

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

**DUNCAN & SON LINES**

**and**

**Case 28-CA-079700**

**GENERAL TEAMSTERS (EXCLUDING MAILERS)  
STATE OF ARIZONA, LOCAL UNION NO. 104, AN  
AFFILIATE OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

**ORDER REFERRING PETITION TO REVOKE  
PORTIONS OF INVESTIGATIVE SUBPOENA DUCES TECUM TO THE  
NATIONAL LABOR RELATIONS BOARD**

On July 3, 2012, Counsel for Duncan & Sons Lines, filed with the Regional Director for Region 28 (Regional Director) a Petition to Revoke Portions of Investigative Subpoena Duces Tecum (Petition), served upon Duncan & Sons Lines by an Agent of the Regional Director. A copy of the subpoena (B-633423), along with the Petition, are annexed hereto. Accordingly,

**IT IS HEREBY ORDERED**, pursuant to Section 102.31(b) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that the Petition filed herein be, and the same hereby is, referred to the National Labor Relations Board, for consideration and ruling.

Dated at Phoenix, Arizona, this 17<sup>th</sup> day of July 2012.

/s/ Stephen E. Wamser  
\_\_\_\_\_  
Stephen E. Wamser, Acting Regional Director

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**DUNCAN AND SON LINES,**

**Cases 28-CA-079700**

**Employer,**

**and**

**GENERAL TEAMSTERS (EXCLUDING MAILERS)  
STATE OF ARIZONA, LOCAL UNION NO. 104,**

**The Union.**

**DUNCAN AND SON LINES'  
PETITION TO REVOKE PORTIONS OF SUBPOENA DUCES TECUM**

Respondent Duncan and Son Lines (“DSL”) petitions to revoke portions of the pre-complaint *Subpoena Duces Tecum* (the “Investigatory Subpoena”) served by the Counsel for the General Counsel on DSL on June 28, 2012. The Investigatory Subpoena should be revoked because: (1) two of the requests go far beyond the bounds of relevance and, with the requests, the Board appears to be engaging in a *fishing expedition*; and (2) these two requests are also objectionable on a number of grounds, as detailed in this Petition, including but not limited to the fact that these Requests are as a whole is overly broad and unduly burdensome.

**Preliminary Statement**

On or about April 26, 2012, General Teamsters (Excluding Mailers) State of Arizona, Local Union No. 104 (the “Union”) filed an unfair labor practice charge against DSL with the Board. In the Charge, the Union alleged that DSL discriminated and

retaliated against two drivers Peter Petriw (“Petriw”) and Tim Jenner (“Jenner”) in violation of Sections 8(a)(1),(3) and (4) of the National Labor Relations Act (the “Act”). In addition, the Charge alleged that the Employer “has restrained, coerced, and interfered with the rights guaranteed in Section 7 of the Act.”

On or about May 18, 2012, the Board sent a letter to DSL seeking evidence. In response to that letter, DSL submitted a position statement to the Board on or about May 31, 2012. After it submitted its position statement, DSL did not hear anything from the Board for several weeks until it received a letter, dated June 22, 2012, requesting its position regarding the possibility of the Board seeking injunctive relief pursuant to Section 10(j) of the Act.

On June 28, 2011, the Board served the Investigatory Subpoena, which contains separate requests for documents. Each of the requests sought multiple categories of documents. For example, Request No. 1 seeks nine different types of documents demonstrating all “runs performed, loads picked up, and loads delivered” by Petriw during a period of over three months. Similarly, Request No. 2 seeks the same nine types of documents demonstrating all “runs performed, loads picked up, and loads delivered” by Jenner during a period of over six months.

For the reasons explained below, portions of the Investigatory Subpoena are overly broad, unduly burdensome and seek information that is not tailored to assist the Board in investigating any of the issues that could conceivably derive from the vague

allegations contained in the Charge. With Requests Nos. 1 and 2 of the Investigatory Subpoena, the Board is clearly engaging in an impermissible fishing expedition.

