

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

MCKENZIE-WILLAMETTE REGIONAL  
MEDICAL CENTER ASSOCIATES, LLC, d/b/a  
MCKENZIE-WILLAMETTE MEDICAL CENTER

and

Cases 19-CA-077096  
19-CA-095797

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 49, CTW-CLC

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION  
TO RESPONDENT'S PETITION TO REVOKE SUBPOENA**

On March 4, 2013, Respondent filed a Petition (the "Petition") to Revoke *Subpoena Duces Tecum* B-712405 (the "Subpoena"). On March 7, 2013, pursuant to Rule 102.31(b) of the Board's Rules and Regulations, the Regional Director referred the Petition to the Division of Administrative Law Judges in San Francisco for disposition.

In its Petition, Respondent essentially argues that the Subpoena is unenforceable, and thus should be revoked, because the Board lacks a quorum pursuant to the District of Columbia Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Additionally, Respondent summarily asserts, without making any specific arguments and without citing any supporting case law, that the Subpoena is overbroad, burdensome, vague, and/or may seek privileged information.

As discussed more fully below, Counsel for the Acting General Counsel clearly possesses the authority to issue the Subpoena in order to investigate and prosecute

these unfair labor practices. Further, the Subpoena is narrowly tailored to address the discrete issues in dispute in this case. Indeed, the Subpoena *only* seeks relevant, unprivileged documents and communications related to those issues that Respondent admits are in dispute in this case. As such, Counsel for the Acting General Counsel respectfully requests that the Administrative Law Judge deny Respondent's Petition and order Respondent to produce the subpoenaed documents.

**1. Procedural Background**

On March 22, 2012, and as amended on May 23, 2012, Service Employees International Union, Local 49, CTW-CLC (the "Union"), filed Charge 19-CA-077096 alleging that Respondent refused to timely produce relevant requested information relating to a pending grievance concerning bargaining unit employee Melissa Frost and related workplace issues in Respondent's CVOR Department (the "Grievances"). On June 21, 2012, the Acting General Counsel issued Complaint on the information request allegations contained in the Union's Amended Charge. On July 5, 2012, Respondent filed an Answer denying the material allegations of the Complaint.

On January 3, 2013, the Union filed Charge 19-CA-095797 essentially alleging that Respondent is failing to produce relevant requested information relating to Respondent's proposed health insurance changes (the "Insurance Changes"). On February 19, 2013, the Acting General Counsel issued a Consolidated Complaint on both charges. On March 5, 2013, Respondent filed an Answer denying the material allegations of the Consolidated Complaint.

that relates to matters in question or that can provide background information or information that can lead to other potentially relevant evidence. See *Perdue Farms, Inc.*, 323 NLRB 345, 348 (1997), *affd. in relevant part*, 144 F.3d 830, 833-34 (D.C. Cir. 1998). As such, “[f]or purposes of an administrative subpoena, the notion of relevancy is a broad one. . . . So long as the material requested ‘touches a matter under investigation,’ an administrative subpoena will survive a challenge that the material is not relevant.” *Sandsend Fin. Consultants, Ltd. v. Federal Home Loan Bank Bd.*, 878 F.2d 875, 882 (5<sup>th</sup> Cir. 1989) (citation omitted), and cases cited therein. See also *NLRB v. Alaska Pulp Corp.*, 1995 WL 389722, 149 L.R.R.M. (BNA) 2684, 2688 (D.D.C. 1995); *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7<sup>th</sup> Cir. 1991).

### **3. *Noel Canning* Has No Bearing on the Authority to Subpoena Herein**

Respondent argues that Counsel for the Acting General Counsel lacks the authority to issue the Subpoena because the Board itself lacks a quorum under the holding in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). In *Noel Canning*, the District of Columbia Circuit determined that two of the three Board members were not appropriately appointed to the Board in violation of the U.S. Constitution. The decision in *Noel Canning*, does not invalidate the Board’s authority to prosecute these unfair labor practices or issue the Subpoena in furtherance of the Board’s prosecutorial authority because, as Chairman Pearce commented in his press release of January 25, 2013, “this order applies only to one specific case, *Noel Canning*, and . . . similar questions have been raised in more than a dozen cases pending in other courts of

appeals. In the meantime, the Board . . . will continue to perform our statutory duties and issue decisions.”

