

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

STEPHENS MEDIA, LLC
dba HAWAII TRIBUNE-HERALD

and

Cases 37-CA-7043 et al.

HAWAII NEWSPAPER GUILD,
LOCAL 39117,
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S REQUEST FOR
SPECIAL PERMISSION FROM THE BOARD TO APPEAL THE OCTOBER 19, 2007,
ORDER OF THE ADMINISTRATIVE LAW JUDGE

Counsel for the General Counsel opposes Respondent's Request for Special Permission from the Board to Appeal the October 19, 2007, Order of the Administrative Law Judge, denying Respondent's Petition to Revoke Subpoena Duces Tecum and requiring Respondent to produce a privilege log. For the following reasons, the Request and Appeal of the Order of the Administrative Law Judge should be denied.

1. PROCEDURAL BACKGROUND

On March 30, 2007,¹ the Regional Director of Region 20, which includes SubRegion 37, issued the Consolidated Complaint and Notice of Hearing in the above-captioned cases. Counsel for the General Counsel served a Subpoena Duces Tecum (No. B-403230) on September 28. Respondent filed a Petition to Revoke the Subpoena Duces

¹ All dates are in calendar year 2007, unless stated otherwise.

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Tecum, arguing, *inter alia*, that the subpoena seeks privileged documents.² Counsel for the General Counsel filed an Opposition to Respondent's Petition to Revoke the Subpoena Duces Tecum, and on October 19, the Administrative Law Judge³ issued an Order denying Respondent's Petition to Revoke the Subpoena Duces Tecum, and requiring Respondent, *inter alia*, to create a privilege log. Respondent seeks special permission to appeal the Judge's Order.

Section 102.26 of the Board's Rules and Regulations provides that "[u]nless expressly authorized by the Rules and Regulations, rulings . . . by the administrative law judge on motions . . . and orders in connection therewith, shall not be appealed directly by the Board except by special permission of the Board." Respondent's stated reasons for seeking special permission to appeal the ALJ's Order, as well as the grounds it relies on, make clear that Respondent's request for special permission to appeal the ALJ's Order should not be granted.

2, ARUGMENT

a. BOARD AND OTHER FEDERAL LAW REQUIRES CREATION OF A PRIVILEGE LOG WHEN A RESPONDENT HAS ASSERTED DOCUMENTS ARE PROTECTED BY ANY APPLICABLE PRIVILEGE

Respondent is correct in its statement of the basic legal premise that privileged documents do not have to be disclosed, but as the ALJ correctly ruled, "a bare assertion of

² Respondent does not provide any specific information concerning what types of documents it claims to be privileged, nor which privilege it is claiming, stating only that the subpoena seeks privileged information.

³ Hereafter, the ALJ or the Judge.

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privilege without more is insufficient." ALJ's Order at 2. What is also clearly established law is "that the party asserting the privilege must establish the essential elements of the privilege." *U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996), *cert. denied*, 519 U.S. 927 (1996) (citing *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987)). As noted, Respondent has not even stated which privilege it is claiming, let alone establish the essential elements of the privilege it is claiming. As the court in *Construction Products Research* explained, "[t]o facilitate its determination of privilege, a court may require 'an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps.'" *Construction Products Research, Inc.*, 73 F.3d at 473 (citing *Bowne of New York City, Inc. v. AmBase, Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993)). The *Construction Products Research* court explained that:

The privilege log should: identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between ... individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony. Even under this approach, however, if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.
Construction Products Research, Inc., 73 F.3d at 473.

Rule 45(d)(2) of the Federal Rules of Civil Procedure also requires that "[w]hen information subject to a subpoena is withheld on a claim that it is privileged. . . the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the

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demanding party to contest the claim.” Fed.R.Civ.P. 45(d)(2). Section 10(b) of the Act provides that any unfair labor practice proceeding:

shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to Section 2072 of title 28, United States Code [section 2072 of title 28].

Respondent argues that General Counsel's citation of an unpublished Board decision, *Tri-Tech Services*, 15-CA-16707 (July 17, 2003), concerning the production of a privilege log suggests that applicable law does not require it to produce a privilege log in Board proceedings. In *Tri-Tech Services*, the Board stated that Tri-Tech Equipment (TTE), the party asserting the privilege (in that case, the attorney-client privilege) bore the burden of demonstrating the essential elements of the attorney-client privilege: “that there was a communication between client and counsel, that the communication was intended to be and was in fact kept confidential, and that the communication was made for the purpose of obtaining or providing legal advice.” *Tri-Tech Services* at 2 (citing *U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996)).

