UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

BASHAS', Inc., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS

and **Cases 28-CA-21435**
28-CA-21501

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

and **Cases 28-CA-21590**
28-CA-21592
28-CA-21639
28-CA-21640
28-CA-21646
28-CA-21676
28-CA-21739
28-CA-21785
28-CA-21803

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

COUNSEL FOR THE GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL RULINGS OF ADMINISTRATIVE LAW JUDGE AND APPEAL OF RULINGS OF ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.26 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel (CGC) requests special permission to appeal to the Board Administrative Law Judge William Schmidt's (the ALJ) requirement and rulings that CGC furnish the names of witnesses it intends to call at hearing to Respondent's counsel 24 hours before such witnesses are called to testify, under penalty of exclusion of any witness who is not previously disclosed. The Board should grant this special appeal because the ALJ's ruling is not only unsupported by the Board's Rules and Regulations or case law, but contravenes the Board's established policy against pre-hearing discovery and the Board's policies enunciated in Section 102.118(a).

I. BACKGOUND

A. Respondent's Operations

Respondent is a retail grocery store chain which operates approximately 160 stores in and near the State of Arizona. In about 1993, Respondent purchased seven stores from Arizona Supermarkets and became a successor employer for the bargaining units in those stores. Those bargaining units were represented by the United Food and Commercial Workers, Local 99 (Union). Respondent and the Union began negotiating over wages, hours and terms of conditions for represented employees in the seven stores. In 2001, Respondent purchased two stores from ABCO Supermarkets and became a successor employer for the bargaining units in those stores. Respondent and the Union incorporated those two stores into the negotiations that had been ongoing since 1993.

The Union filed charges against Respondent in 2006 and 2007, and a hearing was held on those charges on July 24-26, 2007. The consolidated complaint in those proceedings had alleged, in part, that Respondent had unlawfully withdrawn recognition of the Union, unilaterally changed represented employees' terms and conditions of employment, and unilaterally closed two of its represented stores. On April 30, 2008, the Board issued its decision and order, affirming ALJ Kocol, and finding Respondent had engaged in these alleged violations of Section 8(a)(1) and (5) of the Act. 352 NLRB No. 56.

B. The First Consolidated Complaint

On September 28, 2007, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (First Consolidated Complaint) issued in Case 28-CA-21435, and Case 28-CA-21501. This First Consolidated Complaint alleged that Respondent violated Section 8(a)(1), (3), and (5) of the Act by: denying Union representatives access at two of the

represented stores by ordering them to leave, threatening to call the police, and refusing the Union's requests for limited access; promulgating an overly-broad and discriminatory rule prohibiting union representatives from entering any Respondent store for any purpose; disparaging the Union by blaming it for wage increases and benefits withheld from Unit employees; threatening to further withhold wage increases and other benefits if the Union refused to agree to a Board-conducted representation election; soliciting employees to decertify the Union; undermining the Union by blaming it for the withholding of current and future wage increases and other benefits; withholding wage increases to Unit employees because they joined, supported, or assisted the Union; and failing to bargain over wage increases with the Union.

C. The Second Consolidated Complaint

After the First Complaint issued, additional unfair labor practice charges were filed against Respondent, and a Second Consolidated Complaint issued on December 31, 2007 (Second Consolidated Complaint), alleging numerous additional Section 8(a)(1) and 8(a)(3) violations, including discouraging employees from supporting the Union by disparaging the Union and comparing it to invasive vermin; threatening employees with discharge, loss of pay, transfer to other stores, deportation, and other reprisals because of their union activities; and disciplining, transferring, reducing the hours of, and imposing more onerous terms of employment on employees because of their union activities. Further the Second Consolidated Complaint alleged that Respondent violated Section 8(a)(4) by reducing the hours of an employee because she was named in a charge.

