

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

MACHINISTS DISTRICT LODGE 160,
LOCAL LODGE 289

and

Case 19-CD-502

SSA MARINE

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION

**ORDER REFERRING RULING ON RESPONDENT SSA
MARINE, INC.'S AND SSA TERMINAL LLC'S PETITION
TO REVOKE SUBPOENA TO THE HEARING OFFICER**

On June 26, 2009, Counsel for SSA Marine, Inc., filed with the Regional Director for Region 19, Respondent SSA Marine, Inc.'s and SSA Terminal LLC's Petition to Revoke Subpoena No. B-581777.

IT IS HEREBY ORDERED that the Petition to Revoke Subpoena be, and it hereby is, referred for ruling to the Hearing Officer.

DATED at Seattle, Washington, this 29th day of June, 2009.



Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SSA MARINE, INC. and SSA TERMINALS LLC

(Petitioner)

Case No. 19-CD-502

and

INTERNATIONAL ASSOCIATION OF MACHINISTS,
DISTRICT LODGE 160, LOCAL LODGE 289

(Union)

**RESPONDENT SSA MARINE, INC'S AND SSA TERMINAL LLC'S
PETITION TO REVOKE SUBPOENA**

ORIGINAL

INTRODUCTION

Pursuant to Section 102.31(b) of the NLRB Rules and Regulations, Petitioner files this Petition to Revoke the Subpoena Duces Tecum served by the NLRB on behalf of the Charged Party to Petitioner SSA Terminals LLC on June 24, 2009, on the grounds that the subpoena requests the production of privileged and confidential attorney-client documents and communications, the production of documents and other communications that are not within the control of any entity related to SSA Terminals, and for the production of documents and other communications that are simply not relevant to any claims or defenses by the Charged Party in this 10(k) Hearing. A copy of the subpoena is attached to this Petition as Exhibit "A."

RELEVANT BACKGROUND

The instant action arises from unfair labor practice charge 19-CD-502. In that charge, SSA Marine, Inc. and SSA Terminals, LLC (collectively "SSA") allege that the International Association of Machinists, District Lodge 160, Local Lodge 289 ("IAM") engaged in improper conduct by attempting to force by proscribed means SSA to reassign work SSA had assigned to employees represented by the International Longshore and Warehouse Union at Terminal 91 in Seattle, Washington, to employees represented by the IAM in violation of Section 8(b)(4)(D) of the Act. As a consequence, a 10(k) Hearing has been scheduled for June 30, 2009, to resolve the dispute underlying the alleged unfair labor practice.

The Board has issued a subpoena duces tecum to SSA that seeks to have SSA produce privileged and confidential attorney-client communications and documents prepared in and for the purpose of collective bargaining. Moreover, the request asks for documents not in SSA's control and unrelated to the current action.

ARGUMENT

A. The Subpoena Duces Tecum Requests Privileged Attorney-Client Communications

Item 1 of the Board's subpoena requests that SSA produce "copies of all forms of indemnity and/or hold harmless agreements between any of the following parties" (SSA (or any of its affiliated companies/divisions), Harbor Industrial, the Pacific Maritime Association (PMA), ILWU, Local 19, the IAM (or any of its component district or local organizations), and Bridge Warehouse), that is related to work that is, has been, or may be claimed by the ILWU, Local 19 and the IAM." "The requested documents are confined to those applicable to work in the Seattle area and which have been in effect at any time since December 31, 2003." To the extent the request concerns any indemnity/hold harmless agreements that may exist between SSA (its affiliated companies/divisions) and the PMA and/or the ILWU such documents would have been prepared in anticipation of litigation that might ensue and are clearly subject to the attorney-client privilege.

Item 2 of the Board's subpoena requests "[c]opies of all notes (including all forms of recording of communications) made at any time after January 1, 2006, made or kept by any representative of management of any of the organizations named in item 1, above, wherein there was discussion relevant to the apportionment of maintenance and/or repair work of power equipment in the Seattle area, between ILWU Local 19 and the IAM (or its local or district components)." It is SSA's contention, that all notes and other forms of communications relevant to the apportionment of maintenance and/or repair work of power equipment in the Seattle area between ILWU, Local 19 and the IAM constitute privileged communications under the attorney client privilege.

The NLRB has recognized that the attorney-client privilege extends to strategizing and negotiating collective bargaining agreements. *See Patrick Cudahy*, 288

NLRB 193 (1988). In *Cudahy* the union requested subpoenas directing the respondents to produce at the trial some company records, including certain documents, e.g., bargaining notes, proposals, letters, memoranda, and strategies, relating to Cudahy's 1986-1987 contract negotiations for a successor agreement with the union. The Board noted that “. . . , when the legal advice relates to collective bargaining, we will not readily and broadly exclude attorney-client communications from the privilege on the grounds that business and economic considerations were also present.” The NLRB went on to find that the attorney-client privilege encompasses the advice the law firm rendered the employer in the course of helping it prepare for and conduct negotiations with the union and in advising the employer of the legal effects of a strike on the operation of the facility.

Berbiglia Inc. 233 NLRB 1476 (1977), provides additional support for SSA's contention that the documents and communications requested in Item 2 of the subpoena is privileged. In *Berbiglia* the NLRB revoked a subpoena requesting union records of employee meetings during a strike that occurred in the midst of labor negotiations. The NLRB in revoking the subpoena stated that if collective bargaining is to work, the parties must be able to formulate their positions and derive their strategies without fear of exposure.

