

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

**SW GENERAL, INC., d/b/a
SOUTHWEST AMBULANCE**

and

Case 28-CA-094176

**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL I-60, AFL-CIO**

**ACTING GENERAL COUNSEL’S OPPOSITION TO
RESPONDENTS’ PETITION TO REVOKE SUBPOENA DUCES TECUM**

Counsel for the Acting General Counsel (General Counsel) opposes Respondent’s Petition to Revoke Subpoena Duces Tecum (Petition), dated April 5, 2013. Subpoena Duces Tecum number B-708807 (Subpoena) was caused to be served on Respondents’ Custodian of Records on April 12, 2013. As discussed below, Respondent’s objections are without merit, and Respondent should be required to produce all requested documents at the opening of the hearing on April 23, 2013.

I. BACKGROUND

On January 31, 2013, the Regional Director issued a Complaint and Notice of Hearing (Complaint) alleging that Respondent violated Section 8(a)(1) and (5) of the Act by failing to issue longevity pay to certain employees represented by the International Association of Fire Fighters Local I-60, AFL-CIO (the Union) without providing the Union with notice and an opportunity to bargain with respect to the decision or the effects of such conduct.

Respondent, by its Answer dated February 8, 2013, denies the commission of the alleged unfair labor practices. The hearing in this matter is scheduled to commence on April 23, 2013, in Phoenix, Arizona.

II. ARGUMENT

A. The Legal Framework

Pursuant to Section 11 of the Act, the Board and its agents “have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . that relates to any matter under investigation or in question.” 29 U.S.C. § 161 (1). To effectuate this authority, the Board and its delegates may issue “subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation.” *Id.* See *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991) (describing the Board’s Section 11 powers); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 511 (4th Cir. 1996); *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15 (1st Cir. 1983); *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 114 (5th Cir. 1982).

This broad subpoena power enables the Board “to get information from those who best can give it and who are most interested in not doing so.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). When the government or one of its agencies seeks production of documents by subpoena, production is to be ordered so long as it is not “plainly incompetent or irrelevant to any lawful purpose” of the agency in the discharge of its duties. *Endicott Johnson Corp., v. Perkins*, 317 U.S. 501, 509 (1943); see also *G.H.R. Energy Corp.*, 707 F.2d at 113; *Gen. Eng’g Inc. v. NLRB*, 341 F.2d 367, 372 (9th Cir. 1985). Courts enforce subpoenas issued by the Board pursuant to Section 11 so long as “a proceeding is pending before the Board of which it has jurisdiction and the evidence sought relates to or touches the matter under investigation.” *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 932 (10th Cir. 1979). If the material requested “touches a matter under investigation,” the subpoena will survive a challenge that the material is not relevant. *Sandsend Fin. Consultants v. Fed. Home Loan*

Bank Bd., 878 F.2d 875, 882 (5th Cir. 1989). Additionally, a subpoena is proper when it is designed to produce material concerning a defense, even if that defense may never arise.

NLRB v. North Bay Plumbing, 102 F.3d 1005, 1009 (9th Cir. 1996) (citing *Dutch Boy, Inc.*, 606 F.2d at 933 n.4).

In short, the Petition should be denied in full because the Subpoena is “for a proper purpose, the information sought is relevant to that purpose, and statutory procedures are observed.” *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992). Moreover, Respondent’s Petition fails to provide any factual grounds for revoking the Subpoena even though it has long been held that the “burden on a party seeking to dodge compliance ‘is not a meager one.’ Such a party must come forward with facts suggesting that the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency.” *Id.* at 819 (quoting *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1979)).

B. Paragraphs 2 and 3 of the Subpoena Are Reasonable, Seek Relevant Documents and Information, and Are Not Burdensome

Respondent asserts that the documents requested in paragraph 2 and 3 of the Subpoena are irrelevant to this hearing and that production of those documents would be unduly burdensome to the Respondent. Respondent’s claims are without merit.

