

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

NATIONAL LABOR RELATIONS BOARD, :

Applicant, :

v. :

ALARIS HEALTH AT ROCHELLE PARK, :

Respondent. :

Civil. No. 19-cv-19849

**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION  
OF THE NATIONAL LABOR RELATIONS BOARD FOR AN ORDER  
ENFORCING ADMINISTRATIVE SUBPOENA DUCES TECUM**

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## BACKGROUND

The National Labor Relations Board (Board), an administrative agency of the Federal Government, having made an application for an order requiring compliance with an administrative subpoena *duces tecum* served on Respondent Alaris Health at Rochelle Park (Alaris Rochelle), submits this memorandum in support of that application.

The relevant facts concerning Respondent's failure to produce documents in response to the administrative subpoena issued by the Board are set forth in paragraphs 1 through 24 of the Board's Application and are incorporated herein. As detailed in the Application (at ¶ 5), the Board issued the subpoena in pursuit of securing compliance with a judgment rendered by the United States Court of Appeals for the Third Circuit. That judgment, which enforces a Decision and Order of the Board, requires Alaris Rochelle to remedy its violations of the National Labor Relations Act (the Act), as amended, 29 U.S.C. §§ 151-169, by, among other things, rescinding the change in terms and conditions of employment regarding holiday pay for its bargaining unit employees and making its employees whole for any loss of earnings as a result of the unilateral change.

In accordance with its responsibility for investigating whether Alaris Rochelle has complied with the judgment, the Board's Contempt, Compliance, and Special Litigation Branch (CCSLB) attempted to obtain voluntary production of documents from Respondent which would shed light on its compliance with the judgment, or lack thereof. Receiving no response from Respondent or its counsel, CCSLB served Alaris Rochelle with administrative subpoena B-1-16SCLHB for those documents Respondent failed to produce voluntarily. Still, Alaris Rochelle failed to fully respond to the subpoena, even after CCSLB gave it numerous extensions of time and sent follow-up emails to Respondent's counsel notifying that absent compliance, subpoena enforcement proceedings would be initiated.

## **ARGUMENT**

### **A. THIS COURT HAS SUBJECT-MATTER JURISDICTION TO GRANT THE BOARD'S APPLICATION FOR SUBPOENA ENFORCEMENT.**

Section 11(1) of the Act, 29 U.S.C. § 161(1), grants statutory authority to the Board for the exercise of subpoena power. That section states, in part:

The Board, or its duly authorized agents or agencies, 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. *The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application.*

*Id.* (emphasis added); *see NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1008 (9th Cir. 1996); *Perdue Farms, Inc., Cookin' Good Div. v NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998); *NLRB v. Carolina Food Processors*, 81 F.3d 507, 511 (4th Cir. 1996).

The United States district courts receive their power to order enforcement of Board administrative subpoenas by virtue of Section 11(2) of the Act (29 U.S.C. § 161(2)). That section states, in part:

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 resides 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 . . . .

*Id.*; *see N. Bay Plumbing*, 102 F.3d at 1008; *NLRB v. U.S. Postal Serv.*, 790 F. Supp. 31, 33 (D.D.C. 1992).

Alaris Rochelle operates a nursing home and rehabilitation center in Rochelle Park, New Jersey, which is within this judicial district. (App. at ¶ 2.) Accordingly, this Court has jurisdiction under Section 11(2) of the Act to order Respondent's compliance with the Board's subpoena, which was properly served on Respondent.<sup>1</sup>

**B. THE BOARD'S APPLICATION PROCEDURE FOR SUBPOENA ENFORCEMENT IS APPROPRIATE.**

Under the Act, subpoena-enforcement proceedings, authorized by Section 11(2), are summary in nature. *See N. Bay Plumbing*, 102 F.3d at 1007; *NLRB v. Frazier*, 966 F.2d 812, 817 (3d Cir. 1992). Section 11(2) specifically authorizes the Board to make an "application" to the district courts for a summary disposition on the sole issue of whether or not to enforce the Board's subpoena.

