

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

**KALTHIA GROUP HOTELS, INC.  
and MANAS HOSPITALITY LLC d/b/a  
HOLIDAY INN EXPRESS SACRAMENTO  
a Single and/or Joint Employer**

**and**

**Cases 20-CA-176428  
20-CA-178861  
20-CA-182449**

**UNITE HERE! LOCAL 49**

**ORDER ON PETITIONS TO REVOKE  
SUBPOENAS DUCES TECUM  
B-1-U6OUKP; B-1-U6GWWF; and B-1-U660KB**

**I. BACKGROUND**

Based upon charges filed by Unite Here! Local 39 (Union), On October 27, 2016, an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (Complaint) issued alleging that Kalthia Group Hotels, Inc., (Kalthia Group) and Manas Hospitality LLC (Manas Hospitality) (collectively referred to as Respondents) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (Act) by: instructing employees not to participate in union activities, talk to the Union, or sign anything for the Union; threatening employees; promising employees benefits, and continued work, if they did not support the Union; soliciting employees, and instructing them, to sign a Union decertification petition; arranging for employees to meet with the decertification petition solicitor; supporting efforts to decertify the Union; interrogating employees; creating the impression of surveillance; bargaining with the Union with no intention of reaching agreement; refusing to bargain over mandatory subjects of bargaining; and engaging in regressive bargaining. The Complaint also alleges that Respondents are single employers, or alternatively joint employers. On November 9, 2016, Respondents filed an Answer denying to commission of any unfair labor practices, and further denying that the two companies are joint or single employers.

The Counsel for the General Counsel issued subpoenas B-1-U6OUKP and B-1-U6GWWF to Respondents on November 3, 2016, and subpoena B-1-U660KB to Elsa Gutierrez, an admitted supervisor and agent, on November 4. On November 16, 2016, the Regional Director for Region 20 referred to me for ruling the timely filed petitions to revoke subpoenas. The General Counsel filed an opposition to the petitions on November 21, 2016. In its opposition, the General Counsel included a stipulation reached by the parties that: Respondents have common ownership, common management, centralized control of labor relations, and are

single employers.<sup>1</sup> As such, the General Counsel released Respondents from Subpoena B-1-U60UKP.<sup>2</sup> As for Subpoena B-1-U6GWWF, after the stipulation, the only issues remaining in dispute are subpoena paragraphs: 11, 12, 13, 14, 15, 16, and 26.<sup>3</sup>

Having duly considered the arguments of the parties, Respondent's petitions to revoke are DENIED in part, and GRANTED in part, as further set forth below.

## II. LEGAL STANDARD

Section 11(1) of the Act, 29 U.S.C. § 161(1), grants the Board power to subpoena evidence "that relates to any matter under investigation or in question." This subpoena power is broad, and "enables the NLRB to get information from those who best can give it and who are most interested in not doing so." *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 864 (D. Minn. 2010). *Cf. United States v. Morton Salt Co.*, 388 U.S. 632, 642 (1950). Section 11(1) also sets forth the standard upon which a party may petition the Board to revoke a subpoena, and states that the Board shall revoke a subpoena,

[I]f 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.<sup>4</sup>

It is well settled that when the Government or one of its agencies seeks the production of documents by subpoena, production is to be ordered as long as the subpoena requests are not "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). *See also, NLRB v. G.H.R. Energy Corp.*, 707 F. 2d 110, (5th Cir. 1982); *General Engineering, Inc.*, 341 F. 2d 367, 372 (9th Cir. 1985). Moreover, subpoenas issued by the Board pursuant to Section 11(1) are to be enforced if there is 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 (10<sup>th</sup> Cir. 1979). 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, Inc.*, 102 F.3d 1005, 1009 (1996) citing *NLRB v. Dutch Boy, Inc.*, 606 F.2d at 933 n. 4.

---

<sup>1</sup> At the opening of the hearing in this matter, the stipulation of facts will be accepted into evidence.

<sup>2</sup> Subpoena B-1-U660KB, issued to Elsa Gutierrez, is discussed in footnote 8.

