

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

REMINGTON LODGING & HOSPITALITY,

and

UNITE HERE!, LOCAL 878, AFL-CIO

Cases 19-CA-32148
19-CA-32188
19-CA-32222
19-CA-32238
19-CA-32301
19-CA-32334
19-CA-32337
19-CA-32349
19-CA-32367
19-CA-32414
19-CA-32420
19-CA-32438
19-CA-32487

**RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO FILE AN APPEAL AND
RESPONDENT'S APPEAL OF ADMINISTRATIVE LAW JUDGE'S ORAL RULING
ON THE UNION'S PETITION TO REVOKE SUBPOENA**

In accordance with NLRB Rules and Regulation § 102.26, Remington Lodging & Hospitality LLC (hereinafter “the Hotel” or “Respondent”) requests special permission to file an appeal of Administrative Law Judge Meyerson's oral ruling on December 14, 2010, made during a ULP hearing in which he wrongfully revoked Respondent's subpoena *ad testificandum* of an important witness (A-889357 to Mr. John Wilhelm) because of “undue burden” on the subpoenaed individual. This revocation is a misapplication of the law. A copy of the subpoena A-889357 (“the subpoena”) is attached. Respondent’s appeal is incorporated in this request for special permission.

Respondent subpoenaed Mr. John Wilhelm, President of UNITE HERE, to ask him questions about the coordinated contract campaign called "Hotel Workers Rising". Materials

contained on the campaign's own website¹ describe Hotel Workers Rising as a coordinated “contract campaign” involving many hotels and many cities throughout the United States. The Sheraton Anchorage, the hotel at the center of this ULP hearing, is specifically mentioned on the Hotel Workers Rising website as a “Hot Spot.”

There are only a few reasons why a properly served subpoena may be revoked – one of which is a finding that the subpoena is unduly burdensome. In determining whether a subpoena is an “undue burden,” an administrative law judge must balance the true burden of a witness's appearance with the actual benefit of the evidence such witness is expected to provide. Here the benefit of Mr. Wilhelm's testimony was underestimated and the actual burden to Mr. Wilhelm was overstated. Thus, Mr. Wilhelm's petition to revoke should be denied and subpoena A-889357 should be enforced, and Mr. Wilhelm should be compelled to appear on January 24, 2011 as requested.

SUMMARY OF FACTS

1. Charging Party is UNITE HERE, Local 878, an Anchorage hotel workers Union [hereinafter “Union”]. Respondent is the Employer of employees at an entity doing business as the Sheraton Anchorage Hotel and Spa [hereinafter “Employer” or “the Hotel”]. The contract between the Union and the employer expired without reaching a follow-on agreement despite almost one year of negotiations and several contract extensions. After reaching impasse, the Hotel implemented its last, best, and final collective bargaining offer, and the Union instituted a boycott of the Hotel. The Union filed ULP charges alleging the Hotel bargained in bad-faith, a claim the Hotel denies. Instead, the Hotel points to a nationwide contract campaign assembled by UNITE HERE under the banner of “Hotel Workers Rising.”

¹ Pages from the Hotel Workers Rising website are admitted into evidence in the on-going ULP hearing.

2. The Hotel Workers Rising website describes itself as a nationwide coordinated contract campaign – "bargain to organize." (See Exhibit 1) Anchorage generally, and the Sheraton Anchorage specifically, are listed on the Hotel Workers Rising website as areas of specific focus for this campaign. (See Exhibit 1 - Respondent's Exhibit 49, 50, and 62). As a result, the Administrative Law Judge ruled that Respondent is permitted to present evidence in support of its defense that the contract negotiations reached impasse because of the Union's adherence to the Hotel Workers Rising coordinated contract campaign. As part of that defense, the Administrative Law Judge permitted Respondent to request the subpoena of all Hotel Workers Rising materials that were distributed, or in any way communicated to the Union. No such documents were forthcoming. The Administrative Law Judge then ruled that without such documents, Respondent had the option to subpoena leaders of UNITE HERE that had knowledge about the information and communications provided to the Union about the Hotel Worker's Rising campaign.

