

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
SUBREGION 17**

STAHL SPECIALTY COMPANY

and

Case 17-CA-088639

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL #1464  
affiliated with the INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL  
WORKERS, AFL-CIO

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT  
STAHL SPECIALTY COMPANY'S REQUEST FOR SPECIAL  
PERMISSION TO APPEAL AND ACCOMPANYING APPEAL  
OF THE ADMINISTRATIVE LAW JUDGE'S RULING**

Pursuant to Section 102.26 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel opposes Respondent's Request for Special Permission to Appeal and Accompanying Appeal of the Administrative Law Judge's (ALJ) ruling denying Respondent's Petitions to Revoke Counsel for the General Counsel's and the Charging Party's subpoenas duces tecum and the ALJ's ruling ordering compliance with the Counsel for the General Counsel's and Charging Party's subpoenas duces tecum.

**A. The Administrative Law Judge Has the Authority to Order Respondent to Comply With Subpoenas and to Impose Sanctions For Noncompliance**

Respondent argues that an ALJ exceeds her authority by ordering production of any subpoenaed documents. It insists that only a United States District Court may order compliance with a subpoena, that the ALJ's order in this case is therefore invalid, and that Respondent has no obligation to comply with the ALJ's order. On the contrary, ordering the production of subpoenaed documents and imposing sanctions for subpoena noncompliance is clearly within an

ALJ's authority. Section 102.25 of the Board's Rules and Regulations states that the ALJ assigned to the hearing shall rule on all prehearing motions in writing and all motions after opening of the hearing by stating such orders and rulings orally on the record. In McAllister Towing & Transportation Company, a case very factually similar to this one, the ALJ granted in part and denied in part the Respondent's petitions to revoke the General Counsel's subpoenas and expressly ordered the Respondent to comply with the remaining subpoenas. 341 NLRB 394 (2004). The Board upheld the ALJ's order, stating that "the Respondent was obliged to substantially comply with the subpoenas upon the judge's order....The judge gave all sides an opportunity to be heard on the motion and then acted on it." See McAllister Towing, at 398.

In the instant case, the ALJ spent the first full day of the hearing reviewing each paragraph of the Counsel for the General Counsel's and the Charging Party's subpoenas duces tecum and Respondent's arguments as to why it should not be required to produce the information requested in each of those paragraphs. At the end of the day the ALJ determined that some, though not all, of the subpoenaed documents must be produced. She ordered Respondent to produce them the next day.

Respondent appeared at the hearing the following morning without the documents it had been ordered to produce and having made no apparent effort to collect any of the documents. See McAllister Towing at 397 (where the Respondent's lack of attempt to even begin compiling documents despite the ALJ's order weighed heavily in Board's decision). Respondent argued that it was impossible to gather the documents in the time it had been allotted and motioned for a continuance of the hearing. The ALJ denied Respondent's motion and ordered Respondent to begin compiling the documents and to produce them as soon as possible. The ALJ noted in making her ruling that Counsel for the General Counsel's subpoenas issued December 21, 2012,

and the Charging Party's shortly after that, having already given Respondent over three weeks to prepare the documents. The ALJ further stated that she would draw an adverse inference against Respondent for noncompliance, which she is well within her right to do. See ADF, Inc., 355 NLRB No. 14, slip op. at 6 (2010), reaffirmed and incorporated by reference 355 NLRB No. 62 (2010); Paint America Services, Inc., 353 NLRB 973, 989 (2009); Essex Valley Visiting Nurses Assoc., 352 NLRB 427, 440-443 (2008); and Teamsters Local 776 (Pennsy Nurses Assoc.), 352 NLRB 1148, 1154 (1994).

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party....The exercise of this authority is a matter committed in the first instance to the judge's discretion.

See McAllister Towing at 396, citing International Metal Co., 286 NLRB 1106, 1112 fn. 11 (1986), and NLRB v. American Art Industries, 415 F.2d 1223, 1229-1230 (5<sup>th</sup> Cir. 1969), cert. denied 397 U.S. 990 (1970).

