JDR–1-11
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BEACON SALES ACQUISITION, INC. d/b/a QUALITY ROOFING SUPPLY COMPANY	Cases	4-CA-036952 4-CA-037107 4-CA-037120 4-CA-037209 4-CA-037304
and		4-CA-037306 4-CA-037377 4-CA-037378 4-CA-037433 4-CA-037438 4-CA-037456 4-CA-037548 4-CA-037577 4-CA-037736
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542, AFL-CIO		4-CA-037841 4-CA-037885 4-CA-037943

SPECIAL MASTER'S REPORT AND ORDER

PAUL BUXBAUM, Administrative Law Judge. On June 13, 2011,[1] Chief Administrative Law Judge Robert A. Giannasi issued an order appointing me as Special Master in this case for the purpose of making an *in camera* inspection to determine whether certain documents are protected from disclosure by reason of privilege. He directed me to make necessary findings and conclusions and issue an appropriate order.

Pursuant to this mandate, I conducted a telephone conference with lawyers for all parties on June 17. The parties were asked to make an effort to narrow the scope of the documents that would be subject to inspection. Upon completion of this task, counsel for the Respondent was directed to compile and submit a final privilege log and to provide me with the documents listed on that log. All parties were also given an opportunity to file position statements regarding the issues before me.[2] During the discussion, I also asked for the views of all counsel regarding the state of the record related to my task as Special Master. All agreed that the record was adequate and nobody sought to provide any additional evidence.[3]

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[1] All dates are in 2011 unless otherwise indicated.

[2] Counsel for the Charging Party indicated that he would rely on the General Counsel's position statement instead of preparing a separate document.

[3] Respondent concluded its subsequently filed position statement by making the following request: "Should you determine that any particular documents are not privileged or protected, Quality requests the opportunity to provide testimony as to the particular documents' privileged or protected nature." (R. position statement, at p. 6.) While I understand the lawyers' attempt to

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On July 15, I received the privilege log, accompanying documents to be inspected, and the position statements filed by counsel for the Acting General Counsel[4] and for the Respondent. Having now completed a careful review of these materials, I issue the following report and order.

A. Background

On April 7, the Regional Director issued her third consolidated complaint and notice of hearing alleging that the Respondent had engaged in a variety of violations of Section 8(a)(1)(3) and (5) of the Act. It is fair to say that the majority of these alleged unfair labor practices involved the manner in which the Respondent has engaged in collective bargaining with the Charging Party. Perhaps the central allegation is that the Respondent refused to bargain in good faith as manifested by such improper conduct as making unilateral changes to working conditions absent a *bona fide* impasse, insisting on contract provisions granting it unilateral control over key issues, engaging in regressive bargaining, and refusing to bargain over mandatory subjects of bargaining. See third consolidated complaint, Section 15(b), p. 10. The Respondent denied all of the material allegations.

In preparation for the trial of this case, on March 31, counsel for the General Counsel served a subpoena on the Respondent seeking production of a variety of documents. Counsel for the Respondent filed a petition to revoke this subpoena asserting a number of defenses, including the contention that certain of the materials being sought were protected from disclosure by the attorney-client and work product privileges. In addition, counsel noted that the Board's labor relations policies protected certain documents from disclosure because they contained strategies and positions formulated by the Respondent for purposes of engaging in collective bargaining with the Union. Counsel for the General Counsel filed an opposition to the petition to revoke.

On May 10, the case came before Administrative Law Judge Michael A. Rosas for trial. Trial proceedings continued at intervals from that date until July 13. During the course of those proceedings, Judge Rosas ruled on the Respondent's petition to revoke the subpoena. On June 6, he directed counsel for the Respondent to submit for *in camera* inspection the documents listed on the Respondent's original privilege log with certain specified exceptions. Subsequently, the trial judge and the lawyers for all parties discussed the matter as part of the trial proceedings. During that colloquy, counsel for the Respondent requested the appointment of a special master to conduct the *in camera* inspection. All parties agreed to this procedure and the trial judge concurred. The content of the discussion also underscored the limited nature of the task to be undertaken by the special master. As counsel for the Respondent succinctly explained:

> Respondent doesn't need the Special Master to go and look at all the arguments as to why you should review these *in camera.* We're accepting your ruling on that, that these should be looked at *in camera.*

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protect their client, this is essentially a request for a "Mulligan," a concept antithetical to the nature of the litigation process. In any event, I have carefully examined the state of the existing record and find that it is entirely adequate to permit fulfillment of my mandate.

[4] For ease of reference, I will refer to the Acting General Counsel as the "General Counsel" throughout the remainder of this decision.

> . . . .
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> [W]e would ask that the—what the Special Master would do is make a decision "yea" or "nay" that they are privileged.

(Trial tr., p. 41.)

The trial judge and the lawyers for all parties took pains to clarify one other issue related to the special master's mandate. Counsel for the Respondent raised the question as to the procedure to be followed by the master in the event he or she determined that certain documents were not privileged and should be produced in response to the subpoena. All concerned agreed that the master would not provide any documents directly to the General Counsel or the Charging Party. Instead, the master's decision would list any documents required to be produced and would afford the parties an opportunity to seek appropriate review of the master's order for such production. (Trial tr., pp. 38-43.)

During my telephone conference with the lawyers, we confirmed that I would not release any documents sua sponte. In the event my review demonstrated that documents should be produced, I would issue an order detailing such findings. I would then place all of the documents submitted for inspection under seal so as to enable any party to seek review or enforcement of my order. In the Respondent's position statement, counsel addressed the nature of this agreement:

> During the conference call, Judge Buxbaum expressly confirmed that he would not disclose any documents to the General Counsel (or Union) irrespective of his conclusion regarding the applicability of the attorney-client privilege or attorney work product doctrine. Rather, the parties and Judge Buxbaum agreed that Quality had the right to require any such enforcement of the Subpoena through Federal Court proceedings.