3. Rick Sawyer, an International Vice President of UNITE HERE that was involved in negotiations with the Hotel on behalf of the Union testified that the Hotel Workers Rising campaign was formulated and devised by Mr. Wilhelm in coordination with his attorney. (See Exhibit 2 at 4098-4100).

4. The Respondent subpoenaed three individuals identified as leaders of the Hotel Worker's Rising campaign on its website - Annemarie Strassel, John Wilhelm, and Bruce Raynor. The Hotel Worker's Rising website identifies Annemarie Strassel as the lead communications representative for the campaign. A petition to revoke Ms. Strassel's subpoena was denied by the Administrative Law Judge who ordered Ms. Strassel, a resident of Chicago, to appear via video

teleconference at the Alaska hearing from a location either in Chicago or Seattle. Ms. Strassel is scheduled to testify during the week of January 24, 2011.

5. John Wilhelm, President of UNITE HERE, was also subpoenaed. According to the Hotel Workers Rising website, Mr. Wilhelm launched and promoted Hotel Workers Rising throughout the United States, including Alaska. (See Sawyer Testimony at 4098-4100) Photographs of Mr. Wilhelm's speaking at Hotel Workers Rising events are freely available on the internet. John Wilhelm's name can be found on many pages throughout the Hotel Worker's Rising website that outline the campaign's breadth and purpose. Furthermore, testimony is in evidence showing that Mr. Wilhelm himself participated in collective bargaining negotiations in Alaska in 2008. (See Exhibit 2 at 3227-3228)

6. In a hearing on Mr. Wilhelm's subpoena on December 14, 2010, attorney for UNITE HERE, Dmitri Iglitzin, made an oral petition to revoke Mr. Wilhelm's subpoena. Mr. Iglitzin indicated that Mr. Wilhelm was on medical leave, not available to testify, and that even if he was, his appearance at an Alaska hearing was unduly burdensome on UNITE HERE and its President. Respondent argued that Mr. Wilhelm's testimony was essential for the establishment of its defense that Hotel Worker's Rising was an attempt to coordinate contracts around the United States that included the major Anchorage hotels. Even an International Vice President of UNITE HERE claimed he did not have enough information to answer questions about the Hotel Worker's Rising campaign. Mr. Wilhelm's testimony about the purposes, tactics, and principles of Hotel Workers Rising is important testimony for Respondent's defense. The Administrative Law Judge revoked Respondent's subpoena A-889357 by ruling that even if Mr. Wilhelm were not on medical leave, his appearance was unduly burdensome on Mr. Wilhelm and UNITE HERE. Respondent appeals this ruling.

ARGUMENT

1. The Administrative Law Judge's decision is an incorrect application of Board law and an abuse of the Administrative Law Judge's discretion. An NLRB subpoena is enforceable as long as the evidence called for relates to a matter under investigation or in question and the evidence is described with sufficient particularity. NLRB v. G.H.R. Energy, 707 F.2d 110 (5th Cir. 1982). In fact, the Board recently described the compliance with its subpoenas as part of the “social burden of living under government.” In re CNN Am., Inc., 353 NLRB 891 (2009). Mr. Wilhelm claims that the subpoena should be revoked, not because Mr. Wilhelm is without relevant testimony, but because making him available would be unduly burdensome. The party that holds relevant evidence and seeks to avoid compliance with a subpoena bears the burden of demonstrating that the subpoena request is unduly burdensome or oppressive. Id. The party asserting burdensomeness must meet a high standard of proof. Id. A subpoena is not “unduly burdensome” simply because appearance at a hearing is inconvenient. To satisfy the burden, the party must show that production of the subpoenaed information or, in the case of a subpoena *ad testificandum*, appearance at a hearing “would seriously disrupt its normal business operations.” NLRB v. Carolina Food Processors, Inc., 81 F.3d 507, 513–514 (4th Cir. 1996), cited with approval in McAllister Towing & Transportation Co., 341 NLRB 394, 397 (2004), *enfd.* 156 Fed. Appx. 386 (2d Cir. 2005); and CNN America, Inc., 352 NLRB 675, 676 (2008).
2. Administrative law judges have properly consulted the Federal Rules of Civil Procedure in determining exactly what types of subpoena requests are “unduly burdensome.” *See Id.* at 892. Rule 26(b)2(C) says that subpoenaed material (in this case a witness) must be produced if”

