UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMPERSAND PUBLISHING, LLP d/b/a *SANTA BARBARA NEWS-PRESS*, Employer,	)	
and	)	Case: 31-CA-29253
GRAPHIC COMMUNICATIONS CONFERENCE, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Union	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. JURISDICTIONAL STATEMENT

COMES NOW, Ampersand Publishing, LLC d/b/a *Santa Barbara News-Press* ("the *News-Press*"), the Respondent, pursuant to Section102.46 of the National Labor Relations Board's ("the Board" or "NLRB") Rules and Regulations, Series 8, as amended, with this Brief in Support of Exceptions to the February 5, 2010 Decision and Recommended Order of Administrative Law Judge ("ALJ") Lana Parke in NLRB Case No. 31-CA-29253.

II. STATEMENT OF THE FACTS

A. BACKGROUND

Ampersand Publishing, LLC d/b/a *Santa Barbara News-Press* ("*News-Press*") prints and publishes a daily newspaper in the Santa Barbara, California area. The *News-Press* currently has a collective bargaining relationship with Graphic Communications Conference of the International Brotherhood of Teamsters ("GCC/IBT"). In the context of litigation separate from the instant proceeding, on May 8, 2009, the *News-Press* prepared and served subpoenas[1] on former and current employees, as well as non-employees in NLRB Case No. 31-CA-28589 et al. (G.C. Exs. 2-11[2]). GCC/IBT, as well as the General Counsel[3], petitioned to revoke the subpoenas duces tecum; ALJ Anderson granted the request and quashed the subpoenas.

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[1] Each of the subpoenas at issue was a subpoena duces tecum.

[2] References to the transcript will be denoted by "Tr." with the corresponding transcript page; references to General Counsel exhibits will be denoted by "G.C. Ex." with the corresponding exhibit number; references to Respondent exhibits will be denoted "RESP. Ex." with the corresponding exhibit number.

[3] As used in this brief, the term "General Counsel" equally applies to references to Counsel for the General Counsel.

This case emanated from the substance of the subpoenas, particularly one specific request. The General Counsel took the position that the subpoenas chilled employees' Section 7 rights because the subpoenas sought copies of affidavits provided by the NLRB to the subpoenaed individual, that the subpoenaed individual personally possessed.

B. THE SUBPOENAS

On May 8, 2009, Counsel to GCC/IBT agreed to accept service for the following subpoenas issued to the following individuals:

1. Subpoena No. B-566867; former *News-Press* employee Melinda Burns (G.C. Ex. 2)

2. Subpoena No. B566870; former *News-Press* employee Dawn Hobbs (G.C. Ex. 3)

3. Subpoena No. B-566871; *News-Press* employee Karna Hughes (G.C. Ex. 4)

4. Subpoena No. B-566872; *News-Press* employee Marilyn McMahon (G.C. Ex. 5)

5. Subpoena No. B-566874; former *News-Press* employee Dennis Moran (G.C. Ex. 7)

6. Subpoena No. B-566875; former *News-Press* employee Tom Schultz (G.C. Ex. 8)

7. Subpoena No. B-566876; *News-Press* employee Nora Wallace (G.C. Ex. 9)

8. Subpoena No. B-566877; former *News-Press* employee Lynn Ward (G.C. Ex. 10)

The *News-Press* served Subpoena No. B-566880 on former employee Blake Dorfman on or about May 6, 2009. (G.C. Ex. 11). The *News-Press* served Subpoena No. B-566873 on former employee Richard Mineards on or about May 7, 2009 (G.C. Ex. 6).

Each of the subpoena duces tecums contained the following request:

> Any and all documents provided to and/or received from Region 31of the National Labor Relations Board pertaining to the charges in NLRB Cases Nos. 31-CA-28589; 31-CA-28661; 31-CA-28667; 31-CA-28700; 31-CA-28733; 31-CA-28734; 31-CA-28738; 31-CA-28799; 31-CA-28889; 31-CA-28890; 31-CA-28944; 31-CA-29032; 31-CA-29076; 31-CA-29099; and 31-CA-29124, that you personally posses, including, but not limited to: letters, affidavits, notes, and/or e-mails.

(G.C. Ex. 2-11). The requests only sought documents ***personally possessed*** by the subpoenaed individual. It was undisputed that the *News-Press* neither subpoenaed nor requested copies of affidavits contained in the Region/General Counsel's investigatory file.

C. CONFERRING WITH GCC/IBT

1. MAY 7, 2009

On the same day that GCC/IBT's counsel accepted service of the subpoenas issued to Burns, Hobbs, Hughes, McMahon, Moran, Schultz, Wallace, and Ward, GCC/IBT's counsel sent a letter for counsel to the *News-Press*, stating, in relevant part:

> Now that I've got your attention, is it possible we can have a serious discussion about your subpoenas, including someone who is authorized to make agreements about what must and need not be turned over, and how we should proceed with respect to issues of privilege?

(G.C. Ex. 1(f)[Internal Ex. 1 at 3]).

That same day, *News-Press*'s counsel explained to GCC/IBT's counsel, via letter:

> Given the draconian subject line of your email, I can only assume that you refer to documents requested in the subpoenas yesterday that you contend may violate attorney-client privilege and, more specifically, to any alleged *Jencks* confidentiality as described in the GC's Petition to Revoke and Request for Expedited Hearing.
>
> First, and more broadly, we are not seeking communications directed by you, or sent to where you were the primary recipient of the communication, that seeks legal advice. We acknowledge that such communications are privileged, as ours would be. However, as I was told about an incident from the first trial, there were emails where you were

> simply "cc'd" unrelated to legal advice, that you should have disclosed after a third-party witness produced such communications when you did not. It is those communications, unprotected by any privilege, which should be disclosed in response to the subpoenas issued.
>
> Second, Mr. Wyllie's argument regarding what ALJ Kocol may (or may not) have said is irrelevant and lacks authority since no one knows what ALJ Kocol actually said without a transcript of the proceeding referred to in the GC's Petition to Revoke.
>
> Finally, and more specifically, we disagree with the GC's position on *H. B. Zachary Co*., 310 NLRB 1037 (1993), insofar as he extends confidentiality to include documents and materials in possession of a third-party witness, not necessarily contained in the Region's investigatory file. To be clear, we are not seeking unblemished *Jencks* affidavits that the witness may still have in their possession, copies of which are contained in the Region's investigatory file. However, non-privileged documents which must be produced would include: any drafts of the witness affidavit; a copy of the affidavit that contains notes, thoughts or impressions of the affiant which was not given to the Region as part of the *Jencks* affidavit; and any and all documents the affiant has reviewed in preparation for being called as a witness at trial. (*See* Fed. R. Evid 612(2).)
>
> We are entitled to have those documents produced and will ask ALJ Anderson for a ruling ordering their production. Should ALJ Anderson find that the materials as outlined above are *Jencks* material and therefore privileged, we will ask that he order the subpoenaed parties to lodge with the Court any such documents. When the witness testifies, this material along with other *Jencks* materials will be preserved and produced at the appropriate time in order to protect our clients' rights.
>
> Please let me know if the above guidelines will assist you in determining what documents must be produced in response to the subpoenas, validly issued and in good-faith.
>
> In fairness to the GC, and in light of its Petition to Revoke, I have copied Steven Wyllie, attorney for the General Counsel, on this email.

((G.C. Ex. 1(f)[Internal Ex. 1 at 2]).

Later that day, GCC/IBT's counsel further responded regarding the *News-Press*'s issuance of the subject subpoenas, writing, in relevant part:

> … Second, it is unfathomable that the very same counsel for the *News-Press* who represented the employer in the last proceeding could venture into this territory again, having been reproached by Judge Kocol both prior to the hearing and then in his decision issued in December 2007 (attached). The Union will be filing an unfair labor practice charge challenging this recidivist practice by your client and will contemplate further sanctions.
>
> Third, it is far from clear what authority you have, if any, to demand "drafts of affidavits," or "thoughts or impressions of the affiant which was not given to the Region …" This kind of demand is consistent with your client's interference with NLRB investigative process, rather than something to which your client is entitled at the point of cross-examination of an affiant, or at any other juncture.

(G.C. Ex. 1(f)[Internal Ex. 1 at 1]).

2. THE PARTIES TRY TO WORK OUT THE SUBPOENAS

On May 18, 2009, counsel to the *News-Press* wrote another letter to counsel to GCC/IBT after working to resolve subpoena disputes. The letter stated, in relevant part:

> This follows our lengthy conference last week and the recent Petitions to Revoke filed by your office on behalf of yourself, Nicholas Caruso, and members of GCC/IBT's bargaining committee who have been duly served with a subpoena in the upcoming matter. I think we should try to narrow our differences to avoid motion work for Judge Anderson.
>
> **What Is Not Being Sought In the Subpoenas**:
>
> It is easiest to begin with what we are not seeking in the subpoenas. First, we are not seeking materials that are contained in the Region's investigatory file. This would include affidavits in possession of you or other GCC/IBT persons subject to subpoena that are unaltered in any way. To the extent our subpoena is awkwardly stated, please confine your respective documents to this exception.

(G.C. Ex. 1(f)[Internal Ex. 2 at 1]).

In response, the next day, May 19, 2009, GCC/IBT's counsel responded, via letter, and stated, in relevant part:

> This is in response to your letter of May 18. Thank you for clarifying your position on the documents you subpoenaed. I appreciate your willingness to attempt to narrow our differences, and it appears that we have done so.

(G.C. Ex. 30[4][Internal Ex. 3 at 1]). Although there was reference to other paragraphs, there was no reference to Paragraph 25 of the *News-Press*'s subpoena.

