

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

CNN AMERICA, INC. & TEAM VIDEO
SERVICES, LLC, JOINT EMPLOYERS,

Respondent,

and

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS,
COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 31, AFL-CIO,

Charging Party,

and

Case No. 5-CA-33125

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS,
COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 11, AFL-CIO,

Charging Party.

**CHARGING PARTY NABET LOCAL 31'S REPLY TO THE
BRIEF OF CNN AMERICA, INC. OPPOSING THE REPORT AND
RECOMMENDATIONS OF ADMINISTRATIVE LAW JUDGE PAUL BUXBAUM**

Respectfully submitted,

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**LOCAL 31'S REPLY TO THE
BRIEF OF CNN AMERICA, INC. OPPOSING THE REPORT AND
RECOMMENDATIONS OF ADMINISTRATIVE LAW JUDGE PAUL BUXBAUM**

Pursuant to the Order to Show Cause issued on December 11, 2008, Charging Party National Association of Broadcast Employees & Technicians – Communications Workers of America, Local 31 (“NABET Local 31” or “Local 31”) submits this response to the Brief of CNN America, Inc. Opposing the Report and Recommendations of Administrative Law Judge Paul Buxbaum (“CNN’s Brief”).

I. STATEMENT OF THE CASE

On May 30, 2008, the National Labor Relations Board (“Board”) appointed an Administrative Law Judge (“ALJ”) to serve as a Special Master in *CNN America, Inc.*, Case Nos. 5-CA-31838 & 5-CA-33125. *See CNN America, Inc.*, 352 NLRB No. 85, slip op. at 2 (2008). The Board appointed this Special Master “to resolve issues concerning the subpoenas” served by Counsel for the General Counsel and NABET Local 31 upon CNN. *CNN America, Inc., supra*, slip op. at 2. The Board further directed the Special Master to “work with the parties concerning production of subpoenaed documents, including balancing the cost and burdensomeness of producing documents with the relevance of the documents to the matters under litigation, using the framework set forth in the *Sedona Principles* for guidance.”¹ *Id.* Finally, the Board instructed the Special Master to “make recommendations to the Board concerning issues that cannot be resolved.” *Id.* After the issuance of the Board’s Decision, the Chief Administrative Law Judge appointed ALJ Paul Buxbaum to serve as Special Master. (*See* Special Master’s Report and Recommendations (“Special Master’s Report”) at 1.)

¹ As the Board observed, the *Sedona Principles* is a publication of the Sedona Conference that addresses issues relating to the electronic production of documents. *CNN America, Inc.*, 352 NLRB No. 85, slip op. at 1, n.7.

Special Master Buxbaum was very cognizant of the mandate outlined by the Board. (Special Master's Report at 2.) In his words, "[t]he Special Master was instructed to pursue two objectives." (*Id.*) "In the first instance, the master was directed to work with the parties in order to 'aid them in resolving their disputes.'" (*Id.* (quoting *CNN America, Inc.*, 352 NLRB No. 85, slip op. at 2).) "Subsequently, if issues remained unresolved, the master was directed to make recommendations to the Board concerning the appropriate resolution of those issues." (*Id.*)

Over the course of a few months, the Special Master worked with the parties to resolve their disputes over the production of subpoenaed documents. (*See* Special Master Report at 3 (summarizing efforts to resolve disputes).) The Special Master concentrated these efforts by pursuing an agreement between the parties. (*Id.*) However, when it became apparent that the parties could not resolve all of the issues underlying such an agreement, the Special Master directed all of the parties to outline their final views concerning the balancing of the interest analysis. (*Id.*) Counsel for the General Counsel filed the first position statement, which included "decisions to greatly narrow the matters in controversy by the virtually complete withdrawal of the Union's subpoena and the similar withdrawal of all of the General Counsel's subpoena except those portions seeking 'production of only those documents identified in CNN's second revised privilege and redaction logs which fall within the ambit of paragraphs 26, 36, 40 and 43 of the subpoena.'" (*Id.* (citations and footnotes omitted).) CNN filed a position statement objecting to the production of this subset of documents. (*Id.*) CNN also called upon the Special Master to make recommendations on, not whether the limited subset of documents should be produced, but on the enforceability of the subpoenas as a whole. (*Id.* at 4-5.)

