

**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
SUBPOENAS DUCES TECUM B-1-19NVXJF AND B-1-19NW2ZT**

On July 15, 2020, Respondent Oxarc, Inc. (Respondent) issued subpoena duces tecum B-1-19NVXJF on Charging Party Teamsters Local 690 (Local 690), and subpoena duces tecum B-1-19NW2ZT on Charging Party Teamsters Local 839 (Local 839), and collectively referred to as “the Locals,” in the above-captioned matter, the hearing which is scheduled to commence on Monday, August 3, 2020. On July 27, Local 690 and Local 839 each filed a motion to revoke their respective subpoenas, and on July 29, 2020 Respondent files its opposition the said motions. The two subpoenas referenced above are very similar, requiring the production of many of the same items and documents, but not identical. The subpoenas seek the production of the following items:

Subpoena B-1-19NVXJF (Local 690)

1. Any and all handwritten, prepared, or typed notes, emails, text messages, faxes, reports, journals, diaries, transcripts, tapes, electronic recordings, including voicemail, etc., used to document, summarize, list, or otherwise capture any events, discussions or statements

made during collective bargaining meetings or discussions from April 1, 2017 through the present, including bargaining notes and proposals with marginal notations.

2. Any and all handwritten, prepared, or typed notes, emails, text messages, faxes, reports, journals, diaries, transcripts, tapes, electronic recordings, including voicemail, etc., used to document, summarize, list, or otherwise capture any phone or oral communications from April 1, 2017 through the present between representatives of the Union and Respondent in any way related to collective bargaining.

3. All proposals, supposals, counterproposals, or other documents given or sent to or received from Respondent or any of its representatives (whether directly or indirectly) during collective bargaining or that relate to collective bargaining from April 1, 2017 to the present.

4. Any and all handwritten, prepared, or typed notes, emails, text messages, reports, journals, diaries, etc. from April 1, 2017 through the present regarding scheduling of bargaining sessions between representatives of the Union and Respondent.

5. Any and all documents, including emails, faxes, etc., related to collective bargaining negotiations received from Respondent from April 1, 2017 to present.

6. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged interrogation by Respondent representatives Jenna Fitzgerald and Jason Kirby on or about June 4, 2018.

7 Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's alleged last, best, and final offer (hereinafter "LBFO") on or about February 28, 2019.

8. Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's implementation of its LBFO on or about March 11, 2019.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged change in Respondent's reimbursement policy related to work boots.

10. Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's alleged prohibition of employees wearing non-Respondent logo hats and "hear wear," including employees wearing Union-logo hats on or about March 6, 2018.

11. Any and all Documents and/or Communications that identify, reflect, relate to, or refer to the following terms and conditions of employment that were allegedly implemented in a form that differed from Respondent's LBFO: no-strike; a fixed term agreement; a grievance and arbitration provision; a provision barring requests for increases in health benefits; a merit wage system; 401(k); and health plans.

12. Any and all Documents and/or Communications that reflect, relate to, or refer to any substantial change in the Union's bargaining position after February 28, 2019.

13. Any and all documents discussing, referring, or related to wages, bonuses, or healthcare benefits, including premiums, provided by Respondent to the Union from April 1, 2017 to present.

14. Any and all Documents and/or Communications that the Union provided to the National Labor Relations Board ("NLRB") related to the allegations in the Complaint, the underlying unfair labor practices charges and the NLRB's investigation of same.

15. Any and all Documents and/or Communications that the Union received from the NLRB related the allegations in the Complaint, the underlying unfair labor practices charges and the NLRB's investigation of same.

16. Any and all documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

Subpoena B-1-19NW2ZT (Local 839)

1. Any and all handwritten, prepared, or typed notes, emails, text messages, faxes, reports, journals, diaries, transcripts, tapes, electronic recordings, including voicemail, etc., used to document, summarize, list, or otherwise capture any events, discussions or statements made during collective bargaining meetings or discussions from April 1, 2017 through the present, including bargaining notes and proposals with marginal notations.

