

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK DIVISION OF JUDGES**

**ARBOR RECYCLING
ARBOR LITE LOGISTICS,
A Single Employer**

**Case 2-CA-180470
2-CA-186760
2-CA-186930
2-CA-188504
2-CA-195794**

and

AMALGAMATED LOCAL 1931

**ORDER DENYING, IN PART, THE RESPONDENT'S PETITIONS TO REVOKE THE
GENERAL COUNSEL SUBPOENAS DEUCES TECUM**

On May 11, 2017, counsel for Arbor Recycling and Arbor Lite Logistics (collectively, Respondent) moved to revoke portions of the General Counsel subpoena deuces tecum No. B-1-WGDNUR; No. B-1-WGFEDS7; No. B-1-WGG1XX; No. B-1-WGFCER and No. B-1-WGDUOB (subpoenas). The counsel for the General Counsel replied in opposition to the petitions to revoke on May 17. Upon due consideration and for the reasons set forth in the General Counsel opposition to revoke, the Respondent's petitions to revoke the aforementioned subpoenas are denied.

The amended consolidated complaint alleges certain unfair labor practices by the Respondent operating as a single employer in five different facilities. The five subpoenas issued by the General Counsel are identical and served on the Respondent at the five locations. The counsel for the General Counsel maintains that she was being overly cautious by serving the Respondent at each of the five locations to ensure proper service and due process. Consequently, while each subpoena contains over 50 requested items, each request is the same for all five subpoenas. I also note that the time frame for the subpoenaed documents is limited to a relatively short period of time of less than 2 years. As such, I do not find that the five subpoenas are unduly burdensome on the Respondent to produce. The Respondent has not met its burden to show that to produce the requested documents is unduly burdensome on its operations or would threaten the normal operation of its business.

I find that the documents sought in the subpoenas are related to the charges in the consolidated complaint regarding the allegations that the Respondent unlawfully engaged in surveillance, threatened employees and discharged three employees for their support of and their union activities.

Subpoenas paragraphs 1 and 2 seek documents prepared by the Respondent and sent to the Union and documents Respondent received from the Union from June 1, 2016 to the present. The complaint alleges that 3 employees were discharged for their engagement in union activities. Thus, I find that the documents sought in items 1 and 2 are highly relevant to assess knowledge of union activity and whether there was a discriminatory motive to the discharge as alleged in the complaint.

I find that paragraph 3 of the subpoenas is not relevant. Paragraph 3 seeks

all documents, including and not limited to prepared speech written speeches, written comments, written remarks that were delivered by a representative of Respondent Arbor Recycling and Respondent Arbor Lite to Respondent Arbor Recycling and Respondent Arbor Lite employees at its Bronx and Bayshore facilities during the time period from June 1, 2016 until the present.

The counsel for the General Counsel argues that paragraph 3 is relevant to establish a *Wright Line* case with regard to the three discharged employees. I disagree. Paragraph 3 of the subpoenas seek all documents that the Respondent delivered to its employees whether such documents are related or not to the allegations in the complaint. Such documents sought in paragraph 3 are unduly vague and arguably, could also include any documents that the Respondent had generated in its routine operations and management of the facilities regarding its employees. With regards to the allegations in the complaint, I find that paragraphs 1, 2 above, and 4, 5, 6, 7, 8, 9, 10, 11 and 12, below, in the subpoenas would be sufficient for the General Counsel to show alleged animus and a *Wright Line* case.

I find that the documents sought in the paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 in the subpoenas are not overly broad, burdensome, vague or ambiguous. Paragraph 4 seeks documents that may establish the Respondent's animus towards the Union. Paragraphs 5, 6, and 8 seek documents in referenced to the discharge of three employees in the complaint. The aforementioned paragraphs seek documents of personnel files, various and all disciplinary actions, any documents that provide or describe the reasons for the discipline or prior discipline of the discharged employees. The request is limited from March 1, 2015 through October 31, 2016. The personnel and related documents sought in reference to the discharge of three employees are highly relevant.