Moreover, even if *Noel Canning* were not limited to the law of that case, the Board has repeatedly found that it is not appropriate for it to decide whether presidential appointments are valid. Instead, the Board applies the well-settled “presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary.” *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

Apart from the *Noel Canning* law of the case and the presumption of regularity precepts, it bears repeating that the Subpoena was issued by the Acting General Counsel in the prosecution of the Consolidated Complaint.<sup>1</sup> The authority of the General Counsel of the National Labor Relations Board to prosecute an unfair labor practice case derives not from the Board, but rather directly from the statute, as the National Labor Relations Act (NLRA) “divides responsibility over private-sector labor relations between the National Labor Relations Board and the General Counsel of the Board.” *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). “This bifurcated structure reflects the intent of Congress ‘to differentiate between the General Counsel’s and the Board’s final authority along a prosecutorial versus adjudicative line.” *Id.* (quoting *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (“UFCW Local 23”)). As the Supreme Court has explained (*UFCW Local 23*, 484 U.S. at 117-18):

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<sup>1</sup> It should be noted that there was no challenge to Acting General Counsel Solomon’s presidential appointment in *Noel Canning*.

The NLRA, as originally enacted, granted the Board plenary authority over all aspects of unfair labor practice disputes: the Board controlled not only the filing of complaints, but their prosecution and adjudication. The Labor Management Relations Act, 1947 (LMRA), 61 Stat. 136, altered this structure. One of the major goals of the LMRA was to divide the old Board's prosecutorial and adjudicatory functions between two entities. The Conference Committee did not go so far as to create a new agency. It did, though, determine that the General Counsel of the Board should be independent of the Board's supervision and review.

This makes it clear that "Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints." *UFCW Local 23*, 484 U.S. at 27. To this end, "the General Counsel is appointed by the President, with advice and consent of the Senate, and is the 'final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board.' 29 U.S.C. § 153(d)." *Id.* at 118. In turn, the agency staff performing investigative and prosecutorial tasks is directly accountable to the General Counsel, not the Board, as § 3(d) expressly provides that, with the exception of administrative law judges and legal assistants to Board members, the General Counsel "shall exercise general supervision over all attorneys employed by the Board" as well as "over the officers and employees in the regional offices." *NLRB v. FLRA*, 613 F.3d at 278 (the NLRA "specifically mandates a separation of authority over agency employees.").

Since Counsel for the Acting General Counsel is within his prosecutorial discretion in issuing the Subpoena and overseeing the attendant prosecution of the Consolidated Complaint, the Subpoena is legally sufficient.

#### **4. The Subpoena is not Overly Broad, Burdensome, or Vague, nor Does it Seek Privileged Documents**

Additionally, Respondent summarily asserts, almost in passing, that the Subpoena is also overbroad, burdensome, vague and/or may seek privileged documents pursuant to the attorney-client and work-product privileges. Despite this, however, Respondent asserts nothing specific concerning these broad allegations and cites no case law in support of these assertions. Not only is Respondent's broad assertion legally flawed, but factually the Subpoena is clearly relevant to matters at issue in this hearing, is appropriately and narrowly tailored, is not burdensome on Respondent, and does not seek any privileged documents.

As it stated in its Petition and recent Answer, Respondent denies the material allegations in the Consolidated Complaint; it denies the Acting General Counsel's allegations concerning the various information requests as well as the relevance of those information requests. The Subpoena only seeks two categories of documents: 1) documents and communications exchanged between the parties concerning the various information requests at issue in the Consolidated Complaint; and 2) documents and communications related to the underlying relevance of the information requests, *i.e.*, the Grievances and the Insurance Changes. Accordingly, and despite the Board's much broader subpoena standard cited above, since the Subpoena only seeks those documents directly at issue in the upcoming hearing, there can be no good faith claim of vagueness or overbreadth.

Respondent makes a similarly baseless assertion as to burdensomeness. Given its denials in the Answer, Respondent presumably will already be gathering this same

finite set of documents in preparation for the hearing, *i.e.*, documents pertaining to the information requests and the underlying relevance for the information requests. Even if it were not, the Board has long held that a party seeking revocation of a subpoena based on a claim that it is unduly burdensome has the burden of establishing that compliance with the Subpoena is unreasonable, burdensome, or would cause undue hardship and expense. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977). This burden is not easily met. *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986), *cert. denied*, 479 U.S. 815 (1986).

