

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES -- SAN FRANCISCO**

PROFESSIONAL MEDICAL TRANSPORT, INC.

and

Case 28-CA-089300

**INDEPENDENT CERTIFIED EMERGENCY
PROFESSIONALS, LOCAL NO. 1**

**ACTING GENERAL COUNSEL'S PETITION
TO REVOKE SUBPOENA B-712944**

Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.31(b) of the Board's Rules and Regulations, petitions to revoke Subpoena Duces Tecum B-712944 which was served by Professional Medical Transport, Inc. (Respondent) on an agent of Region 28 of the National Labor Relations Board (the Board). The Subpoena should be revoked because Respondent has failed to secure the written consent of the General Counsel to permit an individual on behalf of Region to produce documents; the Subpoena seeks privileged internal deliberative material and attorney work product; and the Subpoena is a subterfuge for discovery. Moreover, Respondent has failed to tender required witness fees.

I. Background

On November 30, 2012, a Complaint and Notice of Hearing issued in Case 28-CA-089300 (the Complaint). The Complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspended Tony Lopez (Lopez) and shutting down Unit 603. The Complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by: unilaterally shutting down Unit 603, and in doing so changing the terms and conditions of employment for employees in the bargaining unit and unilaterally changing the

terms of the collective-bargaining agreement without affording the Union an opportunity to bargain or without the consent of the Union; and dealing directly with Unit employees by offering them monetary bonuses if they ratified Respondent's collective bargaining proposal by July 1, 2012. A hearing in this matter is scheduled to begin on May 13, 2013, in Phoenix, Arizona.

On March 15, 2013, Region 28 received the Subpoena. The Subpoena seeks to require Region 28's custodian of records to appear at the hearing in this matter on May 13, 2013, to testify, and to produce two categories of documents relating to the investigation of, and decision to issue a complaint in, this matter. For the reasons described below, the Subpoena should be revoked in its entirety.

II. Argument

A. Production of the Subpoenaed Documents is prohibited by Federal Regulation

The production of the subpoenaed documents is prohibited by federal regulation; therefore, the Subpoena must be quashed in its entirety. The General Counsel is required to comply with Section 102.118, as amended, of the Board's Rules and Regulations, prohibiting current or former Board employees from producing Board records without approval of the General Counsel. Section 102.118 reads, in part, as follows:

[N]o present or former Regional Director, field examiner, administrative law judge, attorney, specially designated agent, General Counsel, Member of the Board, or other officer or employee of the agency shall produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, **without the written consent of the . . . General Counsel** if the document is in a Regional Office of the Agency or is in Washington, D.C., and in the control of the General Counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court of before the Board . . . with respect to

any information, facts, or other matter coming to that person's knowledge in his or her official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel[.](emphasis added).

The validity of the requirement of Section 102.118 that prohibits production of records without the prior written consent of the General Counsel is well settled. See *Midwest Hanger Co.*, 221 NLRB 991 n. 4 (1975); *Howard Johnson Co.*, 250 NLRB 1412 n. 2 (1980) *Smithfield Packing Co., Inc.*, 334 NLRB 34 (2001); *Davis v. Braswell Motor Freight Lines*, 363 F.3d 600, 602-03 (5th Cir. 1966) (Subpoena to a Regional Director quashed for failure to request the General Counsel's prior consent as required by § 102.118).

The legitimacy of Section 102.118, and similar regulations for other agencies, rests on the presumption that, as a matter of internal management, the head of an agency is authorized to reserve to himself the authority to release records. *Braswell Motor Freight Lines, Inc.*, 363 F.2d at 602-03. By centralizing such authority, an agency is able to properly determine when, and if, to assert any legitimate evidentiary privileges related to such subpoenaed documents. *Id.* This "legitimate and tidy housekeeping objective" is fulfilled when permission is requested from the head of an agency or other properly designated official. *Id.*

Here, although Respondent has sought the written consent of the General Counsel, as required by Section 102.118, Respondent issued the Subpoena on the same date it requested written consent from the General Counsel. Moreover, since the General Counsel has not consented to have an agent of the Region appear and produce the records requested by the Respondent, such records may not be compelled by subpoena. *Braswell Motor Freight Lines, Inc.*, *supra*. See also, *Touhy v. Ragen*, 340 U.S. 462, 464-465, 467-468 (1951) (upholding a

similar regulation prohibiting Department of Justice employees from producing agency records pursuant to a subpoena without the express approval of the Attorney General); *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982). On this basis alone, Respondent's Subpoena must be revoked in its entirety.