## ARGUMENT

### **I. THE BOARD IS ENGAGING IN A FISHING EXPEDITION WITH ITS OVERLY BROAD INVESTIGATORY SUBPOENA.**

Under the Board's own rules, Rule 102.66(c), a petition shall be revoked if,

*the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid.*

[Emphasis added] It has been recognized that an Investigatory Subpoena should not be used by the Board to engage in a fishing expedition. *See* NLRB Casehandling Manual ¶ 11796; *see also, Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Moreover, the Board has noted that, with respect to “any other reason sufficient in law,” the Federal Rules of Civil Procedure provide useful guidance to the Board. *See Brink's Inc.*, 281 NLRB 468 (1986) (finding subpoena did not meet standards prescribed by the Federal Rules of Civil Procedure). Under Rule 26(b) of the Federal Rules of Civil Procedure,

*Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...*

[Emphasis added]

Requests Nos. 1 and 2 in the Investigatory Subpoena go well beyond the scope of relevancy required by Rule 102.66 and permitted by the Federal Rules of Civil

Procedure. The Board's sole function is to investigate whether an unfair labor practice occurred and not whether DSL engaged in any other unlawful conduct. The allegations in the Charge relate to discrete events concerning the suspensions of Petriw and Jenner, as well as the alleged termination of Petriw. As described in its position statement, DSL suspended Petriw for intentionally causing damage to one of the Company's trucks. Similarly, Jenner was suspended for misconduct relating to inappropriate conduct towards a dispatcher. Neither suspension relates to Petriw or Jenner's work with respect to a particular run or load. Nor are there any allegations in the Charge that Petriw or Jenner were treated differently than other drivers concerning the runs or loads of which they performed. Therefore, documents demonstrating the "runs performed, loads picked up, and loads delivered" by both Petriw and Jenner over an extended period of time have absolutely no bearing on the allegations asserted in the Charge. *It is impossible to imagine how Department of Transportation records or bills of lading from a run that Petriw or Jenner performed in early 2012 could lead to information relevant to any of the Union's allegations in this case.*

For this and other reasons, the Board's requests in Nos. 1 and 2 to provide documents relating to "runs performed, loads picked up, and loads delivered" by both Petriw and Jenner goes well beyond the limits established by Rule 102.66 and the Federal Rules of Civil Procedure and should be denied.

As will be explained below, many of the requests in the Investigatory Subpoena are objectionable for several reasons.

**II. REQUESTS NOS. 1 AND 2 OF THE SUBPOENA ARE OBJECTIONABLE AND SHOULD BE REVOKED ON A NUMBER OF OTHER GROUNDS.**

DSL asserts the following objections to the particular requests contained in the Subpoena *Duces Tecum*:<sup>1</sup>

- a. **“Ambiguity objection”**: The particular request is capable of several different meanings, vague or unintelligible, and DSL cannot ascertain the information the NLRB is seeking without further clarification.
- b. **“Burden objection”**: The time and expense of compiling the information sought would be, in light of its relevance and materiality (if any), unduly burdensome and expensive either because of the volume of information requested or because the information requested cannot be ascertained without an oppressive review of countless events and matters with numerous individuals or both.
- c. **“Confidentiality objection”**: The information sought is of a confidential or proprietary nature, or would require the production of the confidential or proprietary information of DSL’s customers, and if produced at all, may be subject to a protective order. To the extent DSL produces any documents pursuant to the Subpoena *Duces Tecum*, DSL will redact any confidential or proprietary information.
- d. **“Overbroad objection”**: The information sought includes matters that are not involved in this case or is so sweeping as to not be reasonable to comply with. Any relevant document requests should be appropriately limited geographically and temporally.
- e. **“Relevance objection”**: The information sought by the request is not relevant to the subject matter involved in the pending action nor does it appear reasonably calculated to lead to the discovery of admissible evidence.

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<sup>1</sup>Any documents ultimately produced will be redacted to protect the confidential and proprietary information of DSL’s customers.

- f. **“Source objection”**: The information sought by the request is not available to DSL, or is in the possession or custody of third persons other than DSL, or is obtainable from some other source that is more convenient, less burdensome or less expensive.

As to the specific requests in the Investigatory Subpoena, the response or objection is as follows:

***Request No. 1:*** Documents, including, but not limited to, driving logs, Department of Transportation logs, bills of lading, contracts, vouchers, invoices, delivery records, timesheets, and payroll records, as will show the runs performed, loads picked up, and delivered by Peter Petriw (Petriw) from February 1, 2012 through April 27, 2012.

