

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

AIRGAS USA, LLC

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS WHOLESALE DELIVERY
DRIVERS, GENERAL TRUCK DRIVERS,
CHAUFFEURS, SALES, INDUSTRIAL AND
ALLIED WORKERS LOCAL 848**

**Cases 31-CA-226568,
31-CA-231728,
31-CA-250429,
31-CA-258850,
31-CA-260893,
31-CA-260895**

and

JUAN BARRAGAN-SOLIS, an Individual

Case 31-CA-234473

and

FERNANDO CARDONA, an Individual

Case 31-CA-234642

**ORDERS GRANTING IN PART AND DENYING IN PART MOTIONS TO REVOKE
SUBPOENAS DUCES TECUM SERVED ON THE UNION AND ON INDIVIDUALS**

On November 30, 2020, the General Counsel filed a Motion to Revoke Subpoena Duces Tecum B-1-1AYBXNT, served by Respondent on Kamaran Francis, an individual.¹ On the same date, the Charging Party Union (Teamsters Local 848) filed a Motion to Revoke Subpoena Duces Tecum B-1-1AYBNHF served by Respondent on the Union, as well as Subpoena Duces Tecum B-1-1AYC3Y7 (served on Carlos Tarango), Subpoena Duces tecum B-1-1AYE20Z (served on Mark Rapoza), as well as a Subpoena Duces Tecum, number unknown, served on Cameron Desborough.² I will discuss the subpoenas issued to the named individuals and the subpoena issued to the Union separately.

A. The Subpoenas issued to the Individuals

As briefly described above, Respondent issued subpoena duces tecum to various individuals, including Francis, Tarango, Rapoza, and Desborough, who were employees or

¹ Francis is a former employee of Respondent Airgas, alleged in the Complaint to have been unlawfully laid off by Respondent.

² Tarango and Rapoza are alleged in the complaint as discriminatees. It is unclear what Desborough's connection to this proceeding is, although he is presumably an employee, or former employee, of Respondent. I would note, in light of the nature of the General Counsel's objections to the subpoena served on Kamaran Francis, that the General Counsel presumably also objects to the subpoenas served on the other individuals named above, but did not do so because it was not aware of these subpoenas.

former employees of Respondent. It is possible, and perhaps likely, that Respondent similarly served subpoenas on other individuals, not currently known to the General Counsel or the Union, and therefore not specifically referred to in their motions to revoke. The known subpoenas served on the above-named employees request very similar, almost identical items or documents from the recipients. For example, the subpoena served on Rapoza (No. B-1-1AYEZ20Z) directs that the following 7 items be produced:

1. All documents in your possession that support your claim that Airgas unlawfully disciplined (suspended) you on about October 15, 2019.
2. All documents in your possession that support your claim that Airgas unlawfully terminated you on or about October 17, 2019.
3. All documents in your possession that otherwise relate to your claim that Airgas unlawfully disciplined you and/or terminated you on or about October 15, 2019 and/or October 17, 2019.
4. Any statements or affidavits that support your claim that Airgas unlawfully disciplined you on October 15, 2019, outside of those provided to the National Labor Relations Board.
5. Any statements or affidavits that support your claim that Airgas unlawfully terminated you on October 17, 2019, outside of those provided to the National Labor Relations Board.
6. Any and all documents in your possession relating to any claim that Airgas engaged in any unlawful activity or discriminated against any employee because of their union activity or support.
7. Copies of any and all messages used in the “What’s App” messaging platform from when the Petition was filed on August 27, 2018 to present related to any claim that Airgas engaged in any unlawful activity or discriminated against any employee because of their union activity or support. This include the Union driver “what’s app” group platform used by Teamster Local 848 and the Airgas drivers.

The subpoenas served on Francis and Desborough contain 5 of the same items described above, while the subpoena served on Tarango has 6 of the same items requested, and all contain the exact same item that references the “What’s App” messaging platform described in item 7, above.

I will first address the motions to revoke subpoena filed by both the General Counsel and the Union with regard to the “What’s App” item request, as reflected above in item 7 of the Rapoza subpoena and identically in the other individual subpoenas, albeit in a differently numbered item. Based on the arguments raised by the General Counsel and the Union, and not disputed by Respondent’s response to their motions, it appears that during the course of the Union’s organizing campaign in 2018 and its aftermath, including the conduct and events alleged in the complaint, employees and the Union communicated with each other via the “What’s App” messaging platform. This platform is apparently the preferred method of communicating between employees and unions in these types of situation because of the privacy offered by this platform, where messages are encrypted, and only invited recipients are privy to their contents. Both the General Counsel and Union object to employees being compelled to provide copies of messages exchanged between employees via this platform, or between employees and the Union, because it would expose the identity of employees engaged in union and/or protected activity,

many of whom are not named in the complaint and may not even testify in this proceeding. Additionally, the General Counsel and the Union object on the basis that employees who engaged in communications via this platform had a reasonable expectation of privacy, given the nature of the platform and the activities they were engaged in.

