UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JONES & CARTER, INC./
COTTON SURVEYING CO.

and **Case 16-CA-27969**

LYNDA TEARE

ORDER DENYING MOTION FOR RECONSIDERATION OF
THE BOARD'S ORDER DENYING PETITION TO REVOKE SUBPEONA

The Employer has filed a motion for reconsideration of the Board's October 20, 2011 Order, in which the Board denied, based on lack of standing, the Employer's petition to revoke subpoenas ad testificandum that were addressed to two of its employees.[1] For the reasons stated below, we deny the motion.

The Employer argues that the Board erred in raising the issue of standing sua sponte. This argument is without merit. The courts have long held that the issue of standing is jurisdictional in nature and should be raised sua sponte if no party has raised it. See, e.g., *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("The standing issue was not raised in the district court. Nor was it raised by the parties before this court. But federal courts are required sua sponte to examine jurisdictional issues such as standing."), citing *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)). In any event, to the extent that the Employer is arguing that it was denied due process because of the Board's sua sponte consideration of the standing issue, the Employer, through its motion, has had

[1] The Employer's pleading is entitled "Motion to Vacate Order Denying Petition to Revoke Subpoenas Ad Testificandum and Requesting Revocation of Subpoenas." The Board's Rules, however, do not provide for a motion to vacate. We will treat this pleading as a motion for reconsideration and refer to it as such in this Order.

the opportunity to present its arguments. Thus, the Employer has no valid due process concern.

On the merits of the standing question, the Employer, quoting from *In re Grand Jury (Schmidt)*, 619 F.2d 1022, 1026 (3d Cir. 1980), argues that it has a "property interest, contractual in nature, in the services of its employees presently under subpoena whose time and attention would be diverted from its business for their subpoenaed appearances" that gives it standing. We find no merit in that argument, either, and additionally find that the Employer's reliance on *Schmidt* is misplaced.

Schmidt involved subpoenas ad testificandum issued to the employer's employees pursuant to a federal grand jury investigation into the employer's business. Asserting that the grand jury process was being abused and had been undertaken in bad faith for improper purposes, both the employer and the employees filed motions to quash the subpoenas, which the district court denied. Id. at 1024. The employer and the employees appealed. The court of appeals held that the lower court's ruling was not a final order, and that the employees were therefore precluded from appealing that order, absent their disobedience of the order and a contempt citation. Id.

Regarding the employer's standing to file an appeal, the appeals court reasoned that because it was unlikely that the employees would risk being cited for contempt, the employer's third-party motion to quash the subpoena was the only mechanism available to challenge the potential abuse. The court further reasoned that a balance must be struck between, on the one hand, the grand jury's investigation, and, on the other hand, the employer's right to be free of grand jury abuse and what the court deemed the employer's property right in the services of its employees. Id. at 1024-1027. Finally, the

court held that "[t]hird party standing to assert claims of grand jury abuse cannot be determined by categorizing the claimed interest as one of property or privilege, but only by examining the nature of the abuse, and asking whether, and in what manner, it impinges upon the legitimate interests of the party allegedly abused." Id. at 1027. Id. at 1027. Based on all of those considerations, the court found that the employer had standing to seek that the subpoenas be quashed.

The instant case is distinguishable. The Respondent does not assert, nor is there any evidence, that the General Counsel's investigation was undertaken in bad faith or for an improper purpose.[2] Nor can the Employer argue that it must be granted standing because there was no other avenue for review of the subpoenas; under the Board's rules, the employees could have filed petitions to revoke on their own behalf.[3] As those key factors are absent, we decline to follow *Schmidt* in the circumstances here.

Rather, we find that the facts in the instant case are markedly closer to those in *In re Subpoenas to Local 478, Int'l Union of Operating Engineers and Benefit Funds,* 708 F.2d 65 (2d Cir.1983), whose reasoning we also agree with. There, an employer appealed a district court order denying the employer's motion to quash subpoenas issued to its employees during a grand jury investigation. Id. at 67. The court held that the employer did not have standing to file the motion because it failed to assert a constitutional, statutory, or common law privilege, nor did it not raise allegations of grand jury abuse. Id. at 72. In addition, the court stated that "[i]nsofar as *C. Schmidt &*

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[2] The Employer's contention in its petition to revoke, that the subpoenas are "duplicative, unnecessary, and harassing," does not rise to the level of potential abuse of process relied on by the court in *Schmidt*.

[3] See Board's Rules and Regulations, Sec. 102.31.

Sons may suggest third party standing to appeal denial of a motion to quash subpoenas to testify directed to employees on the basis that the third party employer has a property right to prevent disruption of its business affairs, the opinion seems to us to be in error." Id. at 73. The court observed--correctly in our view--that "[i]f a third party employer could seek review on a showing of disruption of employees' time and attention, or a substantial burden to its business interests, any employer could impede a grand jury investigation, whether or not the employer came forward with concrete assertions that the legal and practical value of fundamental rights would be destroyed if collateral review were withheld." Id. (internal footnote omitted).

In the instant case, an individual filed unfair labor practice charges against her employer. To complete its investigation of the charges, the Board issued subpoenas requiring other employees to give sworn statements to a Board agent. Applying the Second Circuit's rationale here, we find that the Employer's assertion of a contractual property interest in the services of its employees is legally insufficient to establish that the Employer has standing to petition for revocation of those subpoenas. Board proceedings, including its investigations of unfair labor practices, exist for the purpose of vindicating employee rights against employer and unions. It would be inimical to that purpose to permit an employer to impede an investigation against it through third-party challenges to subpoenas in the absence of "concrete assertions that the legal and practical value of fundamental rights would be destroyed" if standing is not granted. Id.

Accordingly, the Employer's motion for reconsideration is denied.[4]

Dated, Washington, D.C., December 30, 2011.

MARK GASTON PEARCE, CHAIRMAN

CRAIG BECKER, MEMBER

BRIAN E. HAYES, MEMBER

[4] Member Hayes agrees with the denial of the Employer's motion for reconsideration. He joins his colleagues in rejecting the Employer's reliance on *Schmidt,* supra, but finds no need to discuss the standing issue beyond the circumstances of this particular case.