At the close of the hearing, by which time Respondent still had not complied with the ALJ's order concerning the parties' subpoenas, the ALJ ordered Respondent to produce the information within 14 business days, that is, by February 8. The ALJ ruled further that Counsel for the General Counsel may request reopening of the hearing after it has received Respondent's documents, and that it must make such request within 7 business days of Respondent's production deadline, that is, by February 20. The ALJ held that in the event Counsel for the General Counsel does not request reopening of the hearing the parties must submit their briefs within 30 calendar days of the Counsel for the General Counsel's deadline for requesting a reopening, that is, by March 22, 2013.

On February 8, 2013, Respondent submitted a “Declaration of Compliance.” Counsel for the General Counsel is still reviewing this submission and cannot yet confirm or deny whether this serves as full compliance with the ALJ’s order.

**B. The Administrative Law Judge’s Ruling Is Fair**

**1. Counsel for the General Counsel’s Subpoena Seeks Only Relevant Documents**

Respondent objects to Counsel for the General Counsel’s subpoena on the grounds that it is overly broad and places undue burden on Respondent, an argument the ALJ has already carefully considered and rejected. Counsel for the General Counsel’s subpoena is very narrowly tailored in subject matter, scope and time to request only those documents that are relevant to the issues enumerated in the Complaint. Moreover, the scope of the Counsel for the General Counsel’s subpoenas is largely a function of Respondent’s answer to the complaint, which denied such indisputable matters as the supervisory and agency status of individuals who Respondent had itself presented as supervisors and/or agents during the investigation.

Counsel for the General Counsel requested, for instance, the discriminatee’s personnel file because Respondent denies that it fired the discriminatee for engaging in union activities but rather for poor performance. For the same reason, Counsel for the General Counsel requested, for only the 4-month period prior to the discriminatee’s termination, production records which would most directly reflect upon the discriminatee’s performance. Counsel for the General Counsel requested records showing the number of employees Respondent had terminated in the last two years, which would show whether Respondent had treated the discriminatee disparately. It requested records showing any instance when Respondent disciplined an employee for the same reasons Respondent claims it disciplined the discriminatee. Respondent denies that it had knowledge of the discriminatee’s union activities, so Counsel for the General Counsel requested,

for only the 5-month period prior to discriminatee's termination, documents Respondent gave to its employees referencing the union, as they would tend to show Respondent's knowledge of employees' union activities.

Respondent initially made blanket and unsubstantiated assertions that all of these documents were irrelevant, unduly burdensome to produce, and protected by attorney client privilege, work product privilege and the self-evaluative privilege. Counsel for the General Counsel requested logs identifying which documents Respondent claims are privileged, as required by Federal Rule of Civil Procedure Rule 45(d)(2). To date Respondent has failed to produce any such logs. In any event, the ALJ carefully considered each of these arguments when ruling on Respondent's Motion to Revoke Counsel for the General Counsel's subpoena and ordered relevant documents be produced. In its request for a special appeal, Respondent has made no compelling arguments for upsetting the ALJ's painstaking rulings on production, and as such, Respondent's Motion to Revoke Counsel for the General Counsel's subpoena duces tecum should be denied.

Respondent argues again, in its request for a special appeal, that the outstanding items in Counsel for the General Counsel's subpoena duces tecum are irrelevant and overbroad. It cites, as an example, paragraph 14 of Counsel for the General Counsel's subpoena, which requests documents Respondent has distributed to its employees regarding the union over the 9 months prior to the hearing. Respondent contends this request is overbroad because the Complaint alleges only *one* document as having contained improper communications. However, witness testimony established that Respondent distributed anti-union documents on an almost a daily basis over the course of the union's campaign. Respondent denies that it had any knowledge of specific employees' union activities, including the discriminatee's, and denies that it has any

animus toward the union. The production of documents in response to the request in paragraph 14 would likely reflect directly on Respondent's knowledge of employees' union activities and on its unlawful motivation for the termination of the discriminatee, both crucial elements in Counsel for the General Counsel's allegation that Respondent terminated the discriminatee for his union activities.