B. Production of Board Affidavits is Prohibited due to the Express Assurances of Confidentiality Given to the Affiant

To the extent the Subpoena seeks production of affidavits and witness statements taken by the Board, the production of such documents is prohibited due to the nature of the affidavits and the express assurances of confidentiality given to the affiants. Although the Subpoena expressly states that it does not seek confidential witness affidavits that may have been provided during the investigation of the charge, the information Respondent seeks may clearly be contained only in witness confidential affidavits. Production of such documents would impermissibly disclose the identity of confidential sources. Express promises of confidentiality, such as those given to affiants by Board agents, preclude the future production of affidavits unless a hearing is held, and the affiant testifies.¹ *Wayland v. NLRB*, 627 F. Supp. 1473 (M.D. Tenn. 1986). In *Wayland*, the plaintiff sought production of certain documents from two closed unfair labor practice cases, pursuant to the Freedom of Information Act. The *Wayland* court noted that the "ability to grant an assurance of confidentiality is especially important to agencies such as the NLRB." *Id.* at 1480.

¹ The following statement appears on each Board witness statement in this matter: "I have been given assurances by an agent of the National Labor Relations Board that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the Board and will not be disclosed unless it becomes necessary to produce the Confidential Witness Affidavit in connection with a formal proceeding."

Furthermore, “witnesses, who are the principal source of information in NLRB investigations, may be reluctant to give statements to NLRB investigators absent assurances of confidentiality, for fear of employer reprisal or harassment.” Id. at 1480 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)).

Acknowledging a split in the Circuits, the *Wayland* Court held that “the term ‘confidential source’ includes a witness who is promised or reasonably expects confidentiality unless and until the agency needs to call him as a witness at trial.” *Wayland*, 627 F.Supp. at 1480. Accordingly, the *Wayland* Court denied plaintiff’s request for production of affidavits in the closed case files because “the terms of the express promise of confidentiality given by the NLRB to the witnesses . . . provide that the source can expect confidentiality unless the affidavit is produced in a later proceeding.” Id. The fact that the Board case files had been closed was not an issue because “it is entirely reasonable for a witness to expect . . . that his identity will remain confidential if either a later hearing is never held, or the hearing is held and the affidavit of this particular witness is not produced.” Id.

Similarly, in this matter, all affidavits taken by Board Agents which may be subject to the Subpoena contain an express promise of confidentiality.² To the extent that witnesses who subscribed affidavits provided to the Board in connection with the unfair labor practice charge identified in the subpoenas have not been called to testify, such witnesses retain an expectation that their identity will remain confidential. It is reasonable that all such potential witnesses expect that their “identity will remain confidential.” *Wayland*, 627 F.Supp. at 1480.

² All witness affidavits in this matter contain the promise of confidentiality set forth above in footnote 1.

C. Subpoena Seeks Privileged Documents.

Respondent's broad Subpoena requests could be read to seek the production of documents containing the internal deliberations of administrative officials, and as such must be revoked. There are historic privileges against disclosure of intra-agency memoranda, communications, and other documents procured during official NLRB investigations and proceedings. See *NLRB v. Sears Roebuck & Co.*, 421 US 132, 149-152 (1975); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 603 (5th Cir. 1966); *Hickman v. Taylor*, 329 US 495 (1947); FED R. CIV. P. 26(b)(3). In *Hickman*, the Supreme Court explained that the work product protection encompasses "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." *Hickman*, 329 U.S. at 511. Moreover, the protection afforded work product under Rule 26(b)(3) extends to material prepared by agents of the attorney as well as those prepared by the attorney himself, and continues beyond the litigation for which the documents at issue were prepared. *U.S. v. Nobles*, 422 US 225, 238-39 (1975); *FTC v. Grolier*, 462 US 19, 22-27 (1983). Therefore, the subpoenaed work product of the Board is shielded from compelled production through Rule 25(b)(3)'s directive that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney." FED R. CIV. P. 26(b)(3). Accordingly, any such records and testimony is clearly privileged from disclosure and should be protected from the Subpoena.

