

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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NATIONAL LABOR RELATIONS BOARD,

Applicant,

-against-

DN CALLAHAN, INC.,

Respondent.

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POLLAK, United States Magistrate Judge:

**REPORT AND  
RECOMMENDATION**  
18 MC 879 (LDH) (CLP)

By Application filed on March 27, 2018, the National Labor Relations Board (“NLRB” or the “Board”) seeks an Order under 29 U.S.C. § 161(2) compelling respondent DN Callahan, Inc. (“Callahan”) to comply with an administrative subpoena issued by the NLRB on November 8, 2017. The Honorable LaShann DeArcy Hall referred the Board’s Application to the undersigned for decision on April 6, 2018.<sup>1</sup> On April 9, 2018, the Court issued an Order to Show cause requiring respondent to respond to the NLRB’s Application and to show cause why an Order requiring compliance with the administrative subpoena should not issue. (See Order to Show Cause at 1, Apr. 9, 2018, ECF No. 7).

Having considered the parties’ submissions, and for the reasons set forth below, it is

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<sup>1</sup> Unlike an order enforcing a subpoena under Rule 45 of the Federal Rules of Civil Procedure, “[a] district court order enforcing a subpoena issued by a government agency in connection with an administrative investigation may be appealed immediately. . . . The rationale is that, at least from the district court’s perspective, the court’s enforcement of an agency subpoena arises out of a proceeding that may be deemed self-contained, so far as the judiciary is concerned.” United States v. Constructions Prods. Research, Inc., 73 F.3d 464, 469 (2d Cir. 1996) (citation and quotation marks omitted). Deciding the motion to enforce the subpoena concludes the dispute before the Court, and thus the great weight of authority holds that such a motion is dispositive and therefore must be decided by the Magistrate Judge by way of a Report and Recommendation. See Fed. R. Civ. P. 72(b)(1) (requiring disposition by R&R where a Magistrate Judge is designated “to hear a pretrial matter dispositive of a claim or defense”); NLRB v. Bacchi, No. 04 MC 28, 2004 WL 2290736, at \*1 n.1 (E.D.N.Y. June 16, 2004) (collecting cases).

respectfully recommended that the NLRB's Application be granted and that an Order issue requiring respondent DN Callahan, Inc. to respond to the NLRB investigative subpoena *duces tecum* numbered B-1-YXA5JZ.

### FACTUAL BACKGROUND

RHCG Safety Corp. ("RHCG" or "Red Hook") is alleged to be a business engaged in demolition and concrete work with two locations, one at 83 Main Street, Bay Shore, N.Y. and the other at 112 12<sup>th</sup> Street, Brooklyn, N.Y. (Appl.<sup>2</sup> ¶ 6). Christopher Garofalo was RHCG's vice president of operations and responsible for overseeing the demolition division. (Kapelman Decl.<sup>3</sup> ¶ 20, Ex. 1).

Respondent DN Callahan, Inc. ("Callahan" or "Respondent") is alleged to be a New York corporation located in Staten Island and engaged in the construction business. (Appl. ¶ 2). In 2017, Garofalo is listed as having earned \$66,219.80 in net pay from Callahan. (Kapelman Decl. ¶ 21, Ex. 14).

On June 7, 2017, the NLRB issued a decision finding that RHCG had engaged in certain unfair labor practices, including, but not limited to: 1) discharging an employee, Claudio Anderson, because of his union support; and 2) interfering with a representation election by providing an inaccurate voter list that did not comply with the Board's requirements. RHCG Safety Corp., Nos. 29 CA-161261 & 29-RC-157827, 365 N.L.R.B. 88, 2017 WL 2497155 (2017) (the "Order"). (See Appl. ¶ 4; Kapelman Decl. ¶ 2). As a result, RHCG and its officers,

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<sup>2</sup> Citations to "Appl." refer to the Application of the National Labor Relations Board For A Summary Order Requiring Obedience With Investigative Subpoena, dated March 27, 2018, ECF No. 1.

<sup>3</sup> Citations to "Kapelman Decl." refer to the Declaration of Augusta Kapelman, dated March 27, 2018, ECF No. 1-2.

agents, successors, and assigns were ordered to reinstate Mr. Anderson to his former or substantially equivalent position and to make him whole for any loss of earnings and benefits he suffered as a result of RHCG's conduct. (Kapelman Decl. ¶ 2; Appl. ¶ 4). The Board also severed the 29-RC-157827 proceeding, set aside the election, and remanded the action to the Regional Director to conduct a new election. (Appl. ¶ 4; Kapelman Decl. ¶ 2).