It is well established that in a Section 11(2) enforcement case, the district court should treat the Board's application as a dispositive

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<sup>1</sup> Section 102.4 of the Board's Rules and Regulations, 29 C.F.R. § 102.4, provides "[s]ubpoenas must be served upon the recipient personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law." Service was effected when the Board sent a copy of the subpoena to Alaris Rochelle by certified mail; United States Postal Service tracking shows that the subpoena was received on October 12, 2019.

matter, and not as a pre-trial discovery matter. *Frazier*, 966 F.2d at 817-18, *see also EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 1996).<sup>2</sup> For, as the Third Circuit has recognized, “otherwise, the enforcement proceedings may become a means for thwarting the expeditious discharge of the agency's responsibilities.” *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1970). “[T]he question of whether or not to enforce the subpoena is the only matter before the court. The court’s decision seals with finality the district court proceeding and is subject to appellate review.” *Frazier*, 966 F.2d at 818.<sup>3</sup>

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<sup>2</sup> The Equal Employment Opportunity Commission’s statutorily-defined procedure for issuing and enforcing subpoenas, 42 U.S.C. § 2009e-9, incorporates by reference the Board’s statutorily-defined procedure at 29 U.S.C. § 161. Accordingly, decisions interpreting one statute’s subpoena provisions have precedential impact upon the other’s. *See EEOC v. Children’s Hosp. Med. Ctr.*, 719 F.2d 1426, 1430 (9th Cir. 1983) (en banc).

<sup>3</sup> Because a subpoena-enforcement proceeding is an expedited application for a final court order, the position of the NLRB is that referral of such matters to a magistrate judge is not appropriate. *See* 28 U.S.C. § 636(c) (requiring consent of parties to permit magistrate judge to enter final judgment in a civil case); *cf. EEOC v. Schwan’s Home Service*, 707 F. Supp. 2d 980, 984-86 (D. Minn. 2010) (enforcement of subpoena referred to magistrate, then had to be reviewed de novo, resulting in 16-month delay in enforcement).

The Act relieves the Board of any obligation to issue process to commence a subpoena-enforcement proceeding. Section 11(2) specifically provides that a subpoena-enforcement proceeding is commenced by an application, not by a complaint. As explained long ago by the Sixth Circuit in *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450 (6th Cir. 1941), a case challenging the Board’s failure to serve a summons and complaint in a subpoena-enforcement proceeding,

the proceedings plainly are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the district court is controlled by Section 11(2) of the Act . . .

. . .

It is significant that the statute calls for an “application” rather than a petition, for an “order” rather than for a judgment, and that it details no other procedural steps. Obviously, if the enforcement of valid subpoenas, the issuance of which is a mere incident in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to great delay. We think that such was not the intention of Congress, and that this clearly was indicated by the use of the simple and unambiguous words with which it described this proceeding.

*Id.* at 451; *see* Fed. R. Civ. P. 81(a)(5) (providing that the Federal Rules of Civil Procedure apply to subpoena-enforcement proceedings “except as otherwise provided by statute, by local rule, or by court order in the proceedings”).

Thus, the Board's application procedure for seeking enforcement of the subpoena issued to Respondent is appropriate.

**C. RESPONDENT IS ESTOPPED FROM CHALLENGING THE VALIDITY OF THE SUBPOENA.**

Alaris Rochelle failed to petition the Board to revoke the subpoena as provided by Section 11(1) of the Act and as explained on the face of the subpoena. Having failed to exhaust available administrative remedies with respect to the subpoena, Respondent is precluded from challenging the subpoena before this Court. *See NLRB ex rel. United Food & Commercial Workers Int'l Union v. Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d 1155, 1162-63 (9th Cir. 2015); *Maurice v. NLRB*, 691 F.2d 182, 183 (4th Cir. 1982); *Am. Motors Corp. v. FTC*, 601 F.2d 1329, 1332-1337 (6th Cir. 1979); *NLRB v. Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975).