<sup>3</sup> Respondent stated it would produce documents responsive to Subpoena paragraph 4, "subject to redacting personal information." The General Counsel seeks the documents unredacted. Because it is unclear what, other than social security numbers, Respondent could possibly redact, it is unnecessary to resolve this matter now. However, to the extent any information is redacted in relation to the subpoena production, Respondent shall produce a redaction log, describing the nature of the information redacted and provide the log to the General Counsel. *See, Ruggeri v. Cty. of Monmouth, No.*, 2008 WL 686270, at \*1 (D.N.J. Mar. 7, 2008). Respondent shall also be prepared to produce an unredacted copy of all such records for an in-camera review, in the event issues arise as to the necessity for production of the redacted information.

<sup>4</sup> See also Section 102.31(b) of the Board's Rules and Regulations.

### III. ANALYSIS

#### A. Objections to Subpoena paragraph 11.

Subpoena paragraph 11 seeks the April and May 2016 telephone records showing the calls made and received by Elsa Gutierrez, Sanjita Nand, Mohammed Nazeem, Olga Villa, and Ranjeel (Raj) Singh, on any “Respondent provided cellphones.”<sup>5</sup> Respondent asserts that the subpoena request must be revoked because it does not relate to any matter under investigation,<sup>6</sup> and that “no such evidence exists” because there are no Respondent provided cell phones used by the individuals.<sup>7</sup> *Petition*, at 2. The General Counsel asserts that the requested documents relate directly to the allegations in the Complaint that the listed individuals engaged in unfair labor practices, including soliciting employees to sign decertification petitions, interrogations, threats, and impressions of surveillance. *Opposition*, at 2. Moreover, the General Counsel “proposes” (without providing any evidence, and without citation to any legal authority) that if Respondent subsidizes the costs of cell phones used by these individuals, they constitute “Respondent provided items.” *Opposition*, at 3.

Complaint paragraph 10 alleges that Gutierrez, Nand, and Nazeem either committed, or were present during the commission of, various unfair labor practices, including soliciting employees to sign a decertification petition and interrogating and threatening employees over the telephone. As such, the requested information “touches upon” the allegations in the Complaint. Because Gutierrez, Nand, and Nazeem are admitted supervisors and agents of Respondent, I order that the responsive documents be produced. *Station Casinos, Inc.*, 358 NLRB 637, 644 (2012) (Employers are responsible for the actions of their agents according to common law agency principles). This includes subpoenaed information for any personal cell phone that Gutierrez,<sup>8</sup> Nand, and Nazeem used for work related purposes, or otherwise used to contact coworkers or subordinates, during April and May 2016. See *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, 2013 WL 6486921, at \*16-18 (S.D. Ill. Dec. 9, 2013), *order rescinded on other grounds sub nom., In re Petition of Boehringer Ingelheim Pharm.*, 745 F.3d 216 (7th Cir. 2014)<sup>9</sup> (employer was required to preserve employee text messages relevant to the

---

<sup>5</sup> Respondents have admitted that Gutierrez, Nand, and Nazeem are statutory supervisors and agents of Respondent, but deny that Villa and Singh are its statutory agents. *Answer*, at p. 2.

<sup>6</sup> Respondent’s arguments that subpoena paragraph 11 constitutes an “invasion of privacy,” is without merit. Respondent fails to identify what, if any, privacy interests are involved, and fails to cite any authority supporting its conclusory claim. Cf. *Thomas v. U.S. Dep’t of Homeland Security*, 876 F. Supp. 2d 1, 9 (D.D.C. 2012) (movant’s “conclusory assertion” that government administrative subpoenas were issued in “reckless disregard” of their rights does not satisfy their burden).

<sup>7</sup> Also without merit is Respondent’s assertion that paragraph 11 is overly broad. The subpoena request is not overly broad. It is limited to the two month period surrounding the alleged unfair labor practices, and is further limited to the individuals named in the complaint.

<sup>8</sup> The General Counsel also served a separate subpoena (B-1-U66DKB) upon Gutierrez seeking similar documents, and Respondents made similar objections. As set forth above, I have ordered these documents produced. Gutierrez is separately ordered to produce the documents requested in Subpoena B-1-U66DKB. Clearly Gutierrez only needs to produce responsive documents once.