The Special Master did not accept CNN's invitation to resolve the enforceability of the withdrawn portions of subpoenas. (Special Master's Report at 5.) As he observed:

The attempt to induce me to perform an analysis of the degree of burdensomeness involved in complying with the demands for production made in the now-withdrawn 239 paragraphs must be rejected as contrary to any notions of administrative efficiency, common sense, and, most importantly, the terms of my mandate and the governing legal authority. As to administrative efficiency, CNN is demanding that I analyze and resolve 239 hypothetical problems in civil procedure in a manner that I have not been called on to do so since I graduated from law school more decades ago than I wish to remember. If I were to accept this invitation, presumably the same demand would be made upon the Board to evaluate the results of my labor in the field of hypothetical problem solving. I feel quite certain that, in creating the Board, Congress intended to use its limited time and resources to set national labor policy and adjudicate real disputes affecting interstate commerce. I feel equally confident that the Board would not desire its judges, special master, or other professional employees to devote time and effort to the resolution of controversies that no longer exist.

(*Id.*) The Special Master further concluded that CNN's request for "hypothetical problem-solving" was not supported by the mandate outlined by the Board, which focused on narrowing the disputed issues and resolving those issues. (*Id.* at 5-6.)

After rejecting CNN's initial argument, the Special Master focused on the actual dispute between the parties, *viz.*, the production of documents for inspection that are identified in CNN's privilege logs that correspond to four paragraphs of the General Counsel's subpoena. (Special Master's Report at 10-16.) Generally, the Special Master applied the balancing standard as directed by the Board, relying upon both Rule 26 of the Federal Rules of Civil Procedure and the *Sedona Principles*. (*Id.*) Based upon a thorough analysis of those standards, the Special Master made five recommendations. (*Id.* at 16-17.) First, he recommended that the Board accept the withdrawal of paragraphs 1 through 25, 27 through 35, 37 through 39, and 44 through 243 of the General Counsel's subpoena. (*Id.* at 16.) Second, he recommended that, with respect to the four remaining paragraphs (*i.e.*, 26, 36, 40 and 43), the Board accept the General Counsel's limitation to those documents and electronically stored information that have already been produced by CNN or that are identified on CNN's privilege and redaction logs. (*Id.*) Third, he recommended

that the Board accept Local 31's withdrawal of its subpoena to the extent the subpoena requires the production of documents or electronically stored information not already provided by CNN or being sought by the General Counsel's revised demand. (*Id.*) Fourth, he recommended that the Board find that CNN has failed to meet its burden of proving that the production of the documents under the General Counsel's revised demand is unduly burdensome. (*Id.*) Finally, the Special Master recommended that CNN identify the items on its privilege and redaction logs that correspond to Paragraphs 26, 36, 40, and 43 of the General Counsel's subpoena and submit those items for an in camera inspection in accordance with the Board's order in *CNN America, Inc.*, 352 NLRB No. 64 (2008). (*Id.* at 17.)

On December 11, 2008, the Executive Secretary issued a Notice to Show Cause directing the parties to show "why the Board should not accept in its entirety the Special Master's Report and Recommendations that issued on December 1, 2008." (Notice at 1-2.) Respondent CNN filed a brief opposing the Special Master's Report and Recommendations on January 9, 2008. CNN made five principal arguments. First, CNN argues that the Board must review the Special Master's Report and Recommendation using the *de novo* standard of review. Second, CNN argues that the Special Master's Report should be rejected because it is inconsistent with the Board's mandate, it improperly shields the subpoenas from "plenary review," and it was based upon an order issued by the Board without a quorum. Third, CNN asserts that the Board should reject the Special Master's Report because the issue is moot. Fourth, CNN argues that the Board should find that the subpoenas are unenforceable. Fifth, CNN argues that the Board should "reject or correct" the Special Master's recommendations. Each argument is addressed below.