The fact that compliance with a subpoena may require the production of bulky, voluminous or numerous documents is insufficient to establish that it is burdensome and does not serve as an excuse for noncompliance. *McGarry v. SEC*, 147 F.2d 389 (10th Cir. 1945); *NLRB v. United Aircraft Corp.*, 200 F. Supp. 48, 51 (D. Conn. 1961). The party seeking revocation must show that compliance with the Subpoena “would seriously disrupt normal business operations.” *United Aircraft*, 200 F. Supp. at 51; *see also, EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993); *G.H.R. Energy Corp.*, 707 F.2d at 113-14 (5<sup>th</sup> Cir. 1982). Here, Respondent has not proffered any substantive argument concerning the alleged burdensomeness of the Subpoena, nor is there any evidence to suggest production of a relatively finite set of documents would be overly burdensome on Respondent.

Finally, the Acting General Counsel has never sought production of any of Respondent’s attorney-client or work-product-privileged documents. In fact, the Subpoena itself defines “documents” consistent with Rule 34 of the Federal Rules of

Civil Procedure (the “FRCP”) to ensure this. “Communications” are likewise defined in this context, *i.e.*, that the subpoena is intended to comply with the limitations of the FRCP. Conceivably, responsive documents to this request may include items like letters and e-mails exchanged between the parties related to the information requests, the Grievances, or the Health Information, none of which would have been communications between a client and its attorney seeking legal advice or documents “prepared by a party or his representative in anticipation of litigation.” *Central Tel. Service of Tx.*, 343 NLRB 987, 988 (2004) (work-product privilege); *Upjohn Corp. v. U.S.*, 449 U.S. 383, 389-90 (1981) (attorney-client privilege).

However, if Respondent were to somehow extend its reading to include privileged documents, the Subpoena itself provides a method for addressing this: follow the well established principles of creating a privilege log. As the Definitions and Instructions section of the Subpoena indicates, “[f]or any document withheld on a claim of privilege and/or under the work-product doctrine, [Respondent should] identify the date, author, recipients, title, general nature and privilege claimed.” This is consistent with applicable case law, which holds that the subpoenaed party should create a privilege log, identifying the allegedly privileged documents in sufficient detail to permit an informed decision as to whether the documents at issue meet all elements of the claimed privilege or protection. See *CNN Am., Inc.*, 352 NLRB 448, 448-49 (2008); *U.S. v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). Insofar as a party contends that material within the scope of the Subpoena is privileged, the material may be submitted to the Administrative Law Judge for an *in camera* inspection

before a ruling on a petition to revoke is made.<sup>2</sup> See *CNN Am., Inc.*, 352 NLRB at 448-49; *Brink's, Inc.*, 281 NLRB at 470.

## 5. Conclusion

The Subpoena is validly issued and is not vague, overbroad, or burdensome. It only seeks the production of unprivileged documents and communications that directly “relate to” or “touch” upon matters relevant to this proceeding. As such, Counsel for the Acting General Counsel respectfully requests that the Administrative Law Judge deny Respondent’s Petition, and order Respondent to produce the subpoenaed documents and communications.

**DATED** at Seattle, Washington, this 7<sup>th</sup> day of March, 2013.

/s/ Adam D. Morrison  
Adam D. Morrison  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

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<sup>2</sup> Although *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499 (4th Cir. 2011), prohibits an Administrative Law Judge from enforcing a subpoena, he or she can sustain claims of privilege or order production based upon the privilege log. In any event, the Board has not adopted the Fourth Circuit’s view.

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records  
McKenzie-Willamette Medical Center  
1460 G Street, Springfield, OR 97477-4112

As requested by Adam D. Morrison, Counsel for the Acting General Counsel

whose address is 915 Second Ave., Rm. 2948, Seattle, WA 98174  
(Street) (City) (State) (ZIP)

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

an Administrative Law Judge of the National Labor Relations Board

at Courtroom 3, U.S. District Court, 405 E. 8th Avenue

in the City of Eugene, OR

on the 12th day of March 2013 at 9:00 (a.m.) (~~p.m.~~) or any adjourned

or rescheduled date to testify in McKenzie-Willamette Regional Medical Center Associates, LLC

d/b/a McKenzie-Willamette Medical Center

(Case Name and Number)

Cases 19-CA-077096 and 19-CA-095797

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

**\*\*SEE ATTACHED\*\***

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 - 712405**

Issued at Portland, Oregon

this 22nd day of February 2013



*Paul H. Paine*  
Chairman, National Labor Relations Board

**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**

### **DEFINITIONS AND INSTRUCTIONS**

As used in this document, "Respondent" refers to McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center, and its agents, managers, supervisors, and/or representatives. The term "Union" refers to the Service Employees International Union, Local 49, CTW-CLC.