Paragraph 7 in the subpoenas seeks documents relating to the performance and evaluation assessments prepared by the Respondents of the three discharged employees. Paragraph 9 seeks all documents relating to the unemployment insurance benefit claims filed by the discharged employees. Paragraph 10 seeks documents regarding disciplinary actions of other employees. Paragraph 11 seeks documents relating to any accident or incident reports regarding the damage of Respondent's delivery trucks, including body work invoices, canceled checks, receipts, bills, photographs, emails written correspondence/memos. Paragraph 12 seeks documents relating to the layoffs of employees by the Respondent. Documents sought by the General Counsel in paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 are not overly board or

unduly burdensome and may establish pretext in the anticipated Respondent's *Wright Line* defense.¹

The subpoenaed documents are specific and describe 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.

The complaint also alleges that the Respondent is a single employer. In this regard, the subpoenas seek information relevant to the single employer status issue in the consolidated complaint. In *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006), the Board explained:

In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

"While the Board considers common control of labor relations a significant indication of single-employer status, no single aspect is controlling, and all four factors need not be present to find single-employer status. Instead, the ultimate determination turns on the totality of the evidence in a given case." *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007), enfd. 551 F.3d 772 (8th Cir. 2008) (footnotes and internal citations omitted). Without going into the merits of the parties' arguments as to whether Respondent is a single employer, it is sufficient that the subpoenas seek information reasonably relevant or lead to other evidence potentially relevant that may demonstrate common ownership and financial control and for the General Counsel to establish Section 2(11) supervisory status and 2(13) agent status of Respondent's officials. Thus, I find that paragraphs 13 through 50 as highly relevant to establish single employer status.²

I find that the subpoenas seek information relevant to the matter in this trial and are reasonably related to the allegations in the consolidated complaint. While some documents sought may not be obviously relevant, they are appropriately sought to provide background information or may lead to other evidence potentially relevant to an allegation in the complaint. Board's Rules, Section 102.31(b).³

The Respondent also argues that some documents in the subpoenas are privileged even if they are found to be relevant, not vague or overbroad, not burdensome, and do not lack specificity. In order to determine if the documents are confidential or privileged, a privilege log/index is necessary to identify the documents the Respondent believes are covered by the privilege.

¹ The Respondent is only responsible for providing the documents in its possession and shall note to the General Counsel the documents that it cannot produce because they are not in its possession.

² I would note that the General Counsel is willing to forego the need for documents relating to the single employer status issue upon stipulation by the Respondent (p. 14 of General Counsel's opposition to the petition to revoke).

³ The Respondent shall redact any social security numbers to the extent that they are present in the personnel records and documents of employees produced pursuant to the subpoenas.

The party asserting a privilege has the burden to establish that the documents are in fact privileged and confidential. As part of showing this burden, the Respondent must provide a privilege (or confidential) index log specifically identifying the documents that are covered by the asserted privilege and provide a good cause explanation showing harm if the privilege/confidential nature of the document is disclosed. The index must include 1) a description of the document, including its subject matter and the purpose for which it was created; 2) the date the document was created; 3) the name and job title of the author of the document; and 4) if applicable, the name and job title of the recipient(s). *CNN America, Inc.* 353 NLRB at 899 (2009).

Therefore, the Respondent is ordered to produce any outstanding documents pursuant to subpoenas duces tecum note above, but not in regard paragraph 3 and not to the extent that the subpoenaed documents are covered by a privilege to the counsel for the General Counsel at the National Labor Relations Board Region 2, 26 Federal Building, suite 3614, New York, New York on May 22, 2017 at 9:30 am or at another designated time agreed upon by the parties. The counsel for the Respondent is instructed to provide a privilege log/index as instructed above by May 22, 2017.

Dated: May 18, 2017
New York, New York

Kenneth W. Chu

Kenneth W. Chu
Administrative Law Judge