D. ALJ ANDERSON DISPOSES OF THE ISSUE

In advance of the hearing in NLRB Case No. 31-CA-28589 et al, on May 8, 2009, ALJ Anderson issued an Order with Respecting the General Counsel's petition to revoke subpoena duces tecum and request for expedited ruling. (G.C. Ex. 14 (rejected)). The Order deferred the General Counsel's and GCC/IBT's Petitions to Revoke to the commencement of the hearing.

On May 26, 2009, ALJ Anderson issued a verbal Order with respect to the Petition to Revoke the Subpoena Duces Tecums filed by both the General Counsel and GCC/IBT. (G.C. Ex. 22). To resolve the matter, ALJ Anderson crafted an Order whereby the *News-Press*'s subpoenas were quashed. (*Id* at 5). In addition, using his discretion to resolve the issue, ALJ Anderson crafted what he described as a "sanction" as part of his ruling, whereby the subpoenaed individuals did not have to comply with the subpoenas until after they testified on behalf of the General Counsel or GCC/IBT's case in chief, or the *News-Press* commenced its case in chief, whichever occurred first. (*Id*. at 5-11).

On May 28, 2009, the *News-Press* filed a Motion for Reconsideration before ALJ Anderson out of concern that ALJ Anderson was unaware of all of the facts pertaining to the *News-Press*'s attempts to resolve the subpoenas with GCC/IBT. (Tr. at 65-66).

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[4] This letter is part of the record pursuant to Section 102.45(b) of the NLRB's Rules and Regulations.

On May 29, 2009, ALJ Anderson granted the *News-Press*'s Motion for Reconsideration (both procedurally and substantively) and modified his previous Order. ALJ Anderson apologized, stating, "Arrogance and abruptness anywhere, including the bench, are wrong." (G.C. Ex. 23 at 2-3). ALJ Anderson explained that he was unaware of all of the facts associated with the *News-Press* and GCC/IBT's attempts to resolve the subpoenas, particularly Request 25. (G.C. Ex. at 23 at 3). ALJ Anderson stated:

> The first thing I want to ask all three parties because of the Charging Party's response puts it in play, we have had an agreement between the parties respecting some matters under various of the subpoenas that you agreed you just weren't going to go at anymore. Those fell out of subpoenas, but it's not necessarily obvious to me.
>
> So what I want to ask the parties is what's in play here when we talk about this subpoena? Part of the agreement was that you wouldn't seek it. And then there's the other part that Respondent in the correspondence and the other that there was some stuff that facially the subpoena didn't -- may have appeared to seek but you don't really seek it now. So what I'm asking is, bring me up-to-date as to what's really in play. In other words, if you've got the stuff under the subpoena, what would it be?

(*Id.* at 3). The *News-Press*'s counsel explained:

> As an initial matter, there's the request regarding boycott information pertaining to our request about boycotts. Second is the issue involving our perhaps novel interpretation of *H.B. Zachary*, which is not formally addressed by the court as I stand here currently. So that's the second issue that's still in play. What we would be asking for is that any statements that the witness personally possesses be lodged with the court when they come and testify, and if there is a disparity between what they on their person and what's in the Region's investigatory file, we'd like to be able to compare. I think that if someone has a personal copy that they've made notes on, highlighted, amended, scratched out, put a question mark next to, said I need to talk to this person about this for verification, that wasn't addressed from our perspective by *H.B. Zachary* or any case that has interpreted *H.B. Zachary.*

(*Id*. at 4-5). The *News-Press*'s counsel further explained:

> Mr. Gottlieb represented nine or received service for nine of the individuals. We tried to work out and we thought we had worked out an

> agreement as best we would with Mr. Gottlieb who apparently had a difference of legal opinion. I think we've explained our difference in legal opinion in our motion for reconsideration. It may be an invalid legal opinion from their perspective, but I certainly don't think it's -- it has no merit that warrants a sanction. I guess reasonable minds may be able to differ on that, but we certainly believe that we've raised an issue that's not addressed in *H.B. Zachry* or any of its (unintelligible)[5].

(*Id*. at 14). ALJ Anderson thereafter stated, in relevant part:

> Even if everything that you've proposed is proper, it's too complicated. In part, this adopts the General Counsel's view that the employees are not going to be able to figure out -- I mean if you look at your language, it's quite lawyerly and convoluted, and it undoes what I still hold, and renew my holding, was initially a facially invalid call.

(*Id*. at 17).

> ****

> But the real issue here in my case is what we do in this little window and whether we should call it a sanction. I understand what you mean by a sanction. It's a burden to bear, and it should only be laid on you if you're a higher class villain, if you will, than somebody who had his subpoena quashed.

(*Id*. at 18).

> ****

> But what reach do I have to limit the -- in other words, how do I label a limit on a future subpoena? If I want to limit it and I don't call it a sanction, do I have power? I think so. I think I can tell you this first subpoena which you've had to throw away, and that's an euphemism, you've had to withdraw, as was done in the earlier case before Judge Kocol. I'm not relying on that as authority for the proposition but for there's recidivism argument, repetition.
>
> I think I can, and I've given a lot of thought to this, I think I am entitled within my judicial discretion to limit your drafting a new subpoena associated with these matters until the witnesses have testified or because if they're not called to testify, it doesn't go on to perpetuity until the General Counsel and the Charging Party rest.

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[5] Counsel to the *News-Press* represents that the word should be "progeny."

> Now if I can do that without calling it a sanction, why do I call it a sanction. And my answer is that I now have a broader view of my powers. I withdraw the term sanction. It's not a sanction. You say what does it matter. I've told you the same thing, but I'm not calling it punishment, I'm calling it part of my order to quash. I think that is important.

(*Id*. at 18-19).

> ****

> So the subpoena ruling is done, the sanction is lifted because I don't need the sanction to do what I did and the rationale is before me. Now the difference. I have in fact considered your efforts to clean it up, I don't think you can clean it up whatever your efforts were because you started in a hole officially. I don't think there is prejudice given the extension of time.

(*Id*. at 23).

> ****

> That's my ruling, but I'm going to give – if you don't understand it, all the parties can ask for clarification. Now I'm going to summarize grossly. The ruling was reconsidered. Sanctions were, I don't know, lifted. Is that the verb of choice? Sanctions have been removed and hence do not lie. But the limitation as to employees on the Respondent's service of subpoenas prior to their testimony or in the event they do not testify, before the Charging Party and the General Counsel rest, those people who received the first one, you are denied the right to subpoena them. You can subpoena them then or you obviously can renew by direct asking of a witness who testifies.

(*Id*. at 25).

ALJ Anderson exercised his administrative discretion to address the subpoenas at issue before him (and subsequently before ALJ Parke). ALJ Anderson issued a final Order reiterating that the subpoenas had been quashed, and placed a temporary limitation upon the production of documents responsive to the subpoenas as a result of the Petitions to Revoke filed by the General Counsel and GCC/IBT.

In fact, at the hearing, ALJ Anderson ordered the production of a personally possessed copy of a witness' affidavit. (RESP. Ex. 8 at 6-7). ALJ Anderson performed an *in camera* review of the personally possessed copy of the affidavit; the General Counsel did not object. (RESP. Ex. 8 at 7-14). After his *in camera* review, ALJ Anderson ordered that the witness' personally possessed affidavit be produced to the *News-Press*'s counsel. (*Id*).

E. GCC/IBT FILES AN UNFAIR LABOR PRACTICE CHARGE

On or about May 8, 2009 GCC/IBT filed an unfair labor practice charge that Region 31 catalogued as NLRB Case No. 31-CA-29253. (G.C. Ex. 1(a)). The charge alleged:

> Within the last six months, the employer has attempted to intimidate, coerce, and mislead employees and gain an unfair advantage in a NLRB-conducted hearing subpoenaing confidential affidavits submitted by employees to the General Counsel in the course of its investigation of unfair labor practices committed by the employer, and by seeking notes and other information generated at Union meetings. This precise request was deemed improper and worthy of sanctions in the previous unfair labor practice proceeding involving the same parties and counsel, and hence is another part of the employer's pattern of conduct intended to chill and deter employees from exercising their rights under the Act and cooperating in the NLRB's investigative process. This is particularly egregious misconduct in light of the December, 2007 findings of ALJ Kocol, who determined that the employer committed multiple serious "flagrant" unfair labor practices, demonstrative of a "wide-spread, general disregard for the fundamental rights of the employees." 10(j) relief requested.

(*Id*). The charge only alleged a Section 8(a)(1) violation.

Approximately 18 months earlier, on January 4, 2008, GCC/IBT had filed a charge that was cataloged by Region 31 as NLRB Case No. 31-CA-28662 that contained a virtually identical allegation. (RESP. Ex. 9 (rejected)). After investigation by the Region, GCC/IBT withdrew the charge, with the approval of the Regional Director, on

March 3, 2008. (RESP. Ex. 10 (rejected)). The Regional Director's withdrawal letter stated, in relevant part, "Please note that Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing and service of the charge." (*Id*).

F. ALJ PARKE CONDUCTS A HEARING, ISSUES A DECISION AND RECOMMENDED ORDER, AND THE *NEWS-PRESS* FILES EXCEPTIONS

On October 26 and 27, 2009, ALJ Parke conducted a hearing in Santa Barbara, California, where the parties presented witnesses, elicited testimony, and offered evidence in this case. The General Counsel only alleged a Section 8(a)(1) violation of the Act. The General Counsel called a single witness, Mr. Richard Mineards, in support of its case in chief. Mr. Mineards testified that he understood his subpoena was served in the context of litigation; that the Region did not represent him; that the subpoena requested what he personally possessed; that he was not expected to obtain anything from the Region; no one told him his affidavit was confidential; he was not admonished from sharing it with anyone, marking it, or altering it; and that he reviewed his personally possessed affidavit in preparation for testifying. (Tr. 46-51).

