2] Such documents cannot be argued to fall under the attorney-client privilege. Lastly, Respondent is incorrect in its assertion that an Administrative Law Judge lacks the authority to review privileged documents.[3]

Counsel For Respondent Has Failed To Properly Assert A Basis For Attorney-Client Privilege Protection.

SABO has the burden to showing the privilege. *See* United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473-74 (2d Cir. 1996). As part of this burden, SABO should have provided a privilege index log specifically identifying the documents it believes are covered by the privilege. NLRB Div. of Judges Benchbook at 59-60 (Aug. 2010). The log / index should include (1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if

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[2] Labor Consultant H. Sanford Rudnick notified the Subregion by letter dated February 18, 2009 in Case 36-CA-10421 that he had been retained to represent Respondent. Rudnick continued to represent Respondent in a series of Cases (36-CA-10425, 36-CA-10428, 36-CA-10438, 36-CA-10469, 36-CA-10470, 36-CA-10471, 36-CA-10472, 36-CA-10481, 36-CA-10482, 36-CA-10483 and 36-CA-10488) until, by letter dated December 17, 2009, Mr. Rudnick notified the Subregion that he no longer represented Respondent. Counsel for Respondent did not become the legal representative for Respondent in the instant or other related NLRB matters until December 18, 2009.

[3] To the extent Respondent suggests reliance on Douglas Autotech, Corp., No. 7-CA-51428, 2010 WL 667127 (N.L.R.B. Div. of Judges Jan. 5, 2010) (ALJ requires General Counsel seeking *in camera* inspection to articulate grounds to suspect counsel's representations were unreliable), such suggestion, at this point, is premature as Respondent hasn't submitted a privilege log for Counsel for the Acting General Counsel to review.

applicable, the name and job title of the recipient(s) of the document. Id. Once the index log is prepared and received, the judge may then, *if necessary*, review the documents in camera to decide whether the documents fall within the privilege. Id. (emphasis added).

Indeed, without a log showing this information, Counsel for the Acting General Counsel can not even know whether the documents claimed to be privileged by Respondent are ones that Counsel for the Acting General Counsel desires. Until the documents are identified and it is determined whether there is a real dispute about their production, it is entirely premature for an *in camera* inspection.

Moreover, without production of a log making a *prima facie* showing of privilege, the Board should reject Respondent's privilege claims without requiring an *in camera* inspection. *See* Constr. Prods. Research, 73 F.3d at 474 (affirming district court's rejection of privilege claims because "Respondents have failed to demonstrate their claims of privilege" through an adequate privilege log). Thus, where *no* log or other document-specific evidence of privilege has been submitted, the Board should reject Respondent's claims outright.

Mere conclusory statements that documents are work product or within the attorney-client privilege are insufficient. *See* Von Bulow v. Von Bulow, 811 F.2d 136, 146 (2d Cir. 1987) (quoting In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965)) (rejecting conclusory or *ipse dixit* assertion[. . . [that] foreclose[s] meaningful inquiry into the existence of the [attorney-client] relationship"). Indeed, Respondent here has not shown basic elements of the privileges such as: for the attorney-client privilege, whether any of the communications were to an attorney for legal advice, were intended to be

confidential, and were in fact kept confidential, all essential elements of the attorney-client privilege, *see* Constr. Prods. Research, Inc., *73 F.3d at 473; accord* Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 474-75 (S.D.N.Y. 1993); and for the work product doctrine, whether any of the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation, *see* Constr. Prods. Research, Inc., 73 F.3d at 473. In short, without the submission of a sworn privilege log, Respondent's unsubstantiated claims of privilege can not be seriously considered, and an order of *in camera* inspection is unwarranted. *See* In re Grand Jury Investigation, 974 F.2d 1068, 1071, 1075 (9th Cir. 1992) ("[T]he government must establish a sufficient factual basis for the court to conduct an *in camera* inspection" only where "the Corporation's privilege log and accompanying affidavits are sufficient to establish that the attorney-client privilege applies to the . . . withheld documents.").

Though, as stated above, the argument concerning the authority of the Administrative Law Judge is premature, as SABO has raised the argument, we are compelled to address it.

The Administrative Law Judge Has The Authority To Conduct *In Camera* Review Of Documents.