(R. position statement, p. 2, fn. 1.)

Because this is both a developing area of practice and an unsettled area of law, I deem it necessary to provide some commentary regarding counsel's formulation. His statement as to the particular procedures agreed upon by all parties, the trial judge, and me is entirely accurate. To the extent, however, that he has concluded that I endorse his assertion that the Respondent "has the right to require any such enforcement of the Subpoena through Federal Court proceedings," I must respectfully disagree.

The Board's longstanding position has been that its adjudicators possess both the duty and the authority to conduct *in camera* inspections to resolve claims of privilege and to provide nonprivileged materials to the party seeking them by subpoena. Its leading case on this topic is *Brinks, Inc.,* 281 NLRB 468 (1986), a representation proceeding where the employer subpoenaed documents from the union and the union resisted production based on a claim of privilege. The Board held:

> Instead of allowing the Petitioner not to produce the documents, the hearing officer should have conducted an in camera inspection of the documents to determine whether any of them were subject to the attorney-client privilege. The requested documents that were not privileged, if any, should have been made available to the Employer, assuming that other relevant standards were met.

281 NLRB at 470. Two decades later, a two-member panel of the Board signaled the continuing vitality of the principle articulated in *Brinks*, noting that such inspections were "well-established procedures" and constituted "a proper exercise of the administrative law judge's authority." *CNN America, Inc.,* 352 NLRB 448, 449 (2008).[5]

While the Board's position has been clear, it cannot escape notice that two circuit courts have taken a different view as to some aspects of the Board's *in camera* inspection procedures. In *NLRB v. Detroit Newspapers,* 185 F.3d 602, 606 (6th Cir. 1999), the Court found it "implicit" in the structure of the Act that "the district court, not the ALJ, must determine whether any privileges protect the documents from production."

Very recently, the Fourth Circuit has taken a more nuanced approach. Thus, while acknowledging the Board's authority to determine issues of privilege, it required an independent review by the federal courts when enforcement of Board orders requiring production of documents was being sought. As the Court explained:

> We do not say that an ALJ does not have authority to rule on a claim of privilege. He can make such a ruling just as he could rule on any issue of evidence presented to him during the course of a hearing. But the ALJ has no power *to require the production* of documents for *in camera* review or for admission into evidence when a person or party refuses to produce them. . . . Rather, the district court must satisfy *itself* whether, under appropriate legal standards, *it* should enforce the subpoena and thus overrule [the] claim of privilege. [Italics in the original.]

NLRB v. Interbake Foods, LLC, 637 F.3d 492, 499-500 (4th Cir. 2011).

Faced with this conflict among the reviewing authorities, an administrative law judge's duty is clear. As the Board has explained:

> It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise . . . [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved. [Citations omitted.]

Pathmark Stores, Inc., 342 NLRB 378, fn. 1 (2004).

From the foregoing discussion, it should be clear that I cannot, and have not, drawn any

[5] I recognize that *CNN* is not mandatory authority given the Supreme Court's rejection of the two-member Board's power to act. See, *New Process Steel v. NLRB,* __ U.S. __ (2010), 130 S. Ct. 2635 (2010). Nevertheless, the views expressed by the two members are probative as to the Board's current thinking about the issue.

conclusion that an administrative law judge, whether acting as trial judge or special master, is precluded as a matter of law from providing nonprivileged documents to a party seeking them by means of an otherwise proper use of the subpoena power. Nevertheless, given the parties' agreement and the trial judge's concurrence, I will not make any such disclosure of documents directly to any party in this case.

B. Applicable Legal Principles

As an administrative law judge, I am conditioned by both law and experience to make detailed findings and provide full explanations of my conclusions in order to enable the parties to comprehend the rationale for my decisions and to permit the reviewing administrative agency to perform its duties by reference to a completely developed record. Unfortunately, the nature of my mandate in this case makes this difficult. It would eviscerate the parties' agreement as to the master's procedures were I to describe in detail the specific reasons why I have determined that certain documents must be produced and others must remain shielded from disclosure. Of necessity, I must paint with a broad brush and leave it to any reviewer to examine the documents and reach appropriate conclusions.

Given this reality, I deem it important to explain the principles and precedents on which I have placed reliance in performing my *in camera* inspection of the Respondent's documents. At a minimum, this will provide context for an evaluation of my conclusions.

At the outset, I note that this year marks my 25th year of judicial service, beginning in a large urban court system and continuing for two federal administrative agencies, including, of course, a decade spent as a judge for the Board. Such anniversaries induce a retrospective effort to glean universal truths about the nature of our profession.[6] While these are often hard to discern, I am firmly convinced that one such fundamental reality is that the work of trial judges and their reviewing authorities would be virtually impossible without the constant efforts of the members of the bar. Lawyers make the system function. Without their behind-the-scenes work with their clients, we would simply be overwhelmed. While this was obviously true in the busy courthouse, it is equally the case in the field of labor law.

Because of the essential nature of the lawyers' day-to-day work of counseling clients and offering advice and recommendations, judges and other adjudicators must be extremely cautious in imposing any policies that could significantly interfere with the lawyers' ability to work with their clients, particularly toward the goal of keeping their clients out of the courthouse or hearing room. While reading the stack of paperwork submitted to me for *in camera* inspection, I became acutely aware that I was intruding into an important zone of privacy. I was privy to wide ranging and frank discussions by lawyers and their clients. This was an uncomfortable experience for me and, I strongly suspect, an even more uncomfortable experience for the authors of this correspondence.[7] I am troubled by the sense that if this process becomes routine, it will hinder the ability of lawyers to perform their task of keeping their clients out of the legal system by soliciting the sometimes unsavory details of their problems and offering frank solutions. To the extent that *in camera* inspections become more frequent, we risk significant impairment of our adjudicatory process.[8]

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[6] Naturally, my earlier experiences as a government prosecutor and private practitioner also influence my viewpoint.