It was from this record that ALJ Parke rendered her February 5, 2010 Decision and Recommended Order. The *News-Press* filed Exceptions to ALJ Parke's Decision and Recommended Order. This Brief supports the Exceptions filed in NLRB Case No. 31-CA-29253. The *News-Press* submits that the Complaint should be dismissed.

III. ISSUES INVOLVED AND TO BE ARGUED

A. Whether the *News-Press* violated Section 8(a)(1) by issuing subpoenas to current and former employees prior to their testimony in NLRB Case No. 31-CA-28589?

Primary Exceptions on this issue are Respondent's Exceptions 1-7; 11;13-33;35-49.

B. Whether the ALJ impermissibly switched the burden of proof onto the *News-Press* to disprove the allegations asserted by the General Counsel?

Primary Exceptions are Respondent's Exceptions 19-20; 34-49.

C. Whether ALJ Parke erred by relying on a Decision and Recommended Order of an Administrative Law Judge as precedent?

Primary Exceptions on this issue are Respondent's Exceptions 10; 43;45; 50-54.

D. Whether subpoenas are a procedural matter in Board proceedings and upon resolution of a subpoena dispute, the issue is resolved?

Primary Exceptions on this issue are Respondent's Exceptions 15.

E. Whether an NLRB subpoena issued by the Executive Secretary is protected conduct under the First Amendment of the Constitution of the United States of America?

Primary Exceptions on this issue are Respondent's Exceptions 17; 21-29.

F. Whether the *News-Press* was entitled to personally possessed documents and affidavits of subpoenaed individuals pursuant to an NLRB subpoena issued by the Executive Secretary?

Primary Exceptions on this issue are Respondent's Exceptions 30-33; 35-44; 47-49.

G. Whether the complaint was time barred pursuant to Section 10(b) of the act?

Primary Exceptions on this issue are Respondent's Exceptions 10; 43; 45-54.

IV. ARGUMENT

A. THE SUBPOENAS WERE A PROCEDURAL MATTER RESOLVED BEFORE ALJ ANDERSON IN NLRB CASE NO. 31-CA-28589 ET AL; THE MATTER IS MOOT.

ALJ Parke erred by failing to dismiss the Complaint on procedural grounds. A subpoena in the Board context is a procedural issue as explained in the Act, in the Board's Rules and Regulations, and in case law. The ALJ's Decision paid short shrift to the procedural aspects of subpoenas in Board proceedings. (DEC. 6:6-12). The ALJ attempted to justify her erroneous Decision by acknowledging that Judge Anderson disposed of the subpoenas in NLRB Case No. 31-CA-28589, but breathed life into the issue by baldly asserting "the issue of whether service of those subpoenas constituted unfair labor practices was not before Judge Anderson, and he did not address that question." (DEC. 6:9-11). The service of a subpoena is a procedural issue as well; to claim that service of a subpoena is not a procedural issue was intellectually dishonest. The Act and the Board's Rules and Regulations have specific provisions describing service, all of which are procedural requirements. The notion that service of a subpoena is not a procedural matter conflicts with the Act, the Board's Rules and Regulations, and precedent.

1. THE ACT

Section 11 of the Act states, in relevant part:

> For the purpose of all hearings and investigations, which in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10 –
>
> (1) … The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such parties' subpoenas requiring the attendance and testimony of witnesses or the production of evidence in such proceeding or investigation

> requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence who's production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. …

29 U.S.C. § 161(1).

2. THE NLRB'S RULES AND REGULATIONS

The Board's Rules and Regulations, Series 8, as amended, have specific provisions pertaining to the issuance and service of subpoenas. Section 102.31 of the NLRB's Rules and Regulations state, in relevant part:

> (a) Any Member of the Board shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpoenas, if filed prior to the hearing, shall be filed with the Regional Director. Applications for subpoenas filed during the hearing shall be filed with the administrative law judge. Either the Regional Director or the administrative law judge, as the case may be, shall grant the application on behalf of any Member of the Board.
>
> ****
>
> (b) Any person served with a subpoena, whether *ad testificandum,* or *duces tectum*, and does not intend to comply with the subpoena shall, within 5 days after the date of the service of the subpoena upon him, petition in writing to revoke the subpoena. All petitions to revoke subpoenas shall be served on the party at whose request the subpoena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the Regional Director and the Regional Director shall refer the petition to the administrative law judge or the Board for ruling. … the administrative law judge or the Board, as the case may be, shall revoke the subpoena if, in its opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the

> evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The administrative law judge or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed there to, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

29 C.F.R. § 102.31(a) and (b)(italics in original).

Section 102.35 of the NLRB's Rules and Regulations explains the duties of an ALJ with respect to subpoenas. Section 102.35(a) states, in relevant part:

> It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The administrative law judge shall have the authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:
>
> ****
>
> (2) To grant applications for subpoenas;
>
> (3) To rule upon petitions or revoke subpoenas;
>
> ****
>
> (8) To dispose of procedural requests, motions, or similar matters, including motions referred to the administrative law judge by the Regional Director in motions for summary judgment or to amend the pleadings; also to dismiss complaints or portions thereof; to order hearings reopened; and upon motion, order proceedings consolidated or severed prior to issuance of administrative law judge decisions.

29 C.F.R. § 102.35.

3. NLRB SUBPOENAS ARE AUTHORIZED BY THE BOARD THROUGH THE EXECUTIVE SECRETARY.

The *News-Press* petitioned the Regional Director of NLRB Region 31 for the subpoenas duces tecums at issue pursuant to Section 102.31 of the Board's Rules and Regulations. The subpoenas duces tecums were authorized by the Executive Secretary. (G.C. Exs. 2-11). Section 102.31 was a rule created through Section 6 of the Act. *See* 29 U.S.C. § 156; see also *Herman Bros. Pet Supply Co. v. NLRB*, 360 F.2d 176, 178-79 (6th Cir. 1966) ("We hold that the language of the Board Rule relied upon here by the Trial Examiner represents a reasonable employment of the rule-making power conveyed upon the Board by Congress. 29 U.S.C. 161 (1)(1964); 29 U.S.C. 156 (1964); *Lewis v. NLRB*, 357 U.S. 10, 14, 78 S.Ct. 1029, 2 L.Ed. 2d 1103 (1958). *See also NLRB v. Duval Jewelry Co*., 357 U.S. 1, S.Ct. 1024, 2 L.Ed. 2d 1097 (1958)."). Section 6 of the Act states:

> The Board shall have authority from time to time to make, amend, and rescind in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

(*Id*). Pursuant to the authority described in Section 6 of the Act, the Board promulgated its Rules and Regulations, including Section 102.35, and the duty and authority of an ALJ to rule upon petitions to revoke subpoenas. *See* 29 C.F.R. § 102.35(c). In *NLRB v D.B. Lewis*, 249 F.2d 832, 837 (9th Cir. 1957), the validity of Section 102.35(3)[6] was challenged. In response, the court explained:

> We hold this ***rule of procedure*** is within the legitimate purview of the Board's power under Section 6 of the Act. The Board, of course, may not enlarge its authority beyond the scope intended by Congress, but the Board, where such restrictive intention is not shown, may adopt rules and regulations to carryout its myriad functions in a manner consistent with

[6] Section 102.31 is the modern version of the former Section 102.35(3).

> the fulfillment of the purposes of the Act. This is exactly what has been done here.

(*Id*)(emphasis added). On petition for *certorari*, the Supreme Court affirmed the 9th Circuit. *See* 357 U.S. 10, 78 S.Ct. 1029, 2 L.Ed. 2d 1103 (1958) ("the power to make the revocation procedure applicable to subpoenas ad testificatum seems clear from the authority of the Board contained in § 6 of the Act. 'To make … such rules and regulations as may be necessary to carry out the provisions of this Act'.").

Requests for subpoenas, subpoenas, and petitions to revoke are all procedural issues addressed through the Act and the Board's Rules and Regulations. Indeed, the *News-Press* requested and received subpoenas from the Regional Director; the General Counsel GCC/IBT filed petitions to revoke; and the *News-Press* filed an Opposition to the General Counsel's and GCC/IBT's petitions to revoke, all before the hearing opened in NLRB Case No. 31-CA-28589.[7]

ALJ Anderson disposed of the subpoenas when he ruled on the petitions to revoke and the *News-Press*'s subsequent Motion for Reconsideration. (G.C. Ex. 23). Upon the final order of ALJ Anderson on May 29, 2009, regarding the subpoenas and the respective motions, pursuant to Sections 102.31(c) of the NLRB's Rules and Regulations, the *News-Press* (as well as the General Counsel or GCC/IBT) had the ability to petition the Board via a special appeal within 24 hours of ALJ Anderson's Order. No party elected to take advantage of this procedural right. Thus, pursuant to Section 102.31(c)

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[7] Pursuant to Section 102.35(8) of the NLRB's Rules and Regulations, subpoenas and petitions to revoke subpoenas are procedural matters. Additionally, under Section 102.31(b) of the Board's Rules and Regulations, a subpoena, a petition to revoke, an answer, and ruling are not part of the official record unless specifically requested by the aggrieved party.

"… the ruling of the administrative law judge shall become final and his denial shall become the ruling of the Board." ALJ Anderson's Order constituted a final Board Order.

