

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

EULEN AMERICA

and

Case

12-CA-26948

TRANSPORT WORKERS UNION,  
LOCAL 525, AFL-CIO

**REGIONAL DIRECTOR'S OPPOSITION TO  
EMPLOYER'S VERIFIED PETITION TO REVOKE SUBPOENA NO. B-608837**

**I. Introduction**

Counsel for the Regional Director hereby opposes the Employer's Verified Petition to Revoke Subpoena No. B-608837 (the Petition) filed by Michael W. Casey, III of Duane Morris LLP, Counsel for Eulen America (the Employer) in the above-captioned case. The subpoena at issue, a subpoena duces tecum, was issued on April 29, 2011 and received by the Employer on May 2, 2011. The subpoena was issued for the purpose of investigating the unfair labor practice charge in the above-captioned case. A copy of the subpoena is attached hereto as Exhibit A.

The Employer urges that the subpoena should be revoked based on its position that it is subject to the Railway Labor Act (RLA) and therefore is not an employer under the National Labor Relations Act (NLRA). The Employer contends that the subpoena, which seeks documents relevant to the merits of the charge in the above case, should be revoked and that instead the Regional Director should refer the charge to the National Mediation Board (NMB) for the purpose of determining the jurisdictional issue.

However, it is the Regional Director's position that such referral to the NMB is only appropriate following the full investigation of the charge by the Regional Office, and

that the Regional Office should not be required to investigate the charge in piecemeal fashion. The Regional Director has not yet made any determination as to whether 1) it is clear that the employer and employees are subject to the NLRA, 2) it is clear that they are subject to the RLA, or 3) the case is one of arguable jurisdiction between the NLRA and RLA. In addition, the Regional Director has not made any determination as to whether or not there would be merit to the charge in the event that it is determined that the employer and employees are subject to the NLRA.

## **II. Standard for Subpoena Enforcement**

The United States Supreme Court has established a broad standard for relevancy in enforcing agency subpoenas. Such subpoenas are to be enforced unless "plainly incompetent or irrelevant to any lawful purpose." Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). Section 11(1) of the Act gives the Board the power to issue subpoenas in pre-complaint investigations related to unfair labor practices. See *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4<sup>th</sup> Cir. 1996).

Section 11(1) of the Act authorizes the Board or its duly authorized agents to subpoena documents that "relate to any matter under investigation or in question," and authorizes the Board to revoke such subpoenas only if they fail to "describe with sufficient particularity the evidence whose production is required." The courts have adopted the same standard. See *NLRB v. Steinerfilm Inc.* 702 F.2d 14 (1<sup>st</sup> Cir. 1983); *NLRB v. Frederick Cowan & Co. Inc.*, 522 F.2d 26 (2<sup>nd</sup> Cir. 1975); *NLRB v. ITT Telecommunications*, 415 F.2d 768 (6<sup>th</sup> Cir 1969); *NLRB v. Williams*, 396 F.2d 247 (7<sup>th</sup> Cir. 1968). Subpoenaed information must be produced if it relates to any matter in question, or if it can provide background information or lead to potentially relevant

evidence. *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998).

### **III. The Charge**

The charge in the above-captioned case was filed by Transport Workers Union, Local 525, AFL-CIO (the Union) on November 17, 2010 and amended on January 28, 2011. As amended, the charge alleges that the Employer violated Section 8(a)(1)(3) and (5) of the Act by refusing to hire most of the bargaining unit members (employees) who had been employed by Quality Aircraft Services, Inc. (QAS), the entity that the Employer replaced as the provider of baggage handling and sky cap services at Miami International Airport, because of their union membership, and by refusing to recognize and bargain with the Union. Copies of the charge and amended charge are attached hereto as Exhibits B and C, respectively.