[7] I do not mean to suggest that I saw anything improper, simply that I read much that was intended to be private.

[8] One way to reduce the scope of this problem was outlined decades ago in *Brinks, Inc.,* 281

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Hopefully, the reader will forgive this digression into personal advice. I am gratified that the intent of the Board's rulings on the issues presented by my mandate appears to be largely consistent with my individual concerns. Any survey of those precedents must begin with the central decision in this area, *Patrick Cudahy, Inc.,* 288 NLRB 968 (1988). Significantly, among the key allegations in that case was the General Counsel's contention that the employer failed to bargain with the union in good faith because its negotiators possessed "a fixed intent not to reach agreement with the Union." (288 NLRB at 968.) In the pursuit of evidence related to this allegation, the General Counsel issued subpoenas demanding production of the employer's "bargaining notes, proposals, letters, memoranda, and strategies, relating to [the employer's] contract negotiations for a successor agreement with the Union." (288 NLRB at 968.)

The employer's counsel raised the defense of privilege and the trial judge conducted a hearing on the issue. As part of this process, the judge made an *in camera* inspection of the documents and concluded that many of them were not covered by any privilege. Interestingly, both sides followed up with further litigation. Counsel for the General Counsel asked the trial judge to postpone the hearing on the merits to enable her to seek enforcement of the subpoena in Federal Court. At the same time, counsel for the employer filed a request for special permission to appeal the judge's ruling. The Board granted the request.

In announcing its decision on the merits of the privilege issue, the Board took the somewhat unusual step of advising that it had considered the matter "in depth" and intended its decision to "give guidance to litigants and judges in this and future cases." (288 NLRB at 969.) From this language, it is obvious that *Cudahy* must serve as a touchstone in guiding my efforts to fulfill my mandate in this case.

The Board next considered the "threshold question" of whether the attorney-client privilege applied to the types of documents being sought, "given that collective bargaining and labor-management relations in general have business and economic aspects as well as legal aspects." (288 NLRB at 970.) Importantly, it resolved this question by reference to the "principle" that a matter addressed by a client to a lawyer is "prima facie" so addressed for the purpose of securing legal advice, "and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice." (288 NLRB at 970.) [Internal quotation marks omitted.]

I have applied this analytical principle in my assessment of the content of the correspondence involved in this case. In particular, I have been careful to adopt the Board's express recognition that lawyers have a professional obligation to consider relevant "social, economic, political, and philosophical considerations" when giving legal advice, and that "the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." (288 NLRB at 971.) Beyond this general appreciation of the scope of lawyers' duties, the Board took pains to stress that it expected judges to avoid a narrow construction of the extent of the privilege "[f]or specifically labor law policy reasons as well." (288 NLRB at 971.) When documents are being

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NLRB 468, 470 (1986), where the Board admonished that, because "[t]he possibility that some of this requested information would be privileged was clear… the subpoenas should have been drafted to minimize that possibility." With respect, I think the same could be said in this case. To give one example, the subpoena does not exclude a demand for production of letters between in-house counsel and outside counsel despite the tremendous likelihood that such documents would be privileged.

examined in the context of collective bargaining, the Board instructed that the privilege cannot be overcome simply because a communication between lawyer and client also contains "business and economic considerations."[9] (288 NLRB 971.)

Finally, after laying out the analytical methodology for assessment of claims of privilege in the context of documents generated in the collective-bargaining setting that involved a mix of legal and other considerations, the Board performed its evaluation of the specific documents in the case before it. It concluded that the documents written by the employer's lawyers were shielded from disclosure because their contents consisted of an exploration of "the legal ramifications connected with the full range of topics and events that may arise in the setting of contract negotiations." (288 NLRB at 971.) In addition, the Board concluded that the documents written by the employer to its lawyers were similarly protected as they were created in order to provide the attorneys with "needed information about the client's circumstances and aims that facilitated the giving of the advice." (288 NLRB at 971.) [Footnote omitted.]

As a district judge summarizing the holding in *Cudahy* noted, "[t]he NLRB has reasoned that the privilege applies to legal advice related to collective bargaining, despite the presence of business and economic considerations in such advice." *Pennsylvania Truck Lines, Inc. v. International Brotherhood of Teamsters, Warehousemen and Helpers of America,* 1990 WL 65706 (E.D., PA, May 11, 1990). Following *Cudahy,* that judge granted protection to "confidential notes and communications among [the union's] counsel, members, and officers for the purpose of developing positions to be taken in . . . negotiations."

After *Cudahy,* related issues have occasionally arisen. In *National Football League,* 309 NLRB 78 (1992), the trial judge outlined circumstances where the privilege would not apply despite the breadth of scope afforded under *Cudahy.* After performing an *in camera* inspection, the judge concluded that many items of correspondence involving the employer's in-house counsel were not privileged. He based this finding on the fact that the material "reflected discussions of purely business matters" and that the in-house counsel was involved because he was charged with implementing these business decisions "as part of his administrative functions." (309 NLRB at 97.) The judge also concluded that the materials to be disclosed, "did not concern themselves with future collective-bargaining strategy." (309 NLRB at 97.)