Paragraphs 2 and 3 of the Subpoena seek documents as will show the dates Respondent issued longevity pay to employees and the payroll code used by Respondent to issue longevity pay. Absent stipulations by Respondent regarding the dates it issued longevity pay to eligible employees, the documents requested in Paragraphs 2 and 3 of the Subpoena are necessary for the purpose of establishing that employees whom were eligible for longevity pay were not issued that pay during December 2012, as alleged in the Complaint. These documents, along with other testimony and documents reflecting

Respondent's subsequent actions, are also necessary to show that the Respondent unilaterally changed its policy of issuing longevity to eligible employees.

The fact that complying with the request may require the production of bulky and voluminous documents is insufficient to establish that the requests are unduly 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 test to be applied to determine whether a subpoena is too burdensome to be enforced is whether compliance with the subpoena would threaten the normal operation of the business. *NLRB v. Brown Transportation Corp.*, 620 F.Supp. 648, 654 (N.D. Ill. 1985) (assertion that compliance with subpoena would take two employees two weeks at a cost of \$5,000 to review the relevant files is insufficient to establish burdensomeness). The burden is on the party opposing a subpoena to show that compliance would cause an undue burden. *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983). Here, other than making conclusory assertions about the relevance and proprietary nature of the documents sought in the Subpoena, Respondent has not offered any facts showing that compliance would threaten the normal operation of its business. See *NLRB v. Brown Transportation Corp.*, 620 F.Supp. at 654 (citing *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981)).

Last, paragraphs 2 and 3 of the Subpoena are reasonable because the Subpoena specifically states in its "in lieu of" paragraph that, "Documents requested [in the Subpoena] will not be required to be produced at the hearing in this matter if the Respondent and Counsel for the General Counsel arrive at a stipulation with regard to the information contained therein and such stipulation is received in evidence by the administrative law judge hearing this

matter.” Respondent could avoid compliance with paragraphs 2 and 3 of the Subpoena by stipulating to facts it knows and cannot reasonably dispute – the dates it issued longevity pay to employees since January 1, 2008.

C. Paragraphs 9 and 10 Seek Documents that Are Relevant, Including to an Examination of Respondent’s Anticipated Defenses

Respondent asserts that the documents requested in paragraphs 9 and 10 of the Subpoena are irrelevant to this hearing. Respondent’s claims are without merit. These paragraphs seek documents that relate to the issues framed by the pleadings in this case, including Respondent’s anticipated defenses.

More specifically, paragraphs 9 and 10 of the Subpoena seek documents that will show the length of Respondent’s employees’ continuous, full-time service to Respondent and the number and name of unit employees whom were eligible for longevity pay in December 2012. The information contained in these documents will allow the General Counsel to establish the nature and specifics of Respondent’s alleged unilateral change, including by showing which particular employees were eligible for longevity pay in December 2012 – facts which are entirely relevant to a showing that Respondent unilaterally changed its policy of issuing employees longevity pay by failing to issue all eligible employees longevity pay.

Moreover, the documents requested in paragraphs 9 and 10 should be produced because it is likely that they contain information relevant and related to Respondent’s anticipated defense that the unilateral change regarding longevity pay was *de minimis* in nature. As mentioned earlier, a subpoena should be upheld if it is designed to produce material concerning a defense, even if that defense may never arise. *NLRB v. North Bay Plumbing*, 102 F.3d 1005, 1009 (9th Cir. 1996) (citing *Dutch Boy, Inc.*, 606 F.2d at 933 n.4)).

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that Respondent's Petition should be denied in its entirety.

Dated at Phoenix, Arizona, this 18th day of April 2013.

/s/ Daniel B. Rojas
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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' PETITION TO REVOKE SUBPOENA DUCES TECUM in SW GENERAL, INC., d/b/a SOUTHWEST AMBULANCE, Case 28-CA-094176 was served by E-Gov, and E-Filing on this 18th day of April 2013, on the following:

Via E-Gov, E-Filing:

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