**Objections to Request No. 1:** DSL asserts the following objections: **ambiguity, burden, confidentiality, overbroad, relevance and source.**

As explained above, this Request is not reasonably calculated to lead to the discovery of admissible evidence relevant to the unfair labor practice allegations contained in the Charge. However, even if the Request sought arguably relevant information (which it does not), any limited relevance would be outweighed by the considerable burden placed on DSL in having to respond to this Request. First, it would take DSL a substantial amount of time just to identify those dates in which Petriw performed runs or picked up or delivered loads during the period requested. Once it did this, DSL would then need to search large amounts of documents to locate the requested documents for each run and/or load. Finally, before producing those documents, DSL would need to redact all of its customer’s confidential information.

***Request No. 2:*** Documents, including, but not limited to, driving logs, Department of Transportation logs, bills of lading, contracts, vouchers,

invoices, delivery records, timesheets, and payroll records, as will show the runs performed, loads picked up, and delivered by Tim Jenner (Jenner) since January 1, 2012.

**Objections to Request No. 2:** DSL asserts the following objections: **burden, confidentiality, overbroad, relevance, and source.**

As with Request No. 1, this Request is not reasonably calculated to lead to the discovery of admissible evidence relevant to the unfair labor practice allegations contained in the Charge. However, even if the Request sought arguably relevant information (which it does not), any limited relevance would be outweighed by the considerable burden placed on DSL in having to respond to this Request. First, it would take DSL a substantial amount of time just to identify those dates in which Jenner performed runs or picked up or delivered loads. Once it did this, DSL would then need to search large amounts of documents to locate the requested documents for each run and/or load. Finally, before producing those documents, DSL would need to redact all of its customer's confidential information.

**III. DSL REQUESTS ADDITIONAL TIME TO COMPLY WITH THE DOCUMENT REQUESTS CONTAINED IN THE *SUBPOENA DUCES TECUM*.**

As detailed in the Petition above, the Board's Subpoena *Duces Tecum* seeks a substantial amount of information and documents concerning matters which DSL contends are not relevant or reasonably calculated to lead to the discovery of relevant information. The Investigatory Subpoena was served on DSL on June 28, 2012 with a return date of July 6. With the July 4<sup>th</sup> holiday, the Board is only giving DSL five





SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Custodian of Records  
Duncan & Son Lines  
To 23860 W. US Highway 85  
Buckeye, AZ 85326

As requested by Eva Shih Herrera, an Agent for the Regional Director

whose address is 2600 North Central Avenue, Suite 1400 Phoenix, Arizona 85004  
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE \_\_\_\_\_

an agent of the Regional Director of the National Labor Relations Board

at the National Labor Relations Board, 2600 North Central Avenue, Suite 1400

in the City of Phoenix, Arizona

on the 6<sup>th</sup> day of July 20 12 at 10:00 (a.m.) ~~(p.m.)~~ or any adjourned

or rescheduled date to testify in Duncan & Son Lines, Case 28-CA-079700

(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

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 - 633423**

Issued at Phoenix, Arizona

this 28<sup>th</sup> day of July 20 12



*Lester 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.