The General Counsel, in bringing this Complaint, attempted to re-litigate a procedural issue that was a final Board order. Under the doctrine of *res judicata*, ALJ Parke should have respected a final Board order as controlling. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("a fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata* is that 'right' question or fact distinctly put in issue and directly determined by a court of competent jurisdiction … cannot be disputed in a subsequent suit between the same parties or their privies … under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." (extensive citations omitted)); *see also Sabin Towing & Transportation Co*., 263 NLRB 114 (1982) (Board dismissed complaint that constituted an attempt to re-litigate previously disposed-of issue under the doctrine of *res judicata*.).

ALJ Anderson addressed the subpoenas in NLRB Case No. 31-CA-28589 et al, and resolved any disputes. The instant case was not a violation of the Act. The matter was moot. ALJ Anderson's disposition of the subpoenas in NLRB Case No. 31-CA-28589 constituted a final Board Order on a procedural matter. Neither the General Counsel nor GCC/IBT appealed that final order. ALJ Parke's Decision contained reversible error. The Complaint should be dismissed.

B. SERVING A SUBPOENA IN THE CONTEXT OF AN UNFAIR LABOR PRACTICE HEARING CANNOT VIOLATE THE ACT; SERVING A SUBPOENA IS CONSTITUTIONALLY PROTECTED ACTIVITY

ALJ Parke's Decision adopted the same error proffered by the General Counsel. The General Counsel explained her theory with respect to the subpoenas at issue in her opening statement:

> Respondent's solicitation from employees of the affidavits that they provided to Board Agents in connection with the unfair labor practice investigation was inherently coercive, in violation of § 8(a)(1). Further, the fact that the demand was in the form of a subpoena duces tecum, which requires the production of evidence in the possession of the subpoenaed individual, made the solicitation ipso facto involuntary.

(Tr. at 8).

The ALJ and General Counsel's theory contained three flaws. First, the subpoenas sought affidavits the Region provided to the individual, not vice versa. Second, a subpoena was not a "solicitation." Third, a subpoena, in and of itself, cannot, as a matter of law, constitute a violation of the Act.

1. THE *NEWS-PRESS* REQUESTED ONLY DOCUMENTS PERSONALLY POSSESSED BY THE SUBPOENAED INDIVIDUAL.

The *News-Press* requested nothing from the Region's investigatory file. ALJ Parke either failed to recognize this fact, or failed to accept it. The only witness called by the Region, Mr. Richard Mineards, testified that he understood that his subpoena only sought what he personally possessed. (Tr. at 51). Mr. Mineards never, at any time, understood his subpoena to mean that he was expected to obtain a copy of his affidavit from the NLRB or Region 31. (*Id*). Both of these understandings were undisputed. There was no evidence to support a contrary conclusion, especially after the *News-Press*

clarified to GCC/IBT that it did not seek anything from the Region's investigatory file through the subpoena. (G.C. Ex. 1(f)[Internal Exhibits 1-2]). How ALJ Parke committed this error was confounding.

2. A Subpoena Is Not a "Solicitation."

The parties stipulated that the only request by anyone from the *News-Press* for a personally possessed copy of an affidavit was in the form of the subpoena. (Tr. at 90). Cases analyzing a solicitation for an NLRB affidavit by a company agent are factually, procedurally, and legally separate from the instant case.

Black's Law Dictionary defines a solicitation as "asking; enticing; urgent request. Any action which the relation of parties justifies in construing into a serious request." (4th Ed.).

In contrast, Black's defines "subpoena" as:

> A process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses and appear before a court or magistrate therein named at a time therein mentioned to testify for the party named under a penalty therein mentioned.

(4th Ed.). A subpoena is compulsory; a solicitation is simply a request.

In addition, a subpoena is a formal legal document that, in an NLRB proceeding, is issued by the Board pursuant to Section 11(1) of the Act, as well as Section 102.31 of the Board's Rules and Regulations. A party must apply to the Board for a subpoena in a Board proceeding. A Board subpoena is officially issued by the Board, not a private litigant.

In this respect, an NLRB subpoena differs from discovery requests in civil litigation. An NLRB subpoena is presumptively valid as the NLRB issues it. Only if a party objects to a subpoena is the subpoena's validity challenged. The Act and the

Board's Rules and Regulations provide for a five-day period to petition for a subpoena's revocation, otherwise a party must comply with it. *See* 29 C.F.R. § 102.31(b). The burden is on the subpoenaed individual to assert that the subpoena is invalid, rather than the subpoenaing party to assert the subpoena's validity; after all, the subpoena is, officially, issued by the Board.

In *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 731 (D.C. Cir. 1983), the court ordered a Board agent to testify at a Board hearing pursuant to a subpoena issued by the Respondent due to the Board agent's actions in brokering a stipulation for certification. The Board claimed privilege exempted the Board agent from testifying. The court detailed many reasons why the Board agent should be compelled to testify. *Id* at 731-33. As is relevant to the instant dispute, the court explained:

> The proceeding is not a private action, but a complaint pressed by the Board itself against the party who asserts the need for the testimony. It is repugnant to notions of fairness for the government to seek sanctions for alleged wrongdoing while withholding from the proceeding evidence that would demonstrate innocence.

Id. at 733. The court added that the Board agent's personal involvement in the dispute added to the court's reasoning to reject privilege. *Id*. This was significant because included in the defenses asserted by the *News-Press* in NLRB Case No. 31-CA-28589 et. al, before ALJ Anderson, were assertions of arbitrary and capricious agency actions of Region 31; institutional bias of Region 31 against the *News-Press*; prosecutorial misconduct; and prosecutorial abuse of discretion. The subpoena requests, in part, addressed these defenses and made the reasoning of *Drukker Communications* all the

more compelling.[8] In finding a violation of the Act, ALJ Parke actually concluded that ***the Board*** violated the Act, as the Board officially issued the subpoenas duces tecum.

3. A Subpoena, in a Board Proceeding, Is Constitutionally Protected Activity Pursuant to the First Amendment of the Constitution.

ALJ Parke erred by failing to recognize that a subpoena in an NLRB proceeding is protected conduct under the First Amendment of the United States Constitution. An NLRB subpoena is a "direct petition" of the government for the redress of grievances. The *News-Press* directly petitioned the Agency for the subpoenas duces tecums. The subpoenas were authorized by the Board and signed by the Executive Secretary.

The Act makes it abundantly clear that a Board subpoena is a direct petition for the redress of grievances. Section 11(2) of the Act authorizes ***only the Board*** to apply to an authorized court to enforce a Board subpoena. Stated differently, in the event that one of the subpoenaed individual did not comply with a subpoena, only the Board – and not the *News-Press* – could have petitioned for the enforcement of the subpoena. *See* 29 U.S.C. § 161(2). In *Wilmot v. NLRB*, 403 F.2d 811, 815 (9th Cir. 1968), the court reiterated that only the General Counsel, on behalf of the Board, could petition to enforce a Board subpoena. The court further stated:

> If private litigants, willy nilly, could petition the district court, the courts might be flooded with such applications, and neither the Board nor the courts would have any control over such filings … Instead, under the doctrine of administrative remedies, the private litigant may review the errors of the Board resulting from the refusal of the Board to petition to enforce or set aside the Board's final order under Sections 10(e) and 10(f) of the Act …

403 F.2d at 815 (citing references omitted).

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[8] ALJ Anderson specifically analyzed this assertion as a valid defense in Case No. 31-CA-28589 et al.

ALJ Parke's Decision conflicts with the Act. The Decision appeared to be a conclusion based on a predetermined violation of the Act, rather than an objective application of the Act to the record. An objective application of the Act, with due deference afforded to the U.S. Constitution, could only yield a decision whereby ALJ Parke dismissed the Complaint.

a) The Subpoenas were Protected Pursuant to the Petition Clause of the Constitution

The First Amendment of the United States Constitution guarantees that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." (U.S. Const. Amend. I.). The Supreme Court has "recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights' *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967), and has explained that the right is implied by 'the very idea of a government, republican in form,' *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L.Ed. 588 (1876)."; *B.E. & K. Construction Co., v. NLRB*, 536 U.S. 516, 122 S.Ct. 2390, 153 L.Ed. 2d 499 (2002). This right is known as the "Petition Clause" of the Constitution. Under the Petition Clause, one who petitions any department of the government for a redress of grievances is generally immune from any liability for the petitioning conduct. *See e.g. Sosa et al v. DIRECTV, Inc., et al*, 473 F.3d 923, 929 (9th Cir. 2006) (citing *Empress, LLC v. City & County of S.F.*, 419 F.3d 1052, 1056 (9th Cir. 2005) (citing *Manistee Town Center v. City of Glendale*, 227 F.2d 1090, 1092 (9th Cir. 2000))). This application of the Petition Clause is known as the *Noerr-Pennington* doctrine, which derived from two cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 2d 564 (1961) and *United Mine Workers v. Pennington*, 381

U.S. 657, 85 S.Ct. 1585, 14 L.Ed. 2d 626 (1965). The *Noerr-Pennington* doctrine was further expanded in *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed. 2d. 642 (1972), where the Court explained that "the right to petition extends to all departments of the government and that the right of access to the courts is but one aspect of the right of the petition." *Id*. at 510-11.

b) The *Noerr-Pennington* Doctrine Applies to Board Proceedings.