Furthermore, the request in paragraph 14 of Counsel for the General Counsel's subpoena is very narrowly limited in time frame and does not place undue burden on Respondent to produce. The document that is alleged in the Complaint as having improper communications, and which is admitted into evidence as Charging Party Exh. 4,<sup>1</sup> was clearly created by using a computer's word processing software. It is reasonable to assume that all of the documents Respondent distributed to its employees over the 9-month period prior to the hearing were created in a similar manner. It is also reasonable to assume that Respondent could easily access and reproduce the electronic versions of such documents by printing hard copies or by transmitting them electronically, which would place a minimal burden and cost on Respondent.

## **2. Respondent Has Produced Few Documents Responsive to Counsel for the General Counsel's Subpoena**

Respondent's claim that it has provided "hundreds of pages of documents" responsive to the subpoenas is disingenuous. The vast majority of the documents Respondent has produced consist of administrative records from the discriminatee's personnel file. This encompasses numerous documents spanning the last 18 years, including, but not limited to: W-4 forms, departmental transfer requests, shift change requests, job change requests, payroll records, the discriminatee's 1994 application for employment, new employee training forms, government

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<sup>1</sup> It should be noted that Charging Party Ex. 4 was not provided by Respondent, despite the ALJ's order, and that the parties were ultimately forced to go to great lengths to obtain it by other means.

forms related to layoffs, government forms related to the discriminatee's unemployment benefits each time he was laid off, financial lenders' requests for verification of discriminatee's employment, direct deposit authorizations, and all other types of administrative records that are naturally generated as a consequence of the discriminatee's employment with Respondent, which began in 1994.

Respondent claims that it has provided documents responsive to paragraphs 6, 7 and 23 of Counsel for the General Counsel's subpoena and that any further compliance would violate its supervisors' and agents' privacy. Respondent has in fact provided very little in response to the above requests, and its argument that further compliance constitutes invasion of privacy is misleading. Paragraph 6 requests documents Respondent relied on in making its decision to terminate the discriminatee. Paragraph 7 requests those documents that memorialize Respondent's investigation of the incident leading to the discriminatee's termination. Paragraph 23 requests documents exchanged between Respondent's agents from the start of the organizing campaign until the date of the hearing (a 10-month period) concerning unions, union organizing, or employees' union activity. Since Respondent's reason for terminating the discriminatee is in controversy, the documents it relied on in making its termination decision and those that reflect its investigation of the behavior that led to the termination are clearly relevant. The fact that Respondent denies knowledge of employees' union activities makes any documents exchanged between Respondent's agents on this topic relevant as well since they go to establishing knowledge and/or animus.

In response to these three requests Respondent has provided the discriminatee's personnel file and a string of emails exchanged between Respondent's agents over a 42-hour period (Charging Party Ex. 8). Respondent refuses to provide any additional information,

including its agents' telephone records, specifically the voicemail and text messages of its former supervisor, Ken Stewart. Respondent claims those records are contained on Stewart's privately-owned device and that production would unduly invade Stewart's privacy. However, witness testimony established that Stewart regularly used his personal phone to assign employees work and to otherwise communicate with employees about their work for Respondent. Stewart therefore had no expectation of privacy concerning those records. Moreover, not only did Stewart create a record on his own phone by these types of communications, he also at times created a record on the phones of those employees with whom he communicated, clearly forfeiting any expectation of privacy.<sup>2</sup>

Finally, Respondent argues that the documents that it has already produced in response to paragraphs 6, 7 and 23 , in combination with witness testimony, obviate the need for any further compliance. On the contrary, witness testimony suggests that further compliance is essential. Respondents' witnesses demonstrated an astonishing inability to recall what conversations they had or what actions they took regarding the investigation of the discriminatee's alleged negligent behavior and regarding their part in the decision to terminate the discriminatee. They contradicted one another and themselves repeatedly on the stand. They were frequently unable to explain what they did in response to the communications they received in Charging Party's Ex. 8, for instance. There is testimony that suggests there are other written forms of communication responsive to the subpoena requests which Respondent did not produce and which would directly reflect upon Respondent's motivation for terminating the discriminatee and which would clarify those records that Respondent has produced thus far.