II. ARGUMENT

A. The Respondent's Challenge to the Order to Show Cause Lacks Merit

CNN initially claims that the Executive Secretary improperly rejected CNN's request to treat the Special Master's report and recommendation "in the same fashion" as any other ALJ's decision, which would allow CNN to file exceptions and require the Board to conduct a *de novo* review. (CNN Brief at 3.) Rather, as CNN alleges, "the Executive Secretary issued an unprecedented 'Notice to Show Cause' requiring that CNN demonstrate why the Board should not accept Judge Buxbaum's Report and Recommendation in its entirety." (*Id.*) The Respondent further claims that it is "wholly improper for the Board to defer to this 'ruling' [*i.e.*, the Special Master's Report] and force CNN to bear the burden of showing why the recommendations should not be accepted." (*Id.*)

Respondent CNN challenge to the Executive Secretary's issuance of the Notice to Show Cause is frivolous. This point as is aptly demonstrated by the last five words of the Notice to Show Cause – "***By direction of the Board.***" See *CNN America, Inc.*, Case Nos. 5-CA-31828 & 5-CA-33125, Notice to Show Cause at 2 (emphasis added). Those five words clearly and indisputably establish that the Board issued the Notice to Show Cause through the office of the Executive Secretary. *Id.* Therefore, CNN's claims that the Executive Secretary issued an "unprecedented" notice (*see* CNN Brief at 3) and the Respondent's argument about "a potential conflict of interest" within the office of the Executive Secretary (*id.* at 3, n.3) are frivolous.

CNN next argues that it should not have to shoulder the burden of having to show why the recommendations should not be accepted. However, the Respondent fails to appreciate that, if its request to treat the Special Master's Report as an ALJ decision had been granted, CNN would have been required to file exceptions and, in turn, it would have bore the burden of proof

in sustaining those exceptions. 29 C.F.R. §§ 102(b)(1) & (c)(1)-(3) (2007). The Respondent's burden of proof under the Notice to Show Cause is no greater than its burden of proof when filing exceptions.

Finally, with respect to the Notice to Show Cause, CNN claims that the Board is required to decide the subpoena issues and that the Board cannot "abdicate its responsibility to decide the Special Appeal by rubber-stamping his decision based on 'show cause' review." (CNN Brief at 4.) The Respondent further asserts that the Board must review *de novo* the Special Master's recommendations and issue its own decision. (*Id.*) CNN fails to point to anything to support its belief that the Board will "abdicate its responsibility to decide the Special Appeal." Indeed, in its decision, the Board directed the Special Master to work with the parties to resolve the subpoena issues, and, if no resolution could be reached, to make recommendations. *CNN America, Inc.*, 352 NLRB No. 85, slip op. at 2. The obvious implication is that the Board will make the decision, giving whatever weight it deems appropriate to the recommendations of the Special Master, which is entirely within the Board's authority.

Therefore, the Board acted within its authority by issuing a Notice to Show Cause that required CNN to show why the Board should not accept the Special Master's Report. Given CNN is the party that would be challenging the Special Master's Report, which rejected each and every argument proffered by the Respondent, it is logical and reasonable for CNN to bear the burden of proof as to its challenges.

B. CNN's Arguments that the Special Master's Report Should be Rejected as a Whole are Baseless

CNN raises three arguments to support its request that the Board reject the Special Master's Report "as a whole." First, CNN claims that Special Master acted outside of the mandate given to him by the Board. Second, CNN claims that the General Counsel and NABET

Local 31 are shielding their subpoenas from “plenary review.” Third, CNN claims that the Special Master procedure was not created by a quorum of the Board and is invalid. Each of these challenges lacks any semblance of merit.

I. The Special Master Adhered to the Mandate Given to Him by the Board

CNN first contends that, “[i]n analyzing and issuing recommendations concerning documents listed on CNN’s privilege log, Judge Buxbaum acted wholly outside the scope of his mandate from the Board.” (CNN Brief at 5.) The Respondent adds that “an analysis of privilege claims and *in camera* review was not part of the task assigned to Judge Buxbaum.” (*Id.* at 6.) Rather, in CNN’s view, the issue of privilege claims and *in camera* review had been previously decided by the Board in *CNN America, Inc.*, 352 NLRB No. 64, wherein the Board ordered CNN to produce the documents listed on its privilege and redaction logs for an *in camera* review. (*Id.* at 8.) Despite the fact that CNN has refused to comply with the Board’s order, the Respondent asserts that, “[i]t is nonsensical for the Special Master to recommend that the Board order CNN to do something that it already ordered CNN to do, and to cite the previous order as support for his recommendation!” (*Id.*)

