

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

In the Matter of

VOITH INDUSTRIAL SERVICES, INC.

and

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

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

and

INTERNATIONAL UNION, 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

and

Cases 9-CB-075505
9-CB-082805

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

REQUEST FOR SPECIAL PERMISSION TO APPEAL TO THE BOARD
ADMINISTRATIVE LAW JUDGE BRUCE ROSENSTEIN'S ORDER REVOKING
COUNSEL FOR THE ACTING GENERAL COUNSEL'S SUBPOENA DUCES TECUM

Counsel for the Acting General Counsel respectfully requests pursuant to Section 102.26
of the Board's Rules and Regulations permission to appeal Administrative Law Judge
Bruce Rosenstein's ruling, by email dated August 19, 2012, granting, in part, Respondent's

(Voith Industrial Services, Inc.) request to quash the Acting General Counsel's subpoena duces tecum. (A copy of the Administrative Law Judge's ruling is attached hereto as Exhibit 1). For the reasons set forth more fully below, the Board should accept this appeal and reverse the Administrative Law Judge's ruling because the ruling is contrary to established Board precedent regarding the production of relevant subpoenaed documents, is an abuse of his discretion, and the prejudice flowing from the ruling cannot be effectively reversed by the filing of post hearing exceptions

As a preliminary matter, the Board is hereby notified that on August 1, 2012, on behalf of the Board, a petition was filed with the U.S. District Court for the Western District of Kentucky for injunctive relief pursuant to Section 10(j) of the Act. *Muffley v. Voith Industrial Services, Inc., et al.*, Civil No. 3: 12-CV-00458-CRS. Accordingly, pursuant to Section 102.94 of the Board's Rules and Regulations, expedited treatment of these matters by the Board is requested. An administrative hearing is currently scheduled to begin on August 21, 2012, based on the allegations contained in the Acting General Counsel's amended second consolidated complaint and the answer filed to the consolidated complaint. Among the many issues in this matter is whether Respondent violated Section 8(a)(1),(2),(3) and (5) of the Act, by, *inter alia*, unlawfully refusing to hire or consider for hire certain individuals because they were former employees of a predecessor employer, Cooper, and members of or represented by the Charging Party or Teamsters Local Union No. 89, in order to avoid having a bargaining obligation with the Teamsters. (A copy of the amended second consolidated complaint is attached hereto as Exhibit 2.)

Thereafter, on August 6, 2012, the Acting General Counsel served on Respondent, and a courtesy copy on Respondent's counsel, a subpoena Duces Tecum requesting, *inter alia*:

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?

(A copy of the courtesy letter and the subpoena are attached hereto as Exhibit 3.)

Following the service of the subpoena, Respondent filed a petition to quash the Acting General Counsel's subpoena. (A copy of Respondent's petition to quash is attached hereto as Exhibit 4). Regarding request number 23 of the subpoena, Respondent asserted in its petition, that: the subpoena is an "attempt at pretrial discovery," is overly broad, unduly burdensome and protected by attorney client privilege. Thereafter, the Acting General Counsel filed a memorandum in opposition to the petition to quash and the matter was, by order, referred to the Administrative Law Judge for ruling. (A copy of the Order and the memorandum in opposition are attached hereto as Exhibit 5.)

The Administrative Law Judge quashed the subpoena because Respondent did not have “sufficient time prior to the scheduled August 21, 2012 hearing . . . to compile the information and prepare its Petition to Quash the Subpoena Duces Tecum.” The Administrative Law Judge also concluded that the “information sought is unduly burdensome by seeking all e-mails and other correspondence among and between Respondent Voith’s managers and supervisor, agents, or employees of Aerotek, Ford and/or the United Auto Workers pertaining to Teamsters Local 89 and the unionization of Aerotek’s employees.”^{1/} However, in quashing the subpoena, the Administrative Law Judge failed to apply the correct legal standard and his ruling would prejudice the Acting General Counsel’s ability to effectively present its case or to challenge Respondent’s defense.

It is well settled that subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the consolidated complaint. Board’s Rules, Section 102.31(b) and *Perdue Farms*, 323 NLRB 345, 348 (1997), *aff’d* in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998) (the information needs to be only “reasonably relevant”). Here, the emails are relevant or potentially relevant to the allegations of paragraphs 3, 9 11, 12, 13, 14 15, 16, 17, 18, 24, 25 and 26 of the consolidated complaint.

In addition, the subpoena is not overly broad because the subpoena seeks information that is limited in both subject matter and time period. The bare assertion without more that Respondent lacks adequate time to search for the documents is not sufficient grounds to quash a subpoena requesting the production of relevant documents. This hearing is anticipated to last several weeks and if the administrative law judge is convinced that Respondent needs more time

^{1/} The Judge appears to have *sub silentio* rejected Respondent’s argument that the materials sought were irrelevant or not subject to disclosure because of an attorney client privilege.

to compile the subpoena documents he could have simply provided Respondent the additional time. Indeed, in our courtesy letter to Respondent's counsel, the Acting General Counsel invited Respondent's counsel to contact him if there were any questions regarding the subpoena. (Exhibit 3) Respondent did not take advantage of the invitation but instead filed the instant petition to quash.

Respondent also has not established how it would be burdensome to produce the requested documents. Respondent does not provide any support for its claim that it would take more than 2 weeks to search for the documents or that it would take "significant additional time to review the documents." Similarly, Respondent has failed to explain how this request for documents would impact its business operations. Respondent simply does not provide any proof that the production of the requested emails would disrupt its normal business operations. The party asserting burdensomeness must meet a high standard or burden of proof. A subpoena is not "unduly burdensome" simply because it requires the production of a large number of documents. To satisfy the burden, the party must show that production of the subpoenaed information "would seriously disrupt its normal business operations." *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513–514 (4th Cir. 1996), cited with approval in *McAllister Towing & Transportation Co.*, 341 NLRB 394, 397 (2004), enf'd. 156 Fed. Appx. 386 (2d Cir. 2005); and *CNN America, Inc.*, 352 NLRB 675, 676 (2008).

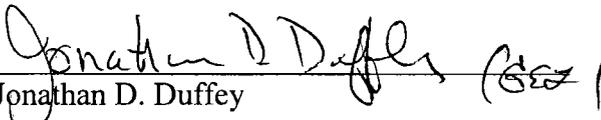
Although in *CNN America*, above, the Board indicated that, when analyzing a large scale request for information under a subpoena, the administrative law judge must balance the relevancy and need for the information against the potential cost and burdensomeness of its production in the form requested and endorsed application of the Federal Rules of Civil Procedure to aid in resolving such questions. 352 NLRB at 676., no such balancing is needed in

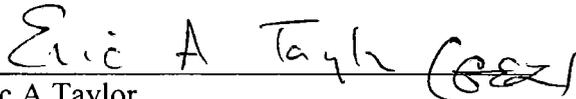
instant matter because Respondent has proffered no basis for concluding that it would be too costly to produce the requested data.

Finally, the Acting General Counsel will be substantially prejudiced if the Administrative Law Judge's ruling is not reversed and is instead left to seeking review by the filing of post hearing exceptions. If the Administrative Law Judge is not reversed, the Acting General Counsel will be denied access to relevant or potentially relevant subpoena documents to use in its case-in-chief or to challenge Respondent's defense. The Acting General Counsel should not be required to wait and file exceptions to the judges ruling at the close of the hearing. For the reasons set forth above, the Administrative Law Judge has abused his discretion and should be reversed.

Dated at Cincinnati, Ohio this 20th day of August 2012.

Respectfully submitted,


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Attachments