Another relevant aspect of the analysis under *Cudahy* was addressed by the judge in *Taylor Lumber and Treating, Inc.,* 326 NLRB 1298 (1998). The issue involved the claim of

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[9] At this point in its analysis, the Board noted that this formulation of a broad scope for the attorney-client privilege in the area of collective bargaining may not apply to the same extent in other areas of labor law practice. (288 NLRB at 971, at fn. 12.) This admonition serves to underscore the significance of the fact that *Cudahy* was a bargaining violation case of the same type as the present case. Later in the decision, in a slightly different context, the Board further explained why it was according broad protection in bargaining situations. It observed, "[c]ertainly there are unquestionably strong policy reasons favoring disclosure insofar as it would facilitate the discovery and deterrence of 'sham' bargaining. These reasons must be weighed, however, against the countervailing policy reasons underpinning the privilege itself and the policy consideration of fostering collective bargaining by protecting the seeking of advice and the uninhibited exchange of ideas in that context. In this regard, we note that 'sham' bargaining cases have been litigated for many years without the benefit of the sort of disclosure sought here. Parties have successfully relied not only on direct evidence of intent but also on intent that might be inferred from objective evidence of bad-faith bargaining." (288 NLRB at 973.) [Footnotes omitted.]

attorney-client privilege as applied to the employer's in-house counsel. In declining to require disclosure, the trial judge acknowledged the *Cudahy* Board's framework for analysis and observed that it afforded broad protection and "seemed to preclude inquiry into or dissection of the 'legal-nonlegal' particulars of the attorney's relationship or communications with the employer-client."[10] (326 NLRB at 1300.) As to the General Counsel's claim that the communications with the attorney were not protected by privilege due to his employment as house counsel, the judge noted that the situation was similar to that presented in *Cudahy.* He found it to be "irrelevant" that the house counsel had claimed an exemption from the requirement that he contribute to the state bar's liability fund on the ground that he was a "house counsel." (326 NLRB at 1300.) The Board adopted his conclusion that the communications were covered by the attorney-client privilege.

An additional aspect of the privilege analysis that has useful lessons for my own task was presented in *BP Exploration (Alaska), Inc.,* 337 NLRB 887 (2002). Among the privilege issues raised was the impact of discussions of financial considerations as possibly weakening the privilege claim. In rejecting the contention that the communications were subject to disclosure because they intermingled legal and financial discussions, the Board observed that, "[s]uch information is integral to weighing the potential costs and benefits of litigation and thus to providing legal advice." (337 NLRB at 889.)

In sum, as to claims of attorney-client privilege, the Board's policy is to afford "strong" protection. *BP Exploration,* infra at 889. Trial judges and special masters should refrain from an overly refined attempt to parse the distinctions between legal advice and assessments of business and financial considerations that are adjunct to that advice. While a lawyer's communications that are devoid of legal content are not privileged, mixed communications made in the labor relations context should be protected from disclosure for reasons related both to the importance of free ranging communications between lawyers and clients generally and because of specific needs arising in the collective-bargaining process. These principles apply equally to so called outside counsel and to in-house lawyers.[11]

In addition to extensive claims of attorney-client privilege, counsel for the Respondent also contends that certain documents are shielded by the work product doctrine. There is no doubt that the Board recognizes and endorses the applicability of this privilege. In its leading case on the topic, *Central Telephone Company of Texas,* 343 NLRB 987, 988 (2004), the Board acknowledged, "[t]he strong public policy underlying the work product doctrine" due to its function as an aid to the "adversarial process by providing a certain degree of privacy to a lawyer in preparing for litigation." In delineating the elements necessary to establish protection under the doctrine, the Board observed that the "essential" question was whether "the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." 343 NLRB at 988, citing *Senate of Puerto Rico v. U.S. Dep't of Justice,* 823 F.2d 586, fn. 42 (D.C. Cir. 1987). [Italics in the original. Footnote omitted.] Recently, the Board described the work product doctrine as protecting "a strong confidentiality interest." *Ralphs Grocery Co.,* 352 NLRB 128, 129 (2008).

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[10] I think this is a bit of an overstatement. As illustrated by the judge's conclusions in *National Football League*, discussed above, some evaluation of the extent of actual legal advice being sought and offered is appropriate.

[11] It does seem clear to me that all such attorneys must be members of the bar and subject to its ethical obligations in order to support invocation of the privilege. For this reason, I required counsel for the Respondent to provide written confirmation that the lawyers involved in this case are so qualified. He has done so.

Finally, counsel for the Respondent contends that certain aspects of the communications among corporate officials are entitled to protection from disclosure because they contain discussions of negotiating strategy of a character that is afforded protection by the Board. The origin of such a specific labor law privilege for discussions of negotiating strategy appears to be certain observations of the trial judge in *Berbiglia, Inc.,* 233 NLRB 1476 (1977). In that case, the judge revoked an employer's subpoena seeking certain records from the union that represented its employees. In his decision, subsequently adopted by the Board, he explained that disclosure of those records would be "subversive of the very essence of collective bargaining" because, "[i]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure." 233 NLRB at 1495. Indeed, he opined that this principle was "so self-evident as apparently never to have been questioned." 233 NLRB at 1495.

This privilege affording protection to documents that reveal strategies related to collective bargaining does not rest merely on the reflections of one judge or on the strength of its logic. It has been specifically endorsed by the Board as part of its exposition of the law of privilege in labor relations cases in *Cudahy. Cudahy* adopted the *Berbiglia* judge's expressed rationale for the privilege employing his language, quoted above, as its own.[12] See, 288 NLRB at 971. The Board has not hesitated to apply this type of protection to records of an employer as well as those of union officials. In *Boise Cascade*, 279 NLRB 422, 432 (1986), it affirmed the judge's conclusion that, despite the likely probative value of an employer's documents discussing the history of collective-bargaining negotiations and strategic plans for future bargaining, such records must be shielded from disclosure in order to enable the bargaining process to function properly.

As I have indicated, I am constrained by the terms of my mandate from giving precise explanations of how I have applied these principles and policies to my assessment of the records in this case. In completing my task, I have strived to apply the policies as specifically articulated by the Board and with an eye to the proper effectuation of the general jurisprudential and specifically labor relations objectives emphasized by the Board.

