

9/12/12

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 SUA SPONTE ORDER
PARTIALLY REVOKING COUNSEL FOR THE GENERAL COUNSEL'S SUBPOENA
DUCES TECUM AND ORDER PRECLUDING TESTIMONY ABOUT DOCUMENTS
PRODUCED PURSUANT TO SUBPOENA

Counsel for the Acting General Counsel respectfully requests, pursuant to Section 102.26 of the Board's rules and regulations, permission to appeal two of Administrative Law Judge Bruce Rosenstein's rulings in the hearing of the above captioned matter. First, at the outset of the hearing, Judge Rosenstein ruled, *sua sponte*, that Respondent Voith Industrial Services, Inc.

(Respondent Voith) need not produce evidence in response to item 22 of the Acting General Counsel's subpoena duces tecum. (A copy of the Acting General Counsel's subpoena duces tecum is attached hereto as Exhibit 1). Second, during the course of the hearing, Judge Rosenstein issued a ruling precluding any testimony regarding documents produced pursuant to subpoenas duces tecum by Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers Of America, AFL-CIO and Respondent United Automobile, Aerospace and Agricultural Implement Workers Of America , Local Union No. 862, AFL-CIO (collectively referred to as Respondent UAW) and Aerotek, Inc. (hereinafter Aerotek) which were admitted into evidence. For the reasons set forth more fully below, the Board should accept this appeal and the Administrative Law Judge should be reversed on both matters because the Administrative Law Judge's rulings are contrary to established Board precedent, are an abuse of his discretion, and result in prejudice that can not be effectively reversed by the filing of post hearing exceptions.

At the outset, the Board is hereby notified that on August 1, 2012, 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. The administrative hearing in this matter began on August 21, 2012, temporarily adjourned on August 30, 2012, and is scheduled to resume on September 19, 2012.

I. Judge Rosenstein's, sua sponte, ruling that Respondent Voith need not produce evidence in response to item 22 of the Acting General Counsel's subpoena duces tecum even though Respondent Voith was willing to provide the evidence

There are numerous allegations at issue in the hearing of this matter. (A copy of the amended second consolidated complaint is attached hereto as Exhibit 2.) Among them are

whether Respondent Voith, by Supervisor Dennis Frank, violated Section 8(a)(2) of the Act by assisting Respondent UAW on about April 11, 2012, by allowing UAW representatives to meet with employees during work time in order to urge them to sign membership applications and dues check off authorizations (paragraph 17 of the complaint). A closely related issue is whether Respondent UAW violated Section 8(b)(1)(A) of the Act by accepting the assistance of Respondent Voith on April 11, 2012 (paragraph 19 of the complaint). On August 6, 2012, the Acting General Counsel served on Respondent Voith a subpoena duces tecum requesting, *inter alia*: “22. Dennis Frank’s cell phone records for any incoming or outgoing calls on April 11, 2012.” (Exhibit 1) The reason for this request was that the counsel for the Acting General Counsel anticipated that several of his witnesses would testify that Dennis Frank received a cell phone call immediately prior to stepping aside so that UAW officials could pressure employees into signing UAW union cards and dues check off authorizations. Significantly, Respondent Voith did not file any motion to quash the subpoena or voice any opposition to producing documents responsive to duces tecum subpoena item #22.

Despite the lack of any objection from Respondent Voith, Judge Rosenstein, *sua sponte*, quashed this subpoena request upon the opening of the hearing on August 21, 2012, following off-the-record discussions. (Exhibit 3) As the witnesses testified about this incident, Respondent Voith’s counsel pointed out on cross examination that these witnesses did not know who had called Frank on his cell phone at the time of the incident in question. (Exhibit 4) Following this, Counsel for the Acting General Counsel renewed his request to have Frank’s phone records produced pursuant to the subpoena, but Judge Rosenstein again denied the request. (Exhibit 5) Although Counsel for the Acting General Counsel does not know who called Frank at the relevant time, such information would be potentially corroborative of witnesses’ testimony that Frank received a phone call at the time and day in question and of the Acting General Counsel’s theory that Frank acted in collusion with UAW officials at the time in

question. For instance, if the records established that Frank received a call from someone in the UAW hierarchy immediately prior to Frank and other Voith supervisors moving aside for the UAW officials to address the employees, an inference may be drawn that the call related to the arrival at the scene by UAW officials, thus bolstering the Acting General Counsel's theory on this alleged violation.

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 complaint. Board's Rules, § 102.31(b) and *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd.* in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998) (the information needs to be only “reasonably relevant”). Here, the single day of cell phone records sought are relevant or potentially relevant to the allegations of paragraphs 17 and 19 of the complaint. The subpoena seeks information that is limited in both subject matter and time. The Acting General Counsel may potentially be prejudiced if the Administrative Law Judge's ruling is not reversed since this potentially corroborative evidence would not be in the record. 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 his case-in-chief or to challenge Respondent Voith's defenses. The Acting General Counsel should not be required to wait and file exceptions to the judge's ruling at the close of the hearing.