The *Noerr-Pennington* doctrine is no stranger to Board proceedings. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed. 2d. 277 (1983), the Court ruled that the petition clause protected access to the judicial process in the labor relations context, and that labor laws must be interpreted so as not to burden such access. *See Id*. at 741-44. In *Bill Johnson's Restaurants*, the company filed a civil suit seeking to enjoin employees from picketing as part of a union organizing campaign. The employees filed an unfair labor practice charge with the Board alleging retaliation pursuant to Section 8(a)(1) and (3) of the Act. *See* 461 U.S. at 734-35. The Court, referencing *Cal. Motor Transport*, determined that the rights afforded to the employer pursuant to the Petition Clause of the Constitution ***prohibited a finding by the Board that the civil lawsuit – even if retaliatory – violated the Act***. *Id*. at 743.

Furthermore, in *B.E. & K. Construction Co. v. NLRB*, the Court expanded *Bill Johnson's Restaurants*, explaining that the *Noerr-Pennington* doctrine applied, completely, in other statutory contexts. In *B.E. & K.*, the Court examined whether the Board had the ability to impose liability on an employer for the unsuccessful prosecution of lawsuits that were brought for the purpose of retaliating against employees for exercising rights protected under the Act. *See* 536 U.S. at 529-30. The Court determined

that filing reasonably based but ultimately unsuccessful lawsuits fell within the protection of the Petition Clause of the Constitution. *Id*. at 531. In addition, the Court made it clear that the Act should be narrowly construed to avoid a conflict with the Constitution.[9] *Id*. at 535 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 45 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed. 2d. 645 (1988)).

c) The Subpoenas Were a Direct Petition to the Government to Redress Grievances.

ALJ Parke created a conflict between the Constitution and the Act to which the Act must give way. The subpoenas at issue were obtained by requesting them from the Board through its proxy in the form of the Regional Director. The *News-Press* directly petitioned the Board for the subpoenas. As the Board is the arbiter of disputes pertaining to the Act, requesting subpoenas from the Regional Director constituted a communication to the Agency, hence a petition. *See Sosa* 437 F.3d at 933 (quoting *Freeman v. Lasky, Hass & Cohler*, 410 F.3d. 1180, 1184, 9th Cir. (2005)). Each subpoena was signed by Mr. Lester A. Heltzer, the Executive Secretary of the Board. (G.C. Exs. 2-11).

ALJ Parke erred by failing to recognize that NLRB subpoenas represent a direct petition to the government to redress grievances. ALJ Parke paid lip service to the Court's teachings by acknowledging that "In the labor relations context, the Petition Clause protects access to the judicial process, and the Court instructs that laws must be interpreted, where possible, to avoid burdening such access …" (DEC. 6:22-24), yet

[9] It bears noting that Region 31 was already admonished for failing to respect the First Amendment rights of the *News-Press* by attempting to subjugate the First Amendment of the Constitution to the Act. *See McDermott v. Ampersand Publishing, LLC*, "Order Denying Petition for Temporary Injunction under Section 10 of the National Labor Relations Act." (08-CV-1551)(C.D. Cal. May 22, 2008); aff'd 593 F.3d 950 (9th Cir. 2010).

devised a finding that contradicted this edict. And, ALJ Parke failed to explain ***why*** an NLRB subpoena was not a direct petition of the government. Rather than addressing this critical issue, ALJ Parke completely ignored it. This absence of explanation was an error.

In *Sosa*, a case brought to ALJ Parke's attention but inexplicably omitted from her Decision, the U.S. Court of Appeals for the Ninth Circuit explained that "… litigation activities which constitute 'communications from the court' may fairly be described as 'petitions'." 437 F.3d at 933. The Petition Clause "extends to all three branches of government …" *Freeman v. Lasky, Haas & Cohler*, 410 F.3d at 1183.

The *News-Press* requested the subpoenas from the Board ***after*** Regional Director issued a complaint, commencing litigation. The *News-Press* petitioned for subpoenas to help defend against the allegations asserted by the Regional Director in the complaint. Stated alternately, as a result of the litigation instigated by the Regional Director through the complaint, the *News-Press* petitioned the Board for subpoenas to defend against the allegations.

d) The Subpoenas Were Petitions Incidental to the Prosecution and Defense of NLRB Case No. 31-CA-28589 et al.

Assuming *arguendo* that the subpoenas duces tecums were not direct communications with the Board, then the *Noerr-Pennington* doctrine still applied as "conduct incidental to the prosecution of the suit is protected by the *Noerr-Pennington* doctrine." *Sosa* at 935 (extensive citations omitted). In the context of private litigation, subpoenas necessarily implicate the petitioning rights of the First Amendment of the United States Constitution, triggering protections under *Noerr-Pennington*. *See Freeman*, 410 F.3d. at 1184 (as cited in *Sosa*, 437 F.3d. at fn. 7).

In *Sosa*, the court unequivocally stated that a private party subpoena in litigation "implicate[d] the exercise of petitioning rights to trigger *Noerr-Pennington* protection." ALJ Parke's conclusion that an NLRB subpoena – which is officially a Board document – was not protected as conduct "incidental" to the prosecution and defense of NLRB Case No. 31-CA-28589 was an unfathomable legal conclusion. The *Sosa* court further stated, "Discovery communications, while not themselves petitions, constitutes 'conduct incidental to a petition'." *Id*. The subpoenas in the instant case triggered the protections of the Petition Clause, explained in the *Noerr-Pennington* doctrine. The petitions were clearly related to the litigation in NLRB Case No. 31-CA-28589 before ALJ Anderson.

Instead of relying on *Sosa*, ALJ Parke cited *Venetian Casino Resort LLC v. NLRB*, 484 F.3d 601, 612 (D.C. Cir. 2007) to assert that "*Noerr-Pennington* immunity" has not been extended "into labor law to protect … 'incidental' conduct." (DEC. 6:27-28). This finding was further error in ALJ Parke's Decision. In *Venetian Casino*, the company argued that broadcasting trespass warnings, threatening arrests, contacting the police to issue citations, and making citizen's arrests – ***all actions taken prior to filing of a lawsuit*** – were conduct incidental to petitioning the court for a redress of grievances. 484 F.3d at 605, 613. The issue in *Venetian Casino* was light years from the record evidence. Ironically, the *Venetian Casino* court explained how *Sosa* differed from the facts of *Venetian Casino*. *Id.* at 613. The *Venetian Casino* court's citation to *Sosa*, and ALJ Parke's failure to even acknowledge the *Sosa* case, was clear error.

Even if the subpoenas duces tecums were issued to retaliate against employees – a fact the *News-Press* does not concede – the subpoenas were all protected pursuant to the Petition Clause of the U.S. Constitution and could not violate the Act. The Court

explained in *B.E. & K.*, as well as *Bill Johnson's Restaurants*, that a retaliatory lawsuit is protected, generally protected, pursuant to the First Amendment of the Constitution. This being the case, a subpoena served in the context of litigation, even assuming *arguendo*, that it was retaliatory, is protected pursuant to the First Amendment of the Constitution. *See also B.E. & K. Construction Co*., 351 NLRB 451 (2007).

The Act, as well as the Board's Rules and Regulations, have specific procedures to address over-broad, irrelevant, or otherwise faulty requests contained in subpoenas. GCC/IBT (as well as the General Counsel) took advantage of these procedures before ALJ Anderson, and the issue was resolved. The subpoenas themselves cannot constitute an unfair labor practice; doing so places the administrative rules of the Act above a Constitutionally protected freedom. The Complaint should be dismissed.

C. THE *NEWS-PRESS* WAS ENTITLED TO PERSONALLY POSSESSED DOCUMENTS AND AFFIDAVITS OF THE SUBPOENAED INDIVIDUALS BECAUSE NO PRIVILEDGE PROTECTED THE DOCUMENTS OR THE INDIVIDUALS

At the commencement of the hearing, the ALJ inquired, and the General Counsel confirmed that the only aspect of the subpoena duces tecums that purportedly violated the Act was the request for affidavits of the subpoenaed individuals. (Tr. 23). Per *The Bakersfield Californian*, 337 NLRB 296, 297 (2001), the General Counsel's "silence" during the ALJ's "clarification of the scope of the Complaint" precluded the ALJ from rendering a decision on those matters not litigated. In the instant case, the General Counsel's clarification of the scope of the Complaint limited the issue to only affidavits.

The General Counsel mixed the issue in her opening statement by stating:

> … Respondent, through its attorneys, issued subpoenas duces tecum to at least ten current and former employees prior to an unfair labor practice

> hearing, which requested all documents in their ***personal possession***, including affidavits that were provided to or received from the Region …

Yet concurrently alleged that the subpoenas duces tecum were an attempted:

> … end run around the Board's long-established policy to preserve the confidentiality of statements and materials ***contained in the investigatory files*** obtained in the course of administrative proceedings; and noting that any files, documents, reports, memoranda, or records of the Board or the General Counsel are privileged against disclosure.

(Tr. at 7)(emphasis added).

The General Counsel's representations about the subpoenas in this regard, and the ALJ's findings were inaccurate. At no time did the *News-Press* ever request a single document from the investigatory file.

1. THE SUBPOENAS SOUGHT NOTHING FROM THE REGION'S INVESTIGATORY FILE.

Each of the subpoena duces tecums contained the following request:

> Any and all documents provided to and/or received from Region 31of the National Labor Relations Board pertaining to the charges in NLRB Cases Nos. 31-CA-28589; 31-CA-28661; 31-CA-28667; 31-CA-28700; 31-CA-28733; 31-CA-28734; 31-CA-28738; 31-CA-28799; 31-CA-28889; 31-CA-28890; 31-CA-28944; 31-CA-29032; 31-CA-29076; 31-CA-29099; and 31-CA-29124, that you personally posses, including, but not limited to: letters, affidavits, notes, and/or e-mails.