CNN’s argument is little more than a proverbial house of cards, which, by definition, lacks any foundation for support. The Board’s mandate is clear: the Special Master is to work with the parties to resolve the subpoena issues, focusing on the production of documents and the balance of burdensomeness to the Respondent with relevance to the General Counsel’s case. *CNN America, Inc.*, 352 NLRB No. 85, slip op. at 2. If there are issues that cannot be resolved, then the Special Master makes recommendations to the Board. *Id.* The facts are equally clear: the issues of production and balancing with respect to 239 paragraphs of the General Counsel’s subpoena and virtually all of Local 31’s subpoena were resolved when those paragraphs were

withdrawn by the General Counsel and Local 31. (See Special Master's Report at 3, 5.) Issues remained as to four paragraphs in the General Counsel's subpoena; however, those issues were narrowed only to those documents that are responsive to the four paragraphs and are identified on either CNN's privilege log or its redaction log. The narrow issue of documents contained on privilege or redaction logs that are responsive to four paragraphs in the General Counsel's subpoena were the only unresolved issues before the Special Master.

Accordingly, the Special Master issued his Report and Recommendations, directing that CNN produce the documents identified on its privilege and redaction logs that are responsive to the four paragraphs of the General Counsel's subpoena. However, given the documents are contained on a privilege or redaction log, there is an intermediate step that must be completed before the Board can require CNN to turn over the documents to the General Counsel and Local 31, viz., a resolution of whether the attorney-client privilege or work product doctrine applies to those documents. The Special Master does not resolve any issue relating to either the attorney-client privilege or the work product doctrine. Instead, he simply recommends that the documents be turned over after the appropriate decision-maker resolves those issues. In addition, as the Board has previously held, the appropriate decision-maker is ALJ Amchan. *CNN America, Inc.*, 352 NLRB No. 64, slip op. at 1-2 (2008). Therefore, CNN's claim that the Special Master's recommendations are inconsistent with the Board's mandate lacks any semblance of merit.

2. *Any Claim that the General Counsel is "Insulating" the Subpoena from "Plenary Review" is Little More than Fiction*

The second basis for rejecting the Special Master's Report as a whole, in CNN's view, is that the Special Master's recommendations insulate the subpoenas issued by the General Counsel and NABET Local 31 from "plenary review." (CNN Brief at 9-11.) The Respondent's argument is little more than a work of fiction, and so the story begins "[o]n the eve of trial, the General

Counsel served its unprecedented 243 paragraph ... subpoena on CNN, which was followed by a similar subpoena served by Local 31.” (CNN Brief at 9.) “The General Counsel and Local 31 stood behind the enforceability through the duration of the trial and used them for their benefit,” *viz.*, “like clubs to bludgeon CNN throughout the trial, obtaining tens of thousands of documents from CNN, yet repeatedly demanding adverse inferences and other sanctions against CNN for its alleged failure to comply with the subpoenas.” (*Id.*) Indeed, as the story goes, the General Counsel “in fact obtained decisional sanctions from Judge Amichan on a number of occasions, as he based his rulings in part upon CNN’s alleged failure to produce documents in response to the subpoenas.” (*Id.* at 9-10.) “But now that the trial is over and the subpoenas can no longer serve a threatening purpose, the General Counsel and Local 341 have tossed them aside and hope to insulate them from any form of administrative or judicial review.” (*Id.* at 9.) In conclusion, “[s]uch blatant opportunism mocks the litigation system and disserves public policy.” (*Id.* at 10.)

When looking beyond the rhetorical flourishes in CNN’s story, the facts emerge. The General Counsel did serve a 243-paragraph subpoena upon CNN, which entailed a substantial production of documents on the part of the Respondent. The subpoena addressed matters relating not only to the allegations in the General Counsel’s complaint, but also matters relating to the defenses raised by the Respondent in its answer.² CNN moved to quash the subpoena; however, the ALJ upheld all of the subpoenas served by all parties (including the subpoena served by CNN upon NABET Local 31). Rather than comply and produce documents as requested in the subpoenas, CNN decided to produce documentation “voluntarily” and

² The Board recognized in its decision that “[t]he evidence needed to pursue the complaint allegations in this case is necessarily quite broad, considering CNN’s extensive news-gathering operations in Washington, D.C. and New York, New York, as well as the large number of employees alleged in the complaint to have been unlawfully discharged.” *CNN America, Inc.*, 352 NLRB No. 85, slip op. at 2.

