

11790 - 11808 *Enforcement of Subpoena*

11800.1 *Patterns Provided:*

Pattern 51 Application for order enforcing subpoena ad testificandum
(see sec. 11802.1)

Pattern 52 Application for order enforcing subpoena duces tecum (see
sec. 11804.1)

Pattern 53 Order to show cause (sec. 11806.1)

Pattern 54 Notice of institution of proceeding to enforce subpoena ad
testificandum (see sec. 11808.1)

11800.2 *Procedural Issues in Subpoena Enforcement*

a. *Service by Certified Mail:* For language setting out service of subpoena by certified mail, see paragraph d of pattern 52.

b. *Personal Service:* For language setting out personal service, see paragraph c of pattern 51.

c. *Failure to Petition to Revoke:* Paragraph e of pattern 52 sets out the statutory procedure for administrative revocation of the subpoena and alleges that respondent failed to utilize this procedure. This allegation will support a contention that the respondent is estopped from questioning the validity of the subpoena or the relevancy of the evidence requested. Such a contention was sustained in *NLRB v. Frederick Cowan*,

522 F.2d 26, 28 (2nd Cir. 1975), *Maurice v. NLRB*, 791 F.2d 182, 183 (4th Cir. 1982), *American Motors v. FTC*, 601 F.2d 1329, 1332-37 (6th Cir. 1979). *But see EEOC v. Cuzzins*, 608 F.2d 1062, 63 (5th Cir. 1979) (constitutional defense not waived); *NLRB v. Midland*, 151 F.3d 472, 474 (6th Cir. 1998) (same); *NLRB v. Detroit News*, 185 F.3d 602 (6th Cir. 1999) (privilege defenses not waived); *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999)(strong presumption of need to exhaust administrative remedies is not jurisdictional, and exhaustion requirements may be waived by court in particular circumstances).

d. *Petition to Revoke Denied*: If respondent did petition to revoke the subpoena and the petition was denied, use paragraph d of pattern 51. Paragraph e of pattern 52 alleges that respondent did not appear in answer of the subpoena.

e. *Refusal to Testify or Produce Records*: If respondent did appear at the hearing but refused to testify or produce the required records, see paragraph e of pattern 51.

11802 *Pattern 51, Application for Order Enforcing Subpoena ad Testificandum*:
The caption on this form shows that the proceeding is brought in the name of the Board, but on behalf of the party who requested the subpoena.

(If the subpoena was issued at the request of the General Counsel or his agent, see pattern 52. Whenever an ex rel. proceeding is brought, pattern 54, which is the notice to the relator or his attorney, should be used.)

Respondent here is an individual; if a corporation, see pattern 52.

11802.1 *Pattern 51*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA**

NATIONAL LABOR RELATIONS BOARD

ON BEHALF OF LOCAL 1, UNITED

SQUIBB WORKERS OF AMERICA, U.S.W., IND.

Applicant

v.

Civil No. 13579

JOHN DOE

Respondent

**APPLICATION FOR ORDER ENFORCING
SUBPOENA AD TESTIFICANDUM**

The National Labor Relations Board, an administrative agency of the Federal Government, on behalf of Local 1, United Squibb Workers of America, USW, Ind. (herein Local 1) applies to this Court for an order enforcing a subpoena ad testificandum issued by the Board and served on Respondent John Doe by Local 1. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application the Board urges as follows:

- a. This Court has jurisdiction of the subject matter of the proceeding, and of the person of Respondent, by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). That is, the unfair labor practice hearing to which Respondent was subpoenaed to appear occurred within this judicial district [add or substitute any other criterion applicable under 11(2), such as that Respondent resides or does business within this judicial district].**

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge Local 1 filed in Case 42-CC-233 that alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing, and answer are attached as exhibits A, B, and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of C.F.R. Sections 102.9, 102.10, 102.15, and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been

published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

c. In order to procure testimony in the hearing before the administrative law judge, Local 1 requested and received a subpoena ad tesificandum from the Board. On January 2, 20__, Local 1 issued the subpoena ad testificandum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20__, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations. The subpoena was served on Respondent by personal service on him, as provided for in Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. Copies of the subpoena

and the affidavit of service are attached as exhibits D and E respectively.

d. On January 7, 20__ , Respondent filed a petition to revoke subpoena, as provided by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Respondent's petition to revoke was denied by Administrative Law Judge Ringer S. Williams in an order dated January 21, 20_ . Copies of the petition to revoke the subpoena and the order denying the petition to revoke are attached as exhibits F and G respectively.