(G.C. Ex. 2-11).

The ALJ's Decision "inferred" facts, and made assumptions and suppositions, rather than relying upon the record. (DEC. 8:19-38). This was error. That ALJ Parke "inferred," rather than relied on actual evidence, constituted an admission that the General Counsel did not meet her burden of proving a violation of the Act by a preponderance of the evidence. ALJ Parke had to reach back to a withdrawn charge to support the flawed Decision. This was error. Relying on a withdrawn charge to "infer" a

violation of the Act boggles the conscience and conflicts with established Board precedent. *See Ducane Heating Corp*. 1, 273 NLRB 1389 (1985) enf'd per men. 785 F.2d 305 (4th Cir. 1986). By referencing any facts associated with NLRB Charge No. 31-CA-28662, the ALJ defied the Board's mandate that the Act proscribes reinstating charges outside the 10(b) period. Incredibly, although the *News-Press* attempted to introduce evidence of the filed and withdrawn charge, ALJ Parke concluded that such evidence was irrelevant (RESP. Exs. 9 (rejected) and 10 (rejected)), yet ***based her decision on unestablished "facts" from a withdrawn charge!*** Such a flawed finding does nothing to effectuate the purposes of the Act.

The ALJ based her Decision on a matter she claimed irrelevant when the *News-Press* attempted to establish a defense on the same facts. This inconsistency was unacceptable. The Complaint should be dismissed.

2. THE GENERAL COUNSEL'S ONLY WITNESS CONTRADICTED THE ALJ'S FACTUAL FINDINGS.

Mr. Mineards – the General Counsel's only witness – testified that upon reading his subpoena (G.C. Ex. 6) he understood that his subpoena only sought what he personally possessed. (Tr. at 51). Mr. Mineards never understood his subpoena to mean that he was expected to obtain a copy of his affidavit from the NLRB or Region 31. (*Id*).

In response to GCC/IBT's concerns about what was sought via the subpoenas, the *News-Press* attempted to work with GCC/IBT's counsel to address any concerns that the *News-Press* sought anything from the Region's investigatory file. The ALJ completely ignored these facts, and effectively "white-washed" the record. On two occasions, the *News-Press* explained that it sought only documents personally possessed by individuals. (G.C. Ex. 1(f)[Internal Exs. 1 and 2)]. The *News-Press* unequivocally stated by letter dated May 18, 2009:

What Is Not Being Sought In the Subpoenas:

> It is easiest to begin with what we are not seeking in the subpoenas. First, we are not seeking materials that are contained in the Region's investigatory file. This would include affidavits in possession of you or other GCC/IBT persons subject to subpoena that are unaltered in any way. To the extent our subpoena is awkwardly stated, please confine your respective documents to this exception.

(G.C. Ex. 1(f)[Internal Ex. 2 at 1]).

The subpoena only sought personal copies of affidavits and nothing from the Region's investigatory file. The face of the subpoena reflected this. The General Counsel's witness testified to this. And, the *News-Press* clarified this upon question by GCC/IBT. The ALJ's contrary Decision was not supported by these undisputed facts.

3. *JENCKS* APPLIES ONLY TO DOCUMENTS POSSESSED BY THE GOVERNMENT.

Categorizing the request for personally possessed copies of the affidavit as a request for a *Jencks* statement is wrong. The Jencks Act, 18 U.S.C.A. § 3500(a) (emphasis added) states, in relevant part:

> … no statement or report ***in the possession of the United States*** which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in a trial of the case.

The *News-Press* did not ask for any document possessed by the Region. The *News-Press* made this fact abundantly clear to GCC/IBT and the General Counsel in NLRB Case No. 31-CA-28589 et al. (G.C. Ex. 1(f) [Internet Exs. 1-2]). As a result, categorizing the subpoena request as a demand for a *Jencks* statement is and was incorrect.

4. *H.B. ZACHARY CO.* IS INAPPLICABLE.

H.B. Zachary Co. 310 NLRB 1037 (1993) was factually and procedurally distinct from the instant case. *H.B. Zachary* involved a request made by an employer upon a union, not individuals, for copies of Board affidavits. The ALJ denied the General Counsel's petition to revoke the subpoenas. The General Counsel filed a special appeal[10] with the Board. The Board recognized that NLRB Rule and Regulation 102.118(b)(1) only applied to documents possessed by the General Counsel but expanded the Rule to encompass documents that were not exclusively within the possession of the General Counsel. *See* 310 NLRB at 1038. As explained, *infra*, Section E, this was an untenable order.

H.B. Zachary did not address the issues raised by the *News-Press* before ALJ Anderson – personally possessed copies of affidavits on which the subpoenaed individual may have made notes, may have edited, or somehow altered after receipt from the Region. (G.C. Ex. 23). If an individual alters an affidavit he or she personally possesses, it necessarily differs from whatever affidavit exists in the Region's investigatory file. The altered affidavit could contain valuable evidence. All that exists in the Region's investigatory file is a copy of what was given to the individual at a particular time. The affidavit contained in the investigatory file is not the document personally possessed by the individual. *H.B. Zachary* did not address the issue of altered or changed affidavits or documents personally possessed by subpoenaed individual.

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[10] That *H.B. Zachary* involved a special appeal to the Board further demonstrates that matters involving subpoenas are procedural matters.

5. *ROBBINS TIRE* IS INAPPLICABLE.

The ALJ's analysis of *NLRB v. Robbins Tire and Rubber Co*., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed. 2d. 159 (1978), was incorrect. The ALJ stretched the Court's holding to force a square peg through a round hole. *Robbins Tire* was not an allegation based on the Act. *Robbins Tire* addressed a Freedom of Information Act ("FOIA") request. *See* 437 U.S. at 217. In *Robbins Tire*, a Respondent made a FOIA request for witness statements after the acting Regional Director issued a complaint. Id. at 216-17. The request was made ***of the Region, not of an individual***. In *Robbins Tire*, the Court thoroughly examined the statute, as well as the legislative history of Exemption 7 of FOIA, as well the Act and stated:

> Although reasonable arguments can be made on both sides of this issue, for the reasons that follow, we conclude that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing.

Id. at 236. In addition, the Court noted that with respect to "interference" by employers or unions with respect to employees who have given statements to the Region, there exists a provision of the Act to address such concerns – Section 8(a)(4). *Id*. at 239. ALJ Parke apparently missed this point while crafting her flawed Decision.

The applicability of *Robbins Tire* to the instant case was strained. *Robbins Tire* involved a FOIA request, not a subpoena request. The Court addressed policy concerns relating to the disclosure of affidavits from the Board's investigatory file in response to a FOIA request; *Robbins Tire* ***did not address*** the production of a personally possessed affidavit by an individual who could claim no privilege, pursuant to a validly issued Board subpoena.

6. NO PRIVILEGE APPLIES TO A PERSONALLY POSSESSED COPY OF AN AFFIDAVIT.

a) The Region Did Not Represent Any of the Subpoenaed Individuals.

No privilege applied to the personally possessed copies of the affidavit sought in the subpoena. In as much as a personally possessed copy is not part of the investigatory file, no investigatory privilege applied. As explained through the General Counsel's own witness, the Region provided Mr. Mineards a copy of his affidavit. (Tr. 46). No one from the Region informed Mr. Mineards that the affidavit was confidential in nature. (Tr. 46). Mr. Mineards was never admonished to not share his affidavit with anyone. (*Id*). Mr. Mineards was not told that there were any conditions associated with his affidavit, like having to keep it in a safe place. (*Id*). Mr. Mineards was never admonished to refrain from making marks on or altering, in any way, his affidavit. (*Id*). The Region never informed Mr. Mineards that his affidavit was confidential, either. (*Id*).

Mr. Mineards did not engage the Region as his personal attorney. (Tr. 47). Mr. Mineards did not pay the Region's investigator, nor did he sign a retainer with the Region or its investigator. (*Id*). At no time did the Region tell Mr. Mineards that any sort of attorney-client privilege protected what was being discussed and disclosed. (*Id*).

Additionally, Mr. Mineards reviewed his February 2009 affidavit in preparation for his May 2009 testimony. Mr. Mineards understood that his subpoena only sought what he personally possessed. (Tr. at 51). Mr. Mineards never understood his subpoena duces tecum to mean that he was expected to obtain a copy of his original affidavit from the NLRB or Region 31 file. (*Id*). Mr. Mineards also testified that he understood that he

was able to share his affidavit with whomever he wanted. (*Id*). Similarly, Mr. Mineards was not admonished to keep quiet about his affidavit .[11] (Tr. at 48).

Mr. Mineards testified that he was permitted to share his[12] affidavit with whomever he desired. In *Network Dynamics Cabling Inc*., 351 NLRB 1423, 1427 (2007), the Board explained that an employee was entitled to share an affidavit prepared with his employer's attorney, with anyone the employee wished. It would be hypocritical for the Board to rule that an affidavit prepared with an employer's attorney and given to an individual was freely distributable, but an affidavit prepared with a Board agent and

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[11] It bears noting that subsequent to these events of this case, the Agency changed its Casehandling Manual to instruct Board agents to communicate various confidentiality assurances and admonishments to affidavits. Section 10060 (revised 12/09) of the NLRB's Casehandling Manual references "The Confidential Witness Affidavit," whereas the predecessor Section 10060 (revised 6/07) only referenced "The Affidavit." *Cf* 29 C.F.R. § 10060 (2008) and 29 C.F.R. § 10060 (2010). Similarly, new Section 10060.6 "Testimony Reduced to Writing" contains a whole new concluding paragraph informing the affiant to "immediately notify the Board agent" of a "desire to make any changes" or if the affiant "remember[s] anything else that is relevant …" The new concluding paragraph also admonishes the affiant from showing the document to "any person other than my attorney or other person representing me in this proceeding."

