

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

VOITH INDUSTRIAL SERVICES, INC.

and

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION NO. 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Cases 9-CA-075496
9-CA-078747
9-CA-082437

and

UNITED AUTOMOTIBLE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, AFL-CIO

and

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, LOCAL UNION NO. 862, AFL-CIO

And

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

9-CB-0755075
9-CB-082805

**RESPONDENT, VOITH INDUSTRIAL SERVICES, INC.'S
PETITION TO QUASH SUBPOENA DUCES TECUM**

Pursuant to 29 U.S.C. § 161(1) and section 102.31(b) of the National Labor Relations Board's Rules and Regulations, as amended, Respondent, Voith Industrial Services, Inc.

~~(“Voith”)~~, by its attorneys, petitions the Administrative Law Judge to revoke the subpoena duces tecum served upon Erwin Gebhardt, Voith’s Director of Labor Relations.

Specifically, Respondent Voith requests that the following subpoena requests be quashed as they constitute either improper pretrial discovery, are otherwise overbroad and/or untimely and/or unduly burdensome and/or duplicative of documents provided by the Respondent Voith during the Region’s investigation of the underlying unfair labor practice charges. A copy of the subpoena is attached as Exhibit A.

I. Facts

1. On February 28, 2012, General Drivers, Warehousemen & Helpers, Local Union 89, Affiliated with the International Brotherhood of Teamsters (“Teamsters 89”), filed with the Board the initial charge in Case No. 9-CA-075496, alleging that Respondent Voith engaged in unfair labor practices in violation of Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act.

2. Subsequent charges were filed as outlined in paragraphs 2 through 8 of the Amended Second Consolidated Complaint. The Region began its investigation of the initial charge in early March 2012. The investigation of this charge and other charges subsequently filed by IBT, Local 89 continued through the early part of August, 2012, a period in excess of six (6) months.

3. During the course of the Region’s investigation, the Respondent Voith has provided thousands of pages of written materials pursuant to the requests made by the Region’s investigator. The materials which the Respondent provided fall within the scope of many of the subpoena requests, as more specifically set forth below.

4. At no time during the course of the investigation did the Region seek the documents sought in Request No. 23 of its August 6, 2012, Gebhardt subpoena duces tecum. It does so for

the first time, within two weeks of the commencement of trial in this matter, which is set for August 21, 2012.

5. Section 102.31(b) of the Boards Rules and Regulations, provides in pertinent part:

" . . . The administrative law judge . . . shall revoke the subpoena if in his/her opinion the evidence whose production is required does not relate to any subject matter under investigation or question, 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 supplied)

Respondent Voith (Petitioner) objects to the following requests for the reasons and grounds set forth herein:

1. Request No. 6: Duplicative of material which has already been provided to the Region by Respondent Voith during the investigative stage, is untimely and unduly burdensome as to time to prepare and expense to copy.
2. Request No. 7: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.
3. Request No. 8: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.
4. Request No. 9: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.

5. Request No. 10: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.
6. Request No. 14: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.
7. Request No. 15: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.
8. Request No. 16: The “no solicitation rules” are set forth in the handbook referenced in Request No. 15 and, as such, Respondent Voith has provided this material to the Region during the investigative stage.
9. Request No. 19: Duplicative of materials made available to the Region during the investigative stage of this proceeding. In addition, the request is unduly burdensome both as to expense and time required to provide the information requested.
10. Request No. 21: Duplicative of what has already been provided to the Region by Respondent Voith, is untimely and unduly burdensome both as to the time required and the expense to copy the duplicative materials.
11. Request No. 23: Counsel for the General Counsel’s request is an attempt at pretrial discovery which is not available under the NLRA, as amended, or the Administrative Proceedings Act.

II. Request No. 23

It is well settled that parties to a Board proceeding are not entitled to pre-trial discovery as a matter of right. *Emhardt Ind. v. NLRB*, 907 F.2d 372, 378 (2nd. Cir. 1990); *David Webb Co.*, 311 NLRB 1135-1136 (1993). Neither the National Labor Relations Act nor the Administrative Procedures Act confers the right of discovery in federal administrative proceedings. *Kenrich Petrochemical, Inc. v. NLRB*, 893 F.2d 1468, 1483 (cert. denied 498 U.S. 981) (1990).

Counsel for the General Counsel, by its subpoena Request No. 23, seeks to require Respondent Voith to produce documents on a subject matter which, to this point, has not been made a matter of the Region's investigation. As such, the overly broad request is no more than a "thinly veiled" effort to secure pretrial discovery. It is a fishing expedition whereby Counsel for the General Counsel hopes to satisfy its threshold evidentiary burden to establish that the Employer's failure to consider and/or hire the alleged predecessor employer's employees was discriminatorily motivated.¹ Discriminatory motive is an essential evidentiary requirement to establish an 8(a)(3) refusal to hire in the context of a successorship case. Absent such evidence, Counsel for the General Counsel cannot establish a violation of Section 8(a)(3) of the Act. Apparently, Counsel for the General Counsel does not presently possess the requisite evidence to overcome this terminal weakness. Simply put, this is not an effort to seek production of documents that support an established legal theory. Rather, it is an effort to determine if documents exist which might support a presently unsubstantiated essential element of the

¹ See *United Ass'n of Journeymen and Apprentices*, 328 NLRB 1235 (1999) (affirming a hearing officer's refusal to permit a union to engage in a fishing expedition through the use of the Board's subpoena authority).