**D. THE SUBPOENA TO RESPONDENT SATISFIES APPLICABLE REQUIREMENTS.**

Even if Alaris Rochelle's failure to petition to revoke the subpoena had not forfeited its right to judicial review, no meritorious defense would be available. Subpoenas issued by the Board are subject to limited judicial review. "A district court should enforce an agency subpoena if the subpoena is for a proper purpose, the information sought is relevant to that purpose, and statutory procedures are

observed.” *Frazier*, 966 F.2d at 815 (citing *United States v. Powell*, 379 U.S. 48, 57–58 (1964); see also *Interstate Dress Carriers*, 610 F.2d at 111 (citing *NLRB v. Kingston Trap Rock Co.*, 222 F.2d 299, 301-02 (3d Cir. 1955)). The subpoena easily satisfies these requirements.

1. ***The Board is authorized to issue subpoenas duces tecum to investigate efforts to comply with an enforced Board order.***

Under Section 10 of the Act, 29 U.S.C. § 160, the Board is tasked with the prevention of unfair labor practices by issuing complaints, conducting hearings, issuing orders, and seeking enforcement of its orders in circuit courts of appeals. Congress granted to the Board and its agents broad investigatory authority, including the power to subpoena any evidence “that relates to any matter under investigation or in question.” 29 U.S.C. § 161(1); see also *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991) (describing the Board’s broad Section 11 powers). Moreover, the Board’s subpoena power extends to all aspects of the Board’s processes, including the investigation of compliance with the Board’s enforced orders. *Id.*; accord *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15 (1st Cir. 1993).

In the present case, the Board is investigating Alaris Rochelle’s compliance with an October 19, 2018 judgment of the Third Circuit

enforcing a Board order issued on May 10, 2018. In furtherance of this investigation, after Respondent ignored CCSLB's attempts to obtain voluntary compliance with its request for evidence, the Board issued a subpoena to Alaris Rochelle, seeking information to help CCSLB assess Respondent's overall compliance with the Third Circuit's judgment, and to liquidate the monetary amounts due pursuant to that judgment. Section 11 of the Act provides the Board with this investigatory authority.

***2. The information sought is relevant to the investigation into Respondent's efforts to comply with the Third Circuit's judgment.***

Under the broad relevancy standard of the Act's Section 11, the Board has "access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Union Pac. R.R.*, 867 F.3d 843, 852 (7th Cir. 2017) (internal quotation marks omitted) (quoting *EEOC v. Shell Oil*, 466 U.S. 54, 68-69 (1984)). This principle applies with equal force to the investigation of compliance with the Board's orders. *Interstate Material*, 930 F.2d at 6. Courts will defer to an agency's appraisal of relevancy, which "must be accepted so long as it is not obviously wrong." *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995)

(internal quotation mark omitted) (quoting *Resolution Tr. Co. v. Walde*, 18 F.3d 943, 946 (D.C. Cir. 1993)).

The information sought pursuant to the subpoena is unquestionably relevant to the Board's investigation. The requests are carefully tailored to determining whether and when Alaris Rochelle rescinded its unlawful change to its holiday pay policy, how much money Alaris Rochelle owes to its unit employees due to the unlawful change, and which employees may have been affected.

***3. The scope of the subpoenas is appropriate and not too indefinite or excessive.***

The requirement that the subpoena not be too indefinite demands that the evidence sought be “described with sufficient particularity.”

*NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982).

However, as noted above, Alaris Rochelle has waived any objection to the scope or burdensomeness of the subpoena by failing to petition to revoke it.

In any event, the Board's subpoena to Alaris Rochelle seeks clearly identifiable information regarding its obligations arising from the Third Circuit's judgment, the extent of Respondent's compliance with those obligations, and the amount owed to its unit employees.