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<sup>2</sup> See General Counsel Exs. 4 and 12.

### **3. Respondent Has Had Sufficient Time to Produce the Subpoenaed Documents**

Respondent objects to the ALJ's ruling on the grounds that Respondent has not been given sufficient time to produce the subpoenaed documents. Respondent has in fact had a generous amount of time in which to prepare and compile the requested documents. Respondent was first put on notice on December 18, 2012, during a pre-hearing settlement conference call, that Counsel for the General Counsel and the Charging Party would be subpoenaing documents. During the conference call the ALJ instructed the parties to meet in advance of the hearing to review subpoenaed documents so that the hearing would not be unnecessarily delayed. When Respondent objected to the ALJ's suggested meeting dates due to the fact that such dates would conflict with a football game Respondent intended to watch, the ALJ graciously accommodated Respondent's schedule and directed the parties to meet later in the week.

Counsel for the General Counsel's subpoenas were issued on December 21, 2012, and the hearing did not begin until January 15, 2013, a full 25 days later. Despite having had all this time to prepare documents, when Respondent had still failed to comply with the ALJ's order by the close of the hearing on January 18, and as noted above, the ALJ granted Respondent an additional 14 business days, or rather another 21 calendar days, to produce the documents. From the time Counsel for the General Counsel's subpoenas were issued until February 8, 2013, Respondent's final deadline for compliance, Respondent will have had a total of 7 weeks to produce the subpoenaed documents. Though Respondent has provided some documents responsive to the subpoenas and the ALJ's order, it has still not fully complied as illustrated by its response to paragraph 10 of the Counsel for the General Counsel's subpoena. Paragraph 10 requests the names of those employees Respondent has terminated in the last two years, together with the documents reflecting those employees' disciplinary records and the reasons for their

terminations. Respondent provided the names of five employees and some underlying documentation, which was admitted into evidence in Respondent's Ex. 6. Respondent attached five documents reflecting the discriminatee's disciplinary record and the reason for his termination and a few documents for two of the other five employees listed. However, for two of the employees listed, Michael Howell and Jason Crawford, Respondent did not attach one supporting document. The ALJ noted the implausibility that Respondent would have terminated these two employees but would not possess a single document related to either of their disciplinary records or terminations. To date, Respondent has provided no supplementary documentation.

**C. Respondent's Actions Are Merely an Attempt to Obstruct the Board's Procedural Processes**

It is clear that Respondent has been attempting to stall the Board's processes since the issuance of the Complaint. In its Petition to Revoke the subpoenas Respondent made unsupported, generalized objections and blanket claims of privilege without specifically identifying any of the documents for which it was claiming privilege, as it is required to do by law. See Avery Dennison Corp. v. Four Pillars, 190 F.R.D. 1, 1 (D.DC 1999) (describing privilege logs as "the universally accepted means" of asserting privilege claims in the federal courts) and Dorf Stanton Communications, Inc. v. Molson Breweries, 100 F.3d 919, 923 (Fed. Cir. 1996) (holding that failing "to provide a complete privilege log demonstrating sufficient grounds for taking the privilege "waives the privilege."). Additionally, one of the privileges claimed by Respondent, the self-evaluative privilege, is not even typically applied in this area of the law. The reasoning behind the self-evaluative privilege is that an employer will have more incentive to scrutinize its own policies regarding things like safety, environmental regulations,

and equal opportunity laws if the employer knows those internal investigations will be shielded from discovery in any subsequent litigation. See The Self-Critical Analysis Privilege: It is Time for Formal Adoption, Kurtis B. Reeg and Matthew A. Temper, FDCC Quarterly, Volume 62, No.1, p. 80 (Fall 2011). This privilege is recognized by very few jurisdictions. See Etienne v. Mitre Corp., 146 F.R.D. 145, 147 (E.D. Va. 1993) .