Because TTE did not, as required under Rule 45 (d)(2) and under the portion of the *Construction Products Research* decision concerning the requirements of a production log, provide “an index identifying allegedly-privileged documents, identifying the parties to each of the communications, and providing sufficient detail to permit an informed decision as to whether the document was at least potentially privileged” the Board held that the Board could now arguably deny TTE's petition on those grounds and require

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production of the documents. TTE had in fact, *like Respondent, herein*,⁴ merely stated that the subpoena should be revoked because it “demands privileged documents (communications including with counsel).” *Tri-Tech Services* at fn 2. The Board, however, chose, over the objection of Member Walsh, to give TTE a “second chance,” by allowing it, in lieu of actually producing the documents TTE claimed were within the attorney-client privilege, which the Board could order at that point, to instead provide the General Counsel with an index for these documents, containing for each document:

(1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document, and (4) if applicable, the name and job title of the recipient(s) of the document.”

Tri-Tech Services at 2.

It must be stressed that the log TTE was ordered to produce by the Board in *Tri-Tech Services* was *in lieu* of the actual documents, which the Board stated it could legally require at that moment. Thus, but for the Board's exercise of its discretion, TTE would have been obligated under Rule 45(d)(2) and *Construction Products Research* to produce the documents, without the opportunity to create a privilege log. Respondent cites *Bonilla v. Baker Concrete Constr. Inc.*, 487 F.3d 1340, 1345 fn. 7 (11th Cir. 2007) for the proposition that “unpublished opinions are not controlling authority.” Notwithstanding the Judge's reliance on *Tri-Tech Services*, and Counsel for the General Counsel's citation to the case in the Opposition to Respondent's Petition to Revoke the Subpoena *Duces Tecum*, applicable federal law, as discussed, makes abundantly clear that Respondent failed to establish the essential elements of the privilege(s) it was asserting. *See*

⁴ Italicized for emphasis.

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Construction Products Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996)); Fed.R.Civ.P.
45(d)(2). Thus, it would be in the Board's discretion here not to allow Respondent the
opportunity to produce a privilege log, and instead require that it immediately produce to
Counsel for the General Counsel the demanded documents. Counsel for the General
Counsel is not seeking such a harsh result, however, and is willing to accept at this point,
as the ALJ ordered, a privilege log.⁵

b. ETHICAL CONSIDERATIONS DO NOT MILITATE AGAINST THE
CREATION OF PRIVILEGE LOGS, NOR DO PRIVILEGE LOGS
AMOUNT TO DISCOVERY.

Respondent's argument that ethical considerations, citing Tennessee Rules of
Professional Conduct, militate against the production of a privilege log is completely
unavailing. At this point, Respondent, under the Federal Rules of Civil Procedure, as well
as under *Construction Products Research*, could be ordered to produce the documents it
asserts are privileged. It would seem a difficult argument to make that Respondent's
counsel's decision to furnish a privilege log instead of the actual documents Respondent
asserts are privileged, would run afoul of ethical rules. Moreover, Respondent's counsel
surely has ethical duties to ensure that Respondent complies with federal law.

Respondent's argument that the requirement to produce a privilege log amounts to
pre-trial discover is equally unpersuasive. Section 11 of the National Labor Relations Act
provides the "Board, or its duly authorized agents or agencies" with broad access pursuant
to subpoena, "[f]or the purpose of all hearings," to evidence "that relates to any matter

⁵ A copy of the unpublished Board Order in *Tri-Tech Services*, 15-CA-16707 (July 17, 2003) is attached.

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under investigation or in question . . ." and grants the right to examine and copy any such evidence. The ability to subpoena documents is vital to the Board's functioning. If Respondent's view were to prevail, the mere assertion that certain subpoenaed documents are covered by a privilege would be unassailable. Respondent's approach amounts to a "just trust me" policy, as to whether a document is, or is not, protected by any applicable privilege. Surely, such a frivolous argument should be rejected by the Board, and Respondent's claim that a requirement to produce a privilege log is tantamount to discovery must be rejected.

3. CONCLUSION

For all of the above reasons, Respondent's Request for Special Permission from the Board to Appeal the October 19, 2007, Order of the Administrative Law Judge should be promptly denied, and its Appeal should be similarly denied.

DATED AT San Francisco, CA, this 26th day of October, 2007.

Respectfully submitted,

Meredith Burns / mLB

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FILE
Exec. Sec. O

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRI-TECH SERVICES, TRI-TECH EQUIPMENT
AND CEBCO, SINGLE EMPLOYER,
JOINT EMPLOYER AND/OR ALTER EGO

and

Case 15-CA-16707 **F**

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CFC

ORDER

The petition filed by Tri-Tech Equipment ("TTE") to revoke subpoena duces tecum (B-354032) is denied. The subpoena seeks information relating to a matter under investigation as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. TTE does not contend that the documents sought are not relevant to the investigation.

TTE contends that the subpoena is unduly burdensome. TTE has not met its burden of proof with regard to this contention. See *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113-114 (5th Cir. 1982). TTE also contends that some of the requested documents contain proprietary information and are privileged from disclosure for this reason. However, the documents at issue do not on their face appear to contain trade secrets or other confidential information that would be of commercial value to TTE's competitors. Furthermore, TTE has not met its burden of showing how disclosure of the documents would cause substantial economic harm and has not identified any

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commercially valuable information with sufficient particularity to allow informed review of its claim. See Fed.R.Civ.P. 45(c)(3)(B)(i); *Diamond State Insurance Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 697-698 (D.Nev. 1994).¹

TTE also argues that the subpoena requests, among other things, documents that would reveal communications with counsel. The subpoena requests, inter alia, communications between TTE and Tri-Tech Services' general counsel and between Tri-Tech Services and TTE's general counsel, regarding either employees or prospective employees of Tri-Tech Services or TTE. TTE contends that these communications are within the attorney-client privilege. However, not all communications involving an attorney are within the attorney-client privilege. *Brink's, Inc.*, 281 NLRB 468, 470 (1986).