Respondent is incorrect in arguing that the Administrative Law Judge lacks the authority to conduct an *in camera* inspection. To support its argument, Respondent effectively ignores the authority granted to the Board and other federal agencies, as well as years of precedent, and relies primarily on the decisions in NLRB v. Detroit Newspapers, 185 F.3d 602 (6th Cir. 1999) and International Medication Systems, Ltd., 640 F.2d 1110 (9th Cir. 1981). Respondent also relies upon the decision in NLRB v. Interbake Foods, LLC, 2009 WL 3103819 (D. Md. 2009)

The narrow question raised by Respondent's Request for Special Permission to Appeal is whether the National Labor Relations Act allows administrative law judges to attempt to resolve a privilege dispute – not conclusively, but rather *in the first instance* – by means of conducting an in camera inspection. The correct answer to this question, at least with respect to the NLRA, is that ALJ's are so empowered. This result is compelled by the text and structure of Section 11[4] itself, which distinguishes between the Board's power to "receive evidence" and "revoke...subpoena[s]" in subsection (1) and the judiciary's power to enforce – or deny enforcement to – Board subpoenas in subsection (2). It would make little sense for Congress to empower the Board to decide whether a subpoena should be revoked, yet deny to the Board one of the most efficacious tools assisting in that inquiry – that is, the authority to conduct *in camera* review. The Board's administrative law judges are qualified to make, and routinely make, determinations on the admissibility of documents, including those claimed to be privileged from disclosure. In their neutral, independent, and quasi-judicial role, ALJs are particularly well positioned to initially evaluate claims of privilege during ongoing administrative proceedings.

It is clear from the structure and text of the NLRA that Congress intended that evidentiary determinations in unfair labor practice proceedings - including privilege objections to the production of subpoenaed documents – should *first* be made by the Board or its agents, with judicial procedures available only after the objections are considered and denied by the Board. Accordingly, insistence that a federal court, not the Board, be the first to fully evaluate its privilege objections is precisely the reverse of what Congress intended.

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[4] 29 U.S.C. § 161 (2006).

Section 11(1) of the NLRA – entitled "Documentary evidence; summoning witnesses and taking testimony" – provides that the Board "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1). The statute further provides that the Board shall have the authority to issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation" and that any person served with a subpoena "may petition the Board to revoke" the subpoena. Id. Upon the filing of such a petition, the Board may revoke or limit the subpoena in question. Id. Furthermore, the Board has delegated its authority to rule upon a petition to revoke filed during an unfair labor practice evidentiary hearing to the Agency's administrative law judges, subject to further review before the Board. See 29 C.F.R. § 102.31 (b). Finally, the statute provides that the Board "or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence." 29 U.S.C. § 161(1).

Section 11(2) of the NLRA – entitled "Court aid in compelling production of evidence and attendance of witnesses" – gives federal district courts "upon application by the Board" and "[i]n case of contumacy or refusal to obey a subpena issued to any person," jurisdiction "to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question." 29 U.S.C. § 161(2). The statute further provides that "any failure to obey such order of the court may be punished by said court as a contempt thereof." Id.

Read in tandem, Sections 11(1) and (2) define the respective and distinct roles of the Board and the federal district courts. In Section 11(1), Congress authorized the Board to issue administrative subpoenas, revoke such subpoenas when, in its opinion, the subpoena seeks improper evidence, and to receive evidence in administrative proceedings. By contrast, in Section 11(2), Congress authorized the federal district courts – when a subpoenaed party has refused to comply with the initial determination of the Board as to the production of subpoenaed evidence, and when the Board has applied for enforcement of its subpoena – to examine the Board's ruling and to either enforce the subpoena or deny enforcement. That the district court's role is one of judicial enforcement and review of the Board's ruling on objections to the administrative subpoena, and not one in which the court is authorized to insist on being the first to rule on evidentiary disputes, is confirmed by (i) the express statutory provision for the Board to receive evidence and to consider and rule on petitions to revoke, and (ii) the notable omission of any statutory language in Section 11(2) authorizing the district court to "receive evidence" or to "revoke" Board subpoenas, which Section 11(1) expressly gives to the Board. This is further confirmed by the express language in Section 11(2) mandating that all evidence is to be produced "before the Board." By providing the Board with such broad authority, Congress necessarily intended for the Board to rule – initially, though not exclusively – on issues that arise when the Board exercises this authority. Thus, Section 11 "contemplates Board action on a motion to revoke a subpena *before* the jurisdiction of a district court, with its underlying contempt sanction, be invoked in an enforcement proceeding." Hortex Mfg. Co. v. NLRB, 364 F.2d 302, 303 (5th Cir. 1966) (emphasis added).