e. Respondent appeared at the hearing before ALJ Williams on January 28, 20_ , and was sworn as a witness. Counsel for Local 1 propounded questions to Respondent but he refused to answer the questions on the ground of irrelevancy. ALJ Williams ruled that the evidence sought was relevant to the issues in the unfair labor practice hearing before him, and directed Respondent to answer. Respondent refused to

comply with the ruling of ALJ Williams, withdrew from the witness stand, and left the hearing room. Thereafter, ALJ Williams determined that the testimony of Respondent was necessary and pertinent to a resolution of the issues pending before him, and adjourned the hearing to permit the Board to institute these proceedings to compel Respondent to testify. A copy of the pertinent portion of the transcript from the hearing is attached as exhibit H.

- f. Respondent's refusal to testify as required by the subpoena ad testificandum and as directed by the ALJ, who concluded that Respondent's testimony is relevant to the issues in the unfair labor practice proceeding, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board, and is preventing the Board from carrying out its duties and functions under the Act.**

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order, and to show cause why an order should not issue directing him to appear before ALJ Williams in Board Case 42-CC-233 at such time and place as ALJ Williams may designate, and to give testimony and answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before Administrative Law Judge Ringer S. Williams, at a time and place to be fixed by ALJ Williams, and to give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: March 20, 20__.

National Labor Relations Board

By: [GC's name], General Counsel

[RA's name], Regional Attorney

**_____[signature of attorney]_____
Attorney for Applicant**

Region 42

4 Mammoth Drive

Zenith City, NE

11804 *Pattern 52, Application for Order Enforcing Subpoena Duces Tecum:* This form is designed to be used where the subpoena issued at the request of the General Counsel or his agent, and was directed to a corporate respondent; for situations where the subpoena was issued at the request of a private party, or where respondent is an individual, see pattern 51 (sec. 11802.1).

11804.1 *Pattern 52*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA**

NATIONAL LABOR RELATIONS BOARD

Applicant

v.

Civil No. 13579

GOODWILL R. R. CO.

Respondent

**APPLICATION FOR ORDER ENFORCING
SUBPOENA DUCES TECUM**

The National Labor Relations Board, an administrative agency of the Federal Government, applies to this Court for an order compelling compliance with a subpoena duces tecum that the Board issued and served on Respondent Goodwill R.R. Co. This

application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application the Board states as follows:

- a. This Court has jurisdiction of the subject matter of the proceeding, and of Respondent, by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). The subpoena was issued within this judicial district, and Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of Nebraska, with an office at 25 Omnibus Avenue, Zenith City.**

- b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge filed by Local 1, United Squibb Workers of America, U.S.W Ind., in Case 42-CC-233 which alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional**

Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing, and answer are attached as exhibits A, B, and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of C.F.R. Sections 102.9, 102.10, 102.15, and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

c. In order to procure evidence for the hearing before the administrative law judge, a representative of the General Counsel made a written request for and received a subpoena duces tecum from the Board. On January 2, 20__, a representative of the General Counsel issued the subpoena duces tecum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20__, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska, to give testimony, and to produce certain records and papers more fully described as follows:

Records and papers in the possession of the Goodwill R. R. Co., including bills of lading, consignments, receipts, or other documents showing shipment of goods via Goodwill R. R. Co., to and from Fireworks Machinery Corp., Zenith City, Nebraska, for the calendar year 20__.

A copy of the subpoena is attached as exhibit D. The issuance of this subpoena is consistent with the requirements of

Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations.

d. The subpoena described above in paragraph c was served on Respondent by addressing and sending it by certified mail to John Doe, superintendent of the Zenith City Division of Respondent, at the offices located at 25 Omnibus Avenue, Zenith City, Nebraska 44422. Respondent acknowledged receipt of the subpoena on January 3, 20___. Service and receipt complied with Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. 29 C.F.R. 102.113 A copy of the return post office receipt is attached as exhibit E.

e. Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations provide for a period of 5 days after service of a subpoena within which any person served may petition the Board to revoke the subpoena. Respondent has not at any time filed a petition to revoke the subpoena.

Nevertheless, Respondent failed to appear at the hearing on January 7, 20__, or to produce the documents as required by the terms of the subpoena. At no time on or since January 7, 20__ has Respondent produced the subpoenaed documents.

