

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

OXARC, INC.

and

Cases 19-CA-230472

TEAMSTERS LOCAL 839

and

19-CA-237336

19-CA-237499

19-CA-238503

TEAMSTERS LOCAL 690

and

19-CA-248391

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

and

19-CA-232728

JARED FOSTER, an Individual

**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO REVOKE
SUBPOENA DUCES TECUM**

On December 9, 2019, the Regional Director for Region 19 of the Board issued the Third Consolidated Complaint in the above-captioned cases. The complaint alleges, inter alia, that Oxarc, Inc. (“Respondent”), discharged employee Jared Foster on June 14, 2018, which Respondent admits in its answer to the complaint, because Foster engaged in union and/or protected concerted activity, which Respondent denies. Thereafter, on July 15, 2020, Respondent served Subpoena Duces Tecum B-1-19NVZAR on Foster (“Subpoena”). On July 21, 2020, the General Counsel filed a Petition to revoke said subpoena (“Petition”), and on July 24, 2020, Respondent filed its response in opposition to the Petition. The Subpoena seeks the production of the following items by Foster:

1. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline or corrective action you received by Respondent during your employment with Respondent.

2. Any and all Documents and/or Communications that reflect, relate to, or refer to the termination of your employment with Respondent.
3. Any and all Documents and/or Communications that reflect, relate to, or refer to any discipline you received while employed by Respondent, including verbal warnings, written warnings or any discussions of performance or work rule violations.
4. Any and all Documents and/or Communications that reflect, relate to, or refer to any and all employment and/or offers of employment secured by you from June 14, 2018 to present.
5. Your tax returns, both state and federal, for the tax and/or calendar years 2018 through the present.
6. Any and all Documents that reflect, relate to, or refer to income you have received from June 14, 2018 to the present, including, but not limited to, any sums received from unemployment compensation, disability benefits, social security, workers' compensation, or other source(s).
7. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent.
8. Any and all Documents that relate to any Communications, oral or written, taken or received by you, of a potential witness or person with knowledge of facts pertinent to this Complaint.
9. Any and all Documents and/or Communications that reflect, relate to, or refer to the Respondent's alleged violation(s) of the National Labor Relations Act with respect to you.
10. Any and all Communications between you and the Union concerning the allegations contained in the Complaint.
11. Any and all e-mails or text messages that reflect, relate to, or refer to your claims at issue in this Complaint.
12. Any and all Documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

The Board is authorized under Section 11(1) of the National Labor Relations Act to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

...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, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Subpoenaed information must be produced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

In this regard, I note that the Board and the courts have interpreted the concept of relevance, for subpoena purposes, quite broadly. Thus, subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board Rules, Section 102.31(b); *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd.* in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998) (the information needs to be only “reasonably relevant”).

Although the General Counsel’s and other parties’ authority to subpoena information is expansive, it is not unlimited, and a valid nexus must exist between the issues raised by the pleadings and the items sought by the subpoena. Additionally, I must give proper consideration to issues of privacy and confidentiality, particularly if the potential relevance of subpoenaed items is only marginal. Moreover, even if the sought-after evidence may arguably be relevant, I must also take into consideration, pursuant to the Federal Rules of Evidence (FRE) Section 403, whether the evidence’s probative value may be outweighed by the danger that such evidence may cause unfair prejudice, undue delay, confuse the issues, or be cumulative in nature and ultimately burden the record and thus delay the hearing. Keeping these principles in mind, I will address the various subpoenas and motions to revoke these.

