

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

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**Cases 28-CA-163215
28-CA-166351
28-CA-168680**

**ORDER GRANTING RESPONDENT'S
PETITION TO REVOKE SUBPOENA DUCES TECUM B-1-T3WA1B**

This matter is before me on Stern Produce Company, Inc.'s (Respondent) Petition to Revoke Subpoena Duces Tecum B-1-T3WA1B (Subpoena). Counsel for the General Counsel did not respond to Respondent's Petition. Because the hearing in this matter is scheduled for Tuesday, September 6, 2016, I will rule on the Petition without having received a response from the General Counsel. For the reasons set forth below, the Petition is GRANTED.

The Regional Director for Region 28 (Regional Director) issued a complaint alleging that Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it made multiple threats, promises of benefits and unspecified reprisals to employees, interrogated employees, interfered with a Board investigation and failed to recognize the Union.

On or about August 19, 2016, counsel for the General Counsel issued the Subpoena requesting 38 categories of documents from Respondent. On August 25, 2016, Respondent filed a Petition to Revoke raising general objections to the subpoena and specifically objecting to requests 7-12.¹

First, I note that Respondent objects generally to the subpoena on grounds that the requests are irrelevant, overbroad, vague, unduly burdensome, cumulative and duplicative. However, Respondent failed to specify which of the requests were objectionable on these grounds. Accordingly, except as otherwise noted in this Order, I deny the Petition based on these generalized objections.

With respect to relevance, preliminarily, I note the broad standard in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943), in which the Court stated that information requested in a subpoena duces tecum is relevant and must be produced so long as it is "not plainly

¹ By electronic mail dated August 24, 2016, counsel for the General Counsel forwarded to Respondent copies of Subpoenas issued to the Crossroads Group (B-1-T5ED2X), a labor relations consultant firm hired by Respondent, Miko Penn (B-1-T5EESV) and Ricardo Pasalagua (B-1-T5EH4R), who are both agents of Respondent. Respondent also objects to requests 7-12 in the subpoenas issued to Crossroads, Penn and Pasalagua for the reasons it objects to the requests in subpoena B-1-T3WA1B.

incompetent or irrelevant to any lawful purpose.” Section 102.31(b) of the Board’s Rules and Regulations provides that an administrative law judge shall revoke a subpoena only if “the evidence whose production is required does not relate to any matter under investigation or in question in the proceeding, or if such subpoena does not describe with sufficient particularity the evidence whose production is required.” See also, *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1981); *NLRB v. Williams*, 396 F.2d 247, 249 (7th Cir. 1968); *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 372 (9th Cir. 1985). Because Respondent failed to indicate which requests are irrelevant, I deny the Petition on this ground.

With respect to Respondent’s overly broad and undue burden objection, I note that bare and unparticularized assertions of breath and burdensomeness do not suffice to satisfy the burden of “point[ing] out which specific documents and records exceed the bounds of relevancy or the production of which would create an undue burden on [Respondent’s] ability to comply.” *NLRB v. Dutch Boy, Inc.*, 98 LRRM 2396, 2399 (W.D. Okla. 1978), *affd.* 606 F.2d 929 (10th Cir. 1979). As such, Respondent cannot show that producing the documents would “seriously disrupt its normal business operations.” *E.E.O.C v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986). Accordingly, I deny the Petition on these grounds.

Lastly, I deny the Petition on the grounds that the requests are unreasonably cumulative and duplicative because they are general, unparticularized assertions that do not satisfy Respondent’s burden to point out with specificity which requests are objectionable.

Request 7:

Turning to the specific objections, Request 7 seeks documents, including contracts, agreements, letters, memoranda and emails, showing/describing the scope of services provided to Respondent by its consultants (i.e., Crossroads, Penn and Pasalagua). However, I agree with Respondent that this request is overbroad, irrelevant, and outside the scope of information germane to the allegations in this complaint. In fact, I do not see how the requested documents bear on, relate, or are reasonably calculated to lead to the discovery of evidence related to the allegations in this case. Rather, I find the requested information tantamount to a “fishing expedition” which is an improper use of the General Counsel’s trial subpoena power. In sum, the requested information is irrelevant to the issues in this case. Accordingly, I grant the Petition regarding Request 7.