Turning now to the task before me, the Respondent's final amended Privilege Log (hereinafter "PL") contains 282 itemized assertions of privilege.[13] I have divided these into four general topics. PL 1 through PL 62, inclusive, consists of materials that have previously been provided to the General Counsel with certain portions redacted. The redacted portions are claimed to be subject to the attorney-client privilege.[14] PL 63 through PL 279, inclusive,

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[12] For this reason, I do not agree with the doubts about the existence of the *Berbiglia* privilege expressed by the judge in *Taylor Lumber*, supra, at 1300, fn. 11.

[13] In its supplemental chart regarding the status of attachments to emails, Respondent states that 5 emails that were actually not responsive to the subpoena were mistakenly included in its privilege log (PL 160, 206, 233, 243, and 258). Having already examined these emails, I had found them to be privileged. As a result, there is no need to act on counsel's request to withdraw them.

[14] Two of those items, PL 11 and PL 12, are also claimed to fall within the work product doctrine. Throughout my analysis, wherever Respondent has claimed that certain documents are protected from disclosure by both the attorney-client privilege and the work product doctrine (see: PL 11, 12, 68, 74, 77, 104, 116, 142, 152, 153, 171, 173, 197, 198, 201, 202, 226, 228, 230, 231, 235, 238, 252, 258, 260, and 272). I have evaluated the attorney-client privilege issue first. I have done so because that privilege, if established, furnishes absolute protection. By

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consists of materials that the Respondent contends are protected from disclosure in their entirety by reason of the attorney-client privilege. In this world of electronic communication, many of the emails described in PL 62 through 279 contain attachments. Because it was sometimes difficult to discern whether counsel for the Respondent considered those attachments to also be privileged, I requested additional information which has been provided through the means of a supplemental chart. I will address the claims of privilege set forth in that chart in a separate section. Finally, PL 280 through PL 282 consist of bargaining notes that are contended to fall within the work product doctrine. There is no claim of attorney-client privilege with regard to these items. I will now provide my findings regarding each of these four groups of documents.

C. Proposed Redactions Due to Attorney-Client Privilege (PL 1 through 62)

I have examined each of these items and concluded that all of the proposed redactions are justified by the claim of attorney-client privilege. At the outset, I would confirm the accuracy of counsel for the Respondent's remark to the trial judge when discussing the use of a special master that, "[t]here are tons of things in there that are just, you know, 'Mike Viccora, please find a letter for Mr. Bankard.'" (Trial tr., p. 39.) Many of the items listed throughout the entire log consist of the routine and boring mechanics of running a legal operation and relaying relevant correspondence among the Respondent's various lawyers, legal staff, and managers. Of course, the fact that materials are insignificant does not remove them from protection by the attorney-client privilege.

Beyond the mass of routine correspondence, these materials do include highly confidential discussions of legal strategy and bargaining tactics. The protection of these materials is essential to accomplish the Board's objectives as articulated in *Cudahy* and *Berbiglia.* Because the unredacted portions of these documents have already been provided by the Respondent to the other parties, I need take no further action regarding them. I find that all of the redacted materials are subject to the attorney-client privilege.

D. *Items Claimed as Entirely Protected by Attorney-Client Privilege (PL 63 through 279)*

As one would both hope and expect regarding claims of privilege formally raised by members of our profession, the vast majority of the 216 items asserted to be covered in their entirety by the attorney-client privilege are clearly protected from disclosure under that legal doctrine. I cannot and will not discuss their contents except to again note that they consist of a mixture of routine items related to the practice of labor relations and labor law mixed with highly confidential discussions that go to the heart of the rationale for the existence of both the attorney-client privilege and the Board's collective-bargaining privilege (*Berbiglia).*

As one may also anticipate, there are a small number of items that, upon examination, I have concluded are mistakenly asserted to be privileged. In reaching this conclusion, I have

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contrast, the work product doctrine contains an important caveat. As F.R.C.P. 26(b)(3)(A)(ii) states, such materials may be discovered if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." The Board applies the same analysis. See, *Central Telephone Co. of Texas,* 343 NLRB 987, 990 (2004). After conducting my initial evaluation regarding attorney-client privilege as to each of these items, I have concluded that they are covered by that privilege. Thus, because each of these items is shielded by the attorney-client privilege, there was no need to conduct an additional evaluation under the work product doctrine.

compared the contents of those documents with the asserted rationale for the privilege as described on the appropriate entry of the log. Within the constraints of my mandate, I will discuss each item.

PL's 89 and 90 consist of an exchange of emails between the Respondent's human resources manager and an individual who is not identified by title but who is clearly a corporate supervisor. The subject matter of the emails is certainly related to the Respondent's disputes with the Union and the resulting litigation. As to these items, counsel for the Respondent claims a privilege because the emails discuss "privileged communications" with Attorney Cooper. (PL, at p. 7.)

As the District Judge in *Pennsylvania Truck Lines, Inc. v. International Brotherhood of Teamsters,* supra, noted in discussing the attorney-client privilege in labor law cases, it is "well-known" that the privilege only applies to communications between a client and "a member of the bar of a court, or his subordinate." (1990 WL 65706.) I know of no authority for the proposition that discussions of legal matters between two corporate managers could be protected because they involve a topic of interest to their lawyers. Such a claim goes far beyond the scope of the attorney-client privilege. Since the communications under examination do not flow between a client and his or her lawyer or other subordinate employee, they cannot be protected by the privilege.

PL 100 consists of two emails. The first is from a company official, Randy Bucknam, to two higher ranking officials. Once again, there is no doubt that the subject involves labor issues. Indeed, the author suggests that the topics he is discussing should be referred to one of the Company's lawyers. The second email is the referral to the lawyer as suggested by Mr. Bucknam.