2 Any and all handwritten, prepared, or typed notes, emails, text messages, faxes, reports, journals, diaries, transcripts, tapes, electronic recordings, including voicemail, etc., used to document, summarize, list, or otherwise capture any phone or oral communications from April 1, 2017 through the present between representatives of the Union and Respondent in any way related to collective bargaining.

3. All proposals, supposals, counterproposals, or other documents given or sent to or received from Respondent or any of its representatives (whether directly or indirectly) during collective bargaining or that relate to collective bargaining from April 1, 2017 to the present.

4. Any and all handwritten, prepared, or typed notes, emails, text messages, reports, journals, diaries, etc. from April 1, 2017 through the present regarding scheduling of bargaining sessions between representatives of the Union and Respondent.

5. Any and all documents, including emails, faxes, etc., related to collective bargaining negotiations received from Respondent from April 1, 2017 to present.

6. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged interrogation by Respondent representatives Jenna Fitzgerald and Jason Kirby on or about June 4, 2018.

7. Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's termination of Jared Foster's employment.

8. Any and all Documents and/or Communications that reflect, relate to, or refer to Jared Foster's employment, including any performance documentation.

9. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities engaged in by Jared Foster during his employment with Respondent.

10. Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's alleged last, best, and final offer (hereinafter "LBFO") on or about February 28, 2019.
11. Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's implementation of its LBFO on or about March 11, 2019.
12. Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged change in Respondent's reimbursement policy related to work boots.
13. Any and all Documents and/or Communications that reflect, relate to, or refer to Respondent's alleged prohibition of employees wearing non-Respondent logo hats and "hear wear," including employees wearing Union-logo hats on or about March 6, 2018.
14. Any and all Documents and/or Communications that identify, reflect, relate to, or refer to the following terms and conditions of employment that were allegedly implemented in a form that differed from Respondent's LBFO: no-strike; a fixed term agreement; a grievance and arbitration provision; a provision barring requests for increases in health benefits; a merit wage system; 401(k); and health plans.
15. Any and all Documents and/or Communications that reflect, relate to, or refer to any substantial change in the Union's bargaining position after February 28, 2019.
16. Any and all documents discussing, referring, or related to wages, bonuses, or healthcare benefits, including premiums, provided by Respondent to the Union from April 1, 2017 to present.
17. Any and all Documents and/or Communications that the Union provided to the National Labor Relations Board ("NLRB") related to the allegations in the Complaint, the underlying unfair labor practices charges and the NLRB's investigation of same.
18. Any and all Documents and/or Communications that the Union received from the NLRB related the allegations in the Complaint, the underlying unfair labor practices charges and the NLRB's investigation of same.
19. Any and all documents which support, rebut, or otherwise concern the allegations contained in the Complaint.

Locals 690 and 839 raise the following objections to the above-referenced subpoenaed items:

Items 5 and 13, Subpoena No. B-1-19NVXJF and Items 5, 6, and 16 Subpoena B-1-19NW2ZT

Locals 690 and 839 object to the above items on the grounds that Respondent is seeking materials or documents that Respondent itself generated and provided to the Locals, and are in Respondent's own possession. Respondent, citing *Bakery Workers*, 21-CA-171340, 2016 WL414212 (unpub. Board order issued August 3, 2016), argues that the fact that this information may be available from other sources does not provide a basis to revoke the subpoena. I conclude, however, that *Bakery Workers* presented much different circumstances and is thus inapposite. In that case, the Region was seeking commerce information from the employer to establish Board jurisdiction, and the employer's argument that the Region could obtain the

information from other sources, such as third parties—whom the Region would have to subpoena—was thus unpersuasive and invalid. Here, on the other hand, Respondent is seeing the Locals to produce documents that *Respondent* itself generated and provided the Locals, and which presumably Respondent already has in its possession. This appears to be an effort to have the Locals do some of the legal legwork for Respondent, an effort that is bound to be cumulative, and wasteful, leading to potential delay of the hearing. I therefore grant the Local’s motion to revoke as to these items. Regarding Respondent’s argument that these documents may provide information about what Charging Parties (including alleged discriminatee Foster) may have provide the Board during the course of the investigation or trial preparation, such information is not discoverable at this point. In that regard, I note that any evidence produced during the investigation of the underlying charges or preparation for litigation, and protected from disclosure by the doctrine enunciated by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978) and *Jencks v. U.S.*, 353 U.S. 657, 672 (1957) (later codified by the Jencks Act, 18 USC § 3500). Since at least 1978, when *Robbins Tire* was decided, and probably as far back as 1957, when *Jencks* was decided, it has been well-established that evidence provided to the Board in affidavit or other forms as part of an investigation, or during the course of trial preparation, will not be disclosed or produced prior to the testimony at trial of the witness(es) providing evidence in support of the complaint’s allegations. To the extent that Respondent’s subpoena requests these records, I grant the Locals’ motion to revoke. This evidence, however, should be made available to Respondent, upon request, at the conclusion of testimony on direct examination of the witness who allude to it.