Requests 8 - 10:

These requests call for documents or statements showing fees and charges billed to Respondent by its consultants and/or documents showing payments made by Respondent’s consultants for providing testimony, preparing for, preparing witnesses for and participating in the upcoming hearing of this case. However, again, I do not see how any of these requested documents assist the trier of fact (i.e., the undersigned) in determining whether Respondent made multiple threats, promises of benefits, and unspecified reprisals to employees, interrogated employees or interfered with a Board investigation as alleged in the complaint. Rather, I agree with Respondent that these document requests are irrelevant, unduly burdensome, are tantamount to an improper “fishing expedition” by the General Counsel, and arguably seek to harass

Respondent and its consultants given the complete lack of relevance to the complaint allegations. Accordingly, I grant the Petition as to these requests.

Request 11 and 12:

Requests 11 and 12 ask for documents showing and/or describing communications between Respondent and its consultants and documents describing Respondent's consultants "recommendations, views, opinions and/or advisements regarding Respondent's potential liabilities" concerning the subjects in this complaint. While the General Counsel's objective in seeking these documents is unclear (since counsel for the General Counsel failed to respond to Respondent's Petition and explain the purpose and relevance of these requests), I can only surmise that the General Counsel seeks evidence of unlawful conduct by showing that Respondent and its consultant(s), through its communications, recommendations, views, opinions, etc., made/participated in threats, promises of benefits and/or unspecified reprisals to employees, interrogated employees, and/or conducted an "anti-union campaign" as it relates to the events alleged in the complaint. Again, this is an invalid use by the General Counsel of its trial subpoena power for two reasons. First, I presume that the General Counsel had sufficient and even significant evidence of the alleged unlawful conduct *before* it issued complaint in this matter, otherwise a crucial and indispensable element of its *prima facie* case in the alleged Section 8(a)(1) violations would be missing, arguably depriving the General Counsel of its authority to issue complaint on this issue in the first place. The General Counsel need not, and should not, resort to subpoenaing what would likely amount to thousands of internal communications regarding discussions about the topic of "unions" in the hope of finding evidence of something it already has—or should have.

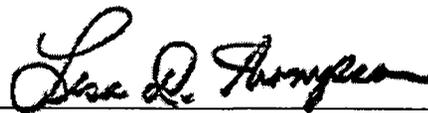
Second, assuming the General Counsel, in requesting this documentation, seeks evidence of the employer's "anti-union" views, such sentiments are protected by Section 8(c) of the Act as well as the First Amendment, unless these views are expressed in a coercive or threatening manner. In fact, private and confidential communications between managers and/or agents of employers in this context cannot by definition be coercive or threatening, and thus Section 8(c)—which states that such statements or views "shall not constitute *or be* evidence of an unfair labor practice" --would appear to preclude the General Counsel from using these statements as evidence of unlawful conduct absent a showing of how these sought-after communications supports establishing a Section 8(a)(1) violation. Because counsel for the General Counsel did not respond to Respondent's Petition, it has not made this requisite showing.

Moreover, the requests are not sufficiently particularized and limited in scope. In fact, the request is so broadly worded, it theoretically encompasses any written or oral communication between Respondent and its consultants about the Union in general, attorney-client privileged communications and those privileged by the work product doctrine, and communications where Respondent or its consultants simply mentioned the date/time of the Board investigation. Thus, to the extent that the General Counsel seeks documents pertaining to communications regarding Respondent and its consultants, it should have been drafted it in a much narrower fashion. As it

stands, the requested documentation is overbroad and irrelevant, and as such, I grant Respondent's Petition as to these requests.²

Accordingly, **IT IS ORDERED** that Respondent's Petition to Revoke subpoena B-1-T3WA1B is **GRANTED**.

Dated: August 31, 2016



Lisa D. Thompson
Administrative Law Judge

Served by facsimile to:

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² To the extent Respondent also objects to Requests 7-12 for subpoenas issued to Crossroads (B-1-T5ED2X), Penn (B-1-T5EESV) and Pasalagua (B-1-T5EH4R), I grant the Petition for the reasons set forth herein.

DiCrocco, Brian

From: noreply@nlrb.gov
Sent: Wednesday, August 31, 2016 3:55 PM
To: DiCrocco, Brian
Cc: SM-Nass
Subject: Re: [NASS] Scan-to-FAX Delivery - [REPORT]
Attachments: MF57C75F9766A8AF820AE2.tif

Retarus job id: MF57C75F9766A8AF820AE2

Number of faxes 4
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 thereof failed with error: 0
Number of pages 4
Resolution Low

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Status OK
Reason

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Duration 109 sec.
Status OK
Reason

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Duration 46 sec.
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