On January 14, 2008, Respondent filed a Motion for a Bill of Particulars contending that the Second Consolidated Complaint's allegations were not sufficiently detailed. In

particular, Respondent sought to discover the identities of the employees who had been subject to its interrogations, threats, surveillance, and other Section 8(a)(1) conduct and the "specific conduct or statements" constituting the unlawful interrogations, surveillance or impression of surveillance, intimidation or harassment, threats, promises, solicitation of grievances, and discriminatory and overbroad rules. On January 28, 2008, Administrative Law Judge John McCarrick, to whom the case was then assigned, denied this motion, finding that:

> each allegation in the Complaint alleging violations of Section 8(a)(1) of the Act conforms with Board Rule and Regulation Section 102.15. Thus, in each allegation the date (where known), place, name of Respondent's agent or representative and a concise statement of what took place is set forth.

On January 17, 2008, Respondent filed a Motion to Sever, seeking to divide the Second Consolidated Complaint into three separate proceedings, based on whether the allegations involved one of Respondent's represented retail stores, one of its unrepresented retail stores, or its unrepresented distribution center. CGC opposed this motion because, among other reasons, the unrepresented retail stores and distribution center are the subject of an ongoing organization drive; thus, the unfair labor practices at the represented stores had a distinct impact on the unrepresented facilities, the impact of which should be analyzed in consolidated proceedings. Based on the CGC's arguments, ALJ McCarrick denied the motion.

D. The Third Consolidated Complaint

The Second Consolidated Complaint was followed by even more unfair labor practice charges which led to the issuance of a Third Consolidated Complaint on March 28, 2008 (Third Consolidated Complaint). The Third Consolidated Complaint added several new independent Section 8(a)(1) allegations, as well as Section 8(a)(3) allegations that Respondent

subcontracted out its baler operation and terminated its baler employees, and threatened union supporters by investigating their immigration status.

In response to the Third Consolidated Complaint, Respondent re-filed its motion to sever and motion for a bill of particulars.[1] During a pre-hearing conference, ALJ Schmidt, who had replaced ALJ McCarrick, granted in part the latter motion, requiring CGC to provide specific facts to support various Section 8(a)(1) allegations in the Third Consolidated Complaint. In this same conference, ALJ Schmidt, over CGC's objection, directed CGC to provide Respondent's counsel with the names of every witness CGC intended to call at the hearing, at least two days in advance. After the hearing began, citing Federal Rules of Evidence, Rule 611(a), and Section 102.35 of the Board's Rules and Regulations, Series 8, as amended, the ALJ has reiterated this requirement, but required only one-day advance notice. At the same time, he indicated that he would not allow CGC to present testimony from any witness not previously disclosed. In an attempt to accommodate any concerns the ALJ and Respondent may have concerning any disruption the hearing may cause to Respondent's business, CGC has been offering advance notice for any current employee or manager of Respondent, so that Respondent may arrange for coverage. These employees and managers are under subpoena. Respondent would most likely already know their identity. The ALJ has rejected this suggested accommodation, ruling that CGC must provide such notice for any witness it intends to call, including Union agents, non-employees, and former employees.

[1] Respondent also filed a motion for partial summary judgment with the Board on issues relating to the represented stores. The Board denied this motion by order dated April 14, 2008.

II. ARGUMENT

A. The Board's Rules and Regulations Do Not Provide Authority for the ALJ to Order CGC to Disclose the Identity of its Witnesses