Subpoena Items 1-3

In its Motion, the General Counsel argues that most, if not all, of the documents sought by Respondent from Foster in items 1-3 are already in Respondent’s possession, inasmuch it was Respondent who initiated and issued the disciplinary actions described in the subpoena. To the extent that these are the documents sought by the subpoena, the General Counsel has a valid argument; Respondent, as the promulgator of the disciplinary actions, should already be in possession of such documents and is the best source for them. Accordingly, to the extent these documents are sought, the General Counsel’s Motion is granted. Nonetheless, Respondent argues that Foster may be in possession of other documents that address or relates to such disciplinary actions, providing an example of a diary about these events that Foster may have kept. I agree with Respondent that any such documents would be relevant and subject to production, inasmuch they may reveal information that might be probative regarding the accuracy of information Foster may have provided to the General Counsel or the Charging Party unions. Such documents, however, to the extent that they reflect on the events discussed by Foster in any affidavit(s) provided to the Board during the course of the investigation, or in any communications with the union(s), need not be produced until Foster has testified in direct examination, and prior to his cross-examination. Accordingly, the General Counsel’s Motion is denied with regard to other documents not generated by Respondent, provided they are produced at the time described above.

Subpoena Items 4-6

The General Counsel objects to the production of the documents sought in these subpoena items because they relate to backpay issues and mitigation of damages issues, arguing that those issues would only be relevant during a compliance proceeding such a backpay specification. I agree with the General Counsel. While it is true, as argued by Respondent, that if I find merit to the allegation in the complaint that Foster was unlawfully discharged, I would order his re-instatement and a make-whole remedy, the specifics of that remedy are not at issue in this proceeding. These items are thus not relevant to the instant proceeding, since only the lawfulness of Foster's discharge is at issue at this stage. Indeed, I were to find that this allegation lacks merit, the information sought by Respondent would not only be moot, but its disclosure might arguably have infringed on Foster's privacy and confidentiality rights in such circumstances. Accordingly, I grant the Motion to revoke these items of the subpoena.

Subpoena Items 7 and 10

In its Motion, the General Counsel argues that items 7 and 10 in Respondent's subpoena should be revoked because they seek information provided by Foster in his Board affidavit, because it because seeks protected communications between Foster and the union, and or protected communications between Foster and other employees—the latter information which the General Counsel argues is an unlawful request in violation of Section 8(a)(1), citing *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enf'd.* 200 F.3d 1162 (8th Cir. 2000); and *Chino Valley Med. Ctr.*, 362 NLRB 283, 283 n. 1 (2015), *enf'd. sub nom. United Nurses Ass'n of Cal. v. NLRB*, 871 F.3d 767 (9th Cir. 2017), as well as others. With regard to the argument that it is seeking a copy of Foster's Board affidavit through its subpoena, Respondent avers that it is not, pointing to item 12 of its subpoena instructions. Accordingly, I see no need to address this issue. With regard to the argument that communications between union and employees they represent—or seek to represent—are protected from disclosure through subpoena, there is strong support for this argument. See, *National Telephone Directory, Corp.*, 319 NLRB 420, 421-422 (1995); *Chino Valley*, *supra*. Certainly, to the extent that Foster may have provided a statement or other written materials to the union which address the same issues or conduct alleged in the complaint and which he addressed in his Board affidavit, it would be improper to direct Foster to disclose such information prior to his testimony on direct examination, lest Respondent obtain through the proverbial “back door” information it cannot obtain through the front door. Just as with his Board affidavit, this information or documents should be disclosed to Respondent after the conclusion of Foster's direct examination, not before. Accordingly, to that extent, I partly grant the General Counsel's motion to revoke. It is true, as Respondent points out, that other aspects of Foster's communications with the union are not protected from pre-direct testimony disclosure, such as mere date and time of calls and communications. See, e.g., *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F3d. 576 (D.C. Cir. 2015). To that extent, I deny the General Counsel's motion, and direct that such information be provided. If there is any uncertainty as to whether the communications or documents at issue may fall into one of the above categories,

those documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

The above principles also hold true for communications between Foster and other employees, for example, to the extent the subpoena requests such records.¹ The potential to expose employees' protected activity, and possibly expose them to coercion or intimidation, in my view outweighs Respondent's right to such information, at least prior to testimony regarding the identity of such employees or the nature of their activity. Should Foster reveal the identity of such employees and/or the nature of their activities during the course of his direct examination, however, due process dictates that Respondent would then be entitled to receive any documents or communications exchanged between them and Foster that address the activities testified about, for purposes of cross-examination. Accordingly, I partly grant the General Counsel's motion in that regard. Finally, I note that the subpoena also potentially requests documents and communications regarding the issues alleged in the complaint between Foster and third parties not including the union or other employees. To the extent it does, such communications are not protected and should be disclosed pursuant to subpoena. Accordingly, the General Counsel's motion is denied in that regard.