<sup>9</sup> The Seventh Circuit overruled the district court’s decision to move deposition locations, but did not overturn the imposition of sanctions for the company’s loss of electronically store information (ESI) stored on employee mobile devices. 745 F.3d at 220.

litigation on “that space” of employee’s personal cell phones used for business purposes, where employees used their personal phones for business, including text messaging).<sup>10</sup>

Singh and Villa are alleged in the Complaint to have solicited employee signatures on a decertification petition during the time period in question. However, Respondent denies that Singh and Villa are its statutory agents, and the General Counsel has yet to prove the allegation. Moreover, Respondent denies providing cell phones to Singh and Villa. As such, at this point, I cannot compel that Respondent produce the personal phone records of Singh and Villa, pursuant to a subpoena directed to Respondent. *See, Cotton v. Costco Wholesale Corp.*, 2013 WL 3819974, at \*6 (D. Kan. 2013) (Discovery request to company for text messages from employee personal cell phones denied, where defendant did not contend that employees used their personal cell phones for any work-related purpose; thus company was not deemed to be in “possession, custody, or control” of the information sought). However, at trial the General Counsel will be allowed to examine Singh and Villa regarding the work related use of their personal cell phones.<sup>11</sup> If the trial evidence shows that Singh and Villa used their personal cell phones for work related purposes, then the documents requested in subpoena paragraph 11 must be produced.<sup>12</sup>

**B. Objections to Subpoena paragraphs 12-15.**

Paragraphs 12-15 seek documents reflecting communications received, or sent by, Gutierrez, Nand, Nazeem and Villa regarding the Union, signing documents pertaining to the Union or documents written and/or distributed by Respondent regarding the Union. Respondent asserts that it will produce the documents, except for “information contained on cell phone(s)” for Gutierrez, Nand, and Nazeem, Singh and Villa. As set forth above, any such communications on cell phones used for work by Gutierrez, Nand, and Nazeem must be produced. If the General Counsel requires such information from Singh and Villa, separate subpoenas must be served upon them, unless the trial evidence shows they used their personal cell phones for work related purposes. If so, the requested documents must be produced.

**C. Objections to Subpoena paragraphs 16.**

Subpoena paragraph 16 reads as follows: “All documents regarding the impressions, perceptions, or descriptions of unit employees’ sentiments regarding the Union or unions generally during October 1, 2015 to June 30, 2016, including any emails, photographs, letters, texts, instant messages and memoranda noting which employees were perceived by which supervisors as likely supporters of opponents of the Union.” Respondent objects to paragraph 16, asserting it is “vague, overbroad, and unintelligible.” The General Counsel asserts the

---

<sup>10</sup> For an in depth discussion of this issue, *See Danielle Richter, “Bring Your Own Device” Programs: Employer Control over Employee Devices in the Mobile E-Discovery Age*, 82 Tenn. L. Rev. 443, 453 (2015) (Employers are deemed to have “possession, custody, or control” of the requested information when an employee’s personal cell phone or device is used for work-related purposes, even if just a “designated space” on the phone is used for this purpose and not the entire phone.)

<sup>11</sup> Of course, the General Counsel could simply subpoena Singh and Villa directly, as they did for Gutierrez.

<sup>12</sup> *See, Richter, supra* note, 10, at 454 (trial court should require sufficient showing of proof that the devices were used for work related purposes, and that the information requested actually exists).

request is limited to only the months which Respondent allegedly engaged in unlawful conduct, and is not vague or unintelligible.

Paragraph 16 is not overly broad, as it is limited to the general time-frame (October 1, 2015 to June 30, 2016) set forth in the Complaint. Although the first part of paragraph 16 is poorly drafted, it is clear that the General Counsel seeks “emails, photographs, letters, texts, instant messages and memoranda noting which employees were perceived by which supervisors as likely supports or opponents of the Union.” As such, the request is not “unintelligible” and any responsive documents quoted the preceding sentence must be produced.

D. Objections to Subpoena paragraph 26.

Subpoena paragraph 26 seeks documents showing communications between the agents of Manas Hospitality and Kalthia Group regarding collective-bargaining proposals presented to, or received from, the Union. Respondents argue this request should be revoked, claiming that it does not “relate to any matter under investigation or in question in [this] matter.”<sup>13</sup> *Petition*, at 4. The General Counsel asserts the request goes directly to the allegation that Respondents bargained in bad faith. I agree with the General Counsel. Complaint paragraph 13 alleges that Respondents, bargained in bad faith by refusing to bargain over mandatory subjects, engaged in efforts to decertify the Union, and denigrated the Union. As such, the requested information clearly “touches upon the matter under investigation,” and must be produced. *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 932 (10<sup>th</sup> Cir. 1979).