The Board's Rules and Regulations provide no authority for the ALJ to order CGC to furnish Respondent with the names of witnesses prior to their testifying. This is because, in essence, such a requirement amounts to establishing a system of discovery, which the Board has clearly and unequivocally held is not available in Board proceedings. See, e.g., *Medicine Bow Coal Company,* 217 NLRB 931, 932-33 (1975) (ALJ properly denied respondent's request for, among other things, the "names and addresses of all persons whom the NLRB or General Counsel will or may call to testify at the hearing," where respondent had argued that this disclosure was necessary to adequately prepare for cross-examination and to locate rebuttal witnesses; ALJ, affirmed by the Board, correctly recognized respondent's request for what it was – pre-hearing discovery in violation of the Board's rules); *Lyman Printing and Finishing Company, a Division of M. Lowenstein & Son,* 183 NLRB 1048 (1970); *W. H. Sackett, d/b/a Sackett Transportation,* 169 NLRB 346 (1968); *Kreiger-Ragsdale & Company, Inc.*, 159 NLRB 490 (1966); *W.L. Rives, Co.*, 125 NLRB 772 n. 1, enforcement denied on other grounds, *N.L.R.B. v. W. L. Rives Company*, 288 F.2d 511 (5th Cir. 1961) (rejecting respondent's claim that the trial judge erred in denying its prehearing motion to discovery the names and addresses of all the witnesses whom the General Counsel intended to call to testify); *Sunshine Piping, Inc.*, 351 NLRB No. 89 (2007) (affirming ALJ decision which rejected respondent's complaint that the General Counsel had not disclosed the identities of his witnesses prior to the hearing, and noted that "there was no requirement for … the General Counsel to inform Respondent of the identify of this witness or any other witness prior to the witness testifying in a Board proceeding"); *Interlake, Inc.*, 218 NLRB 1043, 1048-49 (1975)

(affirming ALJ decision which denied respondent's request that the General Counsel produce a list of all witnesses he intended to call at the hearing, noted that the Federal Rules of Civil Procedure's pre-trial discovery rules do not apply to Board proceedings, and rejected respondent's general assertion that it was otherwise deprived of the opportunity to prepare its best defense); *Owen Steel Co. of Florida*, 172 NLRB 1381, 1385 n. 4 (1968) (affirming ALJ decision which rejected respondent's objection that the General Counsel had improperly refused to produce a list of his witnesses for the hearing, and noted that the request constituted pretrial discovery rejected by the Board). See also NLRB Casehandling Manual Part One (Unfair Labor Practice Proceedings) Section 10292.4 (Federal Rules of Civil Procedure which provide for compulsory pretrial discovery are not applicable to Board proceedings, citing *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976); *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)).

This view has been sustained by various courts of appeals, including the Ninth Circuit. See *NLRB v. Globe Wireless, Ltd.,* 193 F.2d 748, 751 (9th Cir. 1951) ("[t]here is no provision in the Act authorizing the use of the discovery procedure"); see also *Texas Industries, Inc. v. NLRB,* 336 F.2d 128, 132-33 (5th Cir. 1964) ("Board's rules do not permit general prehearing discovery of such statements [of witnesses] .... The validity of these rules on their face has been upheld"); *Movie Star, Inc.*, 361 F.2d 346, 352 (5th Cir. 1966) (contention that respondents were denied due process by refusal of pre-hearing discovery "without merit"); *Raser Tanning Co. v. NLRB*, 276 F.2d 80, 83 (6th Cir. 1960) ("Administrative hearings of the Labor Board are governed by the Administrative Procedure Act rather than the Federal Rules of Civil Procedure"); *N.L.R.B.* v. *Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (C.A. 7, 1961) (Sec. 10(b) of the Act "does not require the Board to adopt the entire discovery procedure

contemplated by the Federal Rules of Civil Procedure"). Moreover, the Ninth Circuit has held that a Federal administrative agency, such as the Board, may not establish discovery procedures absent authorizing legislation. *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964).

Applying these time-tested principles, the ALJ should be reversed for the reasons enunciated in the preceding cases, as it is an abuse of any discretion which may exist to require, in essence, a witness list, even if for a one-day period of notice.

B. The ALJ's Order Violates the Principles of Section 102.118(a) of the Board's Rules and Regulations

This is not simply a case in which the ALJ's ruling is unsupported by Board authority. On the contrary, the ALJ's ruling contravenes the Board's Rules and Regulations. Section 102.118(a) prohibits any past or present Board employee, including an ALJ, from disclosing, or causing the disclosure of, any "information, facts, or other matter coming to that person's knowledge in his or her official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the [General Counsel]." The *only* exception to this rule is contained in Section 102.118(b), which allows for the disclosure of any statement by a witness, *but only after* the witness has testified on behalf of the General Counsel or charging party. The penalties for violating Section 102.118(a)'s disclosure provisions are severe, including removal from Federal service.