Here, any notes or communications regarding the apportionment of maintenance and repair work between the IAM and the ILWU would clearly have been made in preparation for and during collective bargaining sessions. SSA is party to a collective bargaining agreement with the IAM and is a member of a multiemployer bargaining unit that has a contract with the ILWU. Thus any notes or other form of recorded communication relating to the apportionment of the work would for purposes of negotiations or possibly in anticipation of litigation. .

Accordingly, the indemnification/hold harmless agreements to which SSA or its affiliated companies/divisions and the notes and other forms of communications relating

to the apportionment of maintenance and repair work between the IAM and the ILWU that have been requested in the Subpoena Duces Tecum are not subject to discovery and the NLRB is not entitled to such information.

B. The Subpoena Duces Tecum is Over Broad, Requests Irrelevant Information, and Information Not Within the Control of SSA

To the extent the request in Item 1 concerns any indemnity/hold harmless agreements to which SSA and its affiliated companies/divisions are not a party, such request is overbroad and not relevant to any claim or defense the IAM may have against SSA. Simply put, any such agreements would not relate to SSA's role in assigning the disputed work or serve to disqualify this dispute from 10(k) relief. Moreover, these indemnity/hold harmless agreements are not and would not be within SSA's control and consequently SSA cannot compel the production of such documents.

Accordingly, any indemnification/hold harmless agreement to which SSA was not a party is not discoverable through SSA and consequently the NLRB is not entitled to such information.

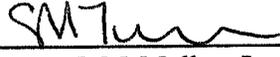
Finally, Items 3 through 9 in the Board's subpoena requests information which SSA does not possess and to the extent such documents exist these documents would be in the possession of the PMA, the ILWU, Harbor Industrial, or the IAM and consequently it is to these parties the burden of production should belong. Consequently, Items 3 through 9 are not discoverable by the Board through SSA.

CONCLUSION

Pursuant to the foregoing, SSA respectfully requests that the NLRB's Subpoena Duces Tecum be revoked with respect to items 1 and 2.

Dated: June 26, 2009

GORDON & REES LLP

By: 

James J. McMullen, Jr.

Sarah Turner

Attorneys for SSA Marine, Inc.

EXHIBIT A

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Ed DeNike, SSA Terminals, LLC

1131 SE Klickitat Way, Seattle, WA 98134

As requested by Terry C. Jensen, Attorney for IAM District Lodge 160

whose address is 2101 4th Ave., Suite 200 Seattle WA 98121
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE _____
a Hearing Officer _____ of the National Labor Relations Board

at James C. Sand Hearing Room, 29th Floor, Jackson Federal Bldg., 915 Second Avenue
in the City of Seattle, WA.

on the 30th day of June 20 09 at 10:00 (a.m.) (p.m.) or any adjourned
or rescheduled date to testify in MACHINISTS DISTRICT LODGE 160, LOCAL LODGE 289

(SSA MARINE) Case 19-CD-502
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHED

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

B - 581777

Issued at Seattle, WA

this 23 day of June

20 09



Leslie A. Neltzer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

1. Copies of all forms of indemnity and/or hold harmless agreements between any of the following parties in relation to work that is, has been, or may be claimed by both ILWU Local 19 and the IAM (or any of its component district or local organizations):

1. The PMA
2. ILWU Local 19
3. The IAM (or any of its component district or local organizations)
4. SSA (or any of its affiliated companies/divisions)
5. Harbor Industrial
6. Bridge Warehouse

The requested documents are confined to those applicable to work in the Seattle area, and which have been in effect at any time after December 31, 2003.

2. Copies of all notes (including all forms of recording of communications) made at any time after January 1, 2006, made or kept by any representative of management of any of the organizations named in item 1, above, wherein there was discussion relevant to the apportionment of maintenance and/or repair work of power equipment in the Seattle area, between ILWU Local 19 and the IAM (or its local or district components).

This request does not seek to obtain documents or other forms of evidence legitimately protected from disclosure by attorney-client privilege.

3. Copies of all disciplinary actions and/or other forms of complaints and/or concerns about the work of power maintenance and repair personnel working in the Seattle area, at any time since January 1, 2000, under either an IAM Collective Bargaining Agreement or under an ILWU Local 19 Collective Bargaining Agreement.

4. Copies of all records for calendar years 2006, 2007, 2008 and for 2009, wherein PMA employers have requested power mechanics represented by ILWU Local 19 for work in the Seattle area.

5. Copies of all records (including copies of notes of all forms, including voice recordings, relating to any such communications) for calendar years 2006, 2007, 2008 and for 2009, where the PMA has in any way discussed with ILWU Local 19 or with any PMA member, the availability of power mechanics represented by ILWU Local 19 for work in the Seattle area.

6. The names, addresses and phone numbers of all employees working at Terminal 91 at any time since January 1, 2007, who were performing maintenance and repair of power equipment there, related to the cruise ship industry. In each case provide the nature of the work done, with whom it was done, and the hours of work involved.

7. Copies of records showing all certifications and training of each of the persons listed in the item immediately above, and showing the date, nature, and providers of such training.

8. Copies of all disciplinary actions and/or other forms of complaints and/or concerns about the work of power maintenance and repair personnel working in the Seattle area, at any time since January 1, 2000, under either an IAM Collective Bargaining Agreement or under an ILWU Collective Bargaining Agreement.

9. Copies of records showing all instances since January 1, 1998 when ILWU Local 19-represented mechanics have performed power M/R work on cruise ship related power equipment in the Seattle area.