In addition, new Section 10060.9 creates three new protocols: 1) requiring a written acknowledgement of the affidavit's receipt; 2) advising the affiant "that the affidavit is being provided so that he/she can further review it and advise the Region of any inaccuracies or omissions;" and 3) "instruct[ing] the witness not to share the affidavit with anyone other than his/her attorney or designated representative …" New Section 10060.9 also removed the Regional Director's discretion to honor an unrepresented affiant's request for a copy of his/her affidavit to "be provided to a counsel or other representative who also represents a party to the case …"

The inconsistencies with applicable privileges are self-evident. The historic and current versions of the Casehandling Manual demonstrate the Agency's inconsistencies on the sanctity of affidavits, and are further evidence of why the Complaint should be dismissed.

Further, the *News-Press* made an offer of proof with respect to the issue. (Tr. 28-31; 79-84).

[12] It is important to remember that the affidavit was Mr. Mineards' affidavit – not the Region's affidavit.

presented to an individual was not. Similarly, mere requests for copies of Board affidavits by supervisors have not been deemed to violate Section 8(a)(1) of the Act. *See e.g. Service Foods*, 223 NLRB 1140, 1144 (1976)(Board dismissed complaint based on supervisor requesting of and receiving from an employee a copy of a personally possessed affidavit from an NLRB Board agent. See also *Robert Shaw Controls Co. v. NLRB*, 483 F.2d 762 (4th Cir. 1973); *NLRB v. Martin A. Gleason Inc.*, 534 F.2d. 466, 479 (2nd Cir. 1976)(no per se rule that making a request for a personally possessed Board affidavit violates the Act). A personally possessed affidavit cannot be both sacrosanct and freely distributable.

b) Even Assuming There Existed a Privilege, It Was Waived.

Assuming, *arguendo*, that the affidavits were privileged, disclosure by the Region to the subpoenaed individuals waived any applicable privilege. It was undisputed that the Region did not represent any of the subpoenaed individuals. It was similarly undisputed that the Region voluntarily provided individuals with the affidavit the individual personally possessed. Thus, assuming *arguendo*, a privilege existed with respect to the personally possessed affidavit, it was waived. "[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege." *Bowles v. Nat'l Assn. of Home Builders*, 224 F.R.D. 246, 251 (D.C. Cir. 2004)(quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)).

Privileged documents are to be treated according to their significance:

> A client wishing to preserve the privilege "must treat the confidentiality of attorney-client communications like jewels – if not crown jewels." *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). Accordingly, "confidentiality of communications covered by a privilege must be jealously guarded by the holder of the privilege lest it be waived." [*SEC*

> *v.*] *Lavin*, 111 F.3d [921], 929 [(D.C. Cir. 1997)](quoting *In re Sealed Case*, 877 F.2d at 980). The holder of the privilege "must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure." *Id.*

Bowles, 224 F.R.D. at 253. *See also In re Worlds of Wonder Securities Litigation*, 147 F.R.D. 208 (N.D. Cal. 1992)("Waiver of work product to the SEC also waived work product to others." (Citing *In re Sealed Case*, 676 F.2d at 817).

Further, as applicable to the instant case, the disclosure of an otherwise privileged document constitutes subject matter waiver to ***all documents involving the same subject matter as well.*** *See Bowles*, 224 F.R.D. at 257 (citing *In re Sealed Case*, 877 F.2d at 980 ("a waiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter'." (Quoting *In re Sealed Case*, 676 F.2d at 809))). Thus, the ALJ's inquiry at the commencement of the Hearing, and the General Counsel's response met this tenet:

> JUDGE PARKE: … I gather -- let me just make sure that I understand that the General Counsel isn't taking a position that should the Respondent had issued subpoenas requesting letters, notes, and/or emails that that would have violated the Act, or have been inherently coercive?
>
> MS. SILVERMAN: That the Counsel for General Counsel is alleging that the request for the affadavits is a violation.

(Tr. at 24). The General Counsel asserted that only the request for affidavits violated the Act; conversely all of the other requests in the subpoena request – letters, notes, emails, etc. – were legitimate. The subpoena requests at issue all related to the same subject matter. By virtue of waiving any purported privilege with respect to "letters, notes, and/or emails," such waiver constituted subject matter waiver over all responsive documents – including the affidavits. The "letter, notes and/or emails" provided to the General Counsel are relevant materials just like the affidavit.

D. THE FEDERAL RULES OF EVIDENCE COMPEL DISCLOSURE OF A PERSONALLY POSSESSED COPY OF AN OTHERWISE PRIVILEGED DOCUMENT.

The disposition of *H.B. Zachary* has never been subject to judicial review. With all due respect to the Agency, *H.B. Zachary*'s holding conflicts with judicial interpretation of privilege. *Martin v. Ronnigen Research & Development Co*., 1 Wage & Hour Cas. 2d. (BNA) 176, 1992 Westlaw 409936 (W.D. Mich. 1992) held that the documents contained in the Department of Labor's investigatory file lost any applicable privilege when the documents were provided to the witness. The court explained, ***"Where an employee's statements have already been released by the Secretary or where an employee has already been deposed without objection about his or her statements and interviews with the compliance officer, the privilege, of course, has been waived as to that employee."*** Id. at *2. Neither the investigatory privilege, attorney-client privilege, or attorney work product privilege applied.

Reich v. Great Lakes Collection Bureau, 172 F.R.D. 58, 1997 WL 160169 (W.D.N.Y. 1997) applied the same rationale as *Martin*, writing:

> The government maintains that all work done by the investigator after the initial employee complaint was received is subject to work product protection. Like the court in *Martin v. Ronningen Research & Development Co., Inc.,* 1992 WL 409936 (W.D.Mich. October 13, 1992), I refuse to construe the work product doctrine so broadly. First, these investigations are done in the ordinary course of the DOL's activities. They are not conducted by attorneys and do not automatically lead to litigation. Second, the cases construing the work product doctrine in this context are primarily interested in protecting informing employees from retaliation. This can be done by relying on the informer's privilege, without attempting to stretch the work product doctrine to cover routine DOL investigations.

172 F.R.D. at 61.

In the same manner, statements taken by Board agents during an investigation are not subject to any litigation privilege as there is no litigation pending during the investigation; not all NLRB affidavits are taken by attorneys; and the witness statements are taken during the ordinary course of the Agency's business.

The Agency must respect and give deference to judicial interpretations of privilege. The Agency is not entitled to create privileges; doing so violates the Constitution. Congress creates privilege; the Judiciary interprets facts to determine if privileges exist, and the Executive branch enforces the judiciary's findings, if necessary. The ALJ's Decision disregarded those fundamental constitutional tenets. The Complaint should be dismissed.

1. THE FEDERAL RULES OF EVIDENCE APPLY

Section 102.39 of the NLRB's Rules and Regulations states:

> *Rules of evidence controlling so far as practicable*.—Any such 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 the Act of June 19, 1934.

The Federal Rules of Evidence are a Congressional mandate. The Federal Rules of Evidence explain evidentiary relevance, evidentiary procedure, and evidentiary waiver. A personally possessed copy of an affidavit should be produced pursuant to the Federal Rules of Evidence.

2. A PERSONALLY POSSESSED AFFIDAVIT IS RELEVANT.

A personally possessed copy of an NLRB affidavit is relevant pursuant to Rules 401-403 of the Fed. R. Evid. The ALJ failed to acknowledge this fact; instead, she falsely claimed that the *News-Press* argued that Fed. R. 401-403 compelled disclosure.

The *News-Press* referenced Rules 401-403 to establish that the personally possessed affidavits were ***relevant***.

Pursuant to Section 102.118(b) of the Board's Rules and Regulations, upon a valid request, pursuant to *Jencks*, the General Counsel provides the copy of the affidavit contained in the investigatory file. As the copy of the affidavit contained in the investigatory file is relevant, so is the personally possessed copy of the affidavit.

Significantly, ALJ Anderson recognized the merit of the *News-Press*'s argument pertaining to potentially altered affidavits at the hearing in NLRB Case No. 31-CA-28589 *Cf. Burrows Paper Corp.*, 332 NLRB 82 (2000) (Company entitled to original copy of witness' bargaining notes instead of a copy the witness had purportedly copied verbatim; a comparison of the notes revealed that the witness had altered the copied notes). During the cross-examination of a witness called by the General Counsel, Ms. Barbara DeWitt Smith, Ms. Smith acknowledged that she had, at the hearing, a personal copy of the affidavit given to her by the Region during its investigation of the charge. (RESP. Ex. 8 at 6-7). ALJ Anderson performed an *in camera* review, over the objection of counsel to GCC/IBT (but not the General Counsel) to compare the personally possessed affidavit to that presented by the General Counsel to the *News-Press* pursuant to *Jencks*. (RESP. Ex. 8 at 7-14). ALJ Anderson ordered that the personally possessed affidavit be produced to the *News-Press*'s counsel for use in cross-examination. (*Id*).

The General Counsel did not object to ALJ Anderson's *in camera* inspection of Ms. Smith's personally possessed affidavit during NLRB Case No. 31-CA-28589. It is conspicuous, therefore, that the Region authorized a Complaint and the General Counsel litigated the instant matter.

