

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

HARBOR RAIL SERVICES COMPANY

and

Case 25-CA-174952

ERIC SCHULTZ, an Individual

GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S PETITION TO REVOKE SUBPOENA

Pursuant to Rule 102.31(b) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files this Opposition to Respondent's Petition to Revoke Subpoena Duces Tecum No. B-1-VMGKFH and submits that said Petition should be denied.

1. On November 30, 2016, the Regional Director for Region Twenty-five issued a Complaint in the above-captioned case. On March 1, 2017, the Regional Director for Region Twenty-five issued an Amendment to Complaint and Notice of Hearing in the above-captioned case. The Complaint alleges, *inter alia*, that at all material times Kenyada Clark has been a supervisor of Respondent Harbor Rail Services Company within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act, and that Respondent unlawfully discharged its employee Eric Schultz because he concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by demanding that Respondent provide employees with a lunch break.

2. On about December 13, 2016, Respondent filed its Answer to the Complaint. In relevant part, Respondent has denied Complaint paragraphs 4(c) and 5 that it unlawfully discharged Schultz because he concertedly complained to Respondent regarding the wages,

hours, and working conditions of Respondent's employees by demanding that Respondent provide employees with a lunch break. Although Respondent to date has not submitted an Answer to Amended Complaint, Respondent has indicated in telephone conversations on February 28, 2017, and March 7, 2017, with Counsel for the General Counsel that it denies Clark's supervisory and agency status at the time relevant to the allegations in the Complaint.¹

3. On March 1, 2017, Counsel for the General Counsel issued a subpoena duces tecum (B-1-VMGKFH) to Respondent. Among other things, the subpoena requests information necessary to establish that Kenyada Clark has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act, and that Respondent unlawfully discharged Schultz because he concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by demanding that Respondent provide employees with a lunch break. On March 6, 2017, Respondent filed its Petition to Revoke Subpoena objecting to the length of time covered by the subpoena and to paragraphs 3, 4, 6, 7, 12, and 14 of the subpoena duces tecum issued by the General Counsel.

4. Section 11 of the National Labor Relations Act grants the Board broad subpoena power to examine and copy "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." The courts are charged to order production of subpoenaed materials unless it can be shown that the information sought is "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *NLRB v. GHR Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). The

¹ Counsel for General Counsel confirms that the parties stipulated to the supervisory status of Albert DeLeon and Ryan Schanfish, and therefore documents relating to their supervisory status do not need to be produced.

Board's subpoena power extends to seeking "material concerning a defense that may never arise." *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1009 (9th Cir. 1996).

5. Respondent contends that the period covered by the subpoena is too broad in scope because Respondent began operations in September 2015 and Schultz was employed from September 2015 until January 2016. Respondent further contends in its Petition that paragraphs 3, 4, and 7 of the subpoena duces tecum are overly-broad in that they request information irrelevant to Clark's supervisory status, paragraph 6 is overly-broad and vague regarding request for work rules, and paragraphs 12 and 14 are too broad in scope regarding comparative discipline of other employees.

Paragraph 3 requests documents that show all wages, benefits, and other compensation paid to Clark during the period covered by the subpoena. Paragraph 4 requests the complete personnel and employment file (excluding medical records) of Clark. Paragraph 6 requests the work rules or conditions of employment applicable to non-supervisory employees, including those hired by any temporary staffing service, employed at Respondent's facility at any time during the period covered by the subpoena, including documents showing any changes to the rules, the effective dates of any such changes, and a description or statement of the changes. Paragraph 7 requests documents used by Respondent in its investigation of an incident on December 28, 2015, involving All-Terrain Vehicles, including any witness statements, reports, and disciplinary actions resulting from the incident. Paragraph 12 requests all disciplinary actions issued to employees for same or similar reasons as the reasons for the discharge of Schultz, along with the personnel file of each disciplined employee showing all other discipline to that employee. Paragraph 14 requests documents reflecting the completed tenure, work

history, and disciplinary record for individuals who were discharged for any reason during the period covered by the subpoena.

Regarding the period covered by the subpoena, the General Counsel would agree to begin the period covered by the subpoena on September 1, 2015, to coincide with when Respondent began operations at its Belvidere, Illinois facility. The General Counsel, however, maintains that the period covered by the subpoena should extend to the present. Respondent's offer to provide only five months' worth of documents is insufficient to glean whether Respondent treated Schultz differently in his discharge than other employees.

The documents requested in paragraphs 3 and 4 of the subpoena go directly towards proving paragraph 3 of the Complaint regarding Clark's supervisor status, which Respondent has denied in conversations with Counsel for the General Counsel. Clark's compensation records and employment file containing his job title, job duties, dates of employment, and disciplinary actions would demonstrate Clark's supervisory status. Regarding the documents requested in paragraph 6, Respondent's work rules are essential to the case given Respondent's vague assertion that Schultz was discharged because of alleged insubordination, without providing any context as to how the alleged insubordination relates to the work rules or conditions of employment that are applicable to employees. The documents requested in paragraph 7 are necessary given Respondent's reliance during the investigation of this case on an incident that involved Schultz and the use of an All-Terrain Vehicle on December 28, 2015, as a justification for his later discharge on January 8, 2016. Regarding paragraphs 12 and 14, the personnel files, disciplinary/discharge records, evaluations, and investigatory documents that demonstrate the manner in which Respondent disciplines and discharges its employees is entirely relevant to the

instant case, as it would demonstrate whether Schultz was treated differently in his discharge than other employees at Respondent's Belvidere facility.

6. For the foregoing reasons, Respondent's Petition to Revoke Subpoena should be denied and Respondent should be ordered to comply fully with General Counsel's subpoena duces tecum.

DATED at Indianapolis, Indiana, this 13th day of March 2017.

Respectfully submitted,

s/ Caridad Austin

Caridad Austin

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Opposition to Respondent's Petition to Revoke Subpoena has been filed electronically with the Division of Judges this 13th day of March 2017. Copies of said filing are being served upon the following persons by electronic mail:

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s/ Caridad Austin
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