D. The Subpoena is a Subterfuge for Obtaining Discovery

The Subpoena is an attempt at pre-trial discovery. The Act does not compel the Board to provide for discovery in its proceedings, and the unavailability of discovery is not a prejudicial denial of due process. See, e.g., *NLRB v. Robbins Tire and Rubber Company*,

437 U.S. 214, 236 (1978); *McClain Industries, Inc. v. NLRB*, 521 F.2d 596 (6th Cir. 1974); *Wellman Industries Inc. v NLRB*, 490 F.2d 427 (4th Cir. 1974); *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1968). Inasmuch as the Subpoena seeks documents on which the Region relied to issue the Complaint in the instant case and which are not otherwise privileged from disclosure, the Subpoena attempts to make an end-run around the Board's policy of declining to provide for discovery in its proceedings. Accordingly, the Subpoena should be revoked.

E. Respondent Failed to Tender Fees with Service of the Subpoenas

Finally, the Subpoena should be revoked because Respondent has failed to tender witness fees to the Region's custodian of records as required by Section 102.32 of the Board's Rules:

Witnesses summoned before the administrative law judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the persons taking the deposition shall be paid by the party at whose instance the deposition is taken.

The tendering of these fees must accompany the service of a subpoena. *Rolligon Corp.*, 254 NLRB 22 (1981); Fed. R. Civ. P. 45. Here, Respondent has not tendered any witness fees, and the General Counsel has not waived the tender of these fees. The Subpoena is thus invalid on its face. Because a witness's obligation to honor a subpoena arises when the subpoena is duly issued and served, the Region's custodian is free to ignore the invalid Subpoena. See *Winn-Dixie Stores, Inc.*, 128 NLRB 574, 579 (1960).

III. Conclusion

It is evident that Respondent is using the Subpoena as a discovery device to obtain as much testimonial and documentary information as possible from the General Counsel concerning the investigation of Case 28-CA-089300 and the decision to issue a complaint in this case. For the reasons fully set forth above, it is respectfully requested that the Associate Chief Administrative Law Judge revoke the Subpoena in its entirety.

Dated at Phoenix, Arizona, this 20th day of March 2013.

/s/ Sandra L. Lyons
Sandra L. Lyons
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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA B-712944 in PROFESSIONAL MEDICAL TRANSPORT, INC., Case 28-CA-089300 was served by E-Gov, and E-Filing on this 20th day of March 2013, on the following:

Via E-Gov, E-Filing:

Honorable Gerald M. Etchingham
Administrative Law Judge
National Labor Relations Board
Administrative Law Judge Division
901 Market Street, Suite 300
San Francisco, CA 94103-1779

One Copy via e-Mail:

Ellen J. Shadur, Attorney at Law
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/s/ Iliana N. Ferrance

Iliana N. Ferrance
Secretary to the Regional Attorney
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
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SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records, National Labor Relations Board, Region 28
2600 North Central, Suite 1400., Phoenix, AZ 85004

As requested by Gerard Morales, Snell and Wilmer
whose address is 400 E. Van Buren Street, Phoenix, AZ 85004
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE _____
an Administrative Law Judge _____ of the National Labor Relations Board
at 2600 N. Central Ave., Suite 1400

in the City of Phoenix, AZ
on the 13th day of May 2013 at 9 :00 (a.m.) ~~(p.m.)~~ or any adjourned
or rescheduled date to testify in Professional Medical Transport, Inc.
28-CA-089300
(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.

B - 712944

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Phoenix, AZ

this 12th day of March

2013



[Signature]
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 TO SUBPOENA DUCES TECUM

Re: Professional Medical Transport, Inc.
Case 28-CA-089300

DEFINITIONS AND INSTRUCTIONS FOR USE

A. Unless otherwise stated, each item requested covers the period from September 14, 2012 to the date of service herein (the subject period).

B. "Employer" refers to Professional Medical Transport, Inc. ("PMT"), its owners, officers, managers, supervisors, agents, and/or representatives.

C. The "Union" means the Independent Certified Emergency Professionals ("ICEP"), its officers, agents and representatives.

D. "Region" refers to Region 28, National Labor Relations Board.

E. "Complaint" refers to the Complaint and Notice of Hearing issued in the instant case dated November 30, 2012.

F. "Disciplining" refers to any form of discipline issued to an employee, supervisor or manager, including, without limitation, orally counseling the individual, issuing the individual a written reprimand, placing the individual on probation, demoting, suspending and/or discharging the individual.