By insisting that a federal district court be the first – and essentially exclusive – forum to rule on privilege objections, Respondent is arguing to reverse this statutory procedure and void the authority Congress provided to the Board in Section 11(1) to make initial evidentiary rulings necessary to rule on petitions to revoke subpoenas, subject to potential judicial enforcement in the federal district courts under Section 11(2). This argument was rejected in a similar context where Congress likewise provided for a non-Article III forum to issue and revoke subpoenas and to receive evidence, subject to judicial review in the federal district courts. *See* Odfjell ASA v. Celanese AG, 348 F. Supp. 2d 283 (S.D.N.Y. 2004), *further proceedings*, 380 F. Supp. 2d 297 (S.D.N.Y.), *aff'd sub nom.*, Stolt-Nielsen SA v. Celanese AG, 430 F. 3d 567 (2d Cir. 2005). In Odfjell, which involved arbitration subpoenas issued pursuant to Section 7 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 7, the district court held that "objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable," and dismissed the subpoenaed party's district court motion to quash "as unripe." Id. 348 at 288. While that case did not concern Section 11 of the NLRA, Odfjell's rationale is equally applicable here."[5] The court correctly concluded that "there is no reason for the Court to decide these [privilege] issues, at least in the first instance, since one of the very reasons for making these subpoenas returnable before one or more members of the arbitration panel is so that the *arbitrators* can rule on preliminary issues of admissibility, privilege,

[5] Section 7 of the FAA is in all material respects analogous to Section 11(1) of the NLRA and provides in relevant part that arbitrators "may summon in writing any person to attend before them or any of them as a witness in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7. Furthermore, Section 7 of the FAA, like Section 11(2) of the NLRA, similarly provides that federal district courts have jurisdiction to compel compliance with such subpoenas." Id.

and the like." Id. At F. Supp. 287 (emphasis added). "Indeed," the court continued, "section 7 would make no sense if it provided the arbitrators with the power to subpoena witnesses and documents but did not provide them the power to determine related privilege issues." Id. *see also* Stolt-Nielsen SA, 430 F.3d at 579 ("Arbitrators may also need to hold a preliminary hearing to decide...issues of privilege, authenticity, and admissibility").

Odfjell's logic has equal application here. One of the very reasons for making the administrative subpoenas returnable before the Board is so that the Board can have an opportunity to first rule on preliminary issues such as privilege. Section 11(1) would make no sense if it provided the Board with the power to subpoena documents, and to revoke improper subpoenas, but did not provide it the power and sufficient means to initially decide concomitant privilege objections to producing the subpoenaed documents. Indeed, it is difficult to understand how the Board could exercise its statutory authority in Section 11(1) to "receive evidence" if that authority did not implicitly include the power to rule on a party's objections to the production of subpoenaed evidence in the first instance. "Certainly preliminary rulings on subpoenaed questions are as much in the purview of a hearing officer as his rulings on evidence and the myriad of questions daily presented to him." NLRB v. Duval Jewelry Co., 357 U.S. 1, 8 (1958). Any other reading would effectively render Section 11(1) meaningless.

The Decision In Detroit Newspapers Is Flawed And Contrary To The Statutory Procedure That Congress Provided In Section 11(1)

In NLRB v. Interbake Foods, LLC, 2009 WL 3103819 (D. Md. 2009), a case relied upon by Respondent, the court erred in deciding that NLRB ALJs do not have the authority to conduct an *in camera* inspection. The problems with the court's analysis in

Interbake Foods begins with its initial, mistaken premise – i.e., that authorizing *in camera* review by Board ALJs would be akin to "delegating" the judiciary's exclusive authority to finally resolve privilege disputes arising in response to agency subpoenas. The NLRB seeks no such result. Indeed, the Board has always acknowledged the supremacy of federal courts in resolving privilege disputes arising in administrative proceedings. Nevertheless, the court in Interbake followed its faulty "delegation" premise to the erroneous conclusion that only an Article III court possesses the authority to conduct an *in camera* review of assertedly privileged documents. In reaching this result, Interbake adhered to the reasoning of the Sixth Circuit in NLRB v. Detroit Newspapers, 185 F.3d 602 (6th Cir. 1999).