selectively, which meant that the Respondent identified 62 individuals “who might potentially have *relevant information* to the issues in the case.” (Letter from Zachary D. Fasman to Honorable Arthur J. Amchan of 01/07/08 at 1 (emphasis added).)³ The Respondent gathered information from these individuals that pertained to very broad categories and directed them to “provide all *relevant documents* and information.” (*Id.* at 2 (emphasis added).) Thereafter, a “team” of attorneys and paralegals reviewed “each document *for relevance to the issues* in this case, and to identify whether those documents contained confidential or privileged information.” (*Id.* (emphasis added).) And, after that review, CNN produced “what we believe is *relevant documents* that we believe to be responsive to the subpoena.” (Tr. 1692, lns. 20-23 (emphasis added).)⁴

Thus, the “victim,” supposedly CNN, was manipulating the document production by screening documents that the Respondent believed to be relevant to the proceedings. Of course, a respondent does not have the power to decide what constitutes a relevant document for purposes of document production in response to a subpoena. *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 54, 59 (D.D.C. 1998) (stating party “may not arrogate” to itself “the power to determine what constitutes a relevant document...”). CNN further produced the screened documents “voluntarily” and on a selective basis, rather than in compliance with the subpoena. Thus, far from an innocent victim being bludgeoned by subpoenas, CNN was willfully defying subpoenas, which had been upheld by the ALJ.

In any event, CNN’s story suffers for a second reason, *viz.*, the “decisional sanctions” issued by ALJ Amchan were not based upon CNN’s failure to comply with the subpoenas. Indeed, this conclusion is evident from the three citations provided by the Respondent in its

³ A copy of this letter is attached as Exhibit 1.

⁴ A copy of the transcript excerpt is provided as Exhibit 2.

brief. For example, at page 95 of his decision, the ALJ finds that there is “absolutely no evidence to corroborate” the claim that CNN managers Joe Murphy and Rick Cole interviewed applicant Ron Fribush over the phone. (ALJD at 95:44-47.) The ALJ adds, that there is “no explanation as to why CNN does not have Murphy’s and Cole’s interview rating sheets for Fribush.” (*Id.* at 95:46-48.) At page 140, the ALJ states, “there is little credible documentation of what occurred and Respondent’s witnesses generally had trouble remembering what had transpired,” adding “CNN did little to preserve a record of how decisions were made, by whom and when they were made.” (ALJD at 140, Ins. 18-22.) At page 144, the ALJ observes that a CNN manager, McIntyre, testified that there was a schedule for studio coverage for the D.C. Bureau for the week of December 8, 2003; however, CNN had *introduced* a plan for studio coverage for December 6 and 7, 2003. (ALJD at 144, Ins. 44-46.) The ALJ observed that CNN never introduced a schedule for the week of December 8, 2003 at trial and he discredited McIntyre’s testimony. (*Id.* at 144, Ins. 47-48.)

As each of these examples illustrates, the ALJ drew adverse inferences based upon CNN’s failure to provide documents to support its defense as a part of its case; the ALJ did not draw those inferences based upon CNN’s failure to produce documents in compliance with the subpoenas. The distinction is material and delineated in Board law. *See RCC Fabricators, Inc.*, 352 NLRB No. 88, slip op. at 26-27 & n.20 (2008). As explained by ALJ Buxbaum in a case involving the alleged supervisory status of foremen:

If a party fails to comply with a subpoena, the trier of fact may impose an adverse inference as a sanction for the noncompliance.... In that event, the fact that the party actually complied with the subpoena would certainly be a complete defense. In this case, nobody has sought imposition of any sanction for noncompliance with a subpoena and I have not imposed any such relief. Instead, I have examined the entirety of the evidence and drawn the appropriate inferences from what was presented and what was not presented. The simple and inescapable fact remains that, despite having multiple opportunities to provide the trier of fact with the

document that may best represent the Company's non-litigation based view of the status and responsibilities of the foremen, the Company has chosen not to provide the document and has also chosen not to present any explanation in support of that decision. From this, applying longstanding and wise principles of jurisprudential analysis, I infer that the document contained a vision of the scope and nature of the foremen's job that is adverse to the constructed picture of that job painted in the Company's trial testimony.

RCC Fabricators, Inc., supra, slip op. at 26-27. While the General Counsel in this case may have requested an adverse inference based upon CNN's failure to produce documents in response to the subpoena, the ALJ's decision clearly shows that – like ALJ Buxbaum – ALJ Amchan drew the inferences based upon CNN's failure to produce corroborating documentary evidence that one would expect the Respondent to produce at trial. *Id.*, slip op. at 27, n.20.

