

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

D & S ELECTRICAL CONTRACTORS, INC.

and

Case 19-CA-088609

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 46

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

**I. INTRODUCTION**

The Acting General Counsel opposes the Petition (the "Petition") to Revoke Subpoena Duces Tecum B-710248 (the "Subpoena") filed by D & S Electrical Contractors, Inc. ("Respondent"), on April 12, 2013. By its Petition, Respondent argues that the Subpoena requests are overly broad, vague, unduly burdensome, and/or privileged. As discussed in detail below, the Acting General Counsel respectfully requests that the Administrative Law Judge deny Respondent's Petition because the Subpoena is narrowly tailored to seek unprivileged documents and communications that are relevant to issues raised by the pleadings.

**II. PROCEDURAL BACKGROUND**

The International Brotherhood of Electrical Workers, Local 46 (the "Union"), filed Charge 19-CA-088609 on September 4, 2012, which it amended on October 29, 2012. On December 19, 2012, the Acting General Counsel issued Complaint, alleging that Respondent interrogated and threatened applicants for employment, and refused to consider for hire or hire applicants Mark Anderson, Steven Begley, David Tomkins, and

Margaret Ely. On January 2, 2013, Respondent filed an Answer denying the material allegations of the Complaint.

On April 5, 2013, Counsel for the Acting General Counsel served Respondent with the attached Subpoena. The Subpoena essentially requests two categories of information: 1) documents and communications showing the supervisory and/or agency status of specifically named individuals; and 2) documents and communications relating to Respondent's threats and interrogation regarding Union activity and affiliation, and failure to consider for hire or hire of Anderson, Begley, Tompkins, and Ely.

On April 12, 2013, Respondent filed its Petition. On April 17, 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.

**III. THE SUBPOENA IS NARROWLY TAILORED TO SEEK INFORMATION RELEVANT TO THE ISSUES FRAMED BY THE PLEADINGS, AND IS NOT OVERLY BROAD OR VAGUE**

**A. The Legal Standard**

The Board is authorized under § 11(1) of the National Labor Relations Act to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

Subpoenaed information must be produced if the information sought is “not plainly incompetent or irrelevant to any lawful purpose.” *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). See also *General Engineering, Inc.*, 341 F.2d 367, 372 (9th Cir. 1965). Thus, a subpoenaed party must produce subpoenaed information 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).

**B. Respondent’s Assertions of Overbreadth and Vagueness are Without Merit**

Respondent summarily asserts that sixteen of the twenty-eight Subpoena requests are overly broad and/or vague, but provides little in support of such argument. As is clear on the face of the Subpoena itself, and discussed in detail below, the information sought is directly relevant to the issues raised by the pleadings in the instant proceeding.

On a general level, to the extent that Respondent argues that it is unclear what type of documents and/or communications are sought by certain requests in the Subpoena, the Subpoena addresses this argument. The Subpoena’s definition section sets forth specific descriptions of documents and communications, eliminating possible confusion or argument about what type of documents are potentially responsive.

With regard to requests 7 and 10, Respondent contends that these are overly broad and vague, and that it is not clear what type of meetings or documents are sought. Specifically, request 7 clearly limits the scope to managerial, supervisory, or administrative meetings attended by three particular individuals during the time period specified on the face of the Subpoena. As Respondent has denied the supervisory

and/or agency status of these individuals, requests 7 and 10 are clearly relevant to paragraph 4 of the Complaint.

With regard to requests 14, 15, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27, and 28, Respondent again contends that these are overly broad, vague, and/or it is unclear what is sought. As noted above, Respondent has denied the material portions of the Complaint. Each of these Subpoena requests targets information relating to the specific allegations at issue: that Respondent interrogated applicants, threatened applicants, and failed to consider for hire and/or hire Anderson, Begley, Tompkins, and Ely. Respondent presumably, in preparing its own defense, would have already explored any and all evidence regarding these same allegations.

Finally, to the extent the Respondent argues some requests are overly broad because Respondent has already provided the requested information, this argument must be rejected for several reasons. First, the Acting General Counsel acted well within its right to request relevant evidence through the Subpoena. In fact, as any documentation previously provided was not produced pursuant to subpoena, it is entirely possible that other relevant documentation exists. As such, it is inherently inconsistent to argue that the mere fact that some information in a given call has already been produced somehow renders a subpoena request overly broad, where potentially relevant, additional information may exist. Moreover, unless produced pursuant to subpoena, there is no guarantee regarding a lack of objection on authentication grounds.

Even assuming, *arguendo*, that additional responsive information does not exist, that fact does not render the underlying request overly broad. Respondent has an

obligation to specify which Subpoena requests have been fully and completely produced or to produce such documents. If Respondent believes its prior production of information is completely responsive to the Subpoena, it need merely state which documents were already provided, how and when they were produced, and that no other documents are responsive to that Subpoena request.

In sum, Respondent's general and specific objections must fail, as the Subpoena is narrowly tailored to the issues raised in the instant pleadings.

### **III. RESPONDENT HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT THE SUBPOENA IS UNDULY BURDENSOME**

#### **A. The Legal Standard**

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 *G.H.R. Energy Corp.*, 707 F.2d at 113-14 (5th Cir. 1982). Conclusory assertions by counsel for the subpoenaed party about the time and expense required to

produce responsive documents, without evidentiary support, have been found to be insufficient to establish that the production of the subpoenaed documents would prove unduly burdensome. *NLRB v. Brown Transport Corp.*, 620 F. Supp. 648 (N.D. Ill. 1985).