I agree with the General Counsel and the Union, and therefore GRANT the motion to revoke with respect to this item. In this regard, I note that the Board has long and zealously protected the identity of employees engaged in protected activity, and has indeed found efforts by employers to engage in surveillance of such activities, or even attempting to subpoena records that would expose the identity of those engaged in such activities, to be unlawful.³ See, e.g., *National Telephone Directory, Corp.*, 319 NLRB 420, 421 (1995), citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Chino Valley Medical Center*, 362 NLRB 283, 283 fn. 1 (2015); *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977). Simply put, the danger of exposing the identity of employees engaged in protected activity in these circumstances outweighs the limited relevance these records may provide Respondent for cross-examination purposes—which is presumably the reason Respondent seeks this information. Additionally, I find that the catchall phrases used in the request, namely *any and all messages...related to any claim...* that Airgas engaged in *unlawful activity or discriminated against* any employee, is impermissibly vague and overbroad, imposing an unreasonable burden on individuals who presumably lack legal training to make subjective judgments as to which messages sent over a lengthy span of time fit the definition of items sought.

Accordingly, and for the above-discussed reasons, the motion to revoke this particular item, in all of the subpoenas that similarly request it, is GRANTED.

Turning to the other enumerated items sought by Respondent in the various subpoenas issued to individuals, which the Union has moved for me to revoke. In this regard, I note that Respondent argues that the Union lacks standing to challenge the subpoenas issued to “third party” individuals. I note, however, that the Union is the certified collective bargaining representative of the employees in the bargaining units at issue in this matter, pursuant Section 9(a) of the Act. As such, the Union is entitled to speak on behalf of employees or former employees whose termination is at issue in this case, and even waive their statutory rights in some circumstances. The Union thus owes a fiduciary obligation to employees in the bargaining units at issue. It would make no sense to hold that the Union, in these circumstances, has no standing to challenge subpoenas served on individuals whom it represents, and who are expected to be witnesses in a proceeding based on charges brought by the Union. Accordingly, I reject this argument, and find that the Union has proper standing to challenge the subpoenas in question.

With regard to the other items sought by Respondent from the individuals in question, as reflected in items 1 through 6 of the Rapoza subpoena, which as discussed above, is almost identical to the items requested in the subpoenas issued to the other individuals, the subpoena suffers from the same deficiencies as discussed above. Thus, I find that the catchall phrases used in these requests, namely *any and all messages...related to any (or your) claim...* that Airgas engaged in certain *unlawful or discriminatory* conduct, is impermissibly vague and overbroad, imposing an unreasonable burden on individuals who presumably lack legal training to make

³ Both the General Counsel and the Union have noted that unfair labor practice charges have been filed (by the Union) alleging that Respondent’s subpoenaing of these employee records is itself a violation of the Act. This issue is not before me, however, and I therefore make no findings or reach any conclusions in that regard.

subjective judgments as to which documents fit the definition of items sought—with the attendant risk of evidentiary sanctions if the production of these items is later determined to have been too narrow or constricted. Moreover, production of these items assumes that these individuals will be called as witnesses, and amounts to an attempt to make an end-run around the *Jenks* rule to require production of documents or items before such individuals testify—and even if they don't.⁴ Requiring production of these items or documents likewise exposes the risk of exposing the identity employees who have engaged in protected activity, employees whom are otherwise not participating in or connected to this proceeding. Finally, I would note that many, if not most, of the items or documents sought from these individuals, such as documents that would support a claim of unlawful disciplinary action such as suspension or termination, are documents that presumably originated from, or were issued by, Respondent. If so, Respondent is presumably already in possession of these items or documents, and requiring their production is both unnecessary and time-wasting.

Accordingly, and for the above-discussed reasons, the motion to revoke these particular items, and in all of the subpoenas to other individuals that similarly request such items, is GRANTED.

B. Respondent's Subpoena on the Union (No. B-1-1AYBNHF)

Respondent's subpoena requests that the following items be produced by the Union:

1. All documents, including bargaining notes, from Tom Tullis, Pablo Camacho and/or any other Union official or agent representing Local 848 during negotiations with Airgas at the Burbank and/or Ventura facilities from August 2018 to the present.
2. All documents in the Union's possession that it believes support the allegations in Paragraph 9 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Sulma Garcia.
3. All documents in the Union's possession that it believes support the allegations in Paragraph 10 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Ron Rydzewski.
4. All documents in the Union's possession that it believes support the allegation in Paragraph 11 of the Third Consolidated Complaint regarding alleged statements by Shant Zakarian, J.R. Brees, and/or Ron Rydzewski.
5. All documents in the Union's possession that it believes support the allegation in Paragraph 12 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by J.R. Brees.
6. All documents in the Union's possession that it believes support the allegation in Paragraph 13 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Gerardo Ruiz.