...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.

Fed. R. Civ. P. 26(b)2(C)

On the balance, the value of Mr. Wilhelm's testimony greatly outweighs the actual burden to the leader of a nationwide union.

A. First, Mr. Wilhelm is a frequent nationwide traveler who makes appearances around the United States as part of his duties as President of UNITE HERE. The Board has held that individuals may be compelled to travel great distances to provide relevant testimony, and that such travel is not unduly burdensome. *See Offshore Mariners United*, 338 NLRB 745 – 746 (2002). In *Offshore Mariners United*, the appearance of a witness at a hearing more than 1000 miles away was not unduly burdensome because the witness had an office in the same town as the location of the scheduled hearing. *Id.* Mr. Iglitzin's argument that travel to Anchorage is an undue burden on Mr. Wilhelm fails to confront the frequency of travel expected from the leader of a nationwide labor organization with many thousands of members. Mr. Wilhelm is a leader who is constantly away from his office. An appearance at a hearing in Alaska will not in any way harm the operations of a nationwide organization that has come to operate without Mr. Wilhelm always seated behind his desk in New York. Furthermore, Mr. Wilhelm is no stranger to Alaska. He took it upon himself to unexpectedly appear as the lead negotiator for an Anchorage hotel in 2008. His willingness to take part in

such negotiations indicates that Anchorage is not too far out of reach to attend to his Union's business and that Anchorage was a particular focus of his attention in 2008, approximately the same time the negotiations in this case began.

B. Mr. Wilhelm's testimony will fill a void that has been left by the Charging Party – what was Hotel Worker's Rising, what role did it play in UNITE HERE collective bargaining negotiations generally, and what role did it play in UNITE HERE negotiations in Anchorage, Alaska with the Hotel? Hotel Workers Rising calls itself a nationwide contract campaign. (Exhibit 1 - Respondent Exhibit 50) Some evidence in the record already suggests that this coordinated contract campaign advised local labor organizations in key locations to not sign new collective bargaining agreements during the economic recession and instead coordinate the expiration of the labor agreements in cities around the country so that entire cities, even entire regions, could then be negotiated at once. (See Exhibit 1 – Abowd Article). Respondent has the right to put on evidence that it did not reach impasses because of its bad-faith bargaining, but because the Union would not negotiate a contract that was not in-line with the Hotel Workers Rising's nationwide contract campaign.

3. Evidence already in the record makes any Union claim that Hotel Workers Rising had “no” influence on its operations implausible. Anchorage was singled out as a focus of the campaign. (See Exhibit 1 – Respondent's Exhibit 50) The Union's own stationary contained large Hotel Worker's Rising icons. The Union's president spent member funds to travel to Oakland for a Hotel Worker's Rising meeting. Hotel Workers Rising had some influence on

Union operations during contract negotiations in 2008, 2009, and 2010. Despite these clear links, the Union has been unable to provide any form of documentary evidence that would describe the role, the strategy, and the tactics that the campaign suggested that participating local labor organizations should take. Faced with a dearth of individuals qualified to provide testimonial evidence about these intentions, a hole remains in the record. Respondent is then forced to call John Wilhelm, the only individual identified by both Rick Sawyer, a UNITE HERE International Vice President, and the Hotel Worker's Rising website as a person with control, oversight, and influence over the Hotel Workers Rising campaign.