Counsel claims that both documents are privileged because they consist of an "[e]mail chain forwarding email from Randy Bucknam regarding conversation with union worker (driver)." (PL, at p. 8.) As discussed above, the initial email does not consist of a communication between a client and a lawyer or subordinate employee of that lawyer. The second email is such a communication and, as such, is privileged. However, that privilege cannot be extended to the first email simply because it has been forwarded in a second, privileged, email. In *Cudahy,* supra, at 971, fn. 13, the Board observed that "ordinary corporate records . . . cannot be swept within the privilege simply by being transmitted from client to attorney or vice versa." That is precisely the claim being made here regarding Mr. Bucknam's email. That email is not protected by privilege. I will, however, redact the second email which is a privileged communication to counsel.

PL 128 is another set of emails exchanged between two corporate officers. In claiming the privilege for this set of correspondence, counsel asserts that the content concerns "conversation with Ross Cooper regarding union health rates." (PL, at p. 10.) While it is true that the correspondents discuss the desirability of raising this issue with their attorney, the mere existence of this topic of discussion does not serve to invoke any privilege. This is routine correspondence among corporate officials that must be disclosed in response to the subpoena.

PL 136 is asserted to be privileged because it is an "[e]mail exchange regarding Union matters." (PL, at p. 10.) The string of emails is begun by Attorney Cooper and the content of his correspondence is clearly privileged as it relates entirely to litigation. His missive provoked further correspondence among several nonattorney managers. In those two emails, the managers chose not to include counsel or even to send copies to counsel. For reasons already explained, this sort of correspondence among corporate officers is not covered by the attorney-

client privilege. Thus, I will redact counsel's initiating email and direct disclosure of the two subsequent emails in the chain.

E. Bargaining Notes Claimed as Work Product (PL 280 through 282)

The final items listed on the privilege log are three sets of notes of collective-bargaining sessions between the Respondent and the Charging Party. Two of those sets were compiled by Respondent's lawyers, Jennifer Thomas (PL 280) and Ross Cooper (PL 281). The remaining set (PL 282) was prepared at the direction of counsel by Deborah Rzepela-Auch, a paralegal employed by counsel. In the privilege log, counsel contends that these notes are shielded from production because, as "[b]argaining notes reflecting impressions," they constitute protected work product. (PL, at p. 20.) There is no contention that the notes are entitled to any additional protection under the attorney-client privilege.[15]

At the outset, I note that counsel indicates that the notes contain two types of content. A review of these items confirms this as accurate. The vast majority of the content consists of each authors' attempt to describe what was said and done at the bargaining sessions by all of the participants. It should be noted that the level of detail differs markedly between the two sets of lawyers' notes. Attorney Thomas made voluminous notes that border on the verbatim.[16] Attorney Cooper's handwritten notes are episodic and make no effort to be comprehensive.

In the notes written by both of the lawyers, interspersed among the description of events and statements are occasional comments representing each writer's subjective reaction to what was unfolding at the bargaining table. As correctly described in the log, these parenthetical remarks are the "impressions" of counsel. (PL, at p. 20.)

In her position statement regarding the issues before me, counsel for the General Counsel makes the following observation:

> To the extent these [bargaining note] materials contain the 'mental impressions, conclusions, opinions, or legal theories . . .' of note-takers pursuant to FRCP 26(b)(3), those 'impressions' can be redacted pre-production. To the extent they contain factual information they must be produced."

(GC position statement, at p. 2.)

It is evident from this statement by counsel for the General Counsel that the parties are in agreement that the comments made by the note takers consisting of their reactions, impressions, and conclusions about the events they were observing should be protected from disclosure. I certainly agree. As noted by counsel for the General Counsel in the passage quoted above, the applicable Federal Rule of Civil Procedure directs that, "[i]f the court orders discovery of [work product] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." FRCP 26(b)(3)(B).[17]

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[15] Nor could there be any such claim. It is apparent that the notes are not communications between attorneys and clients that discuss legal advice as required for invocation of that privilege.

[16] The same is true for the paralegal's notes.

[17] This principle has been applied in labor law cases. As an administrative law judge explained, "The distinction to be drawn is a clear one. Notes of a strictly factual nature, reporting only when, where, what, and by whom something was said during bargaining sessions

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The real issue here is whether the authors' efforts to transcribe what was said and done at the negotiating sessions are protected work product. The Respondent's argument in support of protection is explained in its position statement as follows:

> By filing [NLRB] charges on every dispute it had with Quality, the Union made it very clear from the beginning of the relationship between itself and Quality that the relationship would be litigious. Indeed, beginning in December 2007, Quality had unfair labor practice charges of one kind or another pending against it at virtually all times through the present. It was obvious to Quality that it would need to be prepared for litigation, therefore the notes that Quality's attorneys took at the negotiations were made in anticipation of litigation, and should not be produced in the absence of a compelling showing of need by the General Counsel, which the General Counsel has not made—and cannot make.

(R. position statement, at p. 5.)

In analyzing this argument, the focal point must be the Board's leading case on the work product doctrine, *Central Telephone Co. of Texas,* 343 NLRB 987 (2004). In that decision, the Board set forth its structural framework for analysis of work product issues. Critically for the matter before me, the Board described the starting point for such an assessment:

> The essential question in determining whether a document qualifies as work product is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation. Work product protection will be accorded where a document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation. [Italics in the original. A footnote, internal punctuation, and numerous citations omitted.]