TTE, as the party asserting the attorney-client privilege, bears the burden of demonstrating the essential elements of the privilege – that there was a communication between client and counsel, that the communication was intended to be and was in fact kept confidential, and that the communication was made for the purpose of obtaining or providing legal advice. See *U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996), cert. denied 519 U.S. 927 (1996). TTE has not provided an index

¹ With regard to the request for production of business plans and customer lists, Chairman Battista, contrary to his colleagues, would give TTE the option of providing a descriptive index of these documents to the General Counsel in lieu of immediately producing the documents. In his view, there is at least a potential that business plans and customer lists, in the hands of a competitor, could be commercially valuable to that competitor and correspondingly injurious to the Employer herein. Of course, such an index would have to show these matters with sufficient particularity to allow informed review of the claims. In addition, the index would be subject to the substantive and procedural requirements set forth below regarding documents for which TTE claims the attorney-client privilege.

identifying the allegedly-privileged documents, identifying the parties to each of the communications, and providing sufficient detail to permit an informed decision as to whether the document was at least potentially privileged. See *U.S. v. Construction Products Research, Inc.*, supra, 73 F.3d at 473; Fed.R.Civ.P. 45(d)(2). Although TTE was arguably required to provide such an index as a condition of asserting the attorney-client privilege and although the Board could arguably now deny its petition to revoke on that ground, in light of the fact that the subpoena may intrude upon privileged attorney-client communications, we will exercise our discretion and give TTE the option, in lieu of producing the documents it claims are within the attorney-client privilege, of providing to the General Counsel an index of these documents that contains, for each document, (1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document, and (4) if applicable, the name and job title of the recipients(s) of the document. If TTE submits such an index in lieu of producing the documents and if a complaint issues on the underlying unfair labor practice charge, the General Counsel may press her request for production before the administrative law judge

assigned to hear the case who may, if necessary, review the documents in camera in deciding whether the documents are within the privilege.²

Dated, Washington, D.C., July 17, 2003.

ROBERT J. BATTISTA, CHAIRMAN

WILMA B. LIEBMAN, MEMBER

DENNIS P. WALSH, MEMBER

² Contrary to his colleagues, Member Walsh would deny the petition to revoke without giving TTE a second opportunity to provide a descriptive index to the General Counsel in lieu of immediately producing the documents revealing communications involving TTE's or Tri-Tech Services' general counsels. The instructions attached to the General Counsel's Subpoena Duces Tecum state: "To the extent a subpoenaed party does not produce a responsive document because of claim of privilege of any type, please create an index: (a) describing each document for which a privilege is claimed, (b) reflecting the dates(s) of the document, and (c) stating the privileges relied upon." (Instructions, paragraph 9) The Employer, however, did not create such an index. Instead, the Employer merely stated that the subpoena should be revoked because it "demands privileged documents (communications including with counsel)." The Employer, having been informed of the need to create a descriptive index to support a claim of privilege and having ignored this explicit instruction, should not now be given a second chance to support its claim of privileged communications with counsel. Indeed, the federal courts have held that "A party that fails to submit a privilege log is deemed to waive the underlying privilege claim." *Grand Jury Subpoena (Custodian of Records, Newparent, Inc.)*, 274 F.3d 563, 576 (1st Cir. 2001). See also *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996), cert. denied 520 U.S. 1275 (1997)(District Court did not abuse its discretion when it determined that Dorf & Stanton waived any attorney-client privilege it may have been able to claim when it "fail[ed] to provide a complete privilege log demonstrating sufficient grounds for taking the privilege").

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

D.R. PARTNERS, d/b/a HAWAII TRIBUNE HERALD

and

THE HAWAII NEWSPAPER GUILD, LOCAL 39117,
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Case No. 37-CA-7043

DATE OF MAILING October 26, 2007

**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S REQUEST
FOR SPECIAL PERMISSION FROM THE BOARD TO APPEAL LTHE
OCTOBER 19, 2007, ORDER OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by FedEx and hand delivery upon the following person, addressed to them at the following addresses:

VIA FEDEX

VIA HAND DELIVERY

Wayne Cahill, Administrative Officer
Hawaii Newspaper Guild, Local 39117
1347 Kapiolani Blvd., Suite 404
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Honorable Mary Miller Cracraft
901 Market Street, Suite 300
San Francisco, CA 94103

Subscribed and sworn to before me on

October 26, 2007

DESIGNATED AGENT

Susie Louie

NATIONAL LABOR RELATIONS BOARD