~~Board's 8(a)(3) theory. This last minute investigatory discovery tactic should not be condoned~~
by this Administrative Law Judge.

III. Unduly burdensome and oppressive

Pursuant to Unfair Labor Practice Case Handling Manual ¶ 11776, “[a] subpoena duces tecum should seek relevant evidence and should be drafted as narrowly and specifically as is practicable. The use of the word “all” in the description of records should be avoided wherever possible.” Request No. 23 requires an unduly burdensome electronic search for email communications and other documents that, if they exist, were created in early 2011 or before – nearly a year in some cases and longer in others – prior to the filing of the initial charge in this matter. A search of the magnitude required by Request No. 23 would take Respondent Voith far in excess of the two weeks provided by the subpoena.

In addition, not only would the search itself require more than two weeks, Respondent Voith would need significant additional time to review any potentially responsive documents to determine such matters as privilege, work product, and other confidentiality protections. Any effort by Respondent Voith to complete all of this within such a short period of time would be so oppressive as to substantially impact Voith’s business operations, as well as its attorneys’ trial preparation which would, likewise, impact its business operations. *See NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996) (quoting *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)) (discovery requests are unduly burdensome if they tend to disrupt normal business operations).

Voith also objects to and requests that the Administrative Law Judge quash Respondent’s demand of Request No. 23 for “[t]rue copies of all emails and other correspondence” to the

extent that such demand encompasses documents protected by the "attorney-client privilege."

Patrick Cudahy, Inc., 288 NLRB 968, 969-971 (1988).

NOW, THEREFORE, pursuant to 29 U.S.C. § 161(1), and § 102.31(b) of the Board's Rules and Regulations, as amended, Respondent Voith hereby moves for an Order quashing the paragraphs noted above. Based on the foregoing, said Order is rightfully granted.

Respectfully submitted this 15th day of August, 2012.

By:



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Attorneys for Respondent Voith Industrial Services, Inc.

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Erwin Gebhardt, Director of Labor Relations, Voith Industrial Services, Inc.,
9395 Kenwood Road, Suite 200, Cincinnati, Ohio 45242

As requested by Jonathan D. Duffey, Counsel for the Acting General Counsel
whose address is Room 3003, John Weld Peck Federal Building,
550 Main Street Cincinnati, Ohio 45202
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge

_____ of the National Labor Relations Board

at Room 47, Gene Snyder Courthouse, 601 West Broadway

In the City of Louisville, Kentucky

on the 20th day of August 2012 at 1:00 ~~PM~~ (p.m.) or any adjourned

or rescheduled date to testify in VOITH INDUSTRIAL SERVICES, INC.
Cases 9-CA-075496; 9-CA-078747; 9-CA-082437;

9-CB-075505; 9-CB-082805
(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 - 643335

Issued at Cincinnati, Ohio

this 6th day of August 20 12

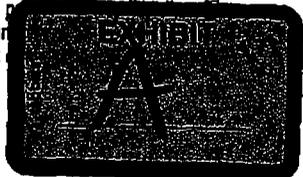
Lesfer A. Neltzer



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

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will not disclose this information to the public. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek in federal court.



DEFINITIONS AND INSTRUCTIONS

- 1) When used in this subpoena, the word "document" or "documents" means any existing printed, typewritten, handwritten or otherwise record material of whatever character, including, but not limited to, letters, correspondence, memoranda, telegrams, mailgrams, minutes, notes, statements, affidavits, agreements, summaries, records of telephone conversations, telephone bills, recordings of personal conversations, interviews or meetings, transcripts, diaries, reports, charts, contracts, calendars, interoffice communications, books, records, tax records, bookkeeping and/or accounting work papers, canceled checks, accounts, account receivable records, ledgers, journals, purchase orders, invoices, bills of lading, billing slips, delivery records, receiving records, photographs, microfilm, audio or video tapes, voice mail messages, material existing on computer software or hardware, computer tapes or disks and electronic mail, and all data contained thereon that may be retrieved, including material stored on hard disks, an any carbon, photographic or other duplicate copy of such material in the possession of, control of, or available to the subpoenaed party or any attorney, agent, representative or other person acting in cooperation with, in concert with, or on behalf of the subpoenaed party.
- 2) Voith Industrial Services, Inc. shall be referred to as "Respondent."
- 3) General Drivers, Warehousemen & Helpers, Local Union 89, Affiliated with the International Brotherhood of Teamsters, shall be referred to as "Teamsters 89."
- 4) United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 862, AFL-CIO, shall be referred to independently and collectively as "UAW".
- 5) Aerotek, Inc. shall be referred to as "Aerotek"
- 6) The Ford Motor Company and any sub-divisions thereof shall be referred to as "Ford".
- 7) "Yard Work" shall refer to all work traditionally and commonly referred to as such at Ford's Louisville Assembly Plant (LAP), including, but not limited to, the batching and holding of vehicles intended for sale (units), shuttle operations, yard/inventory management, and rail loading and unloading.
- 8) The term "person" or "persons" means natural persons, corporations, partnerships, sole proprietorships, associations, organization, trust, joint venture, or group of natural persons or other organizations or any other kind of entity.
- 9) Whenever used in this subpoena, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense, and vice versa; reference to parties shall be deemed to include any and all of their officers, agents and representatives; the masculine shall be deemed to include the feminine, and vice versa; the disjunctive "or" shall be deemed to include the conjunctive "and," and vice versa; and each of the words "each," "any," "every," and "all" shall be deemed to include each of the other words.
- 10) Unless otherwise stated, this subpoena covers the period from October 1, 2011 to