343 NLRB at 988.[18]

In determining whether the bargaining notes at issue were prepared "*because of"* the prospect of litigation, I have considered the general background of labor relations and my own decade of experience as an administrative law judge for the Board.[19] Such reflection provides

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. . . are not privileged as the confidential 'work product' of the Company's bargaining committee . . . . Anything else included in the notes, not of a purely factual nature, is, however, both privileged and irrelevant. There is no requirement for the Company to disclose its bargaining strategy or tactics, or the opinions, mental thought processes, or conclusions and observations of its bargaining team members." *Morton International, Inc.,* 1993 WL 1609483 (Div. of Judges, 1993), at pp. 25-26.

[18] In surveying the federal circuits on the issue, the Board noted that both the D.C. and Third Circuits apply this standard. (343 NLRB 988, at fn. 3.) Subsequently, a noted authority, Magistrate Judge Facciola, has observed that, "[t]he operative question is whether the documents would have been created in essentially similar form irrespective of the litigation." [Internal punctuation and citation omitted.] *U.S. ex rel Fago v. M & T Mortgage Corp.,* 235 F.R.D. 11, 16 (D.D.C. 2006).

[19] It should be recalled that a fundamental rationale for any system of administrative law is

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necessary context for evaluation of counsel's argument in support of application of the work product doctrine to the Company's bargaining notes. I am struck by the fact that the preparation of such notes has been an invariable and universal feature of the collective-bargaining process as revealed in the Board's cases, including those on my own docket.[20] I have never been privy to a situation involving collective-bargaining negotiations where any party has indicated that it failed to take notes during the sessions.

The extent to which note taking is considered both universal and essential to the function of collective bargaining is well illustrated in the discussion of this practice in a pertinent manual. In Collective Bargaining: How it Works and Why: A Manual of Theory and Practice, by Thomas Colosi and Arthur Berkeley (2006), at p. 141, the authors advise that:

> In the turbulent and often emotionally charged atmosphere of the bargaining table, it is all too easy to get confused about what was said by whom about a specific proposal, and what agreement, if any, was reached. To avoid confusion and misunderstandings, each side will usually designate one of its members as a recorder. While it is common for every team member to take some sort of notes during the bargaining sessions, the recorder has the specific responsibility of making and maintaining a complete and accurate record of what transpired. This is not always easy, and it is a position of great responsibility.

The authors conclude, at p. 142, as follows:

> [N]ot only is the recording of notes important during bargaining, but it is imperative to maintain notes from prior negotiations, because quite often the same issue will surface again and again, negotiation after negotiation. Since union negotiating teams may alter composition due to elections and management teams change with promotions and retirements as well as administrations, good, legible records of previous years' bargaining sessions are vital for intelligent preparation for successful negotiations in the present—and the future.

I conclude that the bargaining notes in this case were taken as part and parcel of the routine, regular process of collective bargaining and were primarily intended to serve functions connected with that process. While I do not doubt that the lawyers were aware of the possibility of litigation arising from the collective-bargaining process, such a concern would not have served as the principal motivation for the creation of the notes. Rather, the essential primary motivation for the note taking was the central importance of such a procedure to the effective practice of collective bargaining.[21] In fact, the need for careful note taking is particularly clear in

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the desirability of developing a cadre of persons who possess detailed knowledge and experience in a highly specialized endeavor such as labor relations. As the Supreme Court has observed, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power [to administrative agencies]." *Mistretta v. U.S.,* 488 U.S. 361, 371 (1989).

[20] One need look no further than *Cudahy*, itself, where the Board noted that among the issues was the demand for production of the employer's "bargaining notes." (288 NLRB 968.)

[21] Indeed, I am certain that counsel for the Respondent recognizes that any contention that the needs of future potential litigation was the primary motivation for note taking during the

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the circumstances of this case. It will be recalled that the parties were negotiating for a set of initial collective-bargaining agreements. As a consequence, they did not have any prior contracts that could be used as templates to guide their discussions. The only realistic way to document the course of their negotiations was the type of note taking that the Company's legal staff performed.

In this connection, it is illuminating to undertake a thought experiment by posing the question of whether the Company's bargaining team would have decided to take notes of the sessions in the event that they had enjoyed a cordial relationship with the Union and entertained a strong expectation that the negotiations would be pleasant, cooperative, and fruitful. In answering that hypothetical, I do not hesitate to conclude that the Company's lawyers would have insisted that notes be prepared in order to undertake the essential task of documenting the course of bargaining. Fundamentally, it is impossible to conclude that, but for concern about impending litigation, no notes would have been created.

Because the bargaining notes were prepared primarily for purposes of collective bargaining, not litigation, they do not fall within the protection of the work product doctrine. In the interest of decisional completeness, I will nevertheless assess one additional matter. It will be recalled that the work product doctrine does not provide absolute protection. As the Board has noted, "[i]n order to overcome the work product protection, the Union ha[s] the burden of showing that it had a substantial need for the notes and that it could not obtain equivalent information without undue hardship." *Central Telephone Co. of Texas,* supra, at 990. In my view, the Union and the General Counsel have met this burden here.

As the judge indicated in *Morton International, Inc.,* supra, bargaining notes have special probative value in cases involving alleged violations of Section 8(a)(5) of the Act. To the extent that they provide contemporaneous recordation of the positions and actions of the parties during bargaining, they are unique and irreplaceable.[22] There is simply no way for the Union or General Counsel to obtain equivalent documentary evidence of what the Company itself noted to have occurred during the bargaining process. Production of this particular category of evidence is vital to the effective litigation of bargaining violation cases. The importance of this class of evidence outweighs the desirability of affording protection to work product. In that connection, I also observe that the Respondent's expectation of privacy in bargaining notes is certainly reduced. As indicated in the textbook cited earlier, parties to collective bargaining clearly anticipate that the notes of their sessions may be used by those parties to reconstruct the course of negotiations for the purposes of drafting any resulting agreement or resolving any subsequent disputes about the terms of that agreement.