Quite clearly, the General Counsel's knowledge of the identity of witnesses it intends to call in support of the complaint allegations, i.e., persons involved in the Region's underlying unfair labor practice investigation, is "information, facts, or other matter" derived solely from the "files, documents, reports, memoranda, or records of the Board or of the

General Counsel," namely, the Region's investigative file. This information is confidential and not subject to disclosure unless and until required. See National Labor Relations Board Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 10054.4 ("Since the identity of a witness should be protected, the Board agent should, whenever possible, avoid providing details that would likely disclose the identity of the witness").

C. Even if Disclosure of the Witness' Identities Were Permissible, the ALJ's Ruling Should be Reversed for Policy Reasons

In 1986, on an experimental basis and with the agreement of the Chairman of the Board and the General Counsel, pursuant to published General Counsel Memoranda, the Board permitted some limited pre-hearing exchange of information. More specifically, the Board authorized the release of *Jencks* statements one hour before the opening of the hearing. In doing so, specific parameters for disclosure were established, including directions as to new language to be included in affidavits, whom the disclosures could be made, when such a request for disclosure had to be received, which affidavits were included or excluded from disclosure, the location where the affidavits could be viewed, and who handled any objections to the procedure.

Significantly, neither the Board nor the General Counsel authorized disclosure of these materials on an ad hoc basis, to be determined by each ALJ according the circumstances of a particular proceeding. The decision not to allow ALJs to exercise this discretion on a case-by-case basis was a sound one, as it would have led to confusion as to the process and chaos at trial, insofar as the parties would have no clear indication of the ground rules before the ALJ made them up. That confusion and chaos can be seen in this matter, where at various times the ALJ has indicated that CGC must disclose its witnesses two days before they are called to testify, the day before, or the "night before" (whether this means at the close of the

hearing the day before or anytime in the evening before 12:00 a.m. is unclear). If the ALJ believes he is vested with discretion to order such disclosure, what prevents the ALJ from ordering the disclosure of all of the names of the General Counsel's witnesses at the outset of the hearing or weeks before the trial convenes. Moreover, at various times, it has also been unclear as to whether the ALJ's ruling applies only to CGC or to all parties and how, or to what extent, the parties would be sanctioned if they violated this ruling. Finally, there was another example of the potential confusion. When CGC had to call a witness who it had provided notice to Respondent, but in a different order than previously disclosed due to the witnesses' out-of-state work plans, Respondent objected and requested the ALJ to keep CGC to the order previously given. Although the ALJ allowed CGC to present the witness out of order, the ALJ made it clear that CGC was not to call witnesses out of order during the remainder of the hearing.

For these reasons, if the Board is inclined to adopt a rule that permits ALJ's to require the disclosure of the identities or order of witnesses before hearing, it should do so in a uniform manner, pursuant to its rulemaking authority after appropriate notice and opportunity for public comment. It should not abdicate this authority to ALJs, which will lead to a patchwork of inconsistent rules depending on, among other things, the particular ALJ's view of discovery in Board proceedings. If this ALJ is allowed to require disclosure of witnesses one or two days in advance, another ALJ may, in his discretion, determine that a week or a month is appropriate under the circumstances of the case. This discretion runs the real risk of

creating an end-around to the Board's long-standing policy prohibiting pre-hearing discovery.[2]

D. Even in the Context of Proceedings that Permit Pre-Hearing Disclosure of Witness, Respondents Would Not Be Entitled to a Witness List in this Case