II. Judge Rosenstein's ruling precluding any testimony regarding documents which were admitted into evidence and produced pursuant to subpoenas duces tecum by Respondent UAW and Aerotek.

With regard to the second matter at issue in this special appeal, during the course of the hearing, Judge Rosenstein accepted into evidence a number of documents produced by Respondent UAW and Aerotek, but ordered that no witnesses could be subjected to questioning over these documents. (Exhibits 6 and 7) This ruling places Counsel for the Acting General Counsel at a significant disadvantage inasmuch as he cannot ask witnesses to describe or identify

the documents, to testify when the documents were produced, to testify about who drafted, prepared or originated the documents, and to testify as to the meaning or significance of the documents, or other matters that go to the evidentiary weight and reliability of the documents. Without this information, any future readers of the record will have a limited basis for understanding what the documents are or what evidentiary weight, if any, should attach to them. Examples of such documents that are potentially probative are attached. G.C. Ex. 74, for instance, was produced by Respondent UAW pursuant to subpoena. (Exhibit 8) Respondent Voith has asserted as a defense that the yard work at issue here has been parsed among several employers. (Respondent Voith's Answer is attached as Exhibit 9) G.C. Ex. 74 seems to speak to this theory since it suggests that the Teamsters' employment has increased by 95 employees despite the fact that the Teamsters lost the yard work at issue in this matter. Moreover, G.C. Ex. 74 indicates that the "logistics" parsed to other employers was not the yard work in question, but separate car hauling work and that such work was granted to other employers; reflecting Ford's complicity in Voith's plan to hi-jack the Teamster represented bargaining unit and to force UAW representation on its new workforce of yard employees. It is entirely unclear from the face of G.C. Ex. 74, however, who created the document, when it was created, or what the source of the information contained therein was.

G.C. Ex. 72 is another example of a document produced by Respondent UAW pursuant to subpoena which would benefit from testimony. (Exhibit 10) Respondent Voith has asserted a defense that its actions in recognizing Respondent UAW as the bargaining representative of its newly acquired yard employees were required by terms in Respondent Voith's existing collective-bargaining agreement with Respondent UAW covering janitors at the same location, but in G.C. Ex. 72, UAW officials appear to dispel this notion. Again, however, witness testimony would be beneficial to flesh this out and explore the issue in more detail. A third example of a document which would benefit from witness testimony is G.C. Ex. 70, generated

by the UAW's email system, but containing "talking points" and an attached document marked "Ford Confidential." (Exhibit 11) In this document, the UAW appears to have obtained confidential information from Ford, including potential reasons why Voith was selected as the provider of yard services at the site in question. Like G.C. Ex. 74, this document appears to have some bearing on Respondent Voith's claimed defense that the yard employees at issue in these matters are part of some larger unit. The document also appears to reflect a relationship between Respondent Voith and Ford in which attempts are being made to justify to or mollify an unspecified audience regarding not only the award of the yard contract to Voith, but with respect to the representation of these employees by the UAW. Without witness testimony, however, it is unclear who generated the talking points, how Respondent UAW came to possess a confidential Ford document, to whom the information was intended to be conveyed, and no opportunity to explore the basis for the information contained therein.

The foregoing general counsel exhibits are cited as illustrations of documents that would benefit from witness testimony, but are not the only documents that would benefit from such testimony. To permit full development of the Acting General Counsel's case, and so that the record will be of some value to the Administrative Law Judge and to any future readers of the record, the Acting General Counsel urges that the Administrative Law Judge be reversed with regard to his blanket limitations on witness testimony pertaining to documents produced by Respondent UAW and Aerotek, pursuant to subpoena duces tecum.

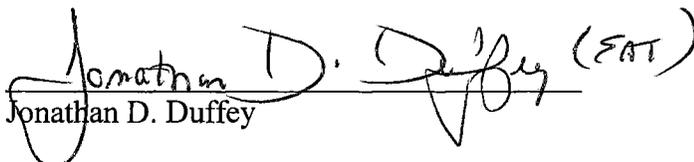
III. Conclusion:

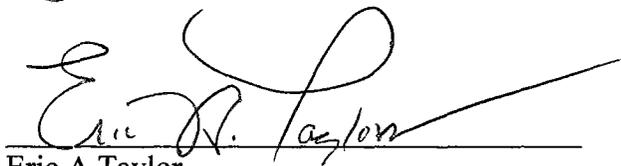
Accordingly, the Acting General Counsel requests that the Board grant this request to appeal Administrative Law Judge Rosenstein's rulings quashing, in part, the Acting General Counsel's subpoena duces tecum to Respondent Voith and prohibiting witness testimony pertaining to documents produced in response to subpoenas duces tecum and that his rulings be reversed. Specifically, the Acting General Counsel requests an order be issued allowing

subpoena item 22 in the subpoena duces tecum to Respondent Voith be provided to the Acting General Counsel for use at the trial and that Administrative Law Judge Rosenstein be directed to allow the Acting General Counsel to examine witnesses on the documents described herein that have been admitted into evidence.

Dated at Cincinnati, Ohio this 12th day of September 2012.

Respectfully submitted,


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Attachments