⁴ I would note, however, that many of the same items or documents requested from these individuals have also been subpoenaed from the Union, which as an institution does not lack the resources or legal support that these individuals do. As discussed below, I will direct production of these documents or items by the Union on a limited basis. For example, if the individuals in question have provided the Union with a statement or affidavit separate from and in addition to the statements or affidavits provided to the Board by these individuals, I will direct the Union to provide these statements or affidavits to Respondent—but *only* after such individuals have testified during direct examination as witnesses for the General Counsel or the Union, not before.

7. All documents in the Union's possession that it believes support the allegation in Paragraph 14 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by John Wayland.
8. All documents in the Union's possession that it believes support the allegation in Paragraph 15 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Juan Padilla.
9. All documents in the Union's possession that it believes support the allegation in Paragraph 16 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by John Wayland.
10. All documents in the Union's possession that it believes support the allegation in Paragraph 13 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Gerardo Ruiz.
11. All documents in the Union's possession that it believes support the allegation in Paragraph 17 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Les Weber.
12. All documents in the Union's possession that it believes support the allegation in Paragraph 18 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Les Weber, Gerardo Ruiz, and J.R. Brees.
13. All documents in the Union's possession that it believes support the allegation in Paragraph 19 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Airgas.
14. All documents in the Union's possession that it believes support the allegation in Paragraph 20 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Airgas.
15. All documents in the Union's possession that it believes support the allegation in Paragraph 21 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Airgas.
16. All documents in the Union's possession that it believes support the allegation in Paragraph 12 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Gerardo Ruiz.
17. All documents in the Union's possession that it believes support the allegation in Paragraph 23 of the Third Consolidated Complaint regarding alleged statements and/or conduct by Airgas.
18. All documents in the Union's possession that it believes support the allegation in Paragraph 24 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
19. All documents in the Union's possession that it believes support the allegation in Paragraph 25 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
20. All documents in the Union's possession that it believes support the allegation in Paragraph 26 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
21. All documents in the Union's possession that it believes support the allegation in Paragraph 27 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
22. All documents in the Union's possession that it believes support the allegation in Paragraph 29 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.

23. All documents in the Union's possession that it believes support the allegation in Paragraph 30 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
24. All documents in the Union's possession that it believes support the allegation in Paragraph 31 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas and/or Gonzalo Guzman.
25. All documents in the Union's possession that it believes support the allegation in Paragraph 32 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Michael Madrigal.
26. All documents in the Union's possession that it believes support the allegation in Paragraph 33 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas, Michael Madrigal, and/or Michelle Hernandez.
27. All documents in the Union's possession that it believes support the allegation in Paragraph 34 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
28. All documents in the Union's possession that it believes support the allegation in Paragraph 35 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
29. All documents in the Union's possession that it believes support the allegation in Paragraph 36 of the Third Consolidated Complaint - including all subparagraphs thereto - regarding alleged statements and/or conduct by Airgas.
30. All documents created by the Union or any current or former Airgas employee as a recollection or memorialization concerning, mentioning, or in any way relating to any statements allegedly made to Airgas's employees that are the subject of the Complaint.
31. All communications to or from any current and/or former Airgas employee regarding the alleged unfair labor practices described in the Complaint.
32. Any recordings from any meetings or conversations where Airgas is alleged to have violated the National Labor Relations Act (29 U.S.C. § 151-169)
33. Any and all documents in your possession relating to any claim that Airgas engaged in any unlawful activity or discriminated against any employee because of their union activity or support.

Item 1: With regard to item 1 of Respondent's subpoena to the Union, which requests production of *all documents, including bargaining notes*, from Union officials who represented the Union during negotiations with Respondent from August 2018 to the present, I note that this request is impermissibly overbroad in its scope, vague, and not tethered to the allegations of the complaint. In this last regard I note that the complaint does not allege bad faith bargaining during the course of collective bargaining negotiations, but rather the unilateral implementation of wages, hours or working conditions without notifying the Union. I am therefore unable to see the relevance of the demand for bargaining notes in this context, let alone the expansive demand for *all documents* for such an extensive time period.⁵ Accordingly, the motion to revoke as to this item is GRANTED.