- f. Respondent's refusal to appear and to produce the subpoenaed documents, which are relevant to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board, and is preventing the Board from carrying out its duties and functions under the Act.**

In view of Respondent's contumacious conduct, the Board requests:

- 1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order, and**

to show cause why an order should not issue directing him to appear before Administrative Law Judge Ringer S. Williams in Board Case 42-CC-233 at such time and place as ALJ Williams may designate, and to produce the subpoenaed records described above, to give testimony, and to answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

- 2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before ALJ Williams, at a time and place to be fixed by ALJ Williams, and to produce the records, give testimony, and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and**
- 3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.**

Dated: March 20, 20__.

National Labor Relations Board

By: [GC's name], General Counsel

[RA's name], Regional Attorney

_____ **[signature of attorney]**
Attorney for Applicant

Region 42

4 Mammoth Drive

Zenith City, NE

11806 *Pattern 53, Order to Show Cause:* This pattern, which applies to an application for enforcement of a subpoena duces tecum involving a corporate respondent, may be used with appropriate modification in proceedings involving other types of respondents or to enforce a subpoena ad testificandum.

Note that service on respondent may be made by serving any officer or agent, and the process may be served by certified mail or in any manner provided for in Rule 5 of the Federal Rules of Civil Procedure.

11806.1 *Pattern 53*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA**

NATIONAL LABOR RELATIONS BOARD

Applicant

v.

Civil No. 13579

GOODWILL R. R. CO.

Respondent

ORDER TO SHOW CAUSE

The National Labor Relations Board filed an application with this Court for an order enforcing a subpoena duces tecum properly served on Respondent Goodwill R. R. Co., and good cause appearing therefor, it is hereby

ORDERED that:

1. Respondent Goodwill R. R. Co. appear in Room 200, United States Courthouse, Federal Square, City of Zenith, State of Nebraska, on the _ day of April 20__ at 9 o'clock a.m., and show cause, if any exists, why an order of this Court should not issue directing Respondent to appear before the designated administrative law judge of the Board, at such time and place as the administrative law judge may determine, and produce the books, papers, records, and other data described in the subpoena duces tecum served on Respondent, and give testimony, in connection with the proceeding in 42-CC-233 now pending before the Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U.S.C. § 160).

2. On or before the _ day of March 20_, service be made on Respondent of a copy of this Order to Show Cause and of the Board's application. Service on Respondent may be made on any officer or agent of Respondent.

3. Respondent shall file and serve its answer to the application not later than April __ 20_.

4. Service of a copy of this order, the application, and the Respondent's answer, made in any manner provided for by Rule 5 of the Federal Rules of Civil Procedure of the United States, or by certified mail, shall be deemed good and sufficient service.

/s/ D. W. Brown

United States District Court

Judge

Dated, Zenith City, Nebraska,

March __, 20__.

11808 *Pattern 54, Notice of Institution of Proceeding to Enforce Subpoena ad Testificandum:* Section 11(2) of the Act provides that a proceeding to enforce a subpoena issued by the Board must be instituted “upon application of the Board.” Sec. 102.31(d) Rules and Regulations provides that when the subpoena was issued at the request of a private party, enforcement proceedings shall be instituted by the General Counsel in the name of the Board “but on relation of such private party.” The same section further provides that “neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution” of the enforcement proceedings. Pattern 54 is designed to put relators on notice that they are primarily responsible for

prosecuting the case before the court and will also serve to establish their standing in the court to participate in the proceedings. This form should be issued to relators or their attorneys in every ex rel. proceeding, and copies should be served on respondent and filed with the court.

11808.1 *Pattern 54*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA**

**NATIONAL LABOR RELATIONS BOARD, ON
RELATION OF LOCAL 1,
U.S.W. (Ind.)**

Applicant

v.

Civil No. 13579

JOHN DOE

Respondent

To: Joan Smith, Esquire

Address

City

Attorney for Relator

Local 1, U.S.W. (Ind.)

**NOTICE OF INSTITUTION OF PROCEEDING TO
ENFORCE SUBPOENA AD TESTIFICANDUM**

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on behalf of Local 1, U.S.W. (Ind.), has petitioned the Court for an order enforcing a subpoena ad testificandum issued by the Board at the request of Local 1, U.S.W. (Ind.). Attached are copies of the order to show cause and the application for order enforcing subpoena ad testificandum, filed with the court on _____, 20 _.

This proceeding has been instituted at your request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 161(2)), and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board (29 C.F.R. 102.31(d)). We specifically call your attention to that portion of Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding “neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court.”

Dated: March 20, 20__.

National Labor Relations Board

By: [GC's name], General Counsel

[RA's name], Regional Attorney

**_____ [signature of attorney]
Attorney for Applicant**

Region 42

4 Mammoth Drive

Zenith City, NE