present.

11) Unless otherwise stated, the term "Respondent's facility" means the facilities where Respondent's employees work at Ford's Louisville Assembly Plant in Louisville, Kentucky (LAP).

12) Any copies of original documents which are different in any way from the original, whether by interlineation, receipt, stamp, notations, indication of copies sent or received, or otherwise, shall themselves be considered original documents and must be produced separately from the originals or copies of originals.

13) All documents produced pursuant to this subpoena should be organized by the subpoena paragraph to which each document or set of documents is responsive.

ATTACHMENT

The following documents and/or other items in the possession or control of either Respondent or its agents and attorneys:

Or, in lieu of the subpoenaed materials, a sworn affidavit by Respondent's officer having personal knowledge of facts relating to the information requested, but provided that said records and other documents will be made available at hearing for inspection by an authorized agent of the National Labor Relations Board, if requested, and said affiant will be available to testify with respect to the information sought at the hearing.

1. Any job descriptions for Respondent's employees who perform janitorial or custodial work at Ford's Louisville Assembly Plant facility (LAP).
2. Any job descriptions for Respondent's employees who perform yard work at LAP.
3. Any tests, physical fitness requirements and/or other standards that must be met by Respondent's employees who perform janitorial or custodial work at LAP.
4. Any tests, physical fitness requirements and/or other standards that must be met by Respondent's employees who perform yard work at LAP.
5. All communications, in any form, between Respondent and Aerotek regarding hiring for yard work at LAP.
6. For all of Respondent's employees who perform yard work at LAP, documents showing the date they were hired, the date they started work for Respondent in any capacity, and the date that they started performing yard work duties at LAP.
7. All job applications of Respondent's employees who performed yard work duties at LAP between January 1, 2012 and present, regardless of when the application was submitted to Respondent or what position was applied for.

8. Any notes taken in the hiring process for employees who applied for and/or were ultimately assigned to perform yard work duties at LAP
9. Any communications between Respondent and Teamsters 89 pertaining to whether Respondent had an obligation to recognize and bargain with Teamsters 89 on behalf of employees at LAP.
10. All collective bargaining agreements in effect between October 1, 2011 and present between Respondent and UAW covering employees at LAP.
11. All advertisements or postings for work for employees to perform yard work duties at LAP.
12. All contracts between Respondent and Ford defining the scope of Respondent's work at LAP in effect during the time period from October 1, 2011 to present, regardless of when the contracts were entered into.
13. Any and all communications, regardless of form, between Ford and Respondent about yard work at LAP from October 1, 2011 to present.
14. Any and all communications, regardless of form, between Respondent and UAW about yard work at LAP from October 1, 2011 to present.
15. Respondent's handbook(s) in effect at LAP from January 1, 2012 to present.
16. Respondent's policies pertaining to solicitation and distribution in effect at LAP from January 1, 2012 to present.
17. All union cards relied upon by Respondent in granting recognition to UAW.
18. Any documents showing vehicles damaged by Respondent's employees at LAP.
19. The personnel files of all of Respondent's employees at LAP who performed yard work from January 1, 2012 to present.
20. Any notes taken by or relied upon by Respondent in meetings held with Respondent's employees at LAP on or about June 1, 2012.
21. Any notes taken by or relied upon by Respondent in hiring employees to perform yard work duties at LAP.
22. Dennis Frank's cell phone records for any incoming or outgoing calls on April 11, 2012.
23. True copies of all emails and other correspondence among and between Respondent's managers and supervisors and/or between Respondent's managers and/or

supervisors and managers, supervisors, agents or employees of Aerotek, Ford, and/or UAW pertaining to Teamsters 89, the unionization of Respondent's employees performing yard work at LAP or the unionization of Aerotek's employees performing yard work at LAP during the period October 1, 2011 through the present. With regard to this item, please provide the following related information:

- **Whose email was searched?** A search of the email of all individuals ("custodians") who are most likely to possess communications covered by the subpoena is expected.
- **What email was searched?** For each custodian's mailbox, what folders, archives and document management systems were searched? Did the search include both email stored on the Respondent's server for its company email system, and email stored in personal folders and archives on individual computers? Did the search include email hosted on third-party service providers such as Google or Yahoo, including both company and personal accounts used by custodians for work-related communications?
- **How was the search conducted?** Who conducted the searches, and what search software and/or search terms were used to locate emails?