### **IV. The Employer's petition should be denied.**

The Employer correctly points out that NLRB Case Handling Manual Section 11711.2 sets forth the procedure for referring cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue, and that when such cases are referred to the NMB, the Board suspends the processing of its case.<sup>1</sup> However, before referring cases of arguable jurisdiction to the NMB, the practice of the Regional Office is to fully investigate the charge with respect to both the jurisdictional

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<sup>1</sup> NLRB Case Handling Manual Section 11711.1 concerns situations where the Regional Office determines that Board jurisdiction is clear and referral to the NMB is not appropriate, and where RLA jurisdiction is clear, and the parties should be referred to the NMB and the charge should be dismissed, absent withdrawal.

issue and the merits of the allegations in the charge.<sup>2</sup> Because the Regional Office does not piecemeal its investigations, the jurisdictional issue and the merits are concurrently investigated. To that end, the Regional Office subpoenaed documents relevant to the allegations that the Employer refused to hire bargaining unit employees formerly employed by QAS, and refused to recognize and bargain with the Union, in violation of Section 8(a)(1)(3) and (5) of the Act. The Employer's representations regarding facts relevant to the jurisdictional issue set forth in its petition are not dispositive of the jurisdictional issue presented by the instant case.<sup>3</sup>

The Employer should be compelled to comply with the Region's request for information pertaining to this ongoing investigation regardless of its contention that this matter should be deferred to the NMB on the jurisdictional issue. The Employer has not raised relevance or burdensomeness as a basis for revoking the subpoena. The Employer only raises jurisdiction, which is an element currently under investigation.

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<sup>2</sup> The Employer improperly relies, in part, on the practice to be followed by regional offices in representation cases where there is arguable RLA jurisdiction [i.e. conduct a hearing, develop a record on the jurisdictional issue, and if the RLA jurisdictional issue remains doubtful, prepare a factual memorandum and recommend that the Board consider whether the issue should be submitted to the NMB – see NLRB Case Handling Manual Section 11711.2(b)], with the practice to be followed in unfair labor practice cases where there is arguable RLA jurisdiction.

<sup>3</sup> The Employer has not provided evidence to support the representations in the Petition other than a two sentence prepared verification signed by its Human Resources Director and a declaration signed by one of its attorneys, both of which were submitted with the Petition. In its communications with the Regional Office prior to filing the Petition, the Employer made no mention of Business Representation International, Inc. (BRI), American Sales & Management Organization (ASMO), or American Sales & Management Organization, LLC (ASM, LLC), and the Employer has not submitted any other evidence concerning its connections to those entities. In addition, in letters filed with the Regional Office on November 22, 2010, January 20, 2011, and February 15, 2011, former counsel for the Employer consistently represented that hiring on the former QAS job at issue in this case was done by Eulen and that those hired were "Eulen's employees." Notwithstanding any possible connection between BRI and/or ASM, LLC and Eulen America, the fact that BRI and the Union agreed to NMB jurisdiction over BRI is not probative of the jurisdictional issue in this case because the matter of jurisdiction over BRI was not litigated. In any event, the jurisdictional determination in this case will be based on the relevant facts as of the time of the alleged unfair labor practices.

The subpoena in question meets the requirements set forth in Section 11 of the Act, and the Employer has failed to establish any valid grounds for revocation of the subpoena. Therefore, Counsel for the Regional Director respectfully urges the Board to deny the Employer's Petition to Revoke Subpoena Duces Tecum No. B-608837 in its entirety.

**DATED** at Miami, Florida this 31<sup>st</sup> day of May 2011.

Respectfully submitted,

/s/ Shelley B. Plass

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Shelley B. Plass  
Counsel for the Regional Director  
National Labor Relations Board, Region 12  
51 SW 1<sup>st</sup> Avenue, Suite 1320  
Miami, FL 33130

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, REGIONAL DIRECTOR'S OPPOSITION TO EMPLOYER'S VERIFIED PETITION TO REVOKE SUBPOENA NO. B-608837 in the matter of Eulen America, Case 12-CA-26948 has been electronically transmitted this 31<sup>st</sup> day of May, 2011 to the below-named persons, respectively:

Hon. Lester Heltzer     (Electronically filed)  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570-0001

Michael W. Casey, III, Esq.   (By electronic mail)  
Duane Morris LLP  
200 South Biscayne Blvd., Suite 3400  
Miami, Florida 33131  
[mwcasey@duanemorris.com](mailto:mwcasey@duanemorris.com)

Mark J. Beutler, Esq.         (By electronic mail)  
Duane Morris LLP  
200 South Biscayne Blvd., Suite 3400  
Miami, Florida 33131  
[mjbeutler@duanemorris.com](mailto:mjbeutler@duanemorris.com)