When the General Counsel provides an individual with a copy of his or her affidavit, all the General Counsel can verify is that the copy contained in the investigatory file was a replica of what was given to an individual. Conversely, the General Counsel cannot verify that the personally possessed affidavit is an exact replica of what is presented to opposing counsel pursuant to a *Jencks* request. As such, ***both*** documents are relevant pursuant to Fed. R. Evid. 401-403.

3. FED. R. EVID. 612

Numerous witnesses testified that prior to testifying at in NLRB Case No. 31-CA-28589 et al., he or she reviewed their own personal copy of the affidavit that would have been responsive to the *News-Press*'s subpoena. (RESP. Ex. 8 (Dewitt Smith); RESP. 16 (Dawn Hobbs)). Mr. Mineards testified that he reviewed his affidavit in preparation for his testimony in NLRB Case No. 31-CA-28589 et al. (Tr. at 51). These admissions necessarily implicated Fed. R. Evid. 612 that states:

> **Rule 612. Writing Used to Refresh Memory**
>
> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in

> criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

By virtue of the individuals reviewing the affidavits, the *News-Press* was entitled to view individuals' personally possessed affidavits. Presumably the Region provided individuals with personal copies of affidavits so the individual could review the affidavits in preparation for testifying. The Agency has no internal directives or policies with respect to the purportedly privileged nature of personally possessed affidavits. (RESP. Exs. 1 and 2).

4. FEDERAL RULE OF EVIDENCE 502

The ALJ misrepresented or misunderstood Fed. R. Evid. 502. (DEC. 7:50-52). Rule 502 applies to ***waiver*** of attorney-client privilege and ***waiver*** of work product. Rule 502 applied to the instant case. Fed. R. Evid. 502, enacted January 1, 2009 states:

> **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> **(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver**
>
> When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> 1. the waiver is intentional;
> 2. the disclosed and undisclosed communications or information concern the same subject matter; and
> 3. they ought in fairness to be considered together.

(b) Inadvertent Disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;

2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and

3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

The Region knowingly and intentionally provided individuals with a copy of the affidavit contained in the investigatory file. This met the standard explained in Fed. R. Evid. 502(a)(1) to constitute a waiver. Similarly, there was nothing inadvertent about the waiver, and the Region made no efforts to prevent the disclosure or rectify the error, as required by Fed. R. Evid. 502(b).

Fed. R. Evid. 502 applies to government attorneys and waiver. In *U.S. v. Sensient Colors, Inc*., 2009 W.L. 2905474 Slip (D.N.J. 2009), the court determined that the government waived its privilege and work product objections to documents inadvertently produced to the defendant. Slip Op. at 1. The court applied Fed. R. Evid. 502 to the government's disclosure and concluded that any applicable privileges[13] were waived. *Id*. at 1-2.

[13] It goes without saying that if the attorney-work product is waived through disclosure, any claimed "investigatory privilege" would, too, be waived under similar circumstances.

Fed. R. Evid. 502 is a congressional mandate. Congress codified how a privilege is waived. By providing individuals with copies of affidavits, the Region waived any applicable privilege.[14]

E. THE GENERAL COUNSEL'S ONLY WITNESS UNDERMINED ITS CASE.

The General Counsel called one single witness in support of its case. In her opening, the General Counsel brashly stated, "Respondent did not inform subpoenaed individuals that it was not seeking the Board affidavits contained in the Region's investigatory file." (Tr. at 8).

In conflict with the General Counsel's assertion, Mr. Mineards ***confirmed*** that the *News-Press* communicated to him that he did not have to comply with the subpoena served on him by the *News-Press*. (G.C. Ex. 6). The hearing revealed:

> Q: And so, what I'm saying is do you recall me (Mr. Sutherland) having state(d) to you that there was no need to produce the affidavit at the hearing, or words to that effect?
>
> A: Yes, I think that's correct. Yeah.
>
> Q: And that was after you'd received the subpoena, prior to your testimony?
>
> A: Indeed. Yes.

(Tr. 43).

Mr. Mineards testified that he received his subpoena (G.C. Ex. 6) sometime in the end of April or the beginning of May, 2009. (Tr. at 27). Mr. Mineards testified that he understood that the subpoena was served in the context of litigation and at the time he was subpoenaed by the *News-Press*, the General Counsel had already subpoenaed him.

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[14] This argument even assumes that a personally possessed affidavit is not freely distributable, a matter on which the Board and courts have already ruled.

(Tr. at 38). Mr. Mineards did not produce any documents in response to the subpoena issued by the *News-Press*. (Tr. at 39). Specifically, Mr. Mineards did not produce a copy of his February 13, 2009 affidavit in response to the subpoena served by the *News-Press*. (Tr. 39-40, 42-43).

The General Counsel bears the burden of proof by a preponderance of the evidence. *See* 29 U.S.C. § 160(c). In the instant case, the General Counsel called no witnesses other than Mr. Mineards to assert that the *News-Press* failed to inform subpoenaed individuals not to comply with subpoena request 25. The only called witness flatly contradicted the General Counsel's assertion. Mr. Mineards completely undermined the General Counsel's case.

F. THE COMPLAINT IS TIME-BARRED PURSUANT TO SECTION 10(B) OF THE ACT

On or about January 4, 2008, GCC/IBT filed NLRB Charge 31-CA-28662 alleging a virtually identical violation of the Act. (RESP. Ex. 9(rejected)). On March 3, 2008, after investigation by Region 31, GCC/IBT withdrew the charge. (RESP. Ex. 10 (rejected)). The instant allegation (NLRB Case No. 31-CA-29253) is the same cause of action alleged by GCC/IBT in NLRB Charge No. 31-CA-28622 on January 4, 2008 – ***eighteen months earlier***. The charge should be dismissed on 10(b) grounds.

By the teachings of *Ducane Heating Corp.*, 273 NLRB 1389 (1985) enf'd per mem. 785 F.2d 394 (4th Cir. 1986), and enf'd sub nom *Int'l Union of Elec. Workers v. NLRB*, 785 F.2d 305 (4th Cir. 1986), and its progeny, the instant charge should be dismissed. In *Ducane Heating Corp.*, the Board mandated that a dismissed or withdrawn charge ***may not be reinstated outside the six-month limitations of Section 10(b)***. *Id* at 1391. Of particular import, the Board stated:

> Moreover, it seems to us that the dismissal of a charge by a government official well versed in the intricacies of labor law creates the impression on members of the public that the charge has been disposed of even more conclusively than is the case when it is merely withdrawn.

Id. The approved withdrawal of NLRB Charge No. 31-CA-28992 should have estopped the General Counsel from prosecuting the instant case. Further, in *Ducane Heating Corp.*, the Board spent considerable time explaining how the General Counsel has little discretion to reinstate charges outside the 10(b) limitation, because the time by which to file a charge is dictated by statute. *Id*. GCC/IBT's allegation is little more than an attempt to undermine the Act's statute of limitations.

Furthermore, the disposition of NLRB Case No. 31-CA-28662 undermined ALJ Parke's purportedly "objective" and "subjective" analyses of the subpoenas. (DEC. 8:12-38). Viewed objectively, the Regional Director authorized the withdrawal of a charge alleging that the 2007 subpoenas violated the Act. The matter was closed. Viewed subjectively, ALJ Parke's Decision required the *News-Press* to discount the fact that the Regional Director approved the withdrawal of a charge alleging the same cause of action, and be on notice that the allegations of the withdrawn charge restricted the *News-Press*'s attempts to mount a defense to the complaint in NLRB Case No. 31-CA-28589.

ALJ Parke's unsupported findings of "intent" were an affront to the evidentiary record. (DEC. 9:12-38). ALJ Parke's findings were based on admitted speculation and innuendo – admissions that her findings were not based on the record. Presumably, this was because the record demonstrated no evidence to support the allegations of the Complaint. Undeterred, ALJ Parke created evidence on an unlitigated and withdrawn charge to support her untenable Decision. The Complaint should be dismissed.

G. RELYING ON ALJ KOCOL'S RECOMMENDED DECISION AND ORDER WAS CLEAR ERROR.

ALJ Parke relied on legal and factual findings in ALJ Kocol's Recommended Decision and Order. The *News-Press* has filed Exceptions to ALJ Kocol's Recommended Decision and Order. Already the U.S. District Court of for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit roundly criticized ALJ Kocol's Decision as legally untenable. ALJ Parke's reliance on ALJ Kocol's Decision contravened Board authority and committed reversible error.

An un-reviewed ALJ decision is not authority on which the Board shall rely. *See Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, 345, (D.C. Cir. 2003)("as the Board has explained, it has a 'well-established practice of adopting an administrative law judge's finding to which no exceptions are filed. Findings adopted under such circumstances are not considered precedent for any other case.'")(Quoting *Colgate-Palmolive Co*., 323 NLRB 515, 515 (1987)); also see *Fabi Const. Co., Inc. v. Sec'y of Labor*, 370 F.3d. 29, fn. 7 (D.C. Cir. 2204)("un-reviewed administrative law judge decisions have no precedential value.")(extensive citations omitted). ALJ Parke knew or should have known of this established precedent. Her inexplicable failure to adhere to Board tenets constituted reversible error that pervaded her Decision. The Complaint should be dismissed.

V. CONCLUSION

WHEREFORE, for the reasons stated in this Brief in Support of Exceptions and for any additional reasons deemed appropriate by the Board, the *News-Press* respectfully requests that the Complaint in NLRB Case No. 31-CA-29253 be dismissed.

DATED: March 19, 2010
Santa Barbara, California
and
Nashville, Tennessee

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that the foregoing BRIEF IN SUPPORT OF EXCEPTIONS was filed electronically with the NLRB Executive Secretary and served this 19th day of March, 2010, on the following, via email:

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