Respondent made every attempt to avoid meeting with the other parties to discuss or review the subpoenaed documents. On December 27, 2012, Respondent claimed its facility was shut down until January 7, 2013, and that it would therefore be unable to compile the requested documents. Counsel for the General Counsel and the Charging Party later discovered, and Respondent later admitted, that the facility was not in fact shut down, and that there were employees working during that time period.

The ALJ instructed the parties to meet prior to the hearing to review subpoenaed documents, but Respondent made only the most insincere efforts. Respondent arrived at the meeting with almost none of the subpoenaed documents. Those that Respondent did provide were mostly administrative records from the discriminatee's personnel file which are immaterial to the allegations, as discussed previously. Respondent also provided a few rather cryptic documents which were impossible for either Counsel for the General Counsel or the Charging Party to comprehend without some explanation. Yet Respondent, when asked, refused to explain their content or even identify their author.

Since Respondent had openly disregarded the ALJ's instruction to produce documents for review prior to the hearing and the parties were unable to have any meaningful discussion toward resolution of subpoena issues, the parties lost an entire day of the hearing to review of the subpoenas and petition to revoke, precisely the delay the ALJ had attempted to avoid. As a

consequence, all witnesses who had come ready to testify the first day of the hearing, including the Counsel for the General Counsel's nine witnesses, had to be sent home and brought back again the second day, thus doubling the Region's witness fee and mileage expenses.

Despite the ALJ's order, and despite the fact that Respondent appeared at the second day of the hearing without documents, the ALJ ordered Counsel for the General Counsel to commence putting on its case-in-chief. Respondent argues that it has been prejudiced by the ALJ's rulings, but its Respondent's noncompliance that is likely to prejudice the Counsel for the General Counsel's case and the overall proceeding. The Counsel for the General Counsel began putting on its case without the benefit of the documents the ALJ had determined were necessary and relevant to the GC's case. See McAllister Towing, at 398.

In view of the preceding facts, it is clear that Respondent's Request for Special Permission to Appeal and Accompanying Appeal is merely another attempt to obstruct the Board's processes.

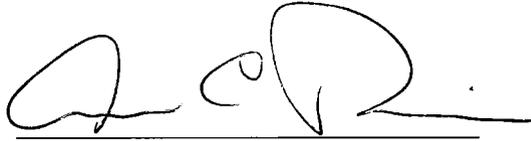
**D. The Administrative Law Judge's Rulings Should Be Affirmed and Respondent's Request for Special Appeal and Accompanying Appeal Should Be Denied**

In sum, the ALJ has already very thoroughly reviewed the Counsel for the General Counsel's and the Charging Party's subpoenas and Respondent's petition to revoke, has heard all of the parties' arguments, and has concluded that some of the information is indeed likely to lead to the discovery of admissible evidence relevant to the disputed issues and is not overly burdensome for Respondent to produce. The ALJ has the authority to require Respondent to produce that information, and she has ordered Respondent to produce it. Respondent has had sufficient time to gather and produce the documents, but still refuses to produce them. Respondent's disrespect for the authority of the ALJ, the Board, and the Board's procedures is evident by its actions

throughout this proceeding. In order to uphold and effectuate the purposes of the Act, the Board should affirm and enforce the ALJ's rulings and deny Respondent's Request for Permission to Appeal and Accompanying Appeal.

Dated: February 12, 2013

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Anne C. Peressin', written over a horizontal line.

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**STATEMENT OF SERVICE**

I hereby certify that I have this date served copies of the foregoing General Counsel's Opposition to Respondent Stahl Specialty's Request for Special Permission to Appeal and Accompanying Appeal to the Administrative Law Judge's Ruling on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Board/Office of the Executive Secretary and by electronic mail to the Honorable Christine E. Dibble, to Counsel for Respondent, Counsel for the Charging Party, and Charging Party Jerry Guilizia.

Dated: February 12, 2013



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