Such adverse inferences are appropriate and reasonable, particularly given the fact that a party's failure to comply with a subpoena is not required before a trier of fact can draw an adverse inference. See *International Union, United Auto., Aero. & Agric. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) (stating, "first, it is important to realize that the applicability of the [adverse inference] rule in no way depends on the existence of a subpoena compelling production of the evidence in question") ("*Gyrodyn*"). As the D.C. Circuit observed:

The theory behind the [adverse inference] rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it. Of course, if a party has good reason to believe his opponent has failed to meet his burden of proof, he may find no need to introduce his strong evidence.... Similarly, if the other party or the judge plays a role in suppression of the evidence, the force of the inference is dissipated.... These special exceptions should not, however, be allowed to detract from the more general, commonsense observation that in most cases a party will introduce his most favorable evidence without being compelled by legal process to do so.

Gyrodyne, 459 F.2d at 1338 (citations omitted). ALJ Amchan applied this “general, commonsense observation” (*id.*) in making the rulings cited by CNN in its brief. The observation led the ALJ to draw adverse inferences based upon CNN’s failure to produce the documents as part of the Respondent’s own case, not because of its steadfast refusal to comply with the subpoenas of the General Counsel or Local 31.

Finally, CNN’s claim that the General Counsel and Local 31 have tossed aside their subpoenas to prevent “plenary review” is preposterous. CNN argued strenuously that the subpoenas were overly broad and burdensome. They cannot now take issue with the General Counsel and Local 31 for reducing the scope of the subpoenas in an effort to resolve the impasse over document production and to facilitate an orderly and manageable production. As noted above, CNN has refused to comply with the subpoenas in any respect, choosing to voluntarily produce documents that were pre-screened according with the Respondent’s view of relevance. Even if the Board were to address the entire subpoenas and find that they are unenforceable, that decision would not have any effect upon the ultimate disposition of the unfair labor practice issues in this case. Such an exercise would be a colossal waste of the Board’s resources, as was so cogently pointed out by Judge Buxbaum. Therefore, the Board should disregard CNN’s fictional story about the “insulation” of subpoenas from “plenary review.”

3. ***CNN’s Challenge to the Validity of the Board’s Decision Establishing the Special Master Procedure is Without Merit***

Finally, CNN argues that the Board should reject the Special Master’s Report because the entire Special Master procedure is invalid. (CNN Brief at 11.) The invalidity stems from the fact that the procedure was created by a decision of two Board members who, in CNN’s view, had no power or authority to act on behalf of the NLRB. (*Id.*) This argument is easily disposed of by virtue of Section 3(b) of the Act and. *See* 29 U.S.C. § 153(b). *See also Laurel Baye*

Healthcare of Lake Lanier, Inc. v. NLRB, No. 08-1162 (D.C. Cir. Pending), Brief for the National Labor Relations Board at 14-23 (filed Sept. 26, 2008). For this reason, CNN's challenge lacks merit.⁵

C. **The Board Should Defer a Ruling on CNN's Mootness Claim**

The Respondent also claims that the subpoena issues have become moot. While the Respondent lards the argument with other frivolous contentions, such as the claim that "the only permissible purpose for subpoenas in NLRB proceedings is to secure the production of evidence for use at trial" (CNN Brief at 12),⁶ the basic point raised by CNN is that, in light of ALJ Amchan's decision, there no longer exists any basis for the production of additional documents in response to the subpoenas. (*Id.* at 13.)

NABET Local 31 respectfully submits that the Board does not need to reach the mootness issue at this time. ALJ Amchan has issued his decision in the underlying unfair labor practice case, in which he finds for the General Counsel and the Charging Parties on every issue as it pertains to the complaint against CNN. The Respondent will undoubtedly file exceptions to ALJ Amchan's decision, placing that decision directly before the Board. If the Board were to determine that the record was unclear with respect to any of the issues in the case (which Local 31 submits is an extremely unlikely event), the Board could remand the case back to the Administrative Law Judge to reopen the record and accept additional evidence. *See, e.g., Regency Service Carts*, 325 NLRB 617 (1998) (remanding part of case to ALJ to take additional

⁵ CNN posits at a later point in its Brief that "[a]lternatively, the Board could remand the proceedings back to Special Master Buxbaum with more specific instructions about the scope of his mandate." (CNN Brief at 21, n.12.) This alternative argument undercuts any claim by the Respondent that the Special Master process is invalid *ab initio*.