**ATTACHMENT TO SUBPOENA DUCES TECUM**

Re: Duncan & Son Lines  
Case 28-CA-079700

**DEFINITIONS AND INSTRUCTIONS FOR USE**

- A. “Employer” refers to Duncan & Son Lines, its directors, managers, supervisors, agents, and representatives.
- B. Unless otherwise stated, each item requested in this subpoena covers the period from January 1, 2012, to the present date.
- C. “Document” or “documents” means any written, recorded, filmed, stored, or graphic matter, whether produced or reproduced on paper, cards, tapes, film, electronic facsimile, computer storage device, or any other media, including, but not limited to, memoranda, notes, electronic-mail, text messages, instant message, Twitter postings (tweets), Facebook or other social media postings, electronic postings, minutes, records, telephone contacts, notice of disciplinary actions, photographs, correspondence, telegrams, diaries, bookkeeping entries, financial statements, tax returns, checks, check stubs, reports, studies, charts, graphs, statements, notebooks, handwritten notes, applications, agreements, books, pamphlets, periodicals, appointment calendars, records or recordings of oral conversations, employment forms, originals and all copies which are different in any way from the original, whether by interlineation, receipt, stamp, notations, indication of copies sent or received, or otherwise, and drafts. The terms include all graphic or records and representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotape recordings, motion pictures and electronic, mechanical or electrical records or recordation of any kind including without limitation electronic mail communications, computer disks, computer input or output, computer hard or flash drive files, tapes, cassettes, disks and recordings. The term includes materials in any language. To the extent the Employer maintains or stores such documents requested herein in electronic form, in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonable form, the Region seeks such electronic documents. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
- D. “Correspondence” includes, but is not limited to, instant message, Twitter postings (tweets), Facebook or other social media postings, electronic postings, text messages, letters, memoranda, notes, tapes of telephone conversations or personal conversations, telegraphs, reports, teletype messages, electronic-mail, interoffice communications, recordings of conversations and telefax communications.
- E. “Any,” “each,” and “all” shall be read to be all-inclusive and to require the production of each and every document responsive to the request in which such terms appear.

- F. “And” and “or,” and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively, so as to make the request inclusive rather than exclusive, and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.
- G. This subpoena is intended to cover all documents that are in the possession, custody, or control of the Employer, its present or former managers, supervisors, agents, attorneys, accountants, advisors, investigators, and any other persons and companies directly or indirectly employed by, or connected with, the Employer, or its parent corporations, subsidiaries, or other related companies and agencies.
- H. If any of the requested documents cannot be produced in full, then produce those documents to the extent possible, and specify the Employer’s reasons for the inability to produce the remainder, stating whatever information, knowledge or belief the Employer has concerning the unproduced portion.
- I. If any document responsive to any request herein was, but no longer is, in the Employer’s possession, custody or control, identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control; and identify (stating the person’s name, title, business address and telephone number, and home address and telephone number) of all persons known or believed to have the document or a copy thereof in their possession, custody or control.
- J. If any document responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons, identify the document (stating its date, author, addressee(s), recipients and intended recipients, title, and subject matter); explain the circumstances surrounding the destruction, discarding, or disposal, including the Employer’s document and electronic data retention/destruction policies, and the timing of the destruction, and identify all persons who authorized disposal of the document, and those persons who are known or believed to have the document or a copy thereof in their possession, custody or control.
- K. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.
- L. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
- M. All documents produced pursuant to this subpoena should be organized by which subpoena paragraph each document or set of documents are responsive to, and labels referring to that subpoena paragraph should be affixed to each document or set of documents.

- N. If any of the requested documents in whole or in part cannot be produced because they are deemed privileged or otherwise subject to protection as trial preparation material, then describe the nature of the document not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable the assessment of the applicability of the privilege or protection.
- O. This subpoena specifically requests the described documents, wherever maintained.

**DOCUMENTS REQUESTED**

1. Documents, including, but not limited to, driving logs, Department of Transportation logs, bills of lading, contracts, vouchers, invoices, delivery records, timesheets, and payroll records, as will show the runs performed, loads picked up, and loads delivered by Peter Petriw (Petriw) from February 1, 2012 through April 27, 2012.
2. Documents, including, but not limited to, driving logs, Department of Transportation logs, bills of lading, contracts, vouchers, invoices, delivery records, timesheets, and payroll records, as will show the runs performed, loads picked up, and loads delivered by Tim Jenner since January 1, 2012.
3. Documents, including, but not limited to, e-mails, notes, witness statements, memoranda, and correspondence, as will show the Employer's investigation into the alleged damage caused by Petriw to the Employer's truck. This includes, but is not limited to, documents as will show the identity of the employee who reported damage to his truck allegedly caused by Petriw and the date on which such damage allegedly was caused by Petriw.
4. Documents, including, but not limited to, e-mails, notes, letters, written estimates for repair, memoranda, and correspondence, concerning the Employer's repair of the alleged damage caused by Petriw to the Employer's truck or, if no repair was made, concerning the Employer's assessment of the alleged damage caused by Petriw to the Employer's truck and the estimated cost to repair such alleged damage.