Items 6 through 12 of Subpoena No. B-1-19NVXJF and Items 6, 7, 9 through 15 of Subpoena B-1-19NW2ZT

Locals 690 and 839 object to the above items on the grounds that Respondent is seeking materials or documents that are overly broad and/or fail to state with sufficient particularity the materials sought. In this regard, it asserts that the repeated use of the phrase “any and all documents and/or communications” which appears at the beginning of every item sought is vague and overly broad, potentially leading to a lengthy and burdensome effort that might disclose materials not related to the matter in question. I concur. With regard to ambiguity, I note that similar language is used in many—indeed most-- of the listed paragraphs, which request production of “all” documents “concerning” or “relating to” a topic or alleged conduct. Such language is ambiguous and therefore overbroad. See, e.g., *Perez v. El Tequila LLC*, 2014 WL 5341766, at *1 (N.D. Okla. Oct. 20, 2014); and *Champion Pro Consulting Group, Inc. v. Impact Sports Football, LLC*, 2014 WL 6686727, at *4 (M.D.N.C. Nov. 26, 2014), and cases cited there. The Locals must make a good faith effort to locate and produce only those documents that discuss, describe, or address the alleged conduct or topic. But the Locals are not required to produce “all” documents where the additional documents would be merely duplicative or cumulative. See FRCP 26(b)(2)(C) and 45(d)(3)(A); and *Duncan & Son Lines*, unpub. Board order issued Sept. 5, 2012 (2012 WL 3862635), at n. 2, invalidated on other grounds *Noel Canning v. NLRB*, 134 S.Ct. 2550 (2014).¹ Moreover, to the extent that these items may request evidence provided to the Board in support of the allegations during the course

¹ I this regard, I direct the parties to confer, prior to the start of the hearing, in an attempt to resolve the scope and ambiguity of the items sought, so that hopefully, not precious hearing time will have to be consumed discussing the

of the investigation, disclosure of this evidence is protected from disclosure at this point, as discussed above. Accordingly, I grant the Locals' motion to revoke on the above grounds.

Items 14, 15 and 16 of Subpoena No. B-1-19NVXJF and Items 17, 18 and, 19 of Subpoena B-1-19NW2ZT

The Locals object to the production of the above-referenced items on the grounds of Attorney-Client privilege and/or Work Product doctrine. The Locals fail, however, to point out exactly which item(s) in the subpoena touch upon these privileges. The party asserting the claim of privilege bears the burden of establishing that it is applicable and as part of this burden a privilege log must be provided. See, *CNN America, Inc.*, 352 NLRB 448, 449 (2008). Should the Locals be able to point to any such items and produce a log, I can conduct an *in-camera* inspection to determine whether the privilege is applicable. Absent such affirmative showing on the part of the Locals, however, their bare assertion of privilege must be denied. Nonetheless, the Local also argue that the items sought were part of the investigative materials provided to the Board during the course of the underlying investigation. Based upon my reading of the language of the items in question, it appears that indeed the subpoena seeks information or evidence provided by the Locals to the Board during the course of the investigation. To the extent that they do, I grant the Locals' motion to revoke, for the reasons discussed above. Again, this evidence should be made available to Respondent, upon request, at the conclusion of testimony on direct examination of the witness who allude to it.

Finally, any of the items not discussed in this Order, or subject of the motions to revoke filed by the Locals, should be produced.²

So Ordered.

Dated at San Francisco, California, this 31st day of July 2020.



