

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

H&M TRANSPORTATION, INC.

and

**Case 22-CA-089596
22-CA-095095**

HARRY NEILAN

ORDER¹

Norfolk Southern Railway Company’s Petition to Revoke subpoena duces tecum B-1-13023VL 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. Further, the Petitioner has failed to establish any other legal basis for revoking the subpoena.² 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).

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² Norfolk Southern’s claim that the Board lacks jurisdiction over it under Section 2(2) of the National Labor Relations Act (the Act) because it is an employer governed by the Railway Labor Act does not provide a basis for revoking the subpoena. Section 11 of the Act provides, in relevant part, that “[t]he Board . . . shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.” Here, the subpoena seeks information necessary to determine whether H&M is in contempt of the Court’s Order in *H&M Int’l Transp. Inc.*, Case No. 16-1317 (D.C. Cir. March 20, 2018), enforcing the Board’s decision in 363 NLRB No. 139 (2016), by failing to reinstate four employees who were unlawfully terminated, or whether H&M is acting in concert with Norfolk Southern to violate that Order. Thus, Norfolk Southern is a “person being investigated or proceeded against,” and therefore subject the Board’s subpoena power.

With respect to Norfolk Southern’s assertion that the subpoena seeks documents that are not in its possession, we note that the subpoena cannot compel Norfolk Southern to produce documents that it does not possess. However, the subpoena does compel Norfolk Southern to conduct a thorough search for all of the requested information. If the

Dated, Washington, D.C., April 1, 2019.

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| JOHN F. RING, | CHAIRMAN |
| LAUREN McFERRAN, | MEMBER |
| MARVIN E. KAPLAN, | MEMBER |

information is found, it must be produced. If the information cannot be found, Norfolk Southern must affirmatively represent to the Region that no responsive documents exist.