The court in NLRB v. Detroit Newspapers, 185 F. 3d 602 (6th Cir. 1999) framed the issue as "whether the district court had the discretion to refuse to review the [subpoenaed] documents to determine whether they were privileged, and to delegate that decision making responsibility to the ALJ hearing the underlying labor dispute." 185 F.3d at 604. Wholly overlooking Congress' delegation of authority to the Board in Section 11(1)[6] of the National Labor Relations Act to make initial evidentiary rulings on the enforceability of the subpoenas, the Sixth Circuit concluded that "[t]he district court does not have the discretion to delegate an Article III responsibility to an Article II judge." Id. at 606. Supported by scant analysis, the Detroit Newspapers court reasoned that simply because "Congress specifically reserved to the federal courts the authority to provide for enforcement of subpoenas" in Section 11(2), "[w]e believe it is implicit in the enforcement authority Congress has conferred upon the district court...that the district court, not the ALJ, must determine whether any privileges protect the documents

[6] 29 U.S.C. § 161(1).

from production." Id. at 605-606. As shown below, there are three fundamental flaws in Detroit Newspapers that undermine its persuasive authority.

First, by focusing solely on the judiciary's ultimate subpoena enforcement authority in Section 11(2), which of course includes the authority to review (and potentially reject) Board rulings on asserted privileges, the Detroit Newspapers court entirely ignored Congress' delegation of initial authority in Section 11(1) to the Board to receive evidence and to consider granting or denying petitions to revoke subpoenas based on its own evidentiary determinations. In so doing, the court misidentified the issue as the district court's discretion to delegate its ultimate enforcement authority to the Board. The Board in that case sought no such result. Indeed, the Detroit Newspapers court overlooked that Congress delegated to the Board the authority in Section 11(1) to make initial evidentiary rulings, including rulings on petitions to revoke, subject to enforcement proceedings in the federal district courts. Thus, contrary to the reasoning in Detroit Newspapers, upon which Counsel for Respondent relies, allowing Judge Parke to review the assertedly privileged documents in the first instance would not constitute an impermissible delegation of an Article III responsibility to an Article II tribunal.[7] Rather, such a course would follow and effectuate the statutory subpoena

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[7] Insofar as Detroit Newspapers holds that *only* Article III judges have the authority to rule on questions of privilege, it ignores the fact that bankruptcy judges, federal magistrates, and special masters – all non-Article III judges – routinely rule on claims of privilege. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 388 (1981) (magistrate ruling on attorney-client/attorney work product privileges); See also 28 U.S.C. § 636(a) (giving magistrates power to "determine" pretrial discovery matters); In re O.P.M. Leasing Servs., Inc., 670 F. 2d 383, 385 (2d Cir. 1982) (bankruptcy judge ruling on claim of attorney-client privilege); In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 791-92 (E.D. La. 2007) (special master appointed to review documents and rule on claims of privilege).

revocation procedure as Congress prescribed in Section 11(1) by enabling the Board to make initial evidentiary rulings, with judicial review and enforcement available as necessary under Section 11(2) in the federal district courts.

Second, the primary case relied on by the Detroit Newspapers court is inapposite and, therefore, lends no support to its rationale. In NLRB v. International Medication Systems, Ltd., 640 F.2d 1110 (9th Cir. 1981), the Board's General Counsel, in lieu of commencing subpoena enforcement proceedings in federal district court, responded to the employer's refusal to produce subpoenaed documents by persuading the ALJ to enter a preclusion order barring the employer from rebutting the General Counsel's evidence on the issue for which the records had been subpoenaed. On review of the Board's final remedial order under Section 10 of the NLRA, 29 U.S.C. § 160, the Ninth Circuit held only that the Board does not have the authority to bypass the Section 11(2) statutory method for enforcing its subpoenas and instead to impose sanctions for noncompliance, which the court equated with the usurpation of a federal district court's Article III authority to compel compliance with Board subpoenas. 640 F.2d at 1116.

In the Detroit Newspapers case, by contrast, the Board did not attempt to bypass the district court's ultimate enforcement authority, but instead sought to invoke the precise statutory procedure that Congress provided in Section 11(1) for initially ruling on objections to Board subpoenas. Moreover, International Medication was not a subpoena enforcement case. It did not hold – or in any way – suggest – that the Board is powerless to initially rule on evidentiary objections to subpoenaed documents when the Board is, in fact, seeking to enforce its subpoenas. It is further noted that other circuits have expressly criticized International Medication and have sustained the

Board's imposition of sanctions in similar circumstances.[8] In any event, the decision in International Medication does not lead to the conclusion that the Board is precluded from ruling on claims of privilege in the first instance pursuant to Section 11(1), which is simply step one in a two-step process to invoke the district court's Article III authority under Section 11(2) to consider enforcement of Board subpoenas.