Furthermore, the subpoena seeks documents covering a reasonably defined period, from October 19, 2018 to the return date of the subpoena, which encompasses the post-judgment period of time during which Respondent's conduct may be contumacious.

In short, the Board's compliance investigation is legitimate, the information sought by the subpoena is described with particularity, and the information is relevant to assessing Alaris Rochelle's efforts to comply with the Third Circuit's judgment enforcing an order of the Board. Accordingly, Respondent should be ordered to fully obey the subpoena issued to it by providing the Board with the requested documents and answers to follow-up questions.

**E. THE BOARD IS ENTITLED TO COSTS AND ATTORNEYS' FEES.**

Finally, because Respondent has so utterly ignored the Board and its obligation to abide by a government investigative subpoena for no legitimate reason, the Board should be awarded the costs and attorneys' fees incurred in preparing the instant application.

First, as regards costs, Federal Rule of Civil Procedure 54(d) makes an award of costs presumptively appropriate with any civil judgment, unless the court orders otherwise. There is no reason to

depart from this rule here given the complete lack of merit of the Respondent's position.

As for attorneys' fees, there are two bases upon which to award such fees. First, the Federal Rules of Civil Procedure, which apply here except as to the mechanics of initiating this proceeding, provide for the *mandatory* award of attorneys' fees against a party which fails to respond to discovery without substantial justification for doing so. Fed. R. Civ. P. 37(d)(3); *accord* Fed. R. Civ. P. 37(a)(5) (mandatory award of attorneys' fees for failure to answer questions or produce documents and things). As numerous courts have found, these rules authorize like awards in the context of failure to comply with an administrative subpoena. *NLRB v. D.N. Callahan*, No. 18-mc-879, 2018 WL 4190153, at \*6 (E.D.N.Y. Aug. 7, 2018) (citing *NLRB v. Cable Car Advertisers, Inc.*, 319 F. Supp. 2d 991, 999-1000 (N.D. Cal. 2004); *NLRB v. Graveley Bros. Roofing Corp.*, No. 98-3054, 1999 WL 1075117, at \*1 (3d Cir. Jan. 14, 1999) (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); *NLRB v. A.G.F. Sports Ltd.*, No. 93 MC 049, 1994 WL 507779, at \*1-2 (E.D.N.Y. June 22, 1994)).

Second, courts have long held that they possess the inherent authority to issue sanctions against parties for bad-faith behavior in litigation. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (internal citation and quotation omitted) (court may sanction litigants who engage in “bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order”). Particularly where, as here, a respondent is refusing to respond to a demand that it turn over documents that the Third Circuit has *already ordered it to produce* (compare subpoena paragraph 1 with paragraph 2(e) of the Third Circuit’s judgment), there is no good-faith justification for compelling the Board to file the instant application.<sup>4</sup>

## CONCLUSION

For the reasons set forth above, the Board respectfully requests that this Court enter an order enforcing Board Subpoena *Duces Tecum*

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<sup>4</sup> In the alternative, the court should consider whether sanctions against Respondent’s counsel, David Jasinski, are appropriate under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings in this matter. Jasinski’s failure to cause his client to comply with the Board’s September 25, 2019 request for records, the court enforced Board order requiring production upon the Board’s request, and the instant subpoena has compelled the Board to file this application and expand its dispute from the Third Circuit to a new forum—thus literally satisfying the requirements of that statute.

No. B-1-16SCLHB by compelling Alaris Rochelle to produce to the Board the documents required by the subpoena within 14 days of the date of the Court's order. Further, the Board requests that its costs and attorneys' fees be assessed against Rochelle Park, for which it should be granted leave to file an itemized application for costs and attorneys' fees within 14 days of the grant of the instant application, with any opposition to the bill due 14 days after that, and the NLRB's reply (if any) in support of its application due a further 7 days after the filing of the opposition. Proposed orders to show cause and to enforce the subpoena are respectfully submitted with this application.

Respectfully submitted,

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