On June 15, 2017, a representative of RHCG informed the Board that the business had ceased operations, was insolvent, and could not conduct the election. (Kapelman Decl. ¶ 3). On October 10, 2017, the Second Circuit issued a Judgment enforcing the NLRB Order. See Judgment & Mandate, NLRB v. RHCG Safety Corp., No. 17-ag-2213 (2d Cir. Oct. 10, 2017). (Appl. ¶ 5; Kapelman Decl. ¶ 4, Ex. 2).

On October 11, 2017, an employee notified counsel for the Construction & General Building Laborers, Local 79, LIUNA (the "Union") that while he was employed by RHCG, his checks came from other corporate entities. (Kapelman Decl. ¶ 5; Appl. ¶ 8). According to her Declaration, Ms. Kapelman obtained evidence from this employee showing that while he was employed by RHCG, he started receiving checks bearing the name "DN Callahan, Inc." (Kapelman Decl. ¶ 6). The employee informed Ms. Kapelman that during the time he was being paid by Callahan, Callahan employed RHCG supervisors and a majority of the RHCG demolition workers. (Id.)

In order to investigate the relationship between RHCG and Callahan, the NLRB issued a subpoena *duces tecum* directed to Callahan seeking production of certain books and records. (Id. ¶ 7). The subpoena, which was served by mail on November 8, 2017, directed Callahan to produce the requested information to the Regional Director by November 29, 2017. (Id.; Appl. ¶ 10). On November 22, 2017, Ms. Kapelman received written objections to the subpoena from

Callahan's counsel, contending that the subpoena sought irrelevant information and that Callahan had "no relevant responsive documents in its custody, possession, or control." (Kapelman Decl. ¶ 8, Ex. 6). According to Ms. Kapelman, Callahan's attorney withdrew the objections to the subpoena during a telephone conversation with her on November 27, 2017, confirmed the withdrawal in writing on November 28, 2017, and thereafter produced certain documents on December 14, 2017. (Id.; Appl. ¶ 11(c)). In the cover letter accompanying the document production, Callahan's counsel asserted that Callahan was not the alter ego of RHCG and was producing the "relevant responsive" documents in Callahan's custody and control. (Id., Ex. 8).

The NLRB asserts that the documents received from Callahan were responsive only to items one and two out of the ten categories of information listed in the subpoena. (Id. ¶ 10). Accordingly, Ms. Kapelman sent an email on December 19, 2017 to Callahan's counsel, indicating that it was not credible that Callahan did not have any payroll, personnel files, or other documents in its possession, custody, or control. (Id. ¶ 11). She extended the date for production and advised that if she did not receive the remaining documents, or a satisfactory explanation as to why Callahan did not have these documents, she would seek to enforce the subpoena in federal court. (Id.)

In an email sent on December 20, 2017, counsel for respondent requested an extension of time until January 8, 2018 to produce the documents. (Id. ¶ 12, Ex. 9). After extending the deadline for production to January 8, 2018, Ms. Kapelman received a letter from RHCG indicating that it was no longer in business. (Id. ¶ 14, Ex. 10). Thereafter, on January 12, 2018, she received a service contract from Callahan that was partially responsive to item five as requested in the subpoena, but which provided no other documents, such as accounts receivable journals and invoices showing all of Callahan's clients. (Id. ¶ 15, Ex. 11). The cover letter

repeated the assertion that Callahan was not RHCG's alter ego and "as such, it does not have any payroll, personnel files, service contracts or other documents that concern RHCG Safety Corp."

(Id.)

Ms. Kapelman left two voicemails and sent an email to counsel for Callahan asking him to contact her regarding the response to the subpoena; he did not return her calls until February 1, 2018, when she received an email from counsel stating: "respectfully, you can enforce the subpoena in any manner you see fit since DN Callahan has produced all relevant documents in its possession." (Id. ¶ 19, Ex. 13). Also attached to the letter was the Callahan 2017 Employee Check Record, which the NLRB claims does not provide all of the information requested and which payroll records would supply. (Id.)

The NLRB is investigating whether Callahan may be derivatively liable for RHCG's obligations under the Order. The Board asserts that not only is there evidence that the principal of RHCG, Garafalo, may be employed by Callahan, but the evidence obtained from the RHCG employee indicates that Callahan may have employed RHCG supervisors and employees. (Id. ¶ 22). The Board argues that Callahan's responses to the subpoena issued by the Board are deficient in that Callahan failed to produce all documents in its possession, custody, or control that are responsive to paragraphs 3, 4, 5, 6, 7, 8, 9, and 10.