**B. Respondent Has Not Established that Compliance with the Subpoena Would Disrupt its Normal Business Operations**

Respondent makes a general assertion as to the burdensomeness of the Subpoena as a whole, but presents no evidentiary support for such general claims.

Respondent baldly argues, without further explanation or specific detail, that a response “would require several weeks for two employees to comb through all of the potential records” (Petition at 2). This conclusory statement by Respondent’s counsel, unaccompanied by any supporting evidence, is in and of itself insufficient to establish that the production of documents is unduly burdensome. *NLRB v. Brown Transport Corp.*, 620 F. Supp. 648. Even assuming, *arguendo*, that a response to the Subpoena would require such a time commitment by two employees, Respondent fails to demonstrate how the efforts of two employees, presumably in an office, would “unduly disrupt and seriously hinder” Respondent’s normal business operations of providing electrical contracting services. *EEOC v. Maryland Cup Corp.*, 785 F.2d at 479.

Respondent’s assertions that the Subpoena would require an extensive search of files, computers, and business records also do not satisfy its burden for several reasons. First, in light of the denials in the Answer, Respondent will need to gather and review these same categories of documents in order to prepare for the hearing.<sup>1</sup> Further, Respondent misconstrues the breadth of the Subpoena when it contends that it will have to “examine all documents ever created” regarding employees, as well as

business records “throughout its history as a company” (Petition at 2). Such melodrama is unwarranted, as the Subpoena is limited, covering only January 1, 2012, through the return date of the Subpoena, unless otherwise indicated. Thus, on its face, Respondent would not be required to cull “all documents ever created” or documents from “throughout its history.”

Additionally, Respondent appears to argue that certain requests are unduly burdensome because it has already provided some of the documents requested, and would thus be required to spend weeks gathering redundant information. Respondent’s construct is faulty. As noted above, the fact that some of the call items in the Subpoena may replicate requests from the underlying investigation does not prevent the Acting General Counsel from subpoenaing them, nor does it create any assurance of either authenticity or completeness under the scope of the Subpoena. Moreover, Respondent fails to specify which of the documents subpoenaed by the Acting General Counsel it has already produced, and how and when they were produced – all of which are obligations of Respondent when responding to the Subpoena. The very argument that Respondent has already gathered and produced such documents undercuts its argument that any such production would be overly burdensome.

Finally, Respondent’s contention that compliance with the Subpoena may result in a voluminous document production is insufficient to establish that the Subpoena is unduly burdensome. *McGarry v. SEC*, 147 F.2d 389; *NLRB v. United Aircraft Corp.*, 200 F. Supp. at 51.

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<sup>1</sup> As the Subpoena itself indicates, Respondent may also choose to alleviate some of the alleged burdensomeness by stipulating to some allegations in the Complaint.

As Respondent has not established that compliance with the Subpoena would disrupt its normal business operations, its argument that the Subpoena is overly burdensome must fail.

#### **IV. THE SUBPOENA DOES NOT SEEK PRIVILEGED DOCUMENTS**

##### **A. Legal Framework**

When a subpoenaed party contends material within the scope of a subpoena is privileged, it is well established 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). Additionally, the material may be submitted to the Administrative Law Judge for an *in camera* inspection. See *id.*

##### **B. Respondent May Create a Privilege Log Should it Construe the Subpoena to Cover Privileged or Confidential Information**

Respondent asserts that the Subpoena seeks documents protected by attorney-client confidentiality, attorney-client work product, and/or employee confidentiality. The Acting General Counsel does not seek production of privileged documents. In fact, the Subpoena defines “documents” consistently with Rule 34 of the Federal Rules of Civil Procedure, and excludes such documents. However, should the Subpoena happen to inadvertently ensnare any privileged or confidential information, the Subpoena itself establishes a mechanism through which to avoid disclosure in accordance with applicable case law: the creation of a privilege log. As the definitions and instructions section indicates, “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.”

In the event that Respondent has concerns about documentation, it may present potentially responsive information to the Administrative Law Judge for *in camera* inspection. Further, the requests generally seek Respondent’s internal documents and/or communication, or communication directly with outside individuals, such as applicants or the public, none of which would presumably constitute 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).

#### IV. CONCLUSION

As discussed above, the Subpoena is tailored to seek information relevant to the issues raised by the pleadings, is not overly broad, vague, or unduly burdensome, and does not seek privileged information. Accordingly, Counsel for the Acting General Counsel respectfully requests that the Administrative Law Judge deny Respondent’s Petition, and order Respondent to produce the subpoenaed materials.

**DATED** at Seattle, Washington, this 17<sup>th</sup> day of April, 2013.



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SUBPOENA.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on April 17, 2013, I served the above-entitled document(s) by E-File, E-Mail, and regular mail upon the following persons, addressed to them at the following addresses:

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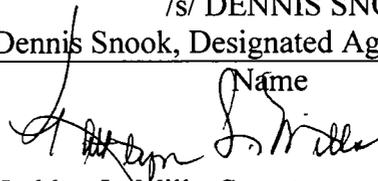
April 17, 2013.

Date

/s/ DENNIS SNOOK

Dennis Snook, Designated Agent of NLRB

Name



Kathlyn L. Mills, Secretary

Signature