G. "Document" or "documents" means any written, recorded, filmed or graphic matter, whether produced or reproduced on paper, cards, tapes, film, electronic facsimile, computer storage device, or any other media, including, but not limited to, memoranda, notes, electronic-mail, text messages, instant message, Twitter postings (tweets), Facebook or other social media postings, electronic postings, minutes, records, telephone contacts, notice of disciplinary actions, photographs, correspondence, telegrams, diaries, bookkeeping entries, financial statements, tax returns, checks, check stubs, reports, studies, charts, graphs, statements, notebooks, handwritten notes, applications, agreements, books, pamphlets, periodicals, appointment calendars, records or recordings of oral conversations, employment forms, originals and all copies which are different in any way from the original, whether by interlineation, receipt, stamp, notations, indication of copies sent or received, or otherwise, and drafts. The terms include all graphic or records and representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotape recordings, motion pictures and electronic, mechanical or electrical records or recordation of any kind including without limitation electronic mail communications, computer disks, computer input or output, computer hard or flash drive files, tapes, cassettes, disks and recordings. The terms include materials in any language. To the extent documents requested are maintained or stored in electronic form, in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonable form, such electronic documents are requested.

H. "Communications" or "correspondence" includes, but is not limited to, letters, memoranda, notes, tapes of telephone conversations or personal conversations, telegraphs, reports, teletype messages, electronic-mail, interoffice communications, recordings of conversations and telefax communications.

I. "Any," "each," and "all" shall be read to be all-inclusive and to require the production of each and every document responsive to the request in which such terms appear.

J. "And" and "or," and any other conjunctions used herein shall be read both conjunctively and disjunctively, so as to make the request inclusive rather than exclusive, and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.

K. Whenever used herein, 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; references to parties shall be deemed to refer to any and all of their officers, directors, owners, managers, supervisors, agents, and representatives.

L. This subpoena is intended to cover all documents that are in the possession, custody, or control of the Union, its present or former managers, supervisors, agents, attorneys, accountants, advisors, investigators, and any other persons and companies directly or indirectly employed by, or connected with the Union.

M. If any of the requested documents cannot be produced in full, then produce those documents to the extent possible, and specify the reasons for the inability to produce the remainder, stating whatever information, knowledge or belief may be raised concerning the unproduced portion.

N. If any document responsive to any request herein was, but no longer is, in your possession, custody or control, identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control; and identify (stating the person's name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.

O. If any document responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons, identify the document (stating its date, author, addressee(s), recipients and intended recipients, title and subject matter); explain the circumstances surrounding the destruction, discarding, or disposal of the document, including the timing of the destruction, identify all persons who authorized disposal of the document, and identify all persons known or believed to have the document or a copy thereof in their possession, custody or control.

P. With regard to any subpoena paragraph requests for which a claim of attorney-client privilege or a claim that the documents are entitled to protection as trial preparation materials are raised, please provide a detailed "privilege log," including a detailed summary of each document regarding which the claim is made, the date of the document, and the name and title of the sender and the receiver of each said document. Said privilege log should comport with the requirements of Fed.R.Civ.P. Rule 45(d)(2).

Q. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

R. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

S. All documents produced pursuant to this subpoena should be organized by what subpoena paragraph each document or set of documents are responsive to, and labels referring to that subpoena paragraph should be affixed to each document or set of documents.

T. Unless otherwise noted, this subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

DOCUMENTS REQUESTED

1. All DOCUMENTS which evidence, relate, pertain or refer to any employee represented by the UNION who took Employer's training course for ACLS, CPR or other similar certification, who failed to provide such certification to the Employer within seven days prior to the expiration of the certification and was not disciplined.
2. All DOCUMENTS which constitute, evidence or otherwise refer to communications between the UNION and any employee of Region 28 of the National Labor Relations Board with respect to any of the claims asserted in the unfair labor practice charge filed by the UNION in the instant matter or in the Complaint.

THESE REQUESTS TO NO INCLUDE AND DO NOT SEEK COPIED OF ANY CONFIDENTIAL WITNESS AFFIDAVITS THAT MAY HAVE BEEN PROVIDED TO THE REGION DURING THE INVESTIGATION OF THE ALLEGATIONS IN THE CHARGE.