## DISCUSSION

### **A. Standard for Enforcement of NLRB Subpoenas**

Pursuant to 29 U.S.C. § 161(2), this Court has the authority to enforce subpoenas issued by the NLRB:

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

29 U.S.C. § 161(2); see NLRB v. U.S. Postal Service, 790 F. Supp. 31, 33 (D.D.C. 1992). Here, the Court has jurisdiction over Callahan, the entity charged with refusing to obey the subpoena, because its offices are located in Staten Island, New York, which is within the Eastern District of New York.

In reviewing an application to enforce an administrative subpoena, it is well-established that a court's role is a limited one, and the court should defer to the agency's determination of relevance "so long as it is not obviously wrong." In re McVane, 44 F.3d 1127, 1135 (2d Cir. 1995). Moreover, "in enforcing administrative subpoenas courts broadly interpret relevance." Acosta v. Fusilli at Miller Place, Inc., No. 18 MC 426, 2018 WL 3302183, at \*2 (E.D.N.Y. July 5, 2018) (quoting NLRB v. American Med. Response, Inc., 438 F.3d 188, 192 (2d Cir. 2006)). Courts should enforce a subpoena when: 1) "the investigation will be conducted pursuant to a legitimate purpose," 2) "the inquiry may be relevant to the purpose," 3) "the information sought is not already within [the agency's] possession," and 4) "the administrative steps required . . . have been followed." NLRB v. American Med. Response, Inc., 438 F.3d at 192 (citations

omitted); see also NLRB v. U.S. Postal Serv., 790 F. Supp. at 33-34 (citing United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)); NLRB v. Bacchi, No. 04 MC 28, 2004 WL 2290736, at \*2 (E.D.N.Y. June 16, 2004). The party resisting the subpoena has the burden of coming forward “with facts suggesting that the subpoena is intended *solely* to serve purposes outside the purview of the jurisdiction of the issuing agency.” NLRB v. Frazier, 966 F.2d 812, 818 (3d Cir. 1992).

**B. NLRB Subpoena *Duces Tecum* Numbered B-1-YXA5JZ**

Here, the subpoena contains a rider listing ten items sought by the NLRB, but Callahan responded only to requests 1 and 2. The remaining requests include: 3) books and records, including but not limited to payroll and personnel files, as will show the identity, date of hire, job title, job duties and descriptions of all managers and supervisors of Callahan during the period August 1, 2016 to the present; 4) books and records showing the identity, date of hire and job function of employees of Callahan during that same period; 5) books and records, including accounts receivables journals and invoices showing Callahan clients and services; 6) books and records, including accounts payable journals and invoices; 7) books and records, including certificates and registrations of motor vehicles purchased by Callahan, including liens, security interest or loans for which the vehicles were pledged as collateral; 8) books and records, including lease agreements for motor vehicles; 9) books and records, including certificates and registrations of ownership for equipment used by Callahan, including any documentation showing if such equipment was pledged as collateral; and 10) books and records, including lease agreements for equipment leased by Callahan during the period. (See Rider to Subpoena, Ex. 3 to Kapelman Decl.).

In determining whether an entity is an alter ego, the Board considers a number of factors, including whether the two entities have substantially identical ownership, management, customers, equipment, and business purposes. (See NLRB Mem.<sup>4</sup> at 5 & n.3 (citing, e.g., Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1982); Fugazy Continental Corp., 265 N.L.R.B. 1301, 1301-02 (1984), enforced, 725 F.2d 1416 (D.C. Cir. 1984)). The Board takes the position that the requests were “narrowly drawn” in order to obtain evidence of connections between Callahan and RHCG given the Board’s investigation into whether Callahan should be derivatively liable for RHCG’s responsibilities under the Order. (Id.) The instant subpoena seeks information calculated to enable the Board to determine if there was a continuity of employees, managers, supervisors, equipment and leases, as well as customers and suppliers, and is limited to a period beginning six months before Callahan became involved in the matter. (Id.) Evidence of continuity of these factors from RHCG to Callahan would be relevant to determining if Callahan was in fact an alter ego of RHCG. (Id. (citing Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942); Howard Johnson Co. v. Detroit Local Executive Board, 417 U.S. 249, 259 n.5 (1974)).

Callahan opposes the Board’s request for an Order enforcing the subpoena, arguing that the relevant documents have been produced and that the Board is engaged in “a fishing expedition into Respondent’s books and records.” (Callahan Mem.<sup>5</sup> at 1). Callahan asserts that

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<sup>4</sup> Citations to “NLRB Mem.” refer to the NLRB’s Memorandum in Support of Application for a Summary Order Requiring Obedience With Investigative Subpoena, filed on March 27, 2018, ECF No. 1-3.