Although the Board's Rules and Regulations do not require CGC to provide a respondent with a witness list before the hearing, it has been held that courts in criminal proceedings have the discretion to order the government to submit a witness list to the defendant. See, e.g., *U.S. v. Napue*, 834 F.2d 1311 (7th Cir. 1987). But a court will not order the government to provide such a list absent a strong showing of need or materiality. See, e.g., *U.S. v. Sclamo,* 578 F.2d 888 (1st Cir. 1978); U.*S. v. Ojeikere*, 299 F. Supp.2d 254 (S.D.N.Y. 2004). It is well-settled that a request for this information is not justified by the simple assertion that it would help the defendant prepare for trial, because the general need to prepare for trial is not a specific showing of necessity and is present in any proceeding. See, e.g., *U.S. v. Reyes*, 911 F. Supp. 64 (N.D.N.Y. 1996).

In this case, Respondent has made no particularized showing of necessity or materiality. Because CGC has agreed to provide notice of when it intends to call witnesses who are also employed by Respondent (whose identities are already known to Respondent by virtue of the trial subpoenas which have been issued to them), Respondent cannot argue that it needs the list for purposes of making sure there are a sufficient number of produce clerks in

[2] That danger is readily apparent in this case. In addition to requiring CGC to disclose the names of its witnesses, the ALJ has granted Respondent's Motion for a Bill of Particulars and required CGC to furnish Respondent with the specific facts these witnesses have provided to the Board in support of certain complaint allegations. Notably, the ALJ previously assigned to this matter denied the same motion, finding that the CGC's complaint fully complied with the Board's notice-pleading rules. As a result, the Respondent here has a clear indication as to specific facts to which Board witnesses intend to testify before they take the stand. That is discovery.

one of its stores or warehousemen in its distribution center. The only reason for seeking the early disclosure of non-employee witnesses is to give Respondent's counsel extra time to prepare for cross-examination and to develop rebuttal evidence. These reasons, however, are present in every case. These reasons have also been rejected by the Board. See *Medicine Bow*, 217 NLRB at 933 (noting that the appropriate course of action is to request a brief continuance after CGC's case in chief, at which time "Respondent would have known the names and addresses of all witnesses called by the General Counsel").

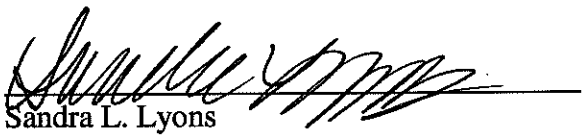
Moreover, even if Respondent had made some showing of necessity, the courts have held that a witness list will still be denied when there is evidence of danger to the witness or obstruction of the judicial process. See, e.g., *U.S. v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975); *U.S. v. Schwimmer*, 649 F. Supp. 544 (E.D. N.Y. 1986). That is the case here. It would be inappropriate to disclose the names of witnesses where there is a complaint allegation that Respondent violated Section 8(a)(4) by reducing the hours of one of its employees because she was named in an unfair labor practice charge.

III. CONCLUSION

Based on the foregoing, CGC requests that the Board reverse the ALJ's ruling requiring CGC to furnish Respondent's counsel with the identities of CGC's witnesses in advance of their testimony under threat of precluding witnesses, called by the General

Counsel, who are not current employees or managers of Respondent, from testifying at the hearing.

Dated at Phoenix, Arizona this 9th day of May 2008.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL RULINGS OF ADMINISTRATIVE LAW JUDGE AND APPEAL OF RULINGS OF ADMINISTRATIVE LAW JUDGE in BASHAS', INC., d/b/a BASHAS', FOOD CITY, and A.J.'S FINE FOODS, Cases 28-CA-21435 et al., was served via E-Gov, E-Filing and by hand delivery on this 9th day of May 2008, on the following:

Via E-Gov E-Filing:
Lester A. Heltzer, Executive Secretary
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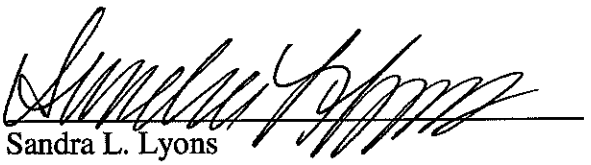

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