Finally, the Detroit Newspapers decision cannot be reconciled with the well-settled legal principles requiring the exhaustion of administrative remedies prior to seeking judicial relief. Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy v. Madigan, 503 U.S. 140, 145 (1992). Detroit Newspapers undermines each of these purposes.

By denying the Board the opportunity to initially rule on privilege claims, Detroit Newspapers is contrary to the Supreme Court's teaching "that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." Id. "[E]xhaustion principles apply with special force when frequent and deliberate flouting of administrative processes could weaken an agency's effectiveness by encouraging disregard of its procedures."[9] Id. *See, e.g.*, EEOC v. Cuzzens of Ga., Inc., 608 F.2d 1062, 1063 (5th Cir. 1979) (enforcing EEOC's administrative subpoena in

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[8] See, e.g., Atl. Richfield Co. v. U.S. Dep't of Energy, 769 F.2d 771, 794 (D.C. Cir. 1985)(disagreeing with International Medication and noting that "[w]e have sustained, indeed required, the drawing of adverse inferences against persons not complying with discovery orders in adjudicatory proceedings before the National Labor Relations Board."); Hedison Mfg. Co., 643 F. 2d at 34-35 (1st Cir. 1981); NLRB v. Am. Art Indus., Inc., 415 F.2d 1223, 1229-30 (5th Cir. 1969).

[9] Upholding a similar principle, the Supreme Court recently held that a district court discovery order requiring disclosure of assertedly privileged materials was not eligible for immediate review under the collateral order doctrine because other adequate means exist to protect the rights of the privilege holder. *See* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009).

case involving Section 11 of the NLRA because subpoenaed party failed to exhaust administrative remedies), *see also* Maurice v. NLRB, 691 F.2d 182 (4th Cir. 1982) (requiring party resisting *NLRB* subpoena to exhaust administrative remedies before the Board).

Detroit Newspapers also results in judicial inefficiencies because, if the Board is afforded an opportunity to first find whether the subpoenaed documents are privileged, "a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided.[10]" McCarthy, 503 U.S. at 145. Accordingly, if the Board were to uphold Respondent's privilege claims after *in camera* inspection by an ALJ, then the controversy would be over – and the resources of the judiciary saved – as to those documents.[11]

Conclusion

To sum up, the Board should reject SABO's request for special appeal, overturn the ALJ's order requiring an *in camera* inspection, and simply reject SABO's privilege

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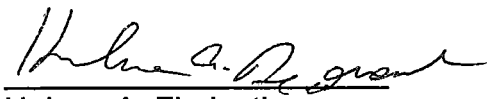
[10] Indeed, Board ALJs routinely rule on privilege claims, *see, e.g.*, Nat'l Football League Mgmt. Council, 309 N.L.R.B. 78, 97 (1992) (ALJ conducted *in camera* review regarding claims of attorney-client privilege and work product protection), and courts routinely review such rulings, *see, e.g.*, NLRB v. Indep. Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 145 (2d Cir. 1978) (reviewing ALJ's initial determination of whether statements were protected by attorney-client privilege). In fact, in a related proceeding involving Detroit Newspapers, the ALJ granted a petition to revoke on privilege grounds. *See* Detroit Newspaper Agency, 326 N.L.R.B. 700, 751 n. 25 (1998), *petition for review granted on other grounds sub nom.* Detroit Typographical Union No. 18 v. NLRB, 216 F.3d 109 (D.C. Cir. 2000).

[11] Stated differently, the NLRB's resolution of privilege claims is "final" only as to the Board's General Counsel, who is bound to accept and apply decisions of the Board. By contrast, an ALJ (and the Board) can *never* conclusively resolve privilege claims against a subpoenaed party. Such parties, like Respondent, can refuse to abide unfavorable privilege rulings and are entitled to await judicial enforcement of the Board's subpoena before they must produce *any* document to their litigation adversaries.

claims -- without requiring an inspection. However, in the event SABO submits an applicable privilege log, and Counsel for the Acting General Counsel calls into question a withheld document on the log, *in camera* review by Judge Parke is not only permissible, it is necessary to fully effectuate the Board's Section 11(1) power to rule on Respondent's petition to revoke on privilege grounds.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the Acting General Counsel's Request for Special Permission to Appeal and Response to Respondent's Request for Special Permission to Appeal from Decision of Administrative Law Judge to the National Labor Relations Board was served by e-file, e-mail, and mail on the 17th day of September 2010, on the following parties:

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