<sup>5</sup> Citations to “Callahan Mem.” refer to Respondent DN Callahan, Inc.’s Memorandum of Law in Opposition to Applicant National Labor Relations Board’s Application for a Summary Order Requiring Obedience with Investigative Subpoena, dated April 17, 2018, ECF No. 8.

it is not an alter ego of RHCG and, furthermore, that production of additional books and records would be unduly burdensome. (Id.)

In support of its first objection, Callahan contends that “outside of the documentation already provided to Applicant, the remaining information sought by Applicant in its subpoena is not reasonably relevant to its stated, investigatory purpose, to wit, ‘to fully investigate the relationship between RHCG and Respondent’ . . . as there is no common ownership, management, control, or affiliation between the entities.” (Id.) Callahan notes that it has produced documents showing that Callahan has only had one owner since its inception and that she has not had any dealings with RHCG. (Id. at 2). To the extent that the Board cites the statements of an RHCG employee, Callahan notes that it is a statement from “single RHCG employee based on occasional observations,” and that no such employee has submitted an affidavit in support of the Board’s application.<sup>6</sup> (Id.) Thus, Callahan argues that the representations in the Kapelman Declaration are “speculative” and the Court should find the information not reasonably related to the NLRB’s investigation. (Id.)

Callahan also argues that even if the information sought is determined to be relevant, the requests are unreasonable and compliance would be unduly burdensome. (Id. at 6). Callahan states that it has already produced 1) the filing receipt and EIN for Callahan; 2) the Certificate of Incorporation; 3) bylaws; 4) shareholder agreement; 5) Client Master Agreement between Callahan and Red Hook Construction (RHCG); and 6) employee check register. (Id.) Callahan contends that this production represents a “good faith effort” on the part of Callahan and should

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<sup>6</sup> Callahan fails to explain why such an affidavit should be required even though the NLRB is not required by the NLRA or applicable regulations to supply such an affidavit.

be sufficient for the Board to determine that Callahan is not an alter ego of RHCG and that Callahan should not be held derivatively liable for RHCG's liabilities. (*Id.*)

To the extent that Callahan had objections to the breadth of the subpoena or to specific requests,<sup>7</sup> its remedy was to comply with the Board's regulations, which specify that for a period of five days after service of the subpoena, the person served may petition the Board to revoke the subpoena. See 29 U.S.C. § 161(1) (providing that "[w]ithin five days after the service of a subpoena on any person requiring the production of any evidence . . . such person may petition the Board to revoke, and the Board shall revoke, such subpoena if 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"); 29 C.F.R. § 102.31(b) (setting forth the Board's procedure for petitions objecting to subpoenas). The face of the subpoena itself sets forth these procedures and informs the recipient how to object. (See Subpoena *Duces Tecum* B-1-YXA5JZ, ECF No. 1-2 at 35, Ex. 3 to Kapelman Decl.). Indeed, Callahan initially filed objections to the subpoena, but subsequently withdrew them in writing. (Kapelman Decl. ¶¶ 9-10). Callahan's failure to exhaust its administrative remedies precludes it from challenging the subpoena in this Court, at least on the grounds advanced. See *NLRB v. Bacchi*, 2004 WL 2290736, at \*3 (holding that "[h]aving failed to exhaust [its] administrative remedies, respondent[] ha[s] waived any objections to the subpoena[] other than on constitutional grounds or a claim that exhaustion would cause irreparable harm" and collecting cases).

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<sup>7</sup> Even if Callahan had exhausted its administrative remedies, the documents requested in the subpoena are limited to 10 categories, and, with the exception of requests for Callahan's Articles of Incorporation and for documents showing the names of Callahan's directors, officers, and shareholders, the requests only seek information dating back to August 1, 2016. (See Rider to Subpoena ¶¶ 1-10, ECF No. 1-2 at 39). These are hardly burdensome or overbroad requests, especially in light of the deferential standard applicable to an agency's investigative subpoena.