4. Therefore, Respondent asks that the Board approve this special request for permission to file an interlocutory appeal because this is a significant issue in the Respondent's defense, the appeal is supported by Board law, and the consideration of this appeal can be accomplished prior to the date the hearing reconvenes on January 24, 2011. Respondent's request for special permission to file an interlocutory appeal, and the appeal of the administrative law judge's ruling on Mr. Wilhelm's petition to revoke subpoena A-889357 should both be GRANTED.

This 23rd day of December, 2010.

STOKES, ROBERTS & WAGNER, ALC

/s/ Peter G. Fischer /s/

Arch Y. Stokes

Karl M. Terrell

Peter G. Fischer

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ATTORNEYS FOR RESPONDENTS

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

REMINGTON HOTEL CORPORATION,
d/b/a THE SHERATON ANCHORAGE

and

UNITE HERE!, LOCAL 878, AFL-CIO

Cases 19-CA-32148
19-CA-32188
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19-CA-32438
19-CA-32487
19-CA-32598
19-CA-32600
19-CA-32609

PROOF OF SERVICE

I am employed in the County of Fulton, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is 3593 Hemphill Street, Atlanta, Georgia 30337.

On December 23, 2010, I caused the following document(s) to be served:

**RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO FILE AN APPEAL AND
RESPONDENT'S APPEAL OF ADMINISTRATIVE LAW JUDGE'S ORAL RULING
ON THE UNION'S PETITION TO REVOKE SUBPOENA**

___ BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Atlanta, Georgia, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone

number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.

X BY THE NLRB'S ELECTRONIC FILING SYSTEM on its website:
<http://www.nlr.gov>.

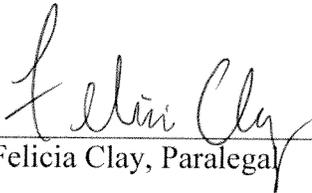
X BY FACSIMILE to: Gregory Meyerson, San Francisco Office of Administrative Law Judges, National Labor Relations Board, at (415) 356-5254 and the NLRB Resident Office in Anchorage to the attention of Administrative Law Judge Meyerson at (907) 271-3055

___ BY EXPRESS MAIL: I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight delivery pursuant to Code of Civil Procedure Section 1013(c) to the following address:

X BY ELECTRONIC MAIL to Mara-Louise Anzalone at Mara-Louise.anzalone@nlrb.gov, and Dmitri Iglitzin at iglitzin@workerlaw.com.

Executed on December 23, 2010, at Atlanta, Georgia.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.



Felicia Clay, Paralegal

Attorneys for the Respondent:

Stokes Roberts & Wagner
3593 Hemphill Street
Atlanta, GA 30337
404.766.0076 Telephone
404.766.8823 Facsimile

FORM NLRB-32
(12-07)

SUBPOENA

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

To John Wilhelm, President of UNITE HERE International

275 7th Avenue, New York, New York 10001

As requested by Arch Stokes, counsel for Remington Hotel d/b/a The Sheraton Anchorage

whose address is Stokes Roberts & Wagner, 3593 Hemphill Street, Atlanta, GA 30337
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE _____

an Administrative Law Judge of the National Labor Relations Board

at the Anchorage Federal Building, Room 152-A, 222 W. 7th Avenue

in the City of Anchorage, Alaska

on the 24th day of January 20 11 at 9:00 (a.m.) ~~PM~~ or any adjourned

or rescheduled date to testify in REMINGTON HOTEL CORPORATION d/b/a THE SHERATON ANCHORAGE

(Case Name and Number)

Cases 19-CA-32148, et al.

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

A - 889357

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at **Atlanta, Georgia**

this **9th** day of **December** 2010



Leifer A. Helzer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The