⁶ *See NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 933, n.4 (10th Cir. 1979) (rejecting claim that General Counsel could not subpoena documents relating to defense not raised at trial, labeling such claim as "frivolous").

evidence and issue supplemental decision). In such a situation, the documents and information at issue in the Special Master's Report may very well affect the continued litigation of the case. By contrast, if the Board were to find the record was clear and a remand is not necessary, then the Board could issue its decision and find that the subpoena issues have become moot. Finally, should important and vital new evidence be produced as part of the subpoena process, Local 31 reserves the right to request a remand to reopen the record.

Accordingly, NABET Local 31 respectfully submits that the Board should reserve the resolution of the mootness issue until it has considered any exceptions filed by CNN to the decision of ALJ Amchan. The Board could then consider the challenges to the Special Master's Report in conjunction with any exceptions to ALJ Amchan's decision. Of course, should CNN decide not to file exceptions, the mootness question may be revisited.

D. CNN's Challenge to ALJ Amchan's Decision Lacks Merit

CNN argues that ALJ Amchan erred when he enforced the subpoenas. (CNN Brief at 20.) This argument is largely a rehash of its special appeal, albeit reworked to fit into the balancing analysis outlined by the Board in *CNN America, Inc.*, 352 NLRB No. 85 (2008). The argument fails for the reason noted by the Special Master, *viz.*, the Respondent's argument is premised upon a challenge to the subpoenas in their entirety. However, the General Counsel has withdrawn all but four of the paragraphs of the subpoena and further limited the documents sought pursuant to those four paragraphs; and, additionally, NABET Local 31 withdrew all of its subpoena except to the extent that the subpoena required CNN to provide Local 31 with documents provided to the General Counsel. As the Special Master observed, CNN has failed to address the question of the burden of responding to the vastly reduced obligation. (Special Master Report at 12.) Obviously, CNN does not want to address the burden of complying with

part of four paragraphs in a subpoena, because it realizes that any hope of carrying the day on its burdensomeness arguments have vanished in light of the vastly reduced scope of the subpoenas.

While the ALJ may have enforced the subpoenas as they were initially written, CNN steadfastly refused to comply with the subpoenas, deciding only to produce documents on a “voluntary” basis after the Respondent screened them for relevance. The fact that the Respondent may have incurred substantial costs in providing its “voluntary” production is immaterial, because it was under no obligation to produce the documents in the manner in which it did. CNN was only obligated to comply with the subpoenas, which it did not.⁷ To Local 31’s knowledge, none of the documents produced by CNN was in native format, none of the documents included metadata and no backup tapes were provided. Nevertheless, the General Counsel and Local 31 have since withdrawn the overwhelming bulk of the subpoenas, including the requests for documents in native format, documents with metadata, and backup tapes.

Therefore, Local 31 respectfully requests that the Board reject CNN’s challenge to ALJ Amchan’s enforcement of the subpoenas. Based on the facts and circumstances of this proceeding, as discussed above, the Respondent’s argument lacks merit.

E. The Board Should Adopt the Special Master’s Recommendations

Finally, CNN argues that the Board should either modify or reject the Special Master’s recommendations. Much of its argument in this regard is simply repetitive of claims that CNN made in other parts of its brief. Rather than reiterate NABET Local 31’s responses, Local 31 will simply request that the Board enforce the Special Master’s recommendations as written.

⁷ CNN reiterates the claim that ALJ Amchan imposed “decisional sanctions” on the Respondent for its failure to comply with the subpoenas; however, as discussed *supra* in Section II.B.2, CNN’s argument is legally erroneous.

III. CONCLUSION

Accordingly, for the foregoing reasons, Charging Party NABET Local 31 respectfully requests that the Board reject the challenges by CNN to the Special Master's Report and Recommendation; and, additionally, that the Board adopt the Special Master's Recommendations in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 21st day of January 2009, a true and correct copy of the foregoing "Charging Party NABET Local 31's Reply to the Brief of CNN America, Inc. Opposing the Report and Recommendations of Administrative Law Judge Paul Buxbaum" was served by United Parcel Service, overnight delivery on the following:

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The undersigned further certifies that, on January 21, 2009, the foregoing counsel were advised, by e-mail, of the filing of the Reply Brief by electronic filing and the service on the parties by overnight delivery.



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