

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

ARIZONA BLUE STAKE d/b/a ARIZONA 811

and

Case 28-CA-182241

SHANTEL O'HARA

ORDER

The Employer's petition to revoke subpoena duces tecum B-1-U3HY5R is granted in part and denied in part. The petition is granted to the extent that paragraph 1 of the subpoena seeks personal, sensitive, and identifying information maintained in distinct employee files separate from the Employer's personnel files. The petition is also granted to the extent that paragraph 5 of the subpoena seeks any work-related emails within the requested 4,995 pages of emails referred to in the declaration of Sandra Holmes.¹

In all other respects, the petition is denied. The subpoena seeks information relevant to the matters under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations.² Further, the Employer has failed to establish any other

¹ To the extent that paragraphs 1 and 5 of the subpoena seek other information not described above, the petition is denied. This Order is without prejudice to the Region's issuance of a new subpoena seeking this additional information, if it can establish why such information is relevant to its investigation.

² Insofar as the subpoena encompasses documents that the Employer believes in good faith to be subject to the attorney-client privilege or the attorney work product doctrine, this Order is without prejudice to the Employer's prompt submission of a privilege log to the Region identifying and describing each such document, and providing sufficient detail to permit an assessment of the Employer's claim of privilege or protection. The Employer is directed to produce

legal basis for revoking the subpoena. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).³

Dated, Washington, D.C., February 2, 2017

PHILIP A MISCIMARRA,	ACTING CHAIRMAN
MARK GASTON PEARCE,	MEMBER
LAUREN McFERRAN,	MEMBER

all responsive documents in its possession not subject to any good-faith claim of privilege or protection.

In addition, the Employer generally asserts that the subpoena seeks documents that do not exist. The Employer is not required to produce subpoenaed evidence that it does not possess, but the Employer is required to conduct a reasonable and diligent search for all requested evidence, and as to requested evidence that the Employer determines it does not possess, the Employer must affirmatively represent to the Region that no responsive evidence exists.

³ We reject the Employer's contention that the subpoena should be revoked because the Region failed to properly serve the subpoena on the Employer's attorney. No prejudice resulted from this failure, as the petition to revoke was timely filed. See, e.g., *NLRB v. Playskool, Inc.*, 431 F.2d 518, 520 (7th Cir. 1970) (court enforced Board's subpoenas, despite failure to serve respondents' attorneys, noting that the specific respondents were personally served and that timely petitions to revoke were filed and thus, no prejudice was shown); *NLRB v. Cincinnati Bronze, Inc.*, 811 F.2d 607, 607 (6th Cir. 1986) (failure to serve respondent's counsel violated the Board's rules, but the subpoena was enforced because the petition to revoke was timely filed, and thus no prejudice was shown).