For the foregoing reasons, I conclude that the bargaining notes (PL 280, 281, and 282) do not meet the definition of protected work product. In addition, if one were to assume that they had met that definition, the General Counsel and Charging Party have met their burden of

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bargaining sessions would come perilously close to an admission of lack of good faith in bargaining as has been alleged by the General Counsel in the complaint in this case. I am confident that counsel does not mean to suggest that his client was not primarily interested in exploring the possibility of reaching an agreement with the Union, but was only seeking to protect itself from losing an anticipated lawsuit.

[22] The Board has certainly recognized the weight to be accorded contemporaneous written evidence when compared with the testimony of interested parties at a subsequent trial. See *Domsey Trading Corp.,* 351 NLRB 824, 836 (2007), and the cases cited therein. Bargaining notes would be particularly clear examples of such relatively trustworthy documentary evidence.

establishing that they have a substantial need for the notes and cannot procure any equivalent substitute by other means. The notes should be produced pursuant to the subpoena. To the extent the notes contain the impressions of counsel, I shall redact those impressions.

F. Attachments Claimed to be Privileged.

As previously mentioned, during my review of the privilege log and documents, I noticed that there were numerous instances where an email that contained an attachment was alleged to be privileged. Since the Board in *Cudahy*, 288 NLRB at 971, fn. 13, had observed that "ordinary corporate records such as payroll or personnel records cannot be swept within the privilege simply by being transmitted from client to attorney or vice versa," I sought clarification from counsel for the Respondent regarding any claims of privilege as to these attachments. Counsel has provided a supplemental chart which I will treat as an addendum to the privilege log.

In this supplement, Respondent asserts claims of privilege as to some or all of the attachments to the following correspondence: PL 69, 73, 75, 85, 96, 99, 108, 125, 127, 140, 147, 179, 202, 209, 219, 227, 241, 242, 248, 251, 254, 260, 270, and 275. As to the majority of these attachments, counsel premises the claim of privilege on a specific certification that the documents were created at the direction of an attorney for purposes related to the provision of legal services to the Respondent. As to some of these attachments, the correspondence clearly confirms this contention, often by containing counsel's request to a corporate officer to prepare the attachment in question. In other instances, the correspondence is silent. In these circumstances, I deem it appropriate to accept counsel's certification to me that an attorney did direct the creation of the document for purposes of providing legal services to the Respondent. In so doing, I recognize that instructions to clients are not always reduced to writing and that, even in the age of computers, much business is still transacted by face-to-face conversation or telephone calls.

As discussed, in the supplemental chart, counsel has taken pains to report that many attachments were created at the lawyers' direction for purposes of rendering legal services to the client. It is, therefore, noteworthy that some of the attachments are described in a different manner. Those documents are merely noted to have been "created at request of counsel." Such notations appear on the chart for attachments to PL 96, 99, 125, 202, 248, and 260. Because I find counsel's terse choice of language to be significant, I conclude that the evidence as to these attachments is insufficient to support a claim of privilege. The mere fact that documents were created at the request of a person who is an attorney does not establish that they are covered by a privilege. I will direct disclosure of these items.

Two other attachments require separate discussion. Attachments to PL 227 and 242 are described in the supplement as having been created by counsel. They are asserted to constitute work product. I have examined these charts and conclude that they do represent the attorney's work product. Absent any claim of substantial need, they should not be subject to disclosure.

Conclusions of Law

1. The redacted portions of PL 1 through 62, inclusive, are protected from disclosure by the attorney-client privilege.

2. PL 89, 90, and 128 are not protected from disclosure by the attorney-client privilege.

3. PL 100 and 136 contain items that are protected by attorney-client privilege and other items that are not covered by that privilege. These documents shall be redacted to prevent disclosure of matters protected by the privilege.

4. PL 280, 281, and 282 contain materials that are protected by the work product doctrine and other materials that are not protected by the work product doctrine or any other privilege. These documents shall be redacted to prevent disclosure of matters protected by the work product doctrine.

5. Attachments to PL 96, 99, 125, 202, 248, and 260 are not protected by the attorney-client privilege or any other privilege.

6. All remaining documents and attachments listed on the Respondent's privilege log are protected from disclosure by the attorney-client privilege.

Based on these findings of fact and conclusions of law, I hereby issue the following:

ORDER

1. Upon final disposition of this special master proceeding, all of the documents described in the Respondent's privilege log at PL 89, 90, and 128 shall be provided to the General Counsel and Charging Party pursuant to the subpoena.

2. Upon final disposition of this special master proceeding, redacted versions of the documents described in the Respondent's privilege log at PL 100, 136, 280, 281, and 282, as prepared by me and placed under seal, shall be provided to the General Counsel and Charging Party pursuant to the subpoena.

3. Upon final disposition of this special master proceeding, the attachments to the documents described in the Respondent's privilege log and supplemental chart at PL 96, 99, 125, 202, 248, and 260 shall be provided to the General Counsel and Charging Party pursuant to the subpoena.

4. No other documents or attachments described in the Respondent's privilege log and supplemental chart shall be subject to production to the General Counsel or Charging Party pursuant to the subpoena.

5. All of the documents and attachments submitted to me by the Respondent for my *in camera* inspection shall be retained under seal until the final disposition of this special master proceeding. Copies of PL 100, 136, 280, 281, and 282 as redacted by me shall also be retained under seal, but one set of such redacted documents will be provided to counsel for the Respondent.

6. At the conclusion of any review or enforcement action in this special master proceeding, all documents found to be privileged and held under seal shall be returned to the Respondent.

7. I shall retain such jurisdiction in this matter as may be necessary to effectuate the terms of this Order.

SO ORDERED.

Dated, Washington, D.C. August 17, 2011

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Paul Buxbaum
Administrative Law Judge