---

<sup>13</sup> Respondent’s claim that subpoena paragraph 26 would violate Respondent’s attorney client privilege is baseless. The subpoena, on its face, does not seek documents legitimately covered by the attorney-client privilege. *Island Architectural Woodwork, Inc.*, 2014 WL 3867966 fn.3 (unpublished order) (Board notes that the subpoenas, on their face, do not seek privileged documents, and that “to the extent that the subpoenas encompass some documents that the Employers believe in good faith to be protected from disclosure, the Employers may submit a privilege log providing sufficient details to permit an assessment of the Employers’ claims”). To the extent that Respondent withholds any responsive documents on the basis of the attorney-client privilege, or any other privilege, it is incumbent upon the Respondent to prepare a privilege log, detailing the document in question and the nature of the privilege, and to be prepared to produce such document(s) for an *in camera* inspection. *United States v. Zolin*, 449 US 554, 568-69 (1989) (approving the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection); *CNN America, Inc.*, 352 NLRB 448, 449 (2008) (ALJ appropriately exercised his discretion in ordering an *in camera* inspection of documents on the employer’s privilege and redaction logs) *Patrick Cudahy, Inc.*, 288 NLRB 968, 969 (1988) (upon base of attorney-client privilege Board orders respondent to produce the documents in question, along with an index, for an *in camera* inspection); Fed. R. Civ. P. 26(b)(5)(A).

## CONCLUSION

For the reasons set forth above, Respondent's Petition to Revoke is DENIED in part, and GRANTED in part. Accordingly Respondent is directed to comply with the Subpoena duces tecum and to provide copies of the responsive documents as set forth above.

SO ORDERED.

Dated: San Francisco, California  
November 22, 2016.



---

John T. Giannopoulos  
Administrative Law Judge

***Served by facsimile upon the following:***

For the NLRB:

Yaromil Ralph, Esq.

Joseph Richardson, Esq., Fax: (415)356-5156

For the Respondent:

Scott A. Wilson Esq., Fax: (619)234-5853

For the Charging Party Union:

Christian Rak, President, Fax: (916)564-4950

Involved Party: (served by e-mail only)

Noah Schwinghamer, Esq. Email: [schwinghamerlaw@gmail.com](mailto:schwinghamerlaw@gmail.com)

**Lee, Vanise J.**

---

**From:** noreply@nlrb.gov  
**Sent:** Tuesday, November 22, 2016 1:45 PM  
**To:** Lee, Vanise J.  
**Cc:** SM-Nass  
**Subject:** Re: [NASS] Scan-to-FAX Delivery - [REPORT]  
**Attachments:** MF5834BBB83A2083740093.tif

---

Retarus job id: MF5834BBB83A2083740093

---

Number of faxes 3  
  thereof successfully sent: 3  
  thereof failed with error: 0  
Number of pages 6  
Resolution Low

---

Fax number +16192345853  
Sent 2016-11-22-16.42.43  
Remote CSID: 6192345853  
Duration 70 sec.  
Status OK  
Reason

---

Fax number +14153565156  
Sent 2016-11-22-16.42.43  
Remote CSID: NLRB  
Duration 62 sec.  
Status OK  
Reason

---

Fax number +19165644950  
Sent 2016-11-22-16.42.44  
Remote CSID:  
Duration 77 sec.  
Status OK  
Reason

---

**Lee, Vanise J.**

---

**From:** Lee, Vanise J.  
**Sent:** Tuesday, November 22, 2016 1:46 PM  
**To:** schwingamerlaw@gmail.com; chrisrak@unitehere.org; scott@pepperwilson.com; Richardson, Joseph; Ralph, Yaromil  
**Cc:** Gomez, Doreen E.; DiCrocco, Brian; Lee, Vanise J.; Goetz, Kathryn  
**Subject:** Judge's Order PRVSubpoenasHolidayInnExpress-11-22-16 d/b/a Holiday Inn Express Sacramento, a Single Employer, 20-CA-176428, et al.  
**Attachments:** ALJOrder PRVSubpoenasHolidayInnExpress-11-22-16.pdf  
**Importance:** High

Counsel attached please find a courtesy copy of Judge Giannopoulos' Order in the above matter that will be formally faxed to the offices who have provided a number shortly.

Regards,

*Vanise J. Lee, Legal Tech.*

*NLRB Division of Judges San Francisco Branch*

*Main – 415.356.5255*

*Direct – 628.221.8826*

*Fax – 415.356.5254*

**“Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” – James Madison**