/s/ Shelley B. Plass

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Shelley B. Plass  
Counsel for the Regional Director  
National Labor Relations Board, Region 12  
51 SW 1<sup>st</sup> Avenue, Suite 1320  
Miami, FL 33130  
Telephone No. (305) 530-7029  
Facsimile No. (305) 536-5320  
[shelley.plass@nlrb.gov](mailto:shelley.plass@nlrb.gov)

# EXHIBIT A

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records, Eulen America, 2665 South Bayshore Drive, Suite 1103  
Miami, Florida 33131

As requested by Marinelly Maldonado, Agent for the Regional Director  
whose address is Suite 1320, Federal Building, 51 SW 1st Avenue, Miami, Florida 33130  
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Agent for the Regional Director  
\_\_\_\_\_ of the National Labor Relations Board  
at Suite 1320, 51 SW 1st Avenue  
in the City of Miami, Florida  
on the 18th day of May 2011 at 10:00 (a.m.) ~~(p.m.)~~ or any adjourned  
or rescheduled date to testify in Eulen America  
Case 12-CA-26948  
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See "Attachment"

cc: Susan Potter Norton, Esq., Allen, Norton & Blue, P.A., 121 Majorca Ave. Suite 300  
Coral Gables, Florida 33134

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.

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

**B - 608837**

Issued at Miami, Florida

this 29th day of April 20 11



*Lesfer A. Neltzer*

**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 routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

**Definitions and Instructions**

**Eulen America**

**Case 12-CA-26948**

- 1) When used in this subpoena, the word “document” or “documents” means any existing printed, typewritten, handwritten or otherwise recorded material of whatever character, including but not limited to letters, correspondence, memoranda, telegrams, mailgrams, minutes, notes, statements, affidavits, agreements, summaries, records of telephone conversations, telephone bills, recordings of personal conversations, interviews or meetings, transcripts, diaries, reports, charts, contracts, calendars, interoffice communications, books, records, tax records, bookkeeping and/or accounting work papers, canceled checks, accounts, accounts receivable records, ledgers, journals, purchase orders, invoices, bills of lading, billing slips, delivery records, receiving records, photographs, microfilm, audio or video tapes, computer tapes or disks and electronic mail, and all data contained therein that may be retrieved including material stored on hard disk, cd-rom, and any carbon copy, photographic or other duplicate copy of such material in the possession of, control of, or available to the subpoenaed party or any attorney, agent, representative or other persons acting in cooperation with, in concert with, or on behalf of the subpoenaed party.
- 2) Eulen America will be referred to as “the Employer.”
- 3) The word “person” or “persons” means natural persons, corporations, partnerships, sole proprietorships, associations or any other kind of entity.
- 4) Whenever used in this subpoena, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense and vice versa; references to parties shall be deemed to include any and all of their officers, agents, and representatives; the masculine shall be deemed to include the feminine and vice versa; the disjunctive “or” shall be deemed to include the conjunctive “and” and vice versa; and each of the words “each”, “any” and “all” shall be deemed to include each of the other words.
- 5) (a) Copies may be produced in lieu of originals provided that such copies are exact and complete copies of original documents and that the original documents be made available at the time of production for the purpose of checking the accuracy of any such copies. (b) Any copies of original documents which are different in any way from the original, whether by interlineations, receipt stamp, notations, or otherwise, shall themselves be considered original documents and must be produced in addition to the originals or copies as described in 5(a).
- 6) If any document responsive to any request herein was withheld from production on the asserted ground that it is privileged, identify and describe:
  1. the author;
  2. the recipient;
  3. the date of the original document;
  4. the subject matter of the document.

## ATTACHMENT

1. Those documents that will show the number of vacated positions that the Employer had to fill when it was awarded the Passenger and Baggage Services at MIA Service Agreement that went into effect on October 1, 2010 for Concourse E Ramp, Baggage Claim, Customs Halls, and Skycap podiums (Service Agreement).
2. For the time period of October 1, 2010 through April 30, 2011, those documents that will show a day by day count of the number of people working under the Service Agreement, broken down by those who were previously working for the Employer and those who were hired to work under the Service Agreement. The documents should note which employees were previously employed by Quality Aircraft Services who were doing the same work being done under the Service Agreement.
3. Those documents that will show the dates of employment for all employees working under the Service Agreement.