Subpoena Items 8, 9, 11 and 12

The General Counsel objects to the above items on the basis that they appear to seek work product information, or information which is not subject to pre-trial discovery pursuant to Board rules. The language in the above-enumerated items, I find, is vague and ambiguous enough that it could be interpreted in the manner the General Counsel asserts. To the extent it is, I grant the General Counsel's motion, inasmuch communications between Foster and the General Counsel and the Union are protected not only for work-product reasons, but also for the reasons discussed above regarding other subpoena items. The principles as discussed above with regards to items 7 and 10 holds true for communications between Foster and other employees. While it is true that Foster is no longer an employee and thus not subject to potential intimidation or retaliation, as argued by Respondent, other current employees with whom Foster may have communicated regarding the allegations of the complaint would be subject to such potential retaliation or intimidation. Accordingly, as discussed above with regards to item 7 and 10, such communications need not be revealed unless and until Foster testifies about them during direct examination. Accordingly, the General Counsel's motion is granted in that respect. As discussed above, however, such protection does not extend to communications between Foster and third parties other than the Board, the union, or fellow employees. Any communications with such third parties must be disclosed, and the General Counsel's motion is denied in that regard. As with the other items discussed above, any uncertainty as to whether the communications or documents at issue may fall into one of the above categories, those

¹ In that regard, I need not address the General Counsel's contention that such subpoena request violates Section 8(a)(1) of the Act. Such allegation is not currently alleged in the complaint, so the issue is not before me.

documents should be presented to me, so that I may conduct an in-camera inspection, to determine whether any of the information in question is protected.

Accordingly, and for the above reasons, General Counsel's Motion to Revoke Subpoena is granted in part and denied in part.

So Ordered.

Dated at San Francisco, California, this 28th day of July 2020.



Ariel L. Sotolongo
Administrative Law Judge.

Served by email upon the following:

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From: Lee, Vanise J. <Vanise.Lee@nrlb.gov>
Sent: Tuesday, July 28, 2020 2:35 PM
To: McBride, Sarah M <Sarah.McBride@nrlb.gov>; Morrison, Adam D. <Adam.Morrison@nrlb.gov>; Harris, Matthew <mharris@teamster.org>; Beerer, Kelsey <kbeerer@fisherphillips.com>; Bononno, Samantha <sbononno@fisherphillips.com>; Grimaldi, Rick <rgrimaldi@fisherphillips.com>
Cc: Lee, Vanise J. <Vanise.Lee@nrlb.gov>; Gomez, Doreen E. <Doreen.Gomez@nrlb.gov>
Subject: Oxarc, Inc., Cases 19-CA-230472., et al., Administrative Law Judge's Order Re Motion to Revoke Subpoena DT_7-28-20a
Importance: High

Good afternoon Counsel,
Attached please find Judge Sotolongo's Order in the above matter.
Thank you for your attention in this matter.
Vanise J. Lee, Legal Tech.
NLRB Division of Judges San Francisco Branch
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From: Microsoft Outlook
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Sent: Tuesday, July 28, 2020 2:36 PM
To: Lee, Vanise J.
Subject: Delivered: Oxarc, Inc., Cases 19-CA-230472., et al., Administrative Law Judge's Order Re Motion to Revoke Subpoena DT_7-28-20a

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McBride, Sarah M (Sarah.McBride@nrlb.gov)
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