Moreover, having reviewed the subpoena *duces tecum* and the information requested therein, the Court finds that the information sought is relevant to the Board's investigation into the relationship between RHCG and Callahan and is necessary to determine whether Callahan is an alter ego of RHCG. As the NLRB points out in its reply letter dated April 19, 2018, the documents produced by Callahan to date are limited in nature and relate largely to the ownership of Callahan; they are not sufficient to determine the question of alter ego (NLRB Reply Letter at 1, Apr. 19, 2018, ECF No. 9), and counsel's representations that the two are not alter egos are simply not sufficient.<sup>8</sup> Furthermore, Callahan's argument that it has made a "good faith effort" to comply and has furnished what it deems to be sufficient information is unavailing. The Board's broad subpoena power under the NLRA is not limited to information the recipient of a subpoena deems sufficient; the statute requires actual production and it is not satisfied merely by attempts to produce. See 29 U.S.C. § 159(1)-(2).

Accordingly, the Court respectfully recommends that the NLRB's application for an Order enforcing the subpoena *duces tecum* be granted.

### **C. Request for Attorney's Fees**

In its application to enforce the subpoena, the NLRB also requests reimbursement of its attorney's fees, contending that such an award is appropriate in this case because the Respondent had no legitimate objection to obeying the subpoena. (NLRB Mem. at 7). Although not

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<sup>8</sup> The Board also objects to the characterization of the subpoena as "a fishing expedition." (NLRB Reply Letter at 2). The Board asserts that it only issued this subpoena after receiving evidence in the form of paystubs indicating that an employee received checks bearing the Callahan name during a period when he was working on an RHCG truck, which suggests that there may be an alter ego or other agency relationship between RHCG and Callahan. (Id.)

addressed by the Board's briefing, the Court concludes that there is a basis in law for such an award.

The National Labor Relations Act does not provide for recovery of attorney's fees or costs incurred in seeking an order to enforce a subpoena, but instead only provides for fees and costs where a party fails to obey a court's order enforcing such a subpoena. See 29 U.S.C. § 161(1)-(2). However, Rule 81 of the Federal Rules of Civil Procedure—which makes the Federal Rules of Civil Procedure applicable to various types of proceedings, including proceedings to enforce NLRB subpoenas—does provide authority for assessing fees and costs. See Fed. R. Civ. P. 81(a)(5), (a)(6)(E). As several courts have concluded, sanctions under Rules 37 and 45 for failure to comply with discovery requests and subpoenas are made available in NLRB enforcement actions by virtue of Rule 81. See, e.g., NLRB v. Cable Car Advertisers, Inc., 319 F. Supp. 2d 991, 999-1000 (N.D. Cal. 2004); see also NLRB v. Graveley Bros. Roofing Corp., No. 98-3054, 1999 WL 1075117, at \*1 (3d Cir. Jan. 14, 1999) (assessing fees and costs against respondent under Fed. R. Civ. P. 37 after granting NLRB's motion to enforce a subpoena) (order of Magistrate Judge appointed as special master); NLRB v. Coughlin, No. 04 MC 8, 2005 WL 850964, at \*5 (S.D. Ill. Mar. 4, 2005) (awarding the NLRB attorney's fees and costs under Rule 37 after granting motion to enforce the Board's investigative subpoena); NLRB v. A.G.F. Sports Ltd., No. 93 MC 049, 1994 WL 507779, at \*1-2 (E.D.N.Y. June 22, 1994) (awarding attorney's fees and costs to the NLRB in connection with its efforts to secure production of voter eligibility lists).

The Board argues that fees are particularly appropriate in this case where Callahan was given four opportunities and multiple extensions of time to provide the documents in response to the subpoena and its failure to do so caused the Board to spend time and effort, "at taxpayers'

expense,” in attempting to secure compliance with the subpoena. (NLRB Mem. at 7). The Court agrees and therefore directs the NLRB to submit its request for fees and costs, supported by appropriate documentation.

### CONCLUSION

For the reasons set forth above, it is respectfully recommended that the National Labor Relations Board’s Application for an Order requiring respondent DN Callahan, Inc. to comply with the Board’s investigative subpoena *duces tecum* numbered B-1-YXA5JZ be granted. It is further recommended that the NLRB be awarded its fees and costs after submitting an appropriately-supported application to the Court.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2); see also Fed. R. Civ. P. 6(a), (e) (providing the method for computing time). Failure to file objections within the specified time waives the right to appeal the District Court’s order. See, e.g., Caidor v. Onondaga Cty., 517 F.3d 601, 604 (2d Cir. 2008) (explaining that “failure to object timely to a . . . report [and recommendation] operates as a waiver of any further judicial review of the magistrate [judge’s] decision”).

The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

**SO ORDERED.**

Dated: Brooklyn, New York  
August 7, 2018

/s/ Cheryl L. Pollak  
Cheryl L. Pollak  
United States Magistrate Judge  
Eastern District of New York