Ariel L. Sotolongo
Administrative Law Judge.

² As discussed during our conference calls, given the fact that the hearing will be conducted remotely via the Zoom platform, it is requested that any materials or documents to be produced pursuant to subpoena be provided and served electronically at least 24 hours in advance of the hearing. Although, as discussed, under the Board's rules parties need not produce subpoenaed documents until the day of the hearing, I make such request in light of the circumstances, in order to save precious time during what is likely to be a lengthy hearing.

*****Served by email upon the following:³***

For the NLRB Region 19:

Adam D. Morrison, Esq.

Email: adam.morrison@nlrb.gov

Sarah McBride, Esq.,

Email:sarah.mcbride@nlrb.gov

For the Charging Parties:

Matthew Harris, Staff Attorney,

Email: mharris@teamster.org

(IBT)

*****Jack Holland, Esq., Email: jack@rmbllaw.com***

(Reid McCarthy Ballew & Leahy LLP)

(IBT Locals 690/839)

For the Respondent:

Rick Grimaldi, Esq.,

Email: rgrimaldi@fisherphillips.com

Samantha S. Bononno, Esq.,

Email: sbononno@fisherphillips.com

Kelsey E. Beerer, Esq.,

Email: kbeerer@fisherphillips.com

(Fisher Phillips, LLP)

³ The attorney filed a notice of appearance with the Region on July 27, 2020 and the service is amended to add counsel.

EMAIL SERVICE REPORT:

From: Lee, Vanise J. <Vanise.Lee@nrlb.gov>
Sent: Friday, July 31, 2020 3:10 PM
To: jack@rmbllaw.com; Bononno, Samantha <sbononno@fisherphillips.com>; Grimaldi, Rick <rgrimaldi@fisherphillips.com>; Harris, Matthew <mharris@teamster.org>; Beerer, Kelsey <kbeerer@fisherphillips.com>; Morrison, Adam D. <Adam.Morrison@nrlb.gov>; McBride, Sarah M <Sarah.McBride@nrlb.gov>
Cc: Gomez, Doreen E. <Doreen.Gomez@nrlb.gov>; Lee, Vanise J. <Vanise.Lee@nrlb.gov>; Mills, Kathlyn <Kathlyn.Mills@nrlb.gov>
Subject: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.
Importance: High

Counsel,
The attached Order has been corrected to include Attorney Jack Holland of Reid McCarthy Ballew & Leahy, LLP who filed an appearance with the Region on July 27, 2010.
Apologies for the inconvenience.

Vanise J. Lee, Legal Tech.
NLRB Division of Judges San Francisco Branch
Main – 415.356.5255
Direct – 628.221.8826
Fax – 415.356.5254

From: Microsoft Outlook
Sent: Friday, July 31, 2020 3:10 PM
To: Lee, Vanise J.
Subject: Delivered: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

Your message has been delivered to the following recipients:

Harris, Matthew

Subject: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

From: Microsoft Outlook
Sent: Friday, July 31, 2020 3:10 PM
To: Lee, Vanise J.
Subject: Delivered: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

Your message has been delivered to the following recipients:

Morrison, Adam D. (Adam.Morrison@nrlb.gov)
McBride, Sarah M (Sarah.McBride@nrlb.gov)

Subject: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

From: Microsoft Outlook
Sent: Friday, July 31, 2020 3:10 PM
To: Lee, Vanise J.
Subject: Relayed: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Bononno, Samantha (sbononno@fisherphillips.com)
Grimaldi, Rick (rgrimaldi@fisherphillips.com)

Subject: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

From: Microsoft Outlook
Sent: Friday, July 31, 2020 3:10 PM
To: Lee, Vanise J.
Subject: Relayed: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Beerer, Kelsey (kbeerer@fisherphillips.com)

Subject: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

From: Microsoft Outlook
Sent: Friday, July 31, 2020 3:10 PM
To: Lee, Vanise J.
Subject: Relayed: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

jack@rmbllaw.com (jack@rmbllaw.com)

Subject: Oxarc Inc.,19-CA-230472 et al., service amended in Judge's Order Grant/Deny RPTR/SDT to Unions, dd., 7-30-20.