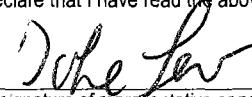
# EXHIBIT B

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**CHARGE AGAINST EMPLOYER**

<b>DO NOT WRITE IN THIS SPACE</b>	
Case 12-CA-26948	Date Filed 11/17/2010

**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>	
a. Name of Employer <b>EULEN AMERICA</b>	
b. Tel. No. <b>(305) 269-2714</b>	
c. Cell No.	
f. Fax No. <b>(305) 856-0779</b>	
g. e-Mail <b>info@eulenamerica.us</b>	
h. Number of workers employed	
d. Address (Street, city, state, and ZIP code) <b>2665 S. Bayshore Drive Suite 1103 Miami, FL 33131</b>	e. Employer Representative <b>Nancy Duran</b>
i. Type of Establishment (factory, mine, wholesaler, etc.) <b>Service</b>	j. Identify principal product or service <b>Aviation, including sky caps and baggage handlers</b>
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) <b>The TWU Local 525 represented a unit of Sky Caps and Baggage Handlers employed at the Miami International Airport by Quality Aircraft Services, Inc. On or about October 1, 2010, Eulen America replaced QAS as the provider of baggage handling and sky cap services at the airport. Eulen America has refused to hire the large majority of the bargaining members formerly employed by Quality Aircraft Services, Inc., on account of their union membership, thereby violating Section 8(a)(3) of the Act.</b>	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) <b>Transport Workers Union, Local 525, AFL-CIO</b>	
4a. Address (Street and number, city, state, and ZIP code) <b>122 Dixie Lane Cocoa Beach, FL 32931</b>	
4b. Tel. No. <b>(321) 783-2266</b>	
4c. Cell No. <b>(321) 514-2452</b>	
4d. Fax No. <b>(321) 784-8847</b>	
4e. e-Mail	
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) <b>Transport Workers Union of America, AFL-CIO</b>	
<b>6. DECLARATION</b>	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  <b>Tobe Lev, Union Attorney</b>	
(signature of representative or person making charge) (Print/type name and title or office, if any)	
Tel. No. <b>(407) 422-1400</b>	
Office, if any, Cell No.	
Fax No. <b>(407) 422-3658</b>	
e-Mail	
Address <b>Post Office Box 2231, Orlando, FL 32801</b>	
11/16/2010 (date)	

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**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 unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



# EXHIBIT C

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET  
FORM NLRB-501  
(2-08)

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

First DO NOT WRITE IN THIS SPACE

Case amended  
12-CA-26948

Date Filed  
01/28/2011

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer <b>EULEN AMERICA Inc.</b>		b. Tel. No. (305) 269-2714
d. Address (Street, city, state, and ZIP code) <b>2665 S. Bayshore Drive Suite 1103 Miami, FL 33131</b>		c. Cell No.
e. Employer Representative <b>Nancy Duran</b>		f. Fax No. (305) 856-0779
i. Type of Establishment (factory, mine, wholesaler, etc.) <b>Service</b>		g. e-Mail <b>info@eulenamerica.us</b>
j. Identify principal product or service <b>Aviation, including sky caps and baggage handlers</b>		h. Number of workers employed

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)  
The TWU Local 525 represented a unit of Sky Caps and Baggage Handlers employed at the Miami International Airport by Quality Aircraft Services, Inc. On or about October 1, 2010, Eulen America replaced QAS as the provider of baggage handling and sky cap services at the airport. Eulen America has refused to hire the large majority of the bargaining members formerly employed by Quality Aircraft Services, Inc., on account of their union membership, thereby violating Section 8(a)(3) of the Act. The Employer has refused to reconize and bargain with the Union.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)  
**Transport Workers Union, Local 525, AFL-CIO**

4a. Address (Street and number, city, state, and ZIP code) <b>122 Dixie Lane Cocoa Beach, FL 32931</b>	4b. Tel. No. (321) 783-2266
	4c. Cell No. (321) 514-2452
	4d. Fax No. (321) 784-8847
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)  
**Transport Workers Union of America, AFL-CIO**

8. DECLARATION  
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Tobe Lev Tobe Lev, Union Attorney  
(signature of representative of person making charge) (Print/Type name and title or office, if any)

Address Post Office Box 2231, Orlando, FL 32801 1/27/11  
(date)

Tel. No. (407) 422-1400
Office, if any, Cell No.
Fax No. (407) 422-3658
e-Mail <u>tlev@esantev.com</u>

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

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 unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

HM