"Documents" includes all material defined in Rule 34 of the Federal Rules of Civil Procedure, and are not limited to the specific examples listed. We seek production of all requested documents and communications within your possession, custody and/or control without regard to who has physical possession of them or who prepared the documents and wherever retained.

"Communications" means any oral or written exchange of words, speeches, correspondence of any nature, thoughts or ideas to another person(s), whether person-to-person, in a group, by telephone, by letter, by telex, facsimile transmission, by e-mail, or by any other process, verbal, written, electronic, or otherwise.

Documents and communications produced should be grouped and in the order that they are maintained in the normal course of business, and should include all files and file labels in which the documents, and extra copies of them, are located.

For any document withheld on a claim of privilege and/or under the work-product doctrine, identify the date, author, recipients, title, general nature and privilege claimed.

If additional documents are discovered that fall within the terms of this request, the additional items also shall be produced immediately.

Unless otherwise indicated this subpoena covers the period of January 1, 2011, through the return date of this subpoena.

### **DOCUMENTS TO BE PRODUCED**

1. For the period from January 1, 2012, to September 23, 2012, documents and communications, including but not limited to grievances, grievance responses, grievance appeals, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to grievances related to Melissa Frost ("Frost") and/or the work environment in the Cardiovascular Operating Room ("CVOR").

2. For the period from February 23, 2012, to September 23, 2012, documents and communications, including but not limited to requests for information, responses to requests for information, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to the Union's request of February 23, 2012, that Respondent furnish the Union with the personnel files of Frost, Aden Davis ("Davis"), and/or Aden Galor ("Galor").
3. For the period from May 14, 2012, to September 23, 2012, documents and communications, including but not limited to requests for information, responses to requests for information, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to the Union's request of May 14, 2012, that Respondent furnish the Union with the following information:
  - (a) any and all documents supporting the assertions Respondent made in its February 21, 2012, grievance response letter concerning Frost's work performance and behavior;
  - (b) the personnel files of Frost, Davis, and/or Galor; and
  - (c) the weekly CVOR department schedules for January and February 2012.
4. For the period from January 1, 2012, to the return date of the subpoena, documents and communications, including but not limited to memoranda, correspondence, letters, emails, meeting minutes, and notes, related to contact and/or communications between Respondent and the Union concerning proposed changes to health insurance.
5. For the period from November 21, 2012, to the return date of the subpoena, documents and communications, including but not limited to requests for information, responses to requests for information, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to the Union's request of November 21, 2012, that Respondent furnish the Union with the following information:
  - (a) Copy of the Summary Plan Description;
  - (b) Financial impact of the plan design and employee contribution rate changes;
  - (c) Actuarial value of the plan;
  - (d) Cost of the plan to McKenzie-Willamette;
  - (e) Method for fixing plan cost to McKenzie-Willamette;
  - (f) Reserves (for payment of claims);
  - (g) Experience (reporting figures);
  - (h) Medical claims cost and administrative expenses;

- (i) Medical claims incurred for services at CHS-affiliated hospitals;
- (j) Actual cost to supply services provided at CHS-affiliated hospitals;
- (k) Contractual discounts for services provided at CHS-affiliated hospitals; and
- (l) Prices to the plan of services provided at McKenzie-Willamette entities, other network providers, and non-network providers.

6. In lieu of providing the records and documents requested above, the custodian of records may make the records and documents and/or true copies of such records requested herein available at a mutually agreeable location and time in Eugene, Oregon no later than Monday, March 11, 2013, to an agent or agents of the National Labor Relations Board for inspection, copying and use in connection with these proceedings. Provided further, that such records and documents requested herein will not be required to be produced at the hearing in this matter if Respondent and the Counsel for the Acting General Counsel arrive at a written stipulation with regard to the information contained therein and such stipulation is received in evidence by the Administrative Law Judge hearing this matter.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Opposition to Respondent's Petition to Revoke Subpoena in cases 19-CA-078239 and 19-CA-095797, was served by e-mail and e-file, as noted below, on March 7, 2013, on the following parties:

E-filing:

Gerald M. Etchingham  
Associate Chief Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103

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