⁵ In this regard, I find it difficult to believe, for example, that the Employer would only inform the Union about its intention to change wages, hours or working conditions verbally during negotiations, as opposed to in writing, if

Items 2-29: Items 2 through 29 of the subpoena request are almost identical to each other, demanding production of *all documents* in the Union's possession *which it believes support the allegations* of the various paragraphs of the complaint, with each enumerated item referencing a separate specific paragraph of the complaint. These requested items suffer from the same deficiencies that were earlier discussed as to the items subpoenaed from the various individuals. Thus, in each item, the catchall phrase used, requesting *all documents in the Union's possession that it believes support the allegations* of the enumerated complaint paragraph, is impermissibly vague and unduly burdensome, effectively requiring the Union to search all of its files and make subjective legal judgments about which are relevant to any of the numerous allegations, with the attendant risk of evidentiary sanctions if the production of these items is later determined to have been too narrow or constricted. See, e.g. *Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1310 (11th Cir. 2011); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649–650 (10th Cir. 2008); *U.S. ex rel. Fago v. M & T Mortgage Corp.*, 238 F.R.D. 3, 13 (D.D.C. 2006); *Champion Pro Consulting Group, Inc. v. Impact Sports Football, LLC*, 2014 WL 6686727, at *4 (M.D.N.C. Nov. 26, 2014); and *Perez v. El Tequila LLC*, 2014 WL 5341766, at *1 (N.D. Okla. Oct. 20, 2014), and cases cited there. See also *Sack v. CIA*, 53 F.Supp.3d 154, 164 (D.D.C. 2014), and cases cited there regarding similar Freedom of Information Act requests.

Accordingly, the motion to revoke regarding items 2 through 29 of Respondent's subpoena to the Union is GRANTED. To the extent, however, that any statements, documents, or affidavits were provided to the Union by its agents or by employees of Respondent, which are different and separate from those provided to the Board, the Union will be required to turn over such items to Respondent, but only after those individuals have testified under direct examination as witnesses for the General Counsel or the Union.

Item 30: This request is impermissibly overbroad and vague, potentially exposes employees who engaged in protected activity and who communicated with their collective bargaining representative, and, as with items 2-29, obligates the Union to make impermissible subjective calls as to which items fall under this overbroad category. Accordingly, the motion to revoke regarding item 30 of Respondent's subpoena to the Union is GRANTED. To the extent, however, that any such statements or memorializations were provided to the Union by Airgas employees (or former employees), which are different and separate from those provided to the Board, the Union will be required to turn over such items to Respondent, but only after those individuals have testified under direct examination as witnesses for the General Counsel or the Union.

Item 31: This request is impermissibly overbroad and vague, and potentially exposes employees who engaged in protected activity and who communicated with their collective bargaining representative, and who may not be a party to this proceeding or be a witness therein. Accordingly, the motion to revoke regarding item 31 of Respondent's subpoena to the Union is GRANTED. To the extent, however, that any such "communications" were provided to the Union by Airgas employees (or former employees), which are different and separate from those provided to the Board, the Union will be required to turn over such items to Respondent, but only after those individuals have testified under direct examination as witnesses for the General Counsel or the Union.

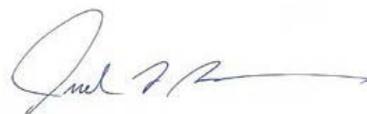
nothing else to cover their own *derrieres*. I therefore cannot see how this requested information would be relevant to any possible defense that the Employer did notify the Union of its intentions.

Item 32: This request is impermissibly overbroad and vague, and potentially exposes employees who engaged in protected activity and who communicated with their collective bargaining representative, and who may not be a party to this proceeding or be a witness therein. Moreover, there are no temporal limitations to this request, further making it overbroad and overly burdensome, and potentially unrelated to the issues raised in the complaint—and therefore not relevant. Accordingly, the motion to revoke regarding item 32 of Respondent’s subpoena to the Union is GRANTED.

Item 33: This request is impermissibly overbroad and vague, and potentially exposes employees who engaged in protected activity and who communicated with their collective bargaining representative, and who may not be a party to this proceeding or be a witness therein. Moreover, there are no temporal limitations to this request, further making it overbroad and overly burdensome, and potentially unrelated to the issues raised in the complaint—and therefore not relevant. Moreover, as with items 2-29, it obligates the Union to make impermissible subjective calls as to which items fall under this overbroad category. Accordingly, the motion to revoke regarding item 33 of Respondent’s subpoena to the Union is GRANTED.

So Ordered.

Dated at San Francisco, California, this 7th day of December 2020.



Ariel L. Sotolongo
Administrative Law Judge.

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Subject: Airgas LLC, 31-CA-226568 et al., Judge's Order Re_SDT Served on Union and Individuals 12-07-20.

Importance: High

Good afternoon,

Attached is an Order from Administrative Law Judge Ariel L. Sotolongo.

Thank you.

Vanise J. Lee